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(1901 — 1969)
ADVOCATE,
and former President
SRINAGAR MUNICIPAL COUNCIL

1. All the latest amendments, Central and State, accurately incorporated.
2. Adaptations made in the sections are given.
3. Corresponding sections of earlier Codes indicated.
4. Synopsis for each section shows where exactly to look for the point required.
5. Decisions are classified under different headings.
6. Decisions are tested on first principles.
7. Principles of law are deduced from vast mass of decisions.
8 Principles of law presented in a logical and cogent manner.
9. Commentary, a reasoned exposition of law.
10. Conflict of opinions in the decisions pointed out and discussed.
11. Copious references to cognate sections and notes are given.
12. Cases overruled or reversed pointed out in the foot-note remarks.
13. Remarks in the foot-notes amplify and illustrate the principles in the Commentary and indicate the distinguishing features of the case.
14. Any case in the Table of Cases will show where to get the entire case-law on the point.
15. The first reference in the foot-notes and reference to Official Reports are indicated in the Table of Cases.
16. Topical Index locates the exact point required.

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In one sense no reported case can ever be obsolete while the laws and judicial usages of English-speaking countries are what they are: that is, no man can say beforehand that any given case, however antiquated or trifling it may appear in itself to be, may not at some time have its use for the modern practitioner or text-writer. Every decision in the books is part of the history of the law, and no part of that history can be absolutely insignificant.—(Sir Frederick Pollock, Bart., LL.D., Corpus Professor of Jurisprudence in the University of Oxford.)

Accurate knowledge of the present state of the law upon any subject involves necessarily the history of the development of the law upon that subject, which can only be attained by following down the decisions touching upon it. — (Francis M. Scott, Justice, Supreme Court, New York.)

The law is the last interpretation of the law given by the last Judge.

The enunciation of the most elementary principle of law is frequently met by a demand for "an authority in support of that proposition . . . ." No time spent upon providing oneself with a precedent is ever wasted even though the book may have to be judiciously hidden from view until required.—(The Hon'ble Sir Cecil Walsh, Kt.,K.C., Ex-Offg., Chief Justice, Allahabad High Court.)

The last Judicial Interpretation of the law is the Law on which your case hangs.

To correctly appraise a Judicial decision, it is important to know later applications of its rules to varying states of facts by way of extension or qualification. —(S. Shepard, Chief Justice, Court of Appeal, Washington (U. S. A.).)

A. I. R. Commentaries

THE

TRANSFER OF PROPERTY ACT

(IV OF 1882)

WITH EXHAUSTIVE, ANALYTICAL AND CRITICAL COMMENTARIES

3rd (1950) Edition

VOLUME III

SECTIONS 105-137

APPENDICES, CONVEYANCING FORMS, GLOSSARY,
TOPICAL INDEX AND TABLE OF CASES.

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PREFACE TO THE THIRD EDITION

No prefatory note is required for this edition beyond the statement that copies of the second edition were exhausted quickly and the book has been out of stock for some time now. The subject yields to none in importance and there have been hundreds of decisions reported since the previous edition. All these have been incorporated in their proper places in this edition. A considerable amount of new matter has been added to the book which has also been revised thoroughly in the light of later decisions. The profession is quite familiar with the method of treatment in the A. I. R. Commentaries and it is not necessary here to explain it at any length. As in the second edition, the provisions of Order 34 of the Civil Procedure Code (relating to suits on mortgages) have been given along with commentaries in the Appendix. Mention may also be made of the glossary of words and phrases and also of the conveyancing forms given at the end of the third volume, along with other useful appendices.

The Authors have great pleasure in expressing their deep sense of obligation to the members of the Editorial Staff of the All India Reporter for their able and unstinting co-operation in the preparation of this edition.

V. V. C.
S. A. R.

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

R. D. ... Revenue Decisions.
Sar ... Saraswati's Privy Council Judgments.
Shome L. R. ... Shome's Law Reports.
Sind L. R. ... Sind Law Reporter.
Suther ... Sutherland's Privy Council Judgments.
Suth. W. R. ... Sutherland's Weekly Reporter.
U. P. L. R. ... United Provinces Law Reports.
Upp. Bur. Rul. ... Upper Burma Rulings.
Weir. ... Weir's Criminal Rulings.

ENGLISH, IRISH AND SCOTTISH LAW REPORTS

A. C. ... (Law Reports) Appeal Cases (1891 onwards).
Amb. ... Ambler [Chancery].
App. Cas. ... (Law Reports) Appeal Cases (1876-1890).
Atk. ... Atkyns [Chancery].
B. & B. ... Ball and Beaty [Chancery, Ireland].
Beav. ... Beavan [Rolls Court].
Bligh ... Bligh [House of Lords].
Bligh (N. S.) ... Bligh New Series [House of Lords].
Bro. C. C. ... Brown's Reports of Cases in Chancery.
Bro. Parl. Cas. ... Brown's Reports of Cases in Parliament [House of Lords].
Bunb. ... Bunbury [Exchequer].
Burr. ... Burrow's Reports [King's Bench].
Cas. T. Talb ... Cases in the time of Lord Talbot [Chancery].
Ch. D. ... (Law Reports) Chancery Division (1876-1890).
Ch. App. ... Chancery Appeals.
Cl. & Fin. ... Clark and Finnelly [House of Lords].
Co. Rep. ... Coke (Sir Edward) (Common Law).
Cox. ... Cox [Chancery].
De G. and J. ... De Gex and Jones [Chancery and Bankruptcy Appeals].
De G., M. & G. ... De Gex, Macnaghten and Gordon [Chancery and Bankruptcy Appeals].
De G. & Sm. ... De Gex and Smale [Chancery]
Dick. ... Dickens [Chancery].
Dow ... Dow [House of Lords].
Dow. & Cl. ... Dow and Clark [House of Lords].
Drew. ... Drewry [Chancery].
East ... East [King's Bench].
Eden ... Eden (Hon. Robert Henry) [Chancery].
E. R. ... English Reports.
Eq. ... (Law Reports) Equity (1866-1875).
Eq. R. ... Equity Reports (1853-1855).
Eq. Cas. Abr. ... Equity Cases Abridged [Chancery].
H. & N. ... Hurlstone and Norman [Exchequer].
H. & Tw. ... Hall and Twells [Chancery].
Hare ... Hare [Vice-Chancellor's Courts].
H. L. ... (Law Reports) House of Lords.
H. L. C. ... House of Lords Cases (continuation of Clark and Finnelly).
Jac. ... Jacob [Chancery].
Jac. & W. ... Jacob and Walker [Chancery].
J. & H. ... Johnson and Hemming [Chancery].
J. P. ... Justice of the Peace.
Jur. (N. S.) ... Jurist Reports (New Series).
K. & J. ... Kay and Johnson [Chancery].
K. B. ... (Law Reports) King's Bench.
Keen ... Keen [Rolls Court].
L. J. Ch. ... Law Journal Reports Chancery.
L. J. (N. S.) Ch. ... Law Journal Reports (New Series) Chancery.
L. J. (N. S.) Ex. ... Law Journal Reports (New Series) Exchequer.
L. J. K. B. ... Law Journal Reports, King's Bench.
L. J. P. C. ... Law Journal Reports, Privy Council.
L. J. Q. B. ... Law Journal Reports, Queen's Bench,
L. R. C. P. ... Law Reports, Common Pleas.
L. R. Eq. ... Law Reports, Equity.
L. R. Ex. ... Law Reports, Exchequer.
L. R. H. L. ... Law Reports, House of Lords.
L. R. P. C. ... Law Reports Privy Council.
L. T. ... Law Times Reports.

L. T. (N. S.) ... Law Times Reports (New Series).
Mac. & G. ... Macnaghten and Gordon [Chancery].
Madd. ... Maddock [Chancery].
M. B. R. ... Morrell Bankruptcy Reports.
M'Cle.... M'Cleland [Exchequer & Equity].
Meg. ... Megone [Companies' Cases].
Mer. ... Merivale [Chancery].
My. & Cr. ... Mylne and Craig [Chancery Appeals].
My. & K. ... Mylne and Keen [Chancery Appeals].
M. & W....Meeson and Welsby [Exchequer].
Prec. Ch. ... Precedents in Chancery.
Price ... Price [Exchequer].
P. Wms. ... Peere Williams [Chancery].
Q. B. ... (Law Reports) Queen's Bench (1891 onwards) or Queen's Bench Reports (1841 to 1852).
Q. B. D. ... (Law Reports) Queen's Bench Division (1876-1890).
R. ... Reports [All The Courts].
R. R. ... Revised Reports.
R. S. C. ... Rules of the Supreme Court of England.
Sch. & Lefr. ... Schoales and Lefroy [Chancery, Ireland].
Sim. ... Simons [Chancery].
Sim. & St. ... Simons and Stuart [Chancery].
Smith...J.P. Smith's Reports [Kings Bench].
S. J. ... Solicitors' Journal.
Swanst. ... Swanston [Chancery].
T. L. R. ... Times Law Reports.
Vern. ... Vernon [Chancery].
Ves. & B. ... Vesey and Beames [Chancery].
Ves. (Jun.) ... Vesey, Junior (After the first two volumes, Ves. simply) [Chancery].
Ves. Sen. ... Vesey, Senior [Chancery].
Wils. Ch. ... Wilson (John) Chancery.
W. R. (Eng.) ... Weekly Reporter (England).
Y. & C. C. C. ... Young and Collyer Chancery Cases.

Other Abbreviations.

Art. ... Article.
B. R. ... Board of Revenue.
Civ. ... Civil.
C. A. ... Court of Appeal.
Cl. ... Clause.
Cr. ... Criminal.
D. B. ... Division Bench.
F. B. ... Full Bench.
F. C. ... Federal Court.
F. N. ... Foot-Note.
G. I. ... Government of India Act, 1935.
Jour. ... Journal.
L. P. ... Letters Patent.
N. ... Note.
O. ... Order.
P. ... Page.
P. C. ... Privy Council.
Pre. ... Preamble.
Rev. ... Revenue.
R. ... Rule.
S. ... Section.
S. B. ... Special Bench.
U. P. B. R. ... United Provinces Board of Revenue.

IN THE FOOT-NOTES TO THE COMMENTARY —

(a) ('66) means (1866); ('04) means (1904); ('27) means (1927); ('39) means (1939).

(b) Full year reference is given prior to 1866, like (1818) and *not* ('18); (1865) and *not* ('65) and so on, and to all English cases.

(c) The figure preceding the A. I. R. reference denotes the *Volume* Number of the All India Reporter. Thus, in ('40) *27* A. I. R. 1940 Oudh 441, the figure *27* denotes the 27th Volume of the All India Reporter "1914" being the 1st Volume.

(d) * Indicates either a leading case or a case giving fuller reasons.

(e) † Indicates a case which is most appropriate for the proposition.

(f) References to Official Reports are invariably given in all cases found in the Official Reports.

ADDENDA.

THE DISPOSITION OF PROPERTY (BOMBAY) VALIDATION ACT, 1947.
(BOM. ACT LIV OF 1947.)

[16th January 1948.]

An Act to validate certain dispositions of property in the Province of Bombay.

WHEREAS it is expedient to validate certain dispositions of property in the Province of Bombay; It is hereby enacted as follows :

1. *Short title.*—This Act may be called the Dispositions of Property (Bombay) Validation Act, 1947.

2. *Application of Act.*—This Act shall apply to all trusts made and to all wills and other testamentary dispositions of persons who have died, before the first day of January one thousand nine hundred and forty-five—

(a) where such trusts, wills or testamentary dispositions relate to immovable property situate within the Province of Bombay ;

(b) where such trusts, wills or testamentary dispositions relate to property of every description other than immovable property and are declared, executed or made by a settlor or testator, as the case may be, in the Province of Bombay, notwithstanding anything to the contrary contained in Part II of the Indian Succession Act, 1925.

3. *Validation of certain dispositions.*—(1) The following provisions of law shall not apply and shall be deemed never to have applied to the dispositions of property contained in or made by the instruments mentioned in section 2, namely, (a) section 13 of the Transfer of Property Act, 1882, and (b) section 113 of the Indian Succession Act, 1925.

(2) To the dispositions of property contained in or made by the instruments mentioned in section 2 the enactments mentioned in the first column of the schedule to this Act shall apply, shall be deemed to have always applied, with the omissions and modifications specified in the second column of the schedule.

4. *Saving.*—Nothing in this Act shall be deemed to affect or prejudice in any way any right, title or interest accrued to any person under a final decree or order of a competent court or acquired by any person for valuable consideration before the coming into force of this Act.

———

SCHEDULE.

1 Enactments	2 Omissions and modifications
Section 15 of the Transfer of Property Act, 1882.	For "sections 13 and" substitute "section".
Section 16 of the Transfer of Property Act, 1882.	For "section 13 and" substitute "section".
Clause (b) of section 3 of the Hindu Disposition of Property Act, 1916.	Omit "113".
Section 115 of the Indian Succession Act, 1925.	Omit "section 113 or".
Section 116 of the Indian Succession Act, 1925.	For "section 113 and" substitute "section".
Schedule III to the Indian Succession Act, 1925.	Omit "113".
Clause (5) under the heading "Restrictions and modifications in application of foregoing sections" in Schedule III to the Indian Succession Act, 1925.	Omit "one hundred and thirteen."

———

BOMBAY TENANCY AND AGRICULTURAL LANDS ACT, 1948
(BOM. ACT LXVII OF 1948).

[28th December 1948.]

Section 3 of this Act is as follows :—

"3. The provisions of Chapter V of the Transfer of Property Act, 1882, shall, in so far as they are not inconsistent with the provisions of this Act, apply to the tenancies and leases of lands to which this Act applies."

———

THE
TRANSFER OF PROPERTY ACT
ACT IV of 1882

Volume III

CHAPTER V

OF LEASES OF IMMOVABLE PROPERTY.

Lease defined

105. A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

Synopsis

1. Applicability of chapter.
2. Essentials of a lease.
2a. "Immovable property," meaning of. See Section 3, Note 2.
3. Lease is an interest in property.
4. Agreement to grant lease.
5. "Right to enjoy."
6. Lease and conveyance of interest in fee simple—Distinction.
7. Contract necessary for lease.
8. Tenancy by payment and acceptance of rent.
9. Kabuliyat, rent-note. etc., whether lease.
10. Application for grant of lease with endorsement of sanction, whether lease. See Note 9.
11. Agreement varying rent or other terms of lease, whether lease.
12. Tenancy by acquiescence.
13. Lease and licence compared—General principles.
14. Lease or licence—Test for determination.
15. Occupation as lodger.
16. Occupation as tenant or servant.
17. Market rights.
18. Agreement for cultivation of land, if lease.
19. Possession under void lease—Effect.
20. Who can grant a lease.
21. Lease by de facto proprietor.
22. Lease by or in favour of a minor.
23. Lease of untransferable property.
24. Commencement of lease.
25. "Certain time."
25a. Concurrent lease. See Section 108, clause (1). Note 10.
26. Term of lease—Mode of determination.
27. Lease entitling lessee to hold as long as he pays rent or as long as he may wish.
28. Lease for indefinite period—Construction of. See Notes 26 and 72.
29. Lease for a term certain with a provision for continuation thereafter.
30. Lease expressed to be terminable before end of term fixed.
31. Periodic leases.
32. Tenancy at will.
33. Tenancy by sufferance. See Notes 37 to 40.
34. Lease for life.
35. Lease with a clause for renewal—General.
36. Covenant for renewal—Enforceability against assignee from lessor or lessee.

37. Lessee holding over after expiration of lease—General.
38. Lessee holding over after expiration of lease—Lessor's assent.
39. Lessee holding over after expiration of lease—Renewal clause in lease, effect of.
40. Lessee holding over after expiry of lease —Basis of liability for compensation.
41. Permanent lease.
42. Permanent lease and creation of absolute estate—Difference.
43. Permanent tenancy—Onus of proof.
44. Principle of lost grant as applied to permanent tenancies.
45. Permanent tenancy—Presumption of validity of grant in case of tenancies of unknown origin.
46. Permanent tenancy—Presumption of lawful origin. See Notes 44 and 45.
47. Permanent tenancy—Construction of leases.
48. Permanent tenancy—Circumstantial evidence as to—General.
49. Circumstantial evidence as to permanent tenancy—Long and undisturbed possession at fixed rent.
50. Circumstantial evidence as to permanent tenancy—Lease for dwelling or residential purpose.
51. Circumstantial evidence as to permanent tenancy—Successions and transfers.
52. Subsequent arrangement between landlord and tenant—Effect on inference of permanence.
53. Acquisition of permanent tenancy after commencement of tenancy.
54. Permanent tenancy—Acquisition of, by prescription. See Notes 79 to 84.
55. Permanency by estoppel.
56. Permanent lease of property belonging to religious and charitable endowments.
57. Consideration for lease.
58. Premium.
59. Rent—General features.
60. Rent—Illustrative cases.
61. Forms of rent.
62. Rent in kind—Payment of money value.
63. Rent—Service as rent.
64. Variation of rent.
65. Rent-free grants.
66. Interest on rent.
67. Lease for a premium and usufructuary mortgage—Distinction.
68. Maintenance grants.
69. Resumption of service grants.
70. Damages for use and occupation.
71. Determination of lease.
72. Heritability of lease.
73. Construction of leases. See S. 8, Note 20.
74. Escheat and reversion—Distinction. See Note 6.
75. Zamindari and ryotwari lands—Tenants of.
76. Zuripeshgi lease. See S. 58, Note 36.
77. Kanom leases. See S. 58, Note 37.
78. Landlord and tenant—Adverse possession. See Notes 79 to 84.
79. Nature of tenant's possession during tenancy—Adverse possession.
80. Nature of tenant's possession after determination of tenancy—Adverse possessions.
80a. Lease terminating on tenant's death—Tenant's legal representative continuing in possession—Nature of possession.
81. Tenant encroaching on other land of the landlord—Adverse possession.
82. Possession under invalid lease, how far adverse.
83. Dispossession of lessee by third person —Adverse possession.
84. Acquisition of tenancy by prescription by trespasser.
85. Estoppel of tenant.

1. Applicability of Chapter.—The provisions of this Chapter apply to all leases[1] except agricultural leases.[2] In the case of agricultural leases, such provisions do not apply unless there is a notification by the Provincial Government making them applicable. (See S. 117.) In the absence of such notification therefore an agricultural lease will be governed by local laws and customs.[2a] But the principles underlying the provisions in this Act may also be applied as being rules of justice, equity and good conscience, when there is nothing in the local laws to make such principles inapplicable.[3]

Section 105—Note 1

1. ('27) 14 AIR 1927 All 78 (79) : 98 Ind Cas 92 (DB), *Abdul Majid* v. *Nageshar Dat.*

[*See* (1900) 27 Cal 205 (209) : 4 Cal WN 76 (DB), *Umrao Bibi* v. *Mahomed Rojabi.* (As the land was not shown to be used for agricultural or horticultural purposes, Bengal Tenancy Act did not apply.)]

2. ('09) 4 Ind Cas 1124 (1124) (Mad), *Madurai Mudaly* v. *Masilamani Gramani*

('27) 14 AIR 1927 All 78 (79) : 98 Ind Cas 92 (DB), *Abdul Majid* v. *Nageshar Dat.*

2a. By S. 3 of the Bombay Tenancy and Agricultural Lands Act. 1948 (Bom Act LXVII of 1948), provisions of this Chapter, in so far as they are not inconsistent with the provisions of the Bombay Act, are made applicable to the tenancies and leases of lands to which that Act applies.

3. ('48) 35 AIIR 1948 Mad 275 (279) : ILR (1948) Mad 757 (FB). *Brahamypa* v. *Sundaramma.*

('19) 6 AIR 1919 Mad 168 (169) : 42 Mad 203 : 51 Ind Cas 507 (SB), *Kandasamy Pillai* v. *Ramasami Mannadi.* (Although T. P. Act does not in its terms apply to

In order to determine if a lease is for an agricultural purpose so as to be outside the purview of the provisions of this Chapter, the primary object of the lease is to be considered.[4] The question is one of 'construction' in each case.[5] See also Notes on sections 106 and 117.

This Chapter does not apply to leases granted before the coming into force of this Act.[6] It does not also apply to leases granted in those parts of British India to which the Act does not apply; but even in such cases, the general principles contained in such provisions may be applied.[7]

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agricultural leases. Definition in S. 105 applies to agricultural leases as well.)

('10) 33 Mad 253 (253) ; 5 Ind Cas 437 (437) (DB), *Gangamma* v. *Bommakka.* (Although T. P. Act does not apply to agricultural leases, analogy of the Act may be relied upon.)

[*See also* ('12) 14 Ind Cas 799 (800) (All), *Ismail Khan* v. *Mithu Lal.* (Plot let for grove.)]

Also see S. 117, Note 2.

4. ('49) 36 AIR 1949 Mad 148 (150) (DB), *Venugopala* v. *Thirunavukkarasu.* [Right to tap cocoanut trees and take toddy held to be benefit to arise out of land and as such immovable property within the definition of General clauses Act S 3 (25)-Grant of such right was lease—The lease was one for agricultural purposes.]

('27) 14 AIR 1927 All 78 (79, 80) : 98 Ind Cas 92 (DB), *Abdul Majid* v. *Nageshar Dat.*

('12) 13 Ind Cas 364 (365) (DB) (Cal). *Abdul Karim* v. *Abdul Rahman.* (Nature of original tenancy and not of sub-tenancy should be considered.)

†('26) 43 AIR 1926 Cal 312 (313) : 92 Ind Cas 411 (DB), *Gopal Chandra* v. *Bhutnath.* (Lease for residential purpose with right to take fruits from trees on the land and plant other fruit trees—Lease not agricultural—T. P. Act applies.)

('35) 22 AIR 1935 Cal 638 (639) : 159 Ind Cas 235, *Bir Bikram* v. *Amaddin.* (Lease of tank for rearing and preserving fish and of the banks for grazing cattle—Primary object being the rearing of fish, lease is not for agricultural purpose.)

('73) 20 Suth W R 341 (341) (DB), *Nidhi Krishna* v. *Ramadoss Sen.* (Where the lease is merely of a tank with so much of its banks as is necessary for its use, it cannot be regarded as an agricultural lease because the tank is the principal subject of the lease.)

('31) 18 AIR 1931 Cal 135 (138) : 130 Ind Cas 219 (DB), *Surendra Kumar* v. *Chandra Taranath.* (Where the lease is merely of a tank with so much of its banks as is necessary for its use it cannot be regarded as an agricultural lease and no right of occupancy can be acquired in the tank—In this case the surrounding land was of considerable area and the lease being indivisible, it was held that the whole lease was for agricultural purpose.)

5. †('26) 13 AIR 1926 Cal 312 (313) : 92 Ind Cas 411 (DB), *Gopal Chandra* v. *Bhutnath.* (Lease for residential Purposes, conduct of the parties is immaterial.)

('36) 164 Ind Cas 837 (839) (Cal). *Chandi Charan* v. *Ashutosh Lahiri.* (Lease for residential purpose—Bengal Tenancy Act is not applicable.)

('26) 13 AIR 1926 Cal 215 (216) : 90 Ind Cas 104 (DB), *Bidhu Mukhi* v. *Gobinda Chandra.* (The description of 'kaimi maurashi' applied very aptly to a non-agricultural tenancy—The word *raiyat* used in a lease does not necessarily mean an agricultural tenant.)

('31) 18 AIR 1931 Cal 135 (136) : 130 Ind Cas 219 (DB), *Surendra Kumar* v. *Chandra Taranath.* (If the terms are not free from ambiguity, conduct of parties may be taken into consideration.)

(1900) 27 Cal 239 (242) (DB), *Rachhea Singh* v. *Upendra Chandra Singh.* (Lease of ferry tolls is non-agricultural lease.)

('26) 13 AIR 1926 Cal 373 (373, 374) : 90 Ind Cas 805 (DB), *Purusottam Mahesri* v. *Panchnan Mazumdar.* (Lease for shop --Bengal Tenancy Act is not applicable.)

('25) 12 AIR 1925 Cal 181 (182, 183) : 79 Ind Cas 648, *Sulaiman Muhammad* v. *Uma Charan.* (Large portion of land covered by tank; still held in the circumstances of the case, the lease was one for agricultural purpose.)

('26) 96 Ind Cas 89 (89) (Cal), *Rokhya Mani* v. *Paramesh.* (Lease held to be horticultural, because it was granted not for enjoying fruit only but also for the purpose of planting trees.)

('14) 24 Ind Cas 788 (788) (Oudh), *Umrao Bahadur* v. *Secy. of State.* (Where a certain land is given for "cultivation and building tenant's houses" held that the lease was for a mixed purpose, agricultural and non-agricultural, for a lump rent.)

6. ('35) 22 AIR 1935 Cal 261 (262) (DB), *Nagendra Chandra* v. *Purna Chandra.* (The definition in Stroud's *Judicial Dictionary* was applied in this case and a maintenance grant was held to be a lease.)

('27) 14 AIR 1927 All 342 (344) : 100 Ind Cas 479, *Sitara Shahjahan Begam* v. *Munna.*

[*See* ('89) 13 Bom 373 (375) (DB), *Vinayak* v. *Baba Shabudin.* (Lease held alienable.)]

7. ('28) 112 Ind Cas 651 (652) (Lah), *Muhammad Budha* v. *Ghulam Qadir.*

The provisions of this Chapter do not apply to a lease of land granted by the Government, as the Crown Grants Act of 1895 expressly provides that this Act (Transfer of Property Act) does not apply to transfer of land of interests in land by or on behalf of the Crown.[8] (See also Preamble, Note 4.) But a 'municipality' is not outside the provisions of the Act and so a lease granted by a municipality is within this Chapter.[9] See also 117 and Notes thereunder.

2. Essentials of a lease.—The essentials factors of a lease under this section are—

(1) The right must be one as to 'immovable' propety. The section does not apply to a lease of any other property.

(2) The right must be that of the 'enjoyment' of immovable property. This includes the right to the 'possession of the property. (See Note 5.)

(3) There must be a transfer of such right.[1]

(4) The right transferred must be an 'interest' in the property. The grant of a merely personal right of enjoyment is not a lease.

(5) The transfer must be made for a certain time express of implied or in perpetuity.

(6) The transfer must be one for consideration.

(7) The consideration must be of the particular kind mentioned in the section, namely, premium or rent as defined by the section, either or both of them.

A lease being a transfer of an 'interest' in immovable property, it is a transfer of property within the meaning of S. 5 and so must comply with the requirements of that and other sections of the Act, so far as they may be applicable.[2]

The definition in this section applies only to leases under this Act. It does not apply to leases not governed by this Act, *viz.*, (a) leases granted before the coming into force of this Act, (b) leases in places to which this Act is not applicable and (c) agricultural leases except when there is a Government notification making the provisions of this Chapter applicable.

In cases to which this Act applies, there will be no lease unless the essentials of the definition under this section are satisfied. But this does not affect the meaning to be attached to instruments for the purpose of the Registration Act and the Stamp Act. Those Acts contain a wider definition of the term "lease."[3] For instance, the Registration Act includes a *kabuliat* or an undertak-

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(Principle of S. 116 applied to the Punjab. where the Act does not apply.)

('92) 16 Bom 568 (575, 576), *Rangoonathdas* v. *Morarji.* (Before T. P. Act was extended to Bombay Presidency, its provisions applied as general principles.)

[*See* ('79) 4 Cal 778 (781) : 4 Cal L R 20 (DB), *Tarachand Biswas* v. *Ram Gobind.* (In this case the English common law rule as to covenant for quiet possession was applied to a darpatni lease granted before the T. P. Act.)]

8. ('37) 24 AIR 1937 Pat 391 (395) : 170 Ind Cas 316 (DB), *Secretary of State* v. *Rajendra Prasad.* (Building lease granted by Government.)

9. ('28) 15 AIR 1928 All 95 (95) : 107 Ind Cas 690, *Aminullah* v. *Emperor.* (Lease cannot be determined merely by a resolution passed by the Municipal Board.)

Section 105—Note 2

1. Thus, the right of possession of a ryot holding under a zamindar is not one derived from the zamindar and so such ryot is not a tenant of the zamindar in the true legal sense of the term, though loosely called so in common practice. See Note 75.

2. As pointed out in S. 5, Note 5 the word "property" in that section is used in the most comprehensive sense and so there is no doubt that it covers the transfer of such an important right as the right of enjoyment of immovable property.

3. ('33) 20 AIR 1933 All 735 (737) : 55 All 874 : 145 Ind Cas 674 (FB), *In the matter of Burma Shell Oil Storage & Distributing Co. of India Ltd.* (Stamp Act.)

ing to occupy, as an instrument of *lease.* But such an instrument will not *per se* amount to a lease under this section as will be seen in Note 9. But the definitions in these special Acts relate only to *procedural* matters. They cannot affect the substantive law on the subject. In other words, an instrument which is not a lease under this section will not be effective to create an interest in property and confer a right of possession, though it may be regarded as a lease for the purpose of registration or stamp duty.

2a. "Immovable property," meaning of.—See Section 3, Note 2.—See also the case noted below.[1]

3. Lease is an interest in property.—The right of enjoyment contemplated by this section is an *interest* in the property.[1] Unless there is a transfer of such an interest there can be no lease.[2] The grant of a merely *personal* right of possession will not be a lease. It will only be a licence. (See Note 13.) Hence, where the agreement is not even to give a *personal* right of possession, there can be no question of a lease merely because one person agrees to pay an annual sum to another and such agreement has a *collateral* reference to a transaction which results in the property being transferred to the person by whom the money is agreed to be paid.[3] See also Note 4.

Section 105—Note 2a

('49) 36 AIR 1949 Mad 148 (150) (DB), *Venugopala* v. *Thirunavukkarasu* [Right to tap cocoanut trees and take toddy is benefit to arise out of immovable property within defination in S. 3 (25) General Clauses Act, and grant of such right held to be a lease.]

Section 105—Note 3

1. ('19) 6 AIR 1919 Mad 168 (169) ; 42 Mad 203: 51 Ind Cas 507 (SB), *Kandasami* v. *Ramasami.* (Provisions of law like S. 39 of the Contract Act which are not applicable to mere contracts are not applicable to lease.)

('40) 27 AIR 1940 Cal 89 (90) : I L R (1939) 2 Cal 254 : 186 Ind Cas 625. *Anvarali* v. *Jamini Lal.* (Even a lease from month to month is such interest.)

('14) 1 AIR 1914 Cal 485 (486) : 23 Ind Cas 925 (DB), *Hari Mohan* v. *Atal Krishna.*

[*See* ('24) 11 AIR 1924 Rang 278 (279) : 82 Ind Cas 381 (DB), *Azee Meah* v. *Jeewa.* (Lessee was held to be a "transferee of the *premises*" though a limited transferee.)

('37) 24 AIR 1937 All 10 (12) : ILR (1937) All 312 : 166 Ind Cas 812 (DB), *Shyam Sundar Lal v. Din Shah.* (A transfer of immovable property contemplated by S. 53A includes a transfer by lease.)]

[But see ('41) 28 AIR 1941 All 56 (59, 60) : ILR (1941) All 17 : 194 Ind Cas 347 (DB), *Ramman* v. *Raghunath* (Note.—In this case, in pointing out the differences between a usufructuary mortgage and a lease the Court observed that there is a transfer of an interest in the property under a usufructuary mortgage while under a lease there is only a transfer of the right of enjoyment of the property —Thus can only mean that under a mortgage an interest in the *fee simple* is transferred while under a lease only the right of possession is transferred—It cannot be supposed that the Court intended to lay down that a lease does not amount to an interest in the property—It would be a preposterous supposition.)]

NOTE.—It may be noted that the section does not expressly state that a lease is a transfer of an *interest* in immovable property, and the transaction is defined as a transfer of a *right* to enjoy immovable property—Notwithstanding this, it is established that a lease is a transfer of an interest in immovable property.

2. ('26) 13 AIR 1926 Pat 487 (489) : 98 Ind Cas 374 (DB), *Rameshwar Singh* v. *Kitab Ali* (A *bid-sheet* or *dak fard* showing the bids made at the auction of land for settlement is a *verbal settlement*, and the document which did not contain the most important terms and was never intended to be delivered to the lessee as a document of title cannot in such circumstances constitute a lease.)

3. ('02) 25 Mad 603 (611) : 29 Ind App 138 (PC), *Subramanian* v. *Arunachalam.* (Collateral agreement to pay a certain sum monthly for five years to the owner of an estate in consideration of his granting a permanent lease is not a part of the lease and does not require registration.)

('34) 21 AIR 1934 Bom 140 (142) : 151 Ind Cas 156 (DB), *Govind Lal Manek Lal* v. *Manekchowk Spinning & Weaving Mills Co.* (Plaintiff's land compulsorily acquired for providing special railway siding to defendant's mill—Arbitration award under which plaintiff is to hand over the compensation money to the mill and receive an annual payment at so much per unit of area from the mill—This is not a transfer of an interest in immovable property by the plaintiff to the mill.)

('30) 17 AIR 1930 All 678 (681) : 130 Ind Cas 8 (DB), *Safdar Ali* v. *Ambika Pra-*

A lease being an *interest* in immovable property, entitling the lessee to possession, a suit for ejectment against a lessee does not lie so long as the lease is in existence.[4] A merely *personal* right of possession under an agreement will not be *in itself* a good defence to such a suit.[4a]

As to whether a lease is a sufficient interest in the property to entitle the lessee to redeem a mortgage on the property, see S. 91, Note 12.

A lessee has a sufficient interest in the property to entitle him to apply under O. 21, R. 89 of the Civil Procedure Code to set aside a sale of the property in execution.[5] See also the A. I. R. Commentaries on the Civil Procedure Code, 4th (1944) Edition, O. 21 R. 89, Note 12.

Under the English law, a lease for a term is only what is known as a *chattel* interest and not a *real* interest, i.e., one corresponding to an interest in immovable property. This is not so under the Indian law,[6] as seen above.

4. Agreement to grant lease.—As seen in Note 3 a lease under this section is a transfer of an *interest* in immovable property. Hence, there must be a present demise to constitute a lease. A mere agreement to grant a lease in future will not be a lease.[1] Such an agreement will merely create a *personal* right and not an *interest* in the property. It is a matter of construction in each case whether the agreement is merely an executory one[2] or a present demise and creates an in-

sad. (Raiyatnama executed by a person already in possession held to be only a collateral agreement and not a lease.)

4. ('07) 34 Cal 57 (63) : 5 Cal L Jour 181 (DB), *Deo Nundan Pershad* v. *Meghu Mahton.*

('28) 15 AIR 1928 All 95 (95) : 107 Ind Cas 690, *Aminullah* v. *Emperor.*

('31) 130 Ind Cas 14 (15) (DB) (All), *Qudir Khan* v. *Kesho Das.* (Suit against defendant as trespasser—Defendant proved to be lessee—Suit dismissed.)

4a. (1903) I KB 577 (580) : 72 LJKB 103 : 88 LT 46 : 51 WR (Eng) 343, *Zimbler* v. *Abrahams.* (Lease void—Agreement not to eject lessee during his lifetime contained in the lease.)

[But see ('30) 17 AIR 1930 All 678 (681) : 130 Ind Cas 8 (DB), *Safdar Ali* v. *Ambika Prasad.* (Tenancy void—Independent collateral agreement not to eject during a certain period is good answer to suit for ejectment. NOTE.—Submitted wrong.)]

5. ('28) 15 AIR 1928 Mad 1191 (1191) : 51 Mad 770 : 109 Ind Cas 168 (DB), *Adenna* v. *Chinna Ramayya.* (Sale subject to lease.)

6. ('19) 6 AIR 1919 Mad 168 (170, 172) : 42 Mad 203: 51 I. C. 507 (SB), *Kandasami* v. *Ramasami.*

Section 105—Note 4

1. †('29) 16 AIR 1929 Rang 164 (165) : 7 Rang 70 : 117 Ind Cas 255 (DB), *Joseph* v. *Samsunder.* (*Held* that the land-lord's letter informing the tenant 'as long as you occupy room we shall not ask you to vacate' did not amount to an agreement of lease.)

('10) 37 Cal 808 (811) : 6 Ind Cas 443 (444) (DB), *Panchanan Basu* v. *Chandi Charan.* (Document held did not require registration.)

(1863) 1 Mad H C R 153 (157) (DB), *Pitchakutti Chetti* v. *Kamala Nayakkan.*

('14) 1 AIR 1914 Low Bur 241 (243) : 8 Low Bur Rul 64 : 24 Ind Cas 911 (DB), *Secretary of State* v. *Ma Dwe.* (Suit for specific performance of such agreement is not for the *recovery* of property.)

†('10) 5 Ind Cas 38 (39) (Cal), *Satyendra Nath* v. *Anil Chandra.* (Is admissible in evidence though unregistered.)

('78) 3 Cal 322 (324) (DB), *Gunga Persad* v. *Gogun Singh.* (A *dowl fehrist* is not a contract of lease.)

2. ('21) 8 AIR 1921 Cal 127 (128) : 64 Ind Cas 747 (DB), *Harinath* v. *Promotho Nath.* (Agreement creating in the plaintiff a right to obtain patni lease on certain conditions at a future date.)

('21) 8 AIR 1921 Bom 200 (201) : 45 Bom 8 : 57 Ind Cas 971 (DB), *Mahomed Yusuf* v. *Secretary of State.* (Does not require registration.)

('23) 10 AIR 1923 Cal 432 (433) : 69 Ind Cas 57 (DB), *Alam Mulla* v. *Surendra Kumar.* (Compromise recording past agreement.)

('10) 5 Ind Cas 38 (39) (Cal), *Satyendra Nath* v. *Anil Chandra.* (Commencing from the next day.)

('33) 20 AIR 1933 Rang 220 (221, 222) : 148 Ind Cas 301 (DB). *Syriam land Co., Ltd.* v. *J. D. Rodrigues.* (Oral agreement).

[*See also* ('29) 16 AIR 1929 Rang 184 (185) : 7 Rang 144 (DB), *Russa Engineering Works, Ltd.* v. *Wearne Bros., Ltd.* (Assignment by prospective lessee of agreement in his favour for grant of lease —No relationship of landlord and tenant is created between assignor and assignee.)]

terest in the property.[3] The mere fact that an agreement provides that the lease is to commence from a future date[4] or that there is a provision for the execution of a formal document[5] does not make it a merely executory agreement and not a lease. Even where possession is allowed to be taken under the agreement it may amount only to a personal agreement not creating any present interest in the property,[6] the right to take possession pending the grant of the lease being, in such cases, only a licence. But the circumstances of the case may show that apart from the lease that is agreed to be granted, there is another tenancy arising by implication from payment and acceptance of rent.[7]

A mere executory agreement for the grant of a lease under which the promisee enters into possession of the property is not by itself a good defence to a suit for ejectment against him by the owner.[7a] Under the doctrine of *Walsh* v. *Lonsdale*[8] such a person would be entitled to an equitable *interest* in the property. It has been held by the Privy Council[9] that this doctrine does not apply to India, but that if the owner sues for the ejectment of the intended lessee the latter can obtain a stay of the suit and sue for specific performance of the agreement to grant him a lease. (See Note 3 on S. 53A) Apart from this, in proper cases, the promisee under such agreement may be entitled to rely on S. 53A of the Act as a defence to the suit for ejectment.

An agreement for the grant of a lease though not an interest in the property, is an obligation annexed to the ownership of the property within the mean-

3. ('23) 10 AIR 1923 Oudh 237 (238) : 74 Ind Cas 480, *Mahomed Ali* v. *Syed Hasan Jafar*. (Whether a contract in writing or orally made is to be construed as a lease or merely as an agreement to lease must be gathered from the terms of the whole document.)
('19) 6 AIR 1919 Cal 168 (168) : 49 Ind Cas 731 (DB), *Annada Kumar* v. *Hara Durga*. (Document held to be a lease though described as a deed of contract.)
('10) 8 Ind Cas 44 (46) (DB) (Cal), *Champaklatika Mitra* v. *Nafar Chandra*. (The question whether there was a present demise or merely an agreement to make a demise in future must depend upon the paramount intention of the parties.)

4. ('30) 17 AIR 1930 Bom 210 (212) : 125 Ind Cas 428, *Sultanali Mulla* v. *Tyeb Pir*.
†('25) 12 AIR 1925 Cal 1087 (1089, 1092) : 52 Cal 695 : 91 Ind Cas 320, *Ramjoo Mahomed* v. *Haridas Mullick*.
('13) 18 Ind Cas 496 (497) (DB) (Lah), *Mihan Khan* v. *Muhammad Baksh*. (Registered deed of lease, lease commencing from future date.)
('17) 4 AIR 1917 Nag 207 (208) : 42 Ind Cas 372, *Vithu Jairam* v. *Akaram*. (Do.)

5. †('34) 21 AIR 1934 Mad 418 (419, 420) : 57 Mad 760 : 152 Ind Cas 538 (DB), *Mopurappa* v. *Ramaswami Gramani*. (Lessee was given possession and rent was taken.)
('30) 17 AIR 1930 Bom 210 (212, 213) : 125 Ind Cas 428, *Sultanali Mulla* v. *Tyeb Pir*.
('86) 10 Bom 101 (104) (DB), *Purmanand Das* v. *Dharsey Virji*. (The question depends on paramount intention.)
†('25) 12 AIR 1925 Cal 1087 (1093) : 52 Cal 695 : 91 Ind Cas 320, *Ramjoo mahomed* v. *Haridas Mullick*.
('68) 10 Suth W R 177 (177) (DB), *Nund Ram* v. *Mannoo Bibee*. (Lessor had agreed to treat '*baeena-puttro*' as a pottah in case he failed to execute it.)
('30) 17 AIR 1930 Pat 530 (532) : 122 Ind Cas 158 (DB), *Khodaijatul Kubra* v. *Krishna Pershad*.

6. ('06) 33 Cal 502 (504, 505) (DB), *Dwarka* v. *Ledu Sikdar*. (Reclamation licence with agreement for lease.)
('24) 11 AIR 1924 Cal 558 (560) : 80 Ind Cas 357 (DB), *Lakshan Chandra* v. *Takin Dhali*.
('30) 17 AIR 1930 Pat 356 (357), *Behari Manjhi* v. *Govind Manjhi*. (Lands granted for reclamation.)
[*See* ('25) 12 AIR 1925 Cal 370 (372) : 82 Ind Cas 349, *Sabdi Bepari* v. *Sheikh Budhai*.
(1903) 1 K B 881 (887) : 72 L J K B 564 : 88 L T 795, *Driscoll* v. *Battersea Borough Council*. (Building agreement—Agreement that the builder should enter on the land and build houses thereon, and that a lease should be granted of each house when erected and that the builder should in the meantime pay £200 a year until the leases were granted.)]
Also see Note 14.

7. (1861) 3 L T 809 (810) : 30 L J Q B 94 : 122 R R 858, *Anderson* v. *Midland Ry. Co*. (Tenancy at will.)
('06) 33 Cal 502 (504, 505) (DB), *Dwarka Nath* v. *Ledu Sikdar*.

7a. *See* (1903) 1 K B 577 (580, 582) : 72 LJKB 103 : 88 LT 46 : 51 WR (Eng) 343, *Zimbler* v. *Abrahams*. (Only remedy is damages or suit for specific performance of contract.)

8. (1882) 21 Ch D 9 (15) : 52 L J Ch 2 : 46 LT 858 : 31 WR (Eng) 109.

9. ('31) 18 AIR 1931 P C 79 (82) : 58 Cal

ing of S. 40 and is enforceable against transferees of the property with notice of such agreement or gratuitous transferees.[10] (See also S. 40, Note 13.)

Specific performance of an agreement for the grant of a lease will not be enforced unless the terms of the lease can be ascertained with reasonable certainty from the agreement .[10a] See also Note 35.

A person entering into possession under a mere agreement for the grant of a lease may be liable for damages for use and occupation,[11] though he is not liable for *rent*. Further, he may be liable under the agreement for damages for *breach of contract* if he vacates the property before the end of period for which he has agreed to be in possession by paying rent.[12]

Registration Act.

Under the Registration Act. S. 2 (7), an agreement to lease is included within the definition of a lease. But it has been held by the Privy Council[13] that the definition only applies to an agreement which creates an *interest* in the property. Hence, there is practically no difference between the Registration Act and this Act so far as this proposition is concerned, namely, that a merely executory agreement to grant a lease is not a lease.

As to whether a counterpart, *kabuliat,* rent note, etc., are leases within the meaning of this section, see Note 9. They are leases under the Registration Act.

5. "Right to enjoyment".—The section defines a lease as the transfer of a right to *enjoy* immovable property. The fundamental conception of a lease is that it is the separation of the right of possession from ownership.[1] Though the section uses the word "enjoy" instead of the word "possess" there is no authority for holding that it contemplates the exclusion of possession when it refers to

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1235 : 58 Ind App 91 : 131 Ind Cas 762 (PC), *G. H. C. Ariff* v. *Jadunath.*

[*See also* ('36) 23 AIR 1936 Pat 133 (135) : 161 Ind Cas 514, *Munshi Mahton* v. *Jugeswari Prasad.* (Oral lease—Suit for ejectment by landlord—Tenant has a right to specific performance but it cannot be said that landlord is estopped from saying that he is entitled to eject defendant.)]

10. *See* ('02) 25 Mad 3 (6) (FB), *Reference under Stamp Act, S.* 57.

10a. ('44) 31 AIR 1944 Mad 518 (524) : ILR (1945) Mad 355 (DB), *Raja of Vizianagaram* v. *Maharaja of Jeypore.* (Agreement to grant lease is not unenforceable merely because it does not specify from what date the lease to be granted is to commence—Section 110 can be read into the agreement— AIR 1921 PC 71 distinguished as being concerned with facts of a very special nature—33 Cal 893: 33 Ind App 106 (PC) and AIR 1919 Cal 837 relied on—Similarly, where, though actual figure of rent is given, the agreement is not uncertain.)

†('24) 11 AIR 1924 Cal 346 (347, 348) : 69 Ind Cas 600, *Nava Kishore* v. *Madan Mohan.*

('22) 9 AIR 1922 Bom 404 (404) : 67 Ind Cas 433 (DB), *Simon Reuben* v. *Haji Shaikh Mahomed.*

[*See* (1881) 19 Ch D 233 (239) : 51 LJCh 329 : 45 LT 599 : 30 W R(Eng) 93, *Marshall* v. *Berridge.* (An executory agreement for a lease does not satisfy the Statute of Frauds, unless it can be collected from it on what day the term is to begin, and there is no inference that the term is to commence from the date of the agreement in the absence of language pointing to that conclusion, *Jaques* v. *Millar,* (1877) 6 Ch D 153 overruled, *Blore* v. *Sutton* (1816-17) 3 Mer 237 followed.)]

[*See also* ('05) 29 Bom 580 (606) : 7 Bom L R 27 (DB), *Municipal Corporation* v. *Secy. of State.* (Attempt to create interest unknown to law—Lease invalid Claim to treat it as agreement to grant lease and to have such agreement specifically enforced is also open to the same objection.)]

11. ('12) 15 Ind Cas 432 (432) (Mad), *In re Kaya Ramakrishnamma.*

Also see Note 70.

12. ('27) 14 AIR 1927 Cal 275 (277) : 100 Ind Cas 404 (DB), *Chuni Lal* v. *Gopiram.*

13. ('19) 6 AIR 1919 P C 79 (80) : 47 Cal 485 : 46 Ind App 240 : 53 Ind Cas 534 (PC), *Hemanta Kumari* v. *Midnapur Zamindari.*

[*See also* ('27) 14 AIR 1927 Cal 275 (276) : 100 I. C. 404 (DB), *Chunilal* v. *Gopiram.* (Where there is an oral agreement to grant a lease, a document which merely puts on record the agreement subsequently, does not require registration and is admissible in evidence to prove the oral agreement.)]

Section 105—Note 5

1. See Salmond, *Jurisprudence,* 9th Edn., 1937, Page 597.

enjoyment. The word "enjoy" must, therefore, be taken to include possession also. The framers of the section do not seem to have intended to depart from the accepted and well-established connotation of lease in jurisprudence.

No doubt, S. 108 (b) which deals with the lessor's duty to put the lessee in possession of the property, is subject to the opening words of the section under which the parties can exclude the operation of any particular clause by express contract. But this only means that the lessor's duty of *putting the lessee in possession* can be excluded by express contract. It does not mean that the parties can agree that the lessee is to have *no right* of possession. If they do so, then the transaction would not be a *lease*. Hence, it is apprehended that the transfer of a mere right to the *usufruct* of the property without the right of possession will not be a lease.[2]

Since there is no valid lease unless the right of possession is granted to the lessee it follows that when a person has already granted a lease he cannot grant a fresh lease of the same property during the continuance of the previous lease. Such a lease has no effect and no rent can be recovered on its basis.[2a]

The word "enjoy" is, however, not used as the *equivalent* of "possess." The connotation of the word "possession" as used in the Act is distinct from "enjoyment" and does not *necessarily* include enjoyment. This is clear from Ss. 58 and 76 of the Act. Those sections show that though a usufructuary mortgagee is entitled to the *possession* of the mortgaged property, he is not entitled to the *enjoyment* of the property. Because, the usufruct of the property is treated as belonging not to the mortgagee but to the *mortgagor*. The mortgagee has only the right to receive such usufruct and reimburse himself for his debt from it. Under a lease, however, the usufruct of the property belongs to the *lessee*. The transfer of a *bare right of possession* without the right to the usufruct is not a lease.[3] Thus, the word "enjoy" seems to be used in the sense of the *beneficial occupation* of property. Such a meaning is not inconsistent with the literal sense of the word. Because, one of the meaning of this word is to *occupy as a good or profitable thing*.[4]

There must be a transfer of the *exclusive* right of possession of the leased property in order to constitute a lease.[5] (See Note 13.) The continuance in the transferor, after the transfer, of any share in the right of possession is detrimental to its character as a lease. This does not mean that there cannot be a lease of an undivided share in joint property. What is meant is that the transferor cannot reserve to *himself* any share in the right of possession.

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2 NOTE.—At the same time, the mere fact that *A* is entitled to a share of the usufruct of property in the possession of *B* will not be sufficient to show that a relationship of landlord and tenant exists between the parties and that *A* is the landlord and *B* is the tenant—Thus, a zamindar's right in respect of the land in the occupation of ryots under him is said to be a right to a share of produce—But this does not prove the existence of the relationship of landlord and tenant between the parties. *See* ('97) 20 Mad 299 (302, 303.)

2a. ('35) 22 AIR 1935 Cal 193 (195), *Haripada Dutt* v. *Gobinda Chandra Das.*

[*See also* ('74) 1 Ind App 76 (81) : 3 Sar 312 (PC), *Tirey v. Kristodhun Bose.* (A valid lease cannot be granted by a person not in possession of the lands leased.)]

3. ('99) 9 Mad L Jour 290 (295) (DB). *Kongatti Valid Nayar* v. *Subramanian Pattar.* (Liability to account for profits negatives idea of enjoyment.).

4. See Webster, *New International Dictionary of the English Language*, 1914 Edn.

5. ('44) 31 AIR 1944 Pat 261 (266) : 23 Pat 115 (DB), *Traders and Miners Ltd.* v. *Dhirendra Nath.* (*Hukumnama* granting right to dig mica mines with 105 kudalis—Grantor retaining right to use and enjoy mines—*Held*, *hukumnama* could not be regarded as a lease as it was a grant of a partial and limited interest and was in the nature of an easement.)
('97) 20 Mad 58 (65) : 6 Mad L Jour 281 (FB), *Seeni Chettiar* v. *Santhanathan.*
('99) 9 Mad L Jour 290 (295) (DB), *Kongatti Valia Nayar* v. *Subramanian Pattar.*

The right to enjoy, spoken of in this section, is the right to enjoy the property in the manner in which it can be normally enjoyed. (See S. 108, cl. (o).) If the property is a coal or other mine it can only be enjoyed by working the mine. Such a right does not cease to be a lease merely because the mode of enjoyment results in the exhaustion of the property.[5]

A lease only connotes a *right* of possession. Actual entry on the land is not necessary to complete a lease. Where before taking a lease a person has already been in possession of the property in some other capacity, a formal surrender of possession by him to the lessor and a retransfer of it by the latter to the lessee is not necessary to constitute the relationship of lessor and lessee between them.[6a]

Under the present English law also (under the Law of Property Act of 1925) actual entry on the property is not necessary to complete a lease. But before the Act, the tenancy did not become complete until actual entry by the lessee on the property.[7] His interest in the property between the date of execution of the lease and actual entry into possession was known as *interesse termini*.

There is a rule of construction of documents under which a transfer of "rents and profits" of the land without any words of limitation is construed as a transfer of the *land* itself.[8] See also s. 8, Note 12. This is only a rule of *construction* adopted to find out the intention of the parties to a document. It does not mean that a transfer which on construction is ascertained to be intended only as a transfer of the *usufruct* of property is in law a transfer of the property itself. As seen above, such a transfer will not be a *lease* unless the right of *possession* is also transferred.

6. Lease and conveyance of interest in fee simple—Distinction. A lease of immovable property is only a transfer of the right of *possession* of such property. Although such a right is an *interest* in the property, it is distinct from the ownership thereof. As Salmond points out in his *Jurisprudence*, the ownership of property is only a particular kind of right in it.[1] Thus, the ownership of land denotes the right known under the English law as the fee simple in the land.[2]

But the ownership of property always carries with it the right of possession also. The right of possession, no doubt, *can* be separated and transferred to another person. This is what happens under a lease. But the moment it ceases to belong to any one else, it will automatically come back and vest in the person entitled to the ownership of the property. Hence, where the last holder of a lease dies intestate and without leaving any heirs, the owner of the property automatically gets back the right of possession. The right of possession does not pass by

6. ('43) 30 AIR 1943 P C 153 (156) : 70 Ind App 180 : 22 Pat 713 : ILR (1944) Kar (PC) 98 : 210 Ind Cas 1 (PC), *Kamakhya Narain Singh* v. *Commissioner of Income-tax, Bihar and Orissa*. (The mining leases are leases within Ss. 105 to 108 or within the ordinary legal acceptance of that word in Indian law.)

('40) 27 AIR 1940 Pat 633 (647) : 20 Pat 13 : 191 Ind Cas 340 (SB), *Income—tax Commissioner* v. *Kamaksha Narain*. (Per Manohar Lall, J.)

6a. ('10) 7 Ind Cas 1001 (1004) (DB) (Lah), *Chokha* v. *Fateh Muhammad*. (Where under the terms of mortgage-deed proprietary possession is transferred to the mortgagee while the cultivating possession has been retained by the mortagagor, the relationship of landlord and tenant is created thereby between them.)

[*See also* ('03) 6 Oudh Cas 26 (28). *Mahmudunnissa* v. *Fakhruddin*. (*A* executing a usufructuary mortgage in favour of *B* and on the same day *B* leasing property to *A*—*Held*, relationship of landlord and tenant is created between them and *B* can sue *A* for rent in a Court of Revenue.)]

7. See Williams and Eastwood, *Principles of the Law of Real Property*, 1933 Edn., page 110.

8. ('40) 27 AIR 1940 Pat 516 (525, 526, 535, 536) : 19 Pat 433 : 192 Ind Cas 17 (DB), *Jyoti Prasad Singh* v. *Samuel Henry Seddon*.

Section 105—Note 6

1. Salmond, *Jurisprudence*, 9th Edn., 1937, p. 397.
2. Salmond, *Jurisprudence*, 9th Edn., 1937, p. 397.

escheat to the Crown in such a case. The reason is that escheat takes place only when a thing does not belong to anybody. It is based on the maxim *quod nullius est, est domini regis* (that which belongs to no one belongs to the King.)[3] But so long as there is a person entitled to the ownership of the property it cannot be said that the right of possession of such property belongs to *no one*. Because, unless such a right is vested in some one else, it always belongs to the person entitled to the ownership of the property.

Where a right passes by escheat to the Crown, the integrity of the right is not in any way destroyed.[4] Hence, the Crown takes the right subject to all burdens which encumber it at the time of the escheat.[5] But when a reversion takes place on the death of the last holder of a lease, intestate and without leaving any heirs, the leasehold interest merges into the right of ownership and loses its integrity. Hence in such a case all interests to which the leasehold is subject at the time of reversion come to an end along with the leasehold.[6]

When the ownership or an interest in ownership is transferred, the right created is not a lease. Thus, a sale is the transfer of the *ownership* of property.[7] It is a transfer of the *fee simple* in the property, to borrow the language of the English law. Similarly, a mortgage connotes the transfer of an interest in the *fee simple*. A usufructuary mortgage includes not only a right of possession of the property but also an interest in the ownership of property.[8]

7. **Contract necessary for lease.**—As seen in Note 2 a lease is a "transfer of property" as contemplated by this Act. Hence as required by S. 5 it can only be effected by an act of a living person. A lease cannot be created by a will, as it is not a transfer within the meaning of S.5, the reason being that a will takes effect only from the death of the testator. (See S. 5, Note 3.) The requirement of *consideration* for a lease under this section shows that it can only be the outcome of a *contract*. Where there is no contract there can be no lease.[1] Merely because one person occupies another person's land a lease will not come into existence.[2] A mere demand of rent by the owner from the person in possession[3] or a

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3. Broom, *A Selection of Legal Maxims*, 1939 Edn., page 228. (*Bona vacantia* i. e., things in which nobody claims property belong to the Crown.)

4. NOTE.—The reason for this, it is conceived, is that escheat to the Crown takes place by the general prerogative of the Crown. The Crown has no pre-existing right in the property. As seen already, escheat takes place because the property belongs to *no one*. Hence, in such a case there is no question of any merger of a lesser right into a greater one with the consequence of the extinction of the lesser right.

5. * ('76) 1 Cal 391 (401) : 3 Ind App 92 (PC), *Sonet Kooer* v. *Himmut*. (Mokurrari tenure—On failure of heirs, Crown will take it by escheat subject to payment of rent reserved under it.)

6. But see ('29) 16 AIR 1929 Nag 23 (25) : 110 Ind Cas 487, *Biju Bapu* v. *Munnalal*. (NOTE.—The assumption to the contrary in this case is not correct.)

7. See Section 54 of the Act.

8. *See* ('41) 28 AIR 1941 All 56 (59, 60) : ILR (1941) All 17 : 194 Ind Cas 347 (DB), *Ramman Lal* v. *Raghunath Shankar*. (In this case, in differentiating between a lease and a usufructurary mortgage the Court remarked that the latter is a transfer of an interest in the property while a lease is only the transfer of the right to enjoy the property—This remark can only be understood as meaning that a usufructuary mortgage is a transfer of an interest in the *fee simple* in the property —The word "property" has only been used to indicate the proprietary as contrasted with the possessory right—It cannot be thought that the Court intended to say that a lease is not an interest in the property, a view which is radically wrong and opposed to the entire law on the subject.)

Section 105—Note 7

1. ('22) 9 AIR 1922 Pat 429 (430) : 1 Pat 764 : 77 Ind Cas 929 (DB), *Jogendra Singh* v. *Kesho Prasad*. (Tenancy is created by contract either express or implied or by statute.)
('92) 19 Bom 133*n* (134*n*) : 1892 Bom P J 406, *Parbhudas Lakshmidas* v. *Fulba*. (Rent-note not intended to be acted upon —No lease.)

2.† ('29) 16 AIR 1929 Nag 13 (13) : 114 Ind Cas 622, *Gulab Sing* v. *Nanaji*. (Tenancy cannot be created by implication or acquiescence.)
('13) 18 Ind Cas 844 (845) (DB) (Cal), *Matilal* v. *Darjeeling Municipality*.

mere offer of tenancy by the owner to such person[4] will not create a lease. Similarly, a co-owner occupying a specific portion of the common property does not *ipso facto* become a tenant of the rest, and is only liable to pay them their share of the profits but not rent unless there is an agreement to pay rent.[5] So also, an *admission* of a lease by the person in possession or by the owner will not by itself create a lease.[6] But an *express* contract of tenancy is not always necessary. The contract may be implied from the conduct of the parties and other circumstances of the case.[7]

When a lease is contained in writing it can be contained in more than one document.[8]

8. Tenancy by payment and acceptance of rent.—The mere fact that one person pays and another receives rent from the former does not necessarily create the relationship of landlord and tenant between them.[1] As seen in Note 7, such relationship can only arise on the basis of a contract between the parties. It is also necessary that there should be an intention to transfer an interest in the property. But payment and acceptance of rent will be an element of *evidence* going to prove the existence of a tenancy.[2] The sufficiency of such evi-

(1900) 27 Cal 239 (242) (DB), *Rachhea Singh* v. *Upendra Chandra.* (Suit for rent of ferry tolls—Defendant not having entered into any contract with plaintiff but having collected the tolls—Lower Court passing decree for rent holding that the defendant has made himself plaintiff's tenant in respect of the ghats by use and occupation—*Held* that this was wrong and no decree for rent could be passed.)

('89) 1889 All W N 176 (177), *Ali Hussain* v. *Ali Bakhsh.*

[*See also* ('17) 4 AIR 1917 Pat 345 (347, 349) : 39 Ind Cas 107 (DB), *Baldeo Singh* v. *Brahmdeo Naraian Singh.* (A mere entry in a *Khasra* does not create a contract of tenancy with the persons entered therein. The mere fact of a person's holding lands in a zemindari estate is not a sufficient proof that he is a tenant.)]

3. (1891) 2 Q B 484 (486) : 61 LJQB 36 : 65 LT 332 : 40 WR (Eng) 37 *Towerson* v. *Jackson.* (Mere demand of rent is only offer of a tenancy.)

('82) 6 Bom 79 (82) (DB), *Kalidas* v. *Vallabhdas.* (Notice to pay rent.)

('07) 34 Cal 57 (62) : 5 Cal L Jour 181 (DB), *Deonandan Pershad* v. *Meghu Mahton.*

4.† ('44) 31 AIR 1944 Nag 141 (142) : ILR (1944) Nag 267 : 218 Ind Cas 25 *Nawabali Syed* v. *Mohammad Ramzan.* (On terms of lease deed lessor having option, on expiry of 10 years, to enter into contract of tenancy with person in occupation—Plaintiff lessor giving notice to defendant who was in occupation but defendant not replying—*Held*, this amounted merely to an offer of tenancy but as there was no acceptance by defendant there was no contract of tenancy.)

('29) 16 AIR 1929 Rang 164 (165) : 7 Rang 70 : 117 Ind Cas 255 (DB), *E. M. Joseph* v. *Samsunder.*

('10) 7 Ind Cas 750 (750) (DB) (Mad), *Bangat Singh* v. *Bolama Reddi.* (Patta tendered to but not accepted by a tenant is not a lease.)

5. ('05) 32 Cal 567 (570) : 3 Cal L Jour 141 (DB), *Girindra Chandra* v. *Sreenath Pal.* (NOTE.—There can be a tenancy by arrangement between co-owners—Each co-owner is entitled to the possession of the whole and every portion of the property—So it is possible for one of them to be a transferee of the right of joint possession of the rest.)

6. ('80) 5 Cal 864 (865) : 6 Cal L R 286 (DB), *Narain Coomary* v. *Ram Krishna.*

7. ('17) 4 AIR 1917 Nag 36 (36) : 46 Ind Cas 909, *Ratnoo* v. *Nabidad.* (Tenant openly breaking up waste land and cultivating it with knowledge of landlord and without any objection by him—Cultivator is licensee first but when improvement and cultivation have continued for a number of years and the cultivator is shown in the village records as tenant a tenancy may be implied.)

8. ('30) 17 AIR 1930 Bom 210 (212) : 125 Ind Cas 428, *Sultan Ali* v. *Tyeb Pir.*

('17) 4 AIR 1917 Mad 274 (276) : 33 Ind Cas 439 (DB), *Morgan* v. *Fernandez.* (It may be a *series of letters.*)

Section 105—Note 8

1. ('85) 11 Cal 434 (446) (FB), *Hori Das Mal* v. *Mahomed Jaki.* (Person paying rent not estopped from denying title of the person to whom he pays rent.)

('03) 7 Cal W N 132 (235), *Rasamoy* v. *Srinath.*

2. (1900) 27 Cal 156 (164, 165) : 26 Ind App 216 (PC), *Beni Pershad* v. *Dudhnath Roy.* (Tenancy for life held created.)

('76) 1 Cal 391 (399) : 3 Ind App 92 (PC), *Sonet Kooer* v. *Himmut.*

('74) 22 Suth W R 334 (335) (DB), *Lalun Monee* v. *Sona Monee.* (Registration as tenant in landlord's books not necessary.)

('85) 11 Cal 434 (446) (FB), *Hori Das*

dence for the purpose will depend on the circumstances of each case.[3] If for instance. the tenancy is for an agricultural or manufacturing purpose and is governed by this Act, then, in the absence of an agreement to the contrary, it will be deemed to be one from year to year under s. 106. Such a lease cannot be created under s. 107 except by means of a registered instrument.[4] But if the tenancy is for any other purpose, then it will be deemed to be a tenancy from month to month under s. 106 and such a tenancy may be inferred from payment and acceptance of rent, provided that such payment and acceptance are sufficient, on the facts of the particular case, to prove an oral agreement of lease accompanied by delivery of possession. Even in the case of a tenancy for an agricultural or manufacturing purpose, the acceptance of rent is sufficient under s. 116 to cause a renewal of an expired lease if a tenant holds over after the expiry of such a lease and the landlord assents to his doing so. In cases not governed by this Act the payment and acceptance of rent may be sufficient to prove a tenancy even in regard to agricultural land, notwithstanding the presumption as to its being one *from year to year.*[5]

A tenancy can arise by implication from payment and acceptance of rent, only where the person, to whom the rent is paid, is the *owner* of the property.[6] Where a trespasser grants a lease of property and the owner accepts rent from the lessee, such acceptance will not amount to confirmation of the lease, the same being void and therefore incapable of confirmation or ratification.[7] But the creation of a *fresh* tenancy may be implied in such a case.[8]

9. **Kabuliat, rent-note, etc., whether lease.**—The word "transfer" necessarily imports that the act of transfer is to be made by the owner of the property.[1] Hence a *kabuliat,* rent-note or other similar document emanating from the transferee cannot by *itself* create a lease.[2] It can, however, *evidence* a lease,

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Mal v. *Mohomed Jaki.*
('06) 33 Cal 502 (504, 505) (DB), *Dwarka Nath* v. *Ledu Sikdar.* (Mere agreement to grant lease—Possession given —Payment and acceptance of rent—Tenancy created.)
('25) 12 AIR 1925 Mad 881 (882) : 87 Ind Cas 669 (DB), *Gopinatha* v. *Kristno.*
('24) 11 AIR 1924 Cal 535 (535) : 72 Ind Cas 311 (DB), *Bali Mohammad* v. *Janaki Nath.*

3. ('26) 13 AIR 1926 Pat 465 (467) : 5 Pat 415 : 98 Ind Cas 893 (DB), *Abdul Gaffar* v. *F. B. Downing.* (Marfatdari receipts i.e., receipts granted in the name of payer on behalf of another, do not constitute any relationship of landlord and tenant between the payer and the payee, nor any recognition of the payee's right as tenant.)
4. ('97) 1 Cal W N 142 (143) (DB), *Sheocharan Lal* v. *Purbhoo Dayal.*
5. ('25) 12 AIR 1925 Mad 881 (882) : 87 Ind Cas 669 (DB), *Gopinath* v. *Kristno.*
6. ('20) 7 AIR 1920 Cal 693 (693, 694) : 59 Ind Cas 565 (DB), *Chandra Kanta* v. *Adinath Shom.*
('19) 6 AIR 1919 Cal 796 (797) : 51 Ind Cas 397, *Bashiram Nath* v. *Dina Nath.* (If one man realizes rent due to another, that fact cannot constitute the former the landlord in place of the latter.)
7. †('97) 1 Cal W N 142 (143) (DB), *Sheocharan Lal* v. *Purbhoo Dayal.*
(1900) 27 Cal 156 (162) : 26 Ind App 216 (PC), *Beni Pershad* v. *Dudhnath Roy.* (Same principle applies where a life-tenant grants a permanent lease and the superior landlord accepts rent from the sub-lessee after the death of the life tenant.)
8. (1900) 27 Cal 156 (164, 165) : 26 Ind App 216 (PC), *Beni Pershad* v. *Dudhnath.*

Also see Note 20.

Section 105—Note 9

1. See S. 7 of the Act.
2. ('49) 36 AIR 1949 All 455 (456) *Magbool Ahmad* v. *Debi.* [Rent note does not amount to lease—Executant, however, bound by its terms though not other party.]
('46) 33 AIR 1946 All 403 (405) *Shubruti* v. *Kunj Behari.* [Agreement by *A* that he would vacate whenever called upon do so —Agreement was of no legal value and could not be admitted in evidence even to show nature of *A's* possession to be that of lessee.]
('43) 30 AIR 1943 All 212 (213) : 207 Ind Cas 323 (DB), *Mohd. Liaqat Ali* v. *Ajudhia Prasad.* [It is not even an invalid lease but it is no lease at all. It can, however, be looked into to ascertain of title made by the person when he entered upon the land.]
†('44) 31 AIR 1944 All 221 (222) : ILR (1944) All 346 (DB), *Pyarelal* v. *Ram Sarup.* (*Kabuliat* executed by mortgagor in favour of usufructuary mortgagee.)
('43) 30 AIR 1943 Lah 127 (128) : ILR

subject to its admissibility in evidence.[3] But an application for the grant of a lease with the endorsement of sanction on such application may be sufficient to create a lease.[4] It has been held that though a rent-note or a *kabuliat* does not operate as a lease it can be enforced as a *contract* against the person executing it who is bound by its terms.[4a]

Under the Registration Act, a lease includes a counterpart, *kabuliat* and an undertaking to cultivate or occupy. (See S. 2 (7) of that Act.)[5]

Such instruments will also be leases under the Stamp Act. Any writing on an application for a lease intended to signify that the application is granted, is a lease under the Stamp Act.

10. Application for grant of lease with endorsement of sanction, whether lease—See Note 9.

(1943) Lah 695 : 208 Ind Cas 22 (FB), *Mohanlal* v. *Ganda Singh.* (Kabuliyat.)

†('42) 29 AIR 1942 All 330 (330) : 202 Ind Cas 678, *Ganga Sahai* v. *Badrul Islam.* (A *Kirayanama* cannot operate as a lease. 26 All 368 followed.)

('09) 2 Ind Cas 994 (994, 995) (DB) (Cal), *Nilmamud Sarkar* v. *Bowl Chandra.* (A *kabuliat*, which is only an undertaking by the prospective tenant to take the tenancy is not a lease defined by S. 105, T. P. Act —Lessee cannot recover possession on the basis of the *kabuliyat*.)

('26) 13 AIR 1926 Nag 389 (392) : 24 Nag LR 68 : 95 Ind Cas 183, *Birdichand Lalchand* v. *Papatlal.* (*Rent-note.*)

[* ('39) 26 AIR 1939 Lah 423 (424) :ILR (1940) Lah 70 (DB), *Taj Din* v. *Abdul Rahim.* (Do.)

('28) 15 AIR 1928 Nag 153 (156) : 111 Ind Cas 488, *Deolia* v.*Raje Janardan,* (Kabuliyat.)

('40) 27 AIR 1940 Nag 143 (144) : 189 Ind Cas 753, *Tulsiram Rajaram* v. *Govinda Ramji.* (Do.)

('06) 9 Oudh Cas 296 (298, 299) (DB), *Mt. Raj Kuar v.Nabi Baksh.* (Do.)

('30) 17 AIR 1930 All 678 (681) : 130 Ind Cas 8 (DB), *Safdar Ali* v. *Ambika Prasad.* (Raiyatnama by person already in possession held only a collateral agreement.)

('25) 12 AIR 1925 Rang 273 (274) : 3 Rang 379 : 90 Ind Cas 693, *U Tha Nyo* v. *Mg. Kyaw Tha.* (Agreement to cultivate another's land.)

('09) 32 Mad 532 (533) : 4 Ind Cas 1039 (1040) (DB), *Kaki Subbanadri* v. *Muthu Rangayya* (Undertaking to occupy.)

('46) 33 AIR 1946 Pat 22 (24) : 24 Pat 429 (DB), *Loknath Singh* v. *Chhotan Barhi.* [In Bihar, in the case of *agricultural* leases the long standing practice to treat a kabuliat executed by lessee and accepted by lessor, as the instrument creating tenancy has not in any way been affected by the T. P. Act.]

('47) 34 AIR 1947 Pat 78 (79) : 229 Ind Cas 394 (DB), *Budhan Mahton* v. *Ramanugrah Singh.* [Patta and kabuliat—Two instruments cannot be regarded as one so as to create a valid lease.]

Also see S. 107, Note 10.

3. ('71) 16 Suth W R 147 (148) (DB), *Danoollah* v. *Amanutoollah.* (Acceptance by landlord of kabuliyat.)

('11) 10 Ind Cas 489 (490) (DB) (Cal), *Akram Ali* v. *Durga Prosonna.* (Do.)

('06) 9 Oudh Cas 296 (298, 299) (DB), *Mt. Raj Kuar* v. *Nabi Baksh.*

[*See* ('92) 19 Bom 133*n* (134*n*) : 1892 Bom P J 406, *Parbhudas Lakshmidas* v. *Fulba.* (Rent-note not intended to be acted upon—No lease.)]

4. ('04) 27 Mad 43 (44) : 13 Mad L Jour 356 (DB), *Ramaswami Ayyar* v. *Thirupathi Naik.*

†('81) 7 Cal 703 (707) : 10 Cal L R 121 (FB), *Sufdar Ieza* v. *Amzad Ali.*

('06) 33 Cal 502 (504, 505) (DB), *Dwarka Nath* v. *Ledu Sikdar.* (When in sanctioning application owner merely agrees to grant a lease in future, there is no lease.)

4a. ('49) 36 AIR 1949 All 455 (456) *Maqbool Ahmad* v. *Debi.* [Person executing rent note is bound by his undertaking though not the other party.]

('44) 31 AIR 1944 All 221 (222) : ILR (1944) All 346 (DB), *Pyarelal* v. *Ram Sarup.* (*Kabuliat* executed by mortgagor in favour of usufructuary mortgagee—Mortgagor continuing in possession—*Held*, relation of lessor and lessee was not brought into existence but mortgagor was bound by terms of the *kabuliat* and for whatever was due under it as compensation for use and occupation of the land.)

('42) 29 AIR 1942 All 330 (330) : 202 Ind Cas 678, *Ganga Sahai* v. *Badrul Islam.* (The contract is not invalid by reason of S. 23, Contract Act.)

5. ('76) 1876 Bom P J 36. *Hiralal* v. *Collector of Surat.* (Undertaking to occupy.)

(1900) 2 Bom L R 488 (489) (DB), *Paji Mania* v. *Lallubhai.* (Rent-note.)

('68) 5 Bom H C R (AC) 92 (94), *Moro Vithal* v. *Tukaram.* (*Bhadekhat* is an agreement between a lessee and a lessor in the nature of a *counterpart of a lease.*)

11. Agreement varying rent or other terms of lease, whether lease —An agreement *merely* varying the amount of rent payable under an existing lease is not itself a lease.[1] Because, there is no fresh transfer of a right to enjoy immovable property in the lessee's favour in such a case. The agreement merely affects one of the terms on which the right of enjoyment already transferred to the lessee shall be exercised. A right to rent is, no doubt, a right in immovable property and an agreement varying the rent, therefore, will be one *creating or limiting* a right in immovable property.[1a] But such a right is that of the *lessor* and not of the *lessee* while there can be no lease unless a right is created in favour of the *lessee.* The same principle will be applicable to agreements involving a variation of other terms of a lease. So long as there is no fresh right of enjoyment transferred to the lessee the agreement will not itself be a lease.

Where the agreement enlarges either the property covered by the lease or the duration of the lease, it transfers a fresh right of enjoyment not included in the original lease and so will itself be a *lease.* So also, the variation in the terms of a lease may be of such a nature that it may lead to the conclusion that the agreement was intended to replace altogether the original lease. In such a case it must be held that the original lease has been given up and a fresh lease has been granted. On these principles it was held in the undermentioned cases[2] that the agreements in them were *leases.*

The question whether an agreement varying the rent or other terms of a lease requires registration is different from the question whether such agreement is a *lease.* Under s. 92 (4) of the Evidence Act where the original lease is by a registered document a subsequent *oral* agreement to vary the rent or other terms of the lease will be inadmissible in evidence. If the agreement varying the terms of a lease is embodied in a written instrument it may require registration under s. 17 (b) of the Registration Act although it does not amount to a *lease.* Thus, the right to rent is a right in immovable property. An agreement reducing or enhancing the rent payable under a lease will, therefore, be one limiting or creating a right in immovable property. Where such an agreement is contained in a

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Section 105—Note 11

1. (1852) 21 L J Ex 135 (136) : 155 E R 968 : 7 Ex 319 : 18 L T (os) 276 : 86 R R 664, *Crowley* v. *Vitty*. . .,

('78) 3 Cal 322 (324) : 2 Ind Jur 642 (DB), *Gungapersad* v. *Gogun Singh.* (Agreement by a person who is already a tenant to pay rent at certain rate is not a lease—*A fortiori,* a memorandum of an agreement by such person to pay rent at certain rates is not lease.)

†('97) 24 Cal 20 (24) (DB), *Satyesh Chunder Sircar* v. *Dhunpul Singh.*

('22) 9 AIR 1922 Cal 511 (512) : 69 Ind Cas 992 (DB), *Priya Nath* v. *Surrendra Nath.*

[*See also* ('44) 31 AIR 1944 Pat 293 (294) : 23 Pat 334 : 217 Ind Cas 14 (DB), *Ananta Lal* v. *Bibhuti Bhusan.* (Compromise decree varying amount of rent payable under a lease.)

('08) 35 Cal 470 (475) : 7 Cal L Jour 499 (DB), *Icharan Singh* v. *Nilmony Balidar.* (The mere acceptance of rent at a reduced rate does not constitute a lease.)

('99) 22 Mad 217 (220) : 8 Mad L Jour 256 (DB), *Obai Goundan* v. *Ramalinga Ayyar.* (It does not require registration.)]

[But see ('29) 16 AIR 1929 Lah 291 (292) : 10 Lah 685 : 117 Ind Cas 240 (DB), *Attar Chand Kapur & Sons* v. *Chandu Lal.* (Where a compromise varies the terms of a registered lease with regard to the rate of rent, the variation amounts to a fresh lease.)]

1a. As will be seen in Note 79, such right is capable of adverse possession and extinction by prescription.

2. ('22) 66 Ind Cas 904 (905) (Lah), *Karim Bakhsh* v. *Natha Singh.* (Duration of lease extended.)

('29) 16 AIR 1929 Cal 462 (463) : 56 Cal 427 : 118 Ind Cas 895 (DB), *Nazar Ali* v. *Indra Kumar.*

('34) 21 AIR 1934 Lah 743 (743) : 148 Ind Cas. 558, *Mohammad Din* v. *Sarada.* (Document prescribing changes in the manner of holding the property.)

('25) 12 AIR 1925 Cal 1171 (1172) : 90 Ind Cas 98 (DB), *Ramchandra Agarwala* v. *Syameswari Dasya.*

('10) 37 Cal 293 (300) : 4 Ind Cas 713 (DB), *Durga Proshad Singh* v. *Rajendra Narain Bagchi.* (Where after the grant of a lease the lessor wrote a letter to the lessee which, besides a definition of a reduced rental, contained a recital of the area of the land demised under the lease,

written instrument it will require registration under s. 17 (b) of the Registration Act if the amount of rent reduced or enhanced is Rs. 100 or more.[3]

In Lalit Mohan Ghose v. *Gopali Chauk Coal Co.*,[4] the following question was referred to a Full Bench: "Does a document which is not a lease but which varies the amount of rent to be paid under existing registered lease as also the incidents of such payments, namely, the date of payment and consequences of default of payment, require registration?" The original lease in the case was a compulsorily registrable one under s. 107 of this Act and s. 17 (d) of the Registration Act. The Full Bench answered the question referred to it by stating that a document of the above kind was compulsorily registrable. The decision proceeds on the ground that the amount of rent, the time of payment thereof and consequences of default relate to essential incidents of a lease and that under s. 107, where a lease is of the kind requiring registration under that section, all its essential incidents must also be embodied in a registered document.

It may be questioned whether such a view does not involve an undue stretching of the language of s. 107. But the decision is clearly an authority for saying that an agreement merely varying some of the essential incidents of a lease is necessarily a lease.

12. Tenancy by acquiescence.—A's occupation of B's property does not *ipso facto* make A tenant of such property. The law requires special factors to bring into existence such a right. The acquiescence of the owner in such occupation is not, in itself, such a factor and by itself cannot create a tenancy.[1] But the acquiscence of B in A's entering into possession and enjoying B's property and doing various things on it will be relevant for the purpose of establishing a tenancy in two ways—

(1) the acquiescence may be evidence of a contract of tenancy which may be express or implied;[2]

(2) the acquiescence may preclude the owner on the principle of estoppel from denying the occupier's claim to be a tenant.[3]

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the nature of the interest granted by the lease and the instalments in which rents were payable—*Held* that the letter contained all the essential elements of a lease, and was inadmissible in evidence for want of registration.)

3. ('44) 31 AIR 1944 Pat 293 (296) : 23 Pat 334 : 217 Ind Cas 14 (DB), *Ananta Lal* v. *Bibhuti Bhusan.* (But it need not be registered if the document is in the form of a compromise which is embodied in the decree of a Court.)

[*See* ('08) 35 Cal 1010 (1012) : 8 Cal L Jour 90 (DB), *Biraj Mohinee Dassee* v. *Kedar Nath Karmakar.*)]

[But see ('99) 22 Mad 217 (220) : 8 Mad L Jour 256 (DB), *Obai Goundan* v. *Ramalinga Ayyar.* (Note—The view expressed in this decision that such agreement does not "relate" to an interest in immovable property and does not require registration is, it is submitted with great respect, not correct.)]

4. ('12) 39 Cal 284 (297, 298) : 12 Ind Cas 723 (727) (FB).

Also see Section 107, Note 7.

Section 105—Note 12

1. †('29) 16 AIR 1929 Nag 13 (13) : 114 Ind Cas 622, *Gulabsing* v. *Nanaji.* (Tenancy can only be created by contract.)

('15) 2 AIR 1915 Cal 494 (495) : 21 Ind Cas 197 (DB), *Raj Krishna* v. *Fakir Dome.* (If a landlord sues for compensation for use and occupation of land, but does not ask for ejectment of the defendant therefrom, he must not be taken to have recognised the defendant as his tenant.)

2. ('15) 2 AIR 1915 Cal 494 (495) : 21 Ind Cas 197 (DB), *Raj Krishna* v. *Fakir Dome.*

('17) 4 AIR 1917 Nag 36 (36, 37) : 46 Ind Cas 909, *Ratnoo* v. *Nabidad.* (Tenant bringing under cultivation waste land adjoining his holding—Landlord looking on and not objecting but on the other hand signing jamabandi papers showing the tenant of the extra land also—There is implied consent to the tenancy—Tenancy contract may be express or implied from conduct of the parties.)

3. ('05) 29 Bom 580 (610, 611) : 7 Bom L R 27 (DB), *Municipal Corporation of Bombay* v. *Secretary of State.* (In this case the lease was held invalid as being an attempt to create an interest in land unknown to the law—But the lessee was given protection by applying the doctrine

It must depend on the facts of each case, whether there is such acquiescence on the part of the owner as to be sufficient for the occupier of property to rely on it in support of his claim of tenancy.

For a complete discussion of the principle of acquiescence applicable in such cases, see Note 22 on s. 51. See also Note 55.

13. Lease and licence compared—General principles.—A *lease, inter alia,* requires the two following essentials:

(1) There must be a transfer of the right of possession.

(2) Such right must be an interest in the property. If a merely personal right of possession is granted the right will not be a lease. (See Note 3.)

A licence differs from a lease in both the above points. Thus:

(1) A licence need not be a right of *possession.* It may be *any* right of user of the property. But it *may* be the right of possession also.

(2) A licence is a merely *personal* right and does not amount to an interest in property. Section 52 of the Easements Act expressly says this.

From the above the following propositions can be laid down:

(1) Where a right of possession is granted *and* such right amounts to an interest in the property, the right is a lease.

(2) Where a right of possession is not given but only a right of user not involving possession is granted *and* the right does *not* amount to an interest in the property, the right is a licence.

(3) Where a right of possession is granted but such right is not an *interest* in the property but only a personal right, the right is not a lease but a licence.

(4) Where a right of possession is not given but only a right of user not involving possession is given but the right amounts to an interest in the property, such right is neither a lease nor a licence. It is not a lease because the right of possession is not granted.[1] It is not a licence because the right amounts to an *interest* in the property.[2]

Under S. 60 of the Easements Act, a licence can be revoked by the grantor unless—

(a) it is coupled with a transfer of property and such transfer is in force;

(b) the licensee, acting upon the licence, has executed a work of a permanent character and incurred expenses in the execution.

But the mere fact that a licence is coupled with a transfer of property[3] or that it has become irrevocable will not make it a lease, unless the elements essential for a lease are present.

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of acquiescence—The judgment in this case which was delivered by Jenkins, C. J., contains a very exhaustive and instructive discussion of the subject of acquiescence in such cases.)

Section 105 Note 13

1. But see ('26) 13 AIR 1926 Nag 174 (174, 175) : 92 Ind Cas 683, *Indal* v. *Debi.* (In this case it was held that a right to take cattle, etc., along a defined strip of land was a lease as it possessed the characteristics of an *interest* in land—It is submitted the decision is wrong—Such a right is neither a lease nor a licence.)

2. †('33) 20 AIR 1933 All 735 (736) : 55 All 874 : 145 I. C. 674 (FB), *In re Burma Oil Company.*

(1867) L R 2 Q B 200 (202) : 36 LJQB 79 :16 LT 152 : 15 WR (Eng) 347, *Hooper* v. *Clark.* (*C* granted and demised the exclusive right and licence to take and kill game on certain land with the use of a cottage to the defendant for a term and the defendant covenanted to leave the land at the end of the term as well stocked with game as at the time of the demise —*Held* that the demise was not a mere licence but the grant of an incorporeal hereditament.)

3. But see ('29) 120 Ind Cas 673 (673) (DB) (Lah), *Pohuram* v. *Tabo.* (NOTE.—An observation capable of the

As a licence does not create an interest in property, a licensee cannot sue in his own name in respect of the property.[4] Similarly, if he is ousted from the property by the owner, he cannot sue him for possession, unless it be under S. 9 of the Specific Relief Act.[5] So also, a licence is not, by itself, a good defence to a suit for ejectment by the owner.

Even if the licence has become irrevocable by the licensee executing work of a permanent character and incurring expenditure thereon, it will not in itself be a good defence. The reason is that a suit for ejectment is based on title and it is only a ground based on title, that will be a good defence to such a suit.[6] Prescription and estoppel will be good defences. But they stand on a special footing. Prescription is a form of title. Estoppel precludes the plaintiff from denying the title of the defendant. But though by itself a licence may not be a good defence to a suit for ejectment, it is conceived that the licensee may, on the principle laid down by the Privy Council in *Ariff* v. *Jadunath*,[7] obtain a stay of the suit and sue for an injunction against the owner restraining him from suing him for ejectment. The licensee can also sue for damages for wrongful revocation of the licence.[8]

Some decisions,[9] however, proceed on the footing that an irrevocable licence is a good defence to a suit for ejectment by the owner. It is submitted with respect that the view taken in them is not correct.

Some of them refer also to the ground of estoppel.[10] But it must be noted that the facts, which make a licence irrevocable, will not necessarily be sufficient to sustain a plea of estoppel or acquiescence. (For the nature of facts that will be necessary to sustain a plea of estoppel in such cases, see Note 22 on s. 51.)

Some of the other points of difference between a lease and a licence are:

(1) A licence may be granted without writing or registration, unless it is

opposite meaning occurs in this case—It is submitted that it is not accurate.)

4. ('26) 13 AIR 1926 Oudh 609 (609, 610) : 96 Ind Cas 410, *Gulab Khan* v. *Lal Mahomed*.

+ (1889) 42 Ch D 461 (468) : 58 LJCh 790 : 61 L T 538 : 38 W R (Eng) 136, *Heap* v. *Hartley*.

NOTE.—Where, however, a licensee is actually in possession and is ousted by a third party, he can maintain a suit for possession against such third person, as possession by itself confers a title to property, which is good against the whole world except the true owner, see the A. I. R. Commentaries on the *Limitation Act*, 2nd (1942) Edn., Arts. 142 & 144, Note 4.

5. ('16) 3 AIR 1916 All 219 (220) : 38 All 178 : 32 Ind Cas 346, *Basudeo Rai* v. *Dwarka Ram*. (Remedy of licensee is suit for damages.)

6. *See* (1903) 1 K B 577 (580) : 72 LJKB 103 : 88 L T 46 : 51 W R (Eng) 343, *Zimbler* v. *Abrahams*. (Mere agreement not to eject is not *ipso facto* defence to a suit for ejectment.)

7. ('31) 18 AIR 1931 P C 79 (82) : 58 Cal 1235 : 58 Ind App 91 : 131 Ind Cas 762 (PC).

8. ('29) 120 Ind Cas 673 (673) (DB) (Lah), *Pohuram* v. *Tabo*. (Revocation of licence contrary to terms of licence.)

9. ('34) 21 AIR 1934 All 517 (519) : 56 All 975 : 149 Ind Cas 389 (DB), *Mathuri* v. *Bholanath*. (Licensee putting up building of permanent character at considerable expense—Transaction ceases to be licence revocable at will and licensee cannot be ejected on payment of compensation.)
('38) 25 AIR 1938 All 32 (34) : 172 Ind Cas 973 (DB), *Mahomed Hasan* v. *Buddhu*.
('27) 14 AIR 1927 All 342 (344) : 100 Ind Cas 479, *Shahjahan Begam* v. *Munna*. (Licence granted for building—Licensee erecting a building of a permanent nature —Licence cannot be revoked.)
('25) 12 AIR 1925 All 203 (204) : 78 Ind Cas 215, *Amjad Khan* v. *Shafi-Uddin Khan*.
('15) 2 AIR 1915 All 56 (57) : 37 All 91 : 26 Ind Cas 445 (DB), *Rasbehari Lal* v. *Akhai Kunwar*.
('10) 8 Ind Cas 793 (793) (DB) (Cal), *Surnomoyee Peshakar* v. *Chunder Kumar*.
('40) 27 AIR 1940 Lah 18 (19) : 186 Ind Cas 890, *Jogat Singh* v. *District Board, Amritsar*.
('18) 5 AIR 1918 Nag 180 (180) : 48 Ind Cas 723, *Madhusudan Das* v. *Bissuji*.

10. ('40) 27 AIR 1940 Lah 18 (19) : 186 Ind Cas 890, *Jogat Singh* v. *District Board, Amritsar*.
(NOTE.—This decision seems to proceed mainly on the ground of estoppel, though there is not a sufficient discussion of the questions of fact involved in such a ground.)
('34) 21 AIR 1934 All 517 (519) : 56 All 975 : 149 Ind Cas 389 (DB), *Mathuri* v. *Bholanath*.

coupled with a transfer of an interest in immovable property. An instrument granting a licence does not require registration.[11] A lease can only be created by a registered instrument, if it is from year to year or for a period exceeding one year or if it reserves a yearly rent.

(2) No notice to quit is necessary to determine a *licence* and to bring a suit for ejectment against the licensee.[12] But unless a *lease* is determined by a due notice to quit or in any other recognised mode, the lessor cannot sue for ejectment against the lessee.

(3) A lease is morally a transferable right while a licence is not.[13]

(4) A lease is a heritable right while a licence is not.

(5) A lease is liable to forfeiture by denial by the lessee of the lessor's title. This principle does not apply to a licence.[14]

14. Lease or licence—Tests for determination.—The question whether a right is a lease or a licence according to the principles discussed in Note 13 is one of construction of the grant in each case. In construing such grants, the substance of the transaction must be considered and not merely the nomenclature used by the parties.[1]

The chief tests for determining whether a right is a lease or a licence are as follows:

(1) Where the right of possession is not granted but only a right of user not involving possession is granted, the right is only a licence.[2]

(2) Where the right of occupation is given but not the *exclusive* right of occupation, the right is only a licence. The reason is that a lease necessarily implies an exclusive right of possession of the leased property and is incompatible with the existence of any right of possession in the lessor.

(3) Where a right of exclusive possession is given, the right will normally be a lease, although there may be some reservations or restrictions as

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11. ('29) 120 Ind Cas 673 (673) (DB) (Lah), *Pohu Ram* v. *Tabo.*
12. †('93) 16 Mad 97 (97) (DB),, *Athakutti* v. *Govinda.*
('18) 5 AIR 1918 Cal 601 (602) : 45 Ind Cas 317 (DB), *Gobinda Chandra* v. *Nandadulal.* (Notice to quit is not necessary even where the licensee has erected huts upon the land.)
('34) 21 AIR 1934 Rang 291 (292) : 151 Ind Cas 971, *Ma Gyi* v. *Moung Tet.*
[*See also* (91) 14 Mad 98 (99) (DB), *Subbaraya* v. *Nataraji.* (Purchaser from a licensee held not entitled to notice to quit.)]
13. †('35) 22 AIR 1935 Lah 958 (959) : 16 Lah 608 : 159 Ind Cas 983 (DB), *Ralla Ram* v. *Chuharkana S. T. Committee.*
('24) 11 AIR 1924 All 825 (825) : 84 Ind Cas 284 (SB), *Kallu Shah* v. *Raheem Baksh.* (The mere fact that the licence had become irrevocable by the erection of buildings does not necessarily imply that the licensee acquired a right to transfer the licence or the building.)
14. ('25) 12 AIR 1925 All 203 (204) : 78 Ind Cas 215, *Amjad Khan* v. *Shafi Uddin.*
('23) 10 AIR 1923 All 403 (403) : 75 Ind Cas 596, *Mt. Durga* v. *Babu Ram.*
*('17) 4 AIR 1917 All 395 (396) : 39 All 621 : 40 I. C. 443, *Akbar Ali Khan* v. *Shah Muhammad.*
*('01) 1901 All W N 157 (157) (DB), *Dharam Kunwar* v. *Fakira.*

Section 105 Note 14

1. (1904) 1904 App Cas 405 (408) : 73 LJ PC 62 : 90 LT 741, *Glenwood Lumber* v. *Phillips.*
(1916) 2 App Cas 54 (59) : 85 L J P C 229 : 114 L T 762 , *King* v. *Allen and Sons, Billposting Ltd.*
†('33) 20 AIR 1933 All 735 (137) : 55 All 874 : 145 Ind Cas 674 (FB), *In re Burmah Shell Oil Storage and Distributing Co. Ltd of India.*
('30) 17 AIR 1930 Bom 165 (166) : 126 Ind Cas 872 (DB), *Sherif Dodumiyaji* v. *Emperor.*
('25) 12 AIR 1925 Cal 370 (372) : 82 Ind Cas 949, *Sabdi Bepari* v. *Budhai.*
†('36) 23 AIR 1936 Pat 362 (368) : 163 Ind Cas 525 (DB), *B. N. W. Rly. Co. Ltd.* v. *Janki Prasad.*
Also see S. 8, Note 20 and S. 58, Note 12.
2. ('47) 34 AIR 1947 Cal 236 (238) : 227 Ind Cas 38 *O. C. Ganguly* v. *Kamalpat Sing.*
('30) 17 AIR 1930 Bom 165 (166) : 126 Ind Cas 872 (DB), *Sherif Dadumiyaji* v. *Emperor.*

to the user of the property, provided the general control over the property is in the grantee.[3]

(4) Where a right of exclusive possession is given but there is sufficient reason to hold that only a *personal* right and not an interest in the property was intended to be created, the right will be only a licence.

The undermentioned cases[4] fall under the *first* class. In such cases, even an exclusive right of user will not make the right a lease.[5]

As regards the *second* class, the position of a lodger in an inn or hotel is an oftenquoted instance. The subject has been dealt with separately in Note 15. The cases noted below[6] will fall under this class.

3. ('47) 34 AIR 1947 Cal 236 (238) : 227 Ind Cas 38 *O. C. Ganguli* v. *Kamalpat Sing.* [Test of lease is whether exclusive right of occupation (though subject to certain reservations) is given—Fact that monthly sum for occupation or term is fixed, or fact that grantee accepts liability for taxes of premises, is not decisive—But fact that under the instrument grantee permits grantor use of portion of property is decisive that it is a lease.]

('04) 1904 App Cas 405 (408) : 73 LJPC 62 : 90 L T 741, *Glenwood Lumber Co.* v. *Phillips.*

('11) 2 K B 195 (212) : 80 LJKB 778 : 104 L T 676, *Young* v. *Liverpool Assessment Committee.* (Nature of respondent's business was not consistent with anything but exclusive occupation subject to the control of the custom's authorities.)

*('30) 17 AIR 1930 Bom 165 (166) : 126 Ind Cas 872 (DB), *Sherif Dadumiyaji* v. *Emperor.*

('23) 10 AIR 1923 Bom 228 (229) : 88 I. C. 316, *Indian Hotels Co. Ltd.* v. *Phiros Sorabji.* (Quoting Halsbury's *Laws of England.* Vol. XVIII, page 337, Art. 770.)

('12) 16 Ind Cas 705 (707) (DB) (Cal), *Mahipal Singh* v. *Lalji Singh.* (To give exclusive possession there need not be express words to that effect; it is sufficient if the nature of the acts to be done by the grantee requires that he should have exclusive possession.)

('25) 12 AIR 1925 Mad 434 (436) : 48 Mad 368 : 86 Ind Cas 688 (FB), *Board of Revenue* v. *S. I. Ry. Co.*

4. ('49) 36 AIR 1949 Mad 148 (150) (DB), *Venugopala* v. *Thirunavukkarasu.* [*Agreement of rent in respect of yield of cocoanut trees—Defendant given right to enjoy toddy yield and right to enter upon land for the purpose—Defendant held was not lessee of garden as such—As far as land was concerned he was only a licensee.* But he was *lessee* of the right to take toddy.]

('49) 36 AIR 1949 Sind 1 (4) (DB), *Gopaldas Jethmal* v. *Hyderabad (Sind) Municipality.* [Municipality granting by deed for 3 years right to collect fees recoverable from butchers at slaughter house—Possession and control remaining with Municipality—Grant held was only a licence and not a lease.]

('38) 25 AIR 1938 Nag 377 (379, 382) : I L R (1939) Nag 432 : 181 Ind Cas 126 (DB), *Mulji Sickka and Co.* v. *Nurmohammad Abdul Gani.* (Right to take tendu leaves.)

('26) 13 AIR 1926 Mad 978 (979) : 97 Ind Cas 548, *Ramaswami Chettiyar* v. *Abdul Kuddus Sahib.* (The right to go and cut and take the bark of trees away from the land.)

(1906) 29 Mad 353 (356) (DB), *Mammikkutti* v. *Puzhakkal Edom.* (Permission to cut certain trees.)

('93) 16 Mad 280 (281, 282) : 3 Mad L Jour 27 (DB), *Ramkrishna* v. *Unni Check.* (Permission to capture elephants.)

('14) 1 AIR 1914 Oudh 272 (273) : 25 Ind Cas 666, *Sadiq Hussain* v. *Secy. of State.* (Theka of right to fish and collect produce from nazul land belonging to Government is not a lease but a mere licence. Money payable by thekadar is licence fee and not rent.)

('27) 14 AIR 1927 Bom 115 (117, 122) : 51 Bom 274 : 101 Ind Cas 210 (DB), *Lakhmichand* v. *Ratanbai.* (Tenants agreeing to use privies in common with others—Tenants are licensees with regard to privies.)

(1895) 1 Q B 484 (492) : 64 L J Q B 84, *Jones* v. *Commissioners of Inland Revenue.* (Agreement to pay annual sum for use of telephonic lines and apparatus.)

('89) 13 Bom 87 (89, 90) (SB), *In re Hormusji Irani.* (Grazing right.)

5. (1916) 2 App Cas 54 (61) : 85 LJPC 229 : 114 L T 762, *King* v. *David Allen and Sons. Billposting, Ltd.* (Agreement giving exclusive permission to affix posters and advertisements to the flank walls of property for a certain period.)

('01) 25 Bom 433 (447) : 3 Bom L R 1, *Heiniger* v. *Droz.*

(1863) 8 L T (NS) 792 (793) : 32 L J Ex 217 : 159 E R 51 : 11 W R (Eng) 786 : 133 R R 605, *Hill* v. *Tupper.* (Grant by cannal company of exclusive right to let pleasure boats.)

6. ('07) 35 Cal 82 (99) : 6 Cal L Jour 342 (FB), *Secy. of State* v. *Karuna Kanta.* (Right to hold fair.)

('30) 17 AIR 1930 Oudh 203 (204) : 127 Ind Cas 46 (DB), *Bhaija* v. *Chuttan.* (Use of certain land for the purpose of wrestling ground.)

As regards the *third* class, the cases noted below[7] fall under this class. In such cases the mere fact that the possession is determinable at very short notice or without any *notice* at all will not make the right a licence.[8]

On this part of the subject, the decisions[9] put the proposition somewhat like this: "If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or restrictions as to the purposes for which it may be used, it is in law a demise of the land itself."

(1882) 10 Q B D 327 (330) : 52 LJMC 1 : 48 L T 57, *Smith* v. *Lambeth- Assessment Committee.* (Book-stall on railway platform.)
(1895) 1 Q B 484 (493) : 64 L J Q B 84, *Jones* v. *Commissioners of Inland-Revenue.* (Licence to place automatic machines on railway platforms.)
('23) 10 AIR 1923 Bom 228 (229, 232) : 88 Ind Cas 316, *Indian Hotels Co. Ltd.* v. *Phiroz Sorabji.* (Grant of cubicles to keep motor cars on payment of certain rent.)
('25) 12 AIR 1925 Mad 434 (434, 435) : 48 Mad 368 : 86 Ind Cas 688 (FB), *Board of Revenue* v. *S. I. Ry. Co.* (Licence to stack coal on railway platform.)
(1875) 10 C P 402 (408) : 44 L J P C 257 : 32 L T 615 : 23 W R (Eng) 562, *Wells* v. *Kingston-upon-Hull Corporation.* (Permission to use certain dock for the repairs of ships.)
(1875) 10 QB 444 (448) : 44 L J M C 180 : 33 L T 329 : 24 W R (Eng) 16, *London and North Western Railway Co.* v. *Buckmaster.* (Railway company letting stables to certain coal owners on payment of monthly rent—*Held*, railway company was properly rated as occupier, as no exclusive possession over stables was parted with.)
(1901) 1 Ch 578 (581) : 70 L J Ch 263 : 84 L T 48, *Wilson* v. *Tavener.* (Agreement to allow the plaintiff to erect a hoarding upon the forecourt of a cottage and to allow him the use of a gable for a bill posting station at a yearly rent.)
(1868) 3 Q B 350 (357) : 37 L J M C 73 : 18 L T 601 : 16 W R (Eng) 1059, *Watkins* v. *Miltonnext-Gravesend Overseers.* (Grant of a right to use moorings fixed in the bed of river as a floating coal depot.)
(1868) 4 Q B 9 (13) : 38 L J M C 39 : 19 L T 378 : 17 W R (Eng) 76, *Grant* v. *Oxford Local Board.* (Boat Club possessed of barge—In absence of exclusive occupation, no rateability.)

7. ('49) 36 AIR 1949 Mad 140 (250) (DB), *Venugopala* v. *Thirunavukkarasu.* [Agreement of rent in respect of yield of cocoanut trees—Defendant given right to enjoy toddy yield and right to enter upon land for the purpose—Right to tap cocoanut trees and obtain toddy was immovable property—Defendant held lessee of such right—as his right was exclusive.]
('47) 34 AIR 1947 Bom 241 (246) : ILR (1947) Bom 94 (DB), *Vithoba Baleaji* v. *Sholapur Municipality.* [Where the land in question had been given to the plaintiffs "for residential purposes," it was held to be a lease. In such a case condition that the land was to be vacated whenever needed without notice, conflicting as it does with definition of lease in S. 105 should be regarded as something superadded and not an essential part of the contract of lease.]
('47) 34 AIR 1947 Cal 236 (238) : 227 Ind Cas 38 *O. C. Ganguli* v. *Kamalpat Sing* [Fact that monthly sum for occupation or term is fixed, or fact that grantee accepts liability for taxes of premises. is not decisive—But fact that under the instrument grantee permits grantor use of portion of property is decisive that it is a lease.]
('45) 32 AIR 1945 Pat 200 (202) : 23 Pat 931 (DB), *Manbhum District Board* v. *B. N. Railway Co.* [Government acquiring property under Land Acquisition Act and making it over on payment to Railpay Company for user and enjoyment during term of contract—Transaction held lease and not license.]
('30) 17 AIR 1930 Bom 165 (166) : 126 Ind Cas 872 (DB), *Sherif Dadumiyaji* v. *Emperor.* (Occupation of municipal stables.)
(1911) 2 K B 195 (212) : 80 L J K B 778 : 104 L T 676, *Young* v. *Liverpool Assessment-Committee.* (Premises granted for the purpose of a bonded warehouse.)
('12) 16 Ind Cas 705 (707) (DB) (Cal), *Mahipal Singh* v. *Lalji Singh.* (Lease of *ahar* or reservoir for water.
('35) 22 AIR 1935 Cal 638 (638) : 159 Ind Cas 235, *Bir Bikram Kishor Manikya* v. *Amanaddin.* (Lease of a tank for rearing and preserving fish—Exclusive right of khas possession given to transferee—Document is a lease and not licence.)

8. (1877) 2 App Cas 262 (276) : 46 L J M C 273 : 36 L T 595 : 25 W R (Eng) 383, *Cory* v. *Bristow.* (Permission to lay down moorings in the bed of river Thames —*Held*, the grantees were in exclusive possession so as to be liable to poor rate.)
('82) 1882 All W N 100 (100) (DB). *Mulchand* v. *Gardner.* (Government land held by respondent at pleasure of the Government.)
'(47) 34 AIR 1947 Bom 241 (247) : ILR (1947) Bom 94 (DB), *Vithoba Babaji* v. *Sholapur Municipality.* [Condition that lessee to quit without notice, is condition superadded and not essential part of contract of lease.]

9. See cases in foot-note (3).

This only means that the right of exclusive possession is *prima facie* a test of a lease and that where such right exists, it will be deemed to be a lease, *unless* there is sufficient reason to hold that only a personal right and not an interest in the property was intended to be granted.

In cases falling under the *fourth* class, the absence of an intention to grant an interest in the property may be gathered from the facts of the case. Thus, where there is an agreement to grant a lease coupled with a permission to occupy the property in the meanwhile, the permission clearly does not create an *interest* in the property and so is not a lease.[10] Similarly, it has been held that where a catering contract is given to a person and he is granted under the contract, the right to use certain rooms on the premises where the catering is to be done,such right is only a licence and not a lease.[11] So also, agricultural raiyats occupying house sites on the village abadi are only a kind of licensees and not lessees.[12] For other instances, see the undermentioned decisions.[13]

Note.—English decisions as to who is an *occupier* of property for purposes of rates, franchise, etc., illustrate typically the difference between a lessee and a mere licensee. An "occupier" may be treated as being in the position of a lessee. (See also Note 15.)

15. Occupation as lodger.—The question whether a person who occupies rooms in a building is a lodger or an occupying tenant, generally arises under the English law in cases relating to rates and franchise. If he is treated as a lodger, he is a licensee. If he is held to be an occupying tenant, he is a lessee.

The reason why a lodger is not a lessee but only a licensee is that he is not entitled to *exclusive occupation.* Though he is entitled to the *exclusive use* of certain rooms, the circumstances of his occupation show that for purposes of management, etc., the landlord retains control and possession of the property and that the lodger has only the *use* of the rooms.[1]

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10. ('36) 23 AIR 1936 Pat 372 (377) : 15 Pat 460 : 163 Ind Cas 501 (DB), *Kuchwar Lime and Stone Co. Ltd.* v. *Secy. of State.* (Lessee of a mine allowing the prospective assignee to work the mine pending the grant of consent by his lessor to the transfer—Assignee is licensee.)
[*See also* ('25) 12 AIR 1925 Cal 370 (372) : 82 Ind Cas 949, *Sabdi Bepari* v. *Budhai.* (Deed held lease and not amaldari.)]
Also see Note 4.

11. ('1863) 8L T 699 (699) : 32 J L M C 245 : 11 W R (Eng) 960, *Reg* v. *Morrish.* (Grant of a space for a refreshment-stall in the International Exhibition.)
(1904) 1 K B 713 (718, 719), *Frank Warr & Co. Ltd.* v. *London County Council.* (Grant of exclusive right to supply refreshments in a theatre with permission to use the refreshment rooms in the theatre for that purpose.)
(1901) 85 L T 650 (652) : 50 W R (Eng) 358 : 18 T L R 169, *Edwards* v. *Barrington.* (Grant of exclusive right to use refreshment rooms in a theatre. Affirming (1901) 83 L T 548.)

12. ('27) 14 AIR 1927 All 720 (721) : 105 Ind Cas 878; *Sheoraj Singh* v. *Kunj Behari.*
[*See* ('15) 2 AIR 1915 All 35 (38) : 37 All 144 : 26 Ind Cas 446 (DB), *Abdul Haq* v. *Datti Lal.* (In this case, certain butchers who had been given building sites were held to be lessees holding under building leases.)]

13. ('18) 5 AIR 1918 Nag 180 (180) : 48 Ind Cas 723, *Madhusudan Das* v. *Bissuji.* (Medical adviser allowed- to occupy house free of rent.)
('10) 8 Ind Cas 793 (793) (DB) (Cal), *Surnomoyee Peshakar* v. *Chunder Kumar.* (Defendant allowed to occupy house without paying rent.)
('93) 16 Mad 97 (97) (DB), *Athakutti* v. *Govinda.* (Blacksmith permitted by the mirasdars of a village to occupy a certain house site in the village, on condition of doing work.)
('36) 23 AIR 1936 Pat 362 (368) : 163 Ind Cas 525 (DB), *B. N. W. Rly. Co. Ltd.* v. *Janki Prasad.* (Rights to cultivate castor seeds on a plot of land.)
('34) 21 AIR 1934 Rang 291 (292) : 151 Ind Cas 971, *Ma Gyi* v. *Maung Tet.* (The owner invited certain persons to live with him as his wife was sick—They continued to live with him after her death—*Held*, they entered with leave and licence of owner.)
[*See* ('12) 15 Oudh Cas 91 (94) : 15 Ind Cas 385 (386) (DB), *Ali Muhammad Khan* v. *Chhedan.* (Grove-holder is *at least* a licensee.)]

Section 105 Note 15

1. (1868) 3 Q B 350 (357) : 37 LJMC 73 : 18 L T 601 : 16 W R (Eng) 1059,

The question, whether a person is in the position of a lodger or a tenant, thus depends on whether he is entitled to exclusive possession of his rooms or not. This depends on the facts and circumstances of each case. In *Bradley* v. *Baylis*[2] Jessel, M. R., observed as follows:

> "I have been quite unable, so far as I am concerned, to frame an exhaustive definition (as to when a man may be said to occupy as an occupying tenant and when he is merely a lodger) . . . . . Some Judges have tried to do so, and, in my opinion, they have failed; and I think it wiser and safer to say that the question whether a man is a lodger, or whether he is an occupying tenant, must depend on the circumstances of each case."

The mere fact that the landlord lives on the premises will not be sufficient to hold that a person occupying rooms in the house is only a lodger and not a tenant.[3] See the undermentioned decisions[4] as to when the possession of such a person can be said to be exclusive and when not.

16. Occupation as tenant or servant.—Where a servant (or agent) of the owner occupies property on his behalf the occupation is in law that of the owner himself and so there is no lease.[1] There is neither a right to exclusive possession nor an interest in the property in such a case. Where a servant's occupation or residence in a house belonging to his master is *required* for the purpose of the service, such occupation is on the master's account. Hence, in such a case, the servant is not a tenant.[2] Where such residence or occupation is not *required* for

Watkins v. *Miltonnext Gravesend Overseers.* (The lodger is merely the inmate.) (1906) 1 K B 60 (67, 68, 70) : 75 L J K B 310 : 94 L T 76 : 54 W R (Eng) 225. *Kent* v. *Fittal.* (To entitle a person to the franchise in respect of the occupation of part of a house, he must show that he occupies it separately—If another person is really in control of that part of the house the person living in it has not a separate occupation within the meaning of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict, c. 26); his occupation is on behalf of his landlord and he is a lodger—On the other hand, if by agreement with his landlord he has an independent occupation which the landlord cannot control his occupation is that of a tenant, and entitles him to the franchise as an inhabitant occupier—In such cases the vital question is that of control by the landlord.)

2. (1881) 8 Q B D 195 (219) : 51 LJQB 183 : 46 L T 253 : 30 W R (Eng) 823.

3. (1906) 1 K B 60 (67) : 75 LJQB 310 : 94 L T 76 W R (Eng) 225, *Kent* v. *Fittal.*

4. ('42) 29 AIR 1942 Rang 11 (12) : 198 Ind Cas 678 (DB), *U Dhammathena* v. *U Nyanoketara* AA constrfcting a building on land of *B* with his consent with the intention that it would be used as study hall by *C*—*Held*, result of putting C into possession was not to give him any right in the property—He was not a tenant but a mere licensee.)

(1871) L R 7 Q B 90 (97) : 41 L J M C 30 : 25 L T 696 : 20 W R (Eng) 179, *Reg.* v. *Georgess Assessment Committee.* (One criterion is whether the landlord retains the control of the outer door and has shown by his retaining the control of the outer door that he has the control of the whole of the premises.)

(1881) 8 Q B D 195 (216-221) : 51 LJQB 183 : 46 L T 253 : 30 W R (Eng) 823, *Bradley* v. *Baylis.* (The fact that the landlord does not reside personally but has resident servants who occupy on his behalf part of the house is enough to hold that the landlord is in possession.)

Section 105 Note 16

1. (1810) 11 R R 605 (607) : 2 Taunt 339 : 2 Leach 1015 : Russ &Ry 185, *Rex* v. *Stock.*

2. ('48) 35 AIR 1948 Cal 8 (10) : 229 Ind Cas 495 (DB), *Governor General of India* v. *Calcutta Corporation.*

(1875) L R 10 Q B 422 (429) : 44 LJMC 114 : 32 L T 859 : 23 W R (Eng) 745, *Smith* v. *Seghill.* (Occupation whether as a tenant or servant—*Hughes* v. *Overseers of Chatham*, 5 M & G 54 and *Dobson* v. *Jones*, 5 M & G 112 establish the correct principles—Where the occupation is necessary for the performance of services, and the occupier is required to reside in the house in order to perform those services, the occupation being strictly ancillary to the performance of the duties, which the occupier has to perform, the occupation is that of a servant—"Required" means more than the master saying "You must reside in one of my houses, if you come into my service"—The residence must be ancillary and necessary to the performance of the servant's duties : and unless he is requird for that purpose to reside in the house and not merely as an arbitrary regulation on

the purpose of the service, the servant is not prevented from holding as a tenant.[3] But it does not necessarily follow that he holds only as a tenant.[4] The question is one of intention of the parties in each case.

This section recognises service as a form of rent. So, a lease in consideration of service to be rendered is valid. A servant, therefore, who is allowed to occupy the master's property in lieu of remuneration or as part remuneration for his service, *may* be a tenant. But it is not *necessary* that he should be one. The question depends on whether the right of exclusive possession is granted and whether an intention to create an interest in the property exists.[5] If these elements are present the servant will be a tenant and not a mere licensee,[6] though the occupation is to end on the termination of the service.[7] But if these elements are

the part of the master, he is *not prevented* from occupying as a tenant.)
(1865) L R 1 Q B 72 (75) : 35 LJMC 74 : 148 R R 774 : 13 L T (N S) 364 : 14 W R (Eng) 81, *R.* v. *Spurrell.* (The question whether the occupation is subservient and necessary to the service; if it is, the occupation is that of the master.)

3. ('48) 35 AIR 1948 Cal 8 (9) :229 Ind Cas 495 (DB), *Governor-General of India* v. *Calcutta Corporation.* [Where occpation is allowed to a servant in part remuneration of his service and is not related to the performance of the service the occupier is in the position of a tenant. To constitute the occupation of a servant it is not necessary to prove that the service could not be performed at all if the servant resided elsewhere. But the mere fact that it is convenient to both parties that the servant should occupy a particular house and that he is put in possession of it for that reason does not prevent the servant from being a tenant, unless he is required to occupy the house for the better performance of his duties though his residence is not necessary for the purpose or unless his residence is necessary for the performance of his duties, though not specifically required: AIR 1944 P C 42 71 Ind App 31 : ILR (1944) Kar (PC) 206 : ILR (1944) 2 Cal 150 (PC) *Foll.* Government creating quarters for employees of Gun and Shell Factory—Quarters not exclusive—Outsiders also allowed—Residence not compulsory for employees —*Held*, in all the circumstances of the case, that the residence of the workmen in the Government quarters was as tenants and premises were "let out" to them within S. 127, Cal. Municipal Act.]
(1875) L R 10 Q B 422 (429) : 44 LJMC 114 : 32 L T 859 : 23 W R (Eng) 745, *Smith* v. *Seghill.*
(1904) 1 K B 84 (86) : 73 LJKB 13 : 89 L T 724 : 52 W R (Eng) 140, *Dover* v. *Prosser.* (Schoolmaster *permitted* but *not required* by his employers to live in certain house so long as he continued to hold the appointment of schoolmaster—*Held* that the schoolmaster did not occupy the house by virtue of his employment—He was not *required* to reside in the house and the nature of his duties did not necessitate his residing there.)

4. *See* (1865) L R 1 Q B 72 (75) : 35 L J M C 74 : 148 R R 774 : 13 L T (N S) 364 : 14 W R (Eng) 81, *R.* v. *Spurrell.* (The observation suggesting the contrary in this case is too broad.)
('02) 15 C P L R 42 (43, 45), *Bandhu Ganda* v. *Balram.* (NOTE.—In this case the rule in English law is stated to be that if the residence of the servant on the property is not necessary for the purpose of the service and is merely permitted by the employer by way of remuneration, an interest in the property is created and there is a tenancy—This is too broad a statement.)

5. †('05) 3 Nag L R 185 (191, 192), *Wasudeo, Gharpure* v. *Ganu Kunabi.* (Suppose a landlord *A* says to *B*, 'I let you my field for Rs. 30 a year in tenancy, and I agree that you shall not pay me any rent in cash, while you work as my agent' —Here if *B* accepts, a clear contract of tenancy is created, whether *B* serves *A* or not—If *B* did not serve he would be liable to pay Rs. 30 as rent—But suppose *A* says to *B* 'I engage you as my servant on Rs. 30 a year and instead of paying you Rs. 30 in cash I allow you to take the produce of my *sir* land'—Here there is no intention to enter into a contract of tenancy and if *B* put an end to the special contract of service, there is no other basis upon which he would be liable to pay rent.)
('24) 11 AIR 1924 Nag 67 (67) : 72 Ind Cas 1012, *Manoharlal* v. *Ramratan.*

6. ('02) 15 C P L R 42 (43, 45), *Bandhu Ganda* v. *Balram.* (Private servant allowed to cultivate occupancy land in lieu of remuneration—*Held*, he was a tenant.)

7. (1875) L R 10 Q B 422 (429) : 44 LJ MC 114 : 32 L T 859 : 23 W R (Eng) 745, *Smith* v. *Seghill.*
(1904) 1 K B 84 (86) : 73 LJKB 13 : 89 L T 724 : 52 W R (Eng) 140, *Dover* v. *Prosser.*

not present, the servant (or agent) will not be a tenant but only a licensee.[8]

Where an agreement is made between A and B that B should cultivate A's land and as his remuneration take a share of the share of the crops and there is no intention to grant B an interest in the land, the agreement is not a lease but a licence.[9]

17. Market rights.—Applying the general tests laid down in Note 14, if the grant of a right to hold a fair or a hat or a market on a piece of land gives the grantee the right of exclusive occupation of the land and there is no sufficient reason to hold that only a personal right and not an interest in the property was intended to be granted, the grant will amount to a lease. The undermentioned decisions fall under this principle.[1] But where the right of exclusive occupation is not given, the grant will only be a licence and not a lease.[2] Whether an exclusive right of occupation is given or not must be judged from the facts and circumstances of each case.

Persons who are allowed to sell articles in a market or on a road are not lessees but only licensees, because they are not entitled to an exclusive right of occupation of any particular spot.[3]

A person, to whom has been granted the right to collect licence fees from persons selling goods in the municipal market, is not a lessee but only a licensee.[4]

18. Agreement for cultivation of land, if lease.—An agreement for the cultivation of land under which a person is to cultivate another's land and the two are to share the produce in certain proportions may be a lease if there is an intention to transfer an *interest* in the property. But if there is no such intention such agreement cannot create a lease. The matter is one purely of construction in each case.[1] If there is no intention to transfer an *interest* in the property, the right will be a licence. See Note 13.

19. Possession under void lease—Effect.—A void lease can confer no title to possession. If the intended lessee enters into possession the property under a void lease he thereby does not get any interest in the property. The personal agreement implied in a void lease is not by itself a good defence to

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8. ('05) 3 Nag L R 185 (191, 192), *Wasudeo Gharpure* v. *Ganu Kunabi.* (Agent appointed to carry on duties of mokaddam in village allowed to appropriate usufruct of a particular as his remuneration—No lease.)
('88) 1 C P L R 182 (185), *Lala Lachman* v. *Hariram.* (Person engaged as *mukhtyar* and given land rent-free in lieu of salary so long as the agency subsisted—Such a person is not a tenant.)
('92) 16 Mad 97 (97) (DB), *Athakutti* v. *Govinda.* (Person permitted to occupy a house site without payment of rent so long as he did blackmith's work for the grantor—*Held*, licensee and not tenant.)
9. ('11) 11 Ind Cas 32 (32) (Cal), *Biroj Mahammad* v. *Mohabut Mahammad.*

Section 105 Note 17

1. ('30) 17 AIR 1930 Cal 739 (742, 743) : 57 Cal 655 : 129 Ind Cas 177 (DB), *Secy. of State* v. *Bhupal Chandra.*
('29) 16 AIR 1929 Cal 197 (199, 200, 201) : 55 Cal 1328 : 115 Ind Cas 185 (DB), *Secy. of State* v. *Sati Prasad.*
('40) 27 AIR 1940 Cal 89 (91) : ILR (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali* v. *Jaminilal Roy.* (Exclusive right to sell fish or let out the land to others for selling fish.)
2. ('08) 35 Cal 82 (93, 100) : 6 CalLJour 342 (FB), *Secy. of State* v. *Karunakanta.* (Zamindar granting right to hold fair on land in the possession of tenants.)
3. ('35) 22 AIR 1935 Pat 184 (185) : 154 Ind Cas 877, *Aliar Kunjra* v. *Hazarimull.*
('28) 15 AIR 1928 Oudh 99 (100, 101) : 3 Luck 282 : 106 Ind Cas 491, *Ram Lal* v. *Badal Khan.*
('08) 35 Cal 82 (89, 91, 99, 100) : 66 Cal L Jour 342 (FB), *Secy. of State* v. *Karunakanta.* (Persons attending a fair with a view to sell various articles of merchandise and who either occupy or set up stalls are not lessees.)
4. ('35) 22 AIR 1935 Pat 184 (185) : 154 Ind Cas 877, *Aliarkunjra* v. *Hazarimull.*

Section 105 Note 18

1. ('20) 7 AIR 1920 Cal 548 (549) : 58 Ind Cas 859 (DB), *Brahmamoyee Barmani* v. *Munsur.* (No lease. AIR 1919 Cal 14 reversed.)
('19) 6 AIR 1919 Cal 264 (265) : 50 Ind

a suit for possession against the lessee by the lessor.[1] The reason is that a suit for ejectment is one based on *title* and only a ground of *title* can be a good defence to such a suit. A merely *personal* right cannot be a good defence to such a suit.

The mere fact that an owner sues for possession on the allegation that the defendant is his tenant (whose tenancy has expired) and it is found that the alleged tenancy is void or that the lease-deed is inadmissible in evidence does not disentitle the plaintiff to a decree for possession where he is otherwise entitled to such decree.[2]

A lessee in possession may, however, be entitled to sue for specific performance of the contract to grant a lease which is implicit in the void lease.[3] Even where such a contract is required to be, but has not been, registered, S. 27A of the Specific Relief Act confers on the lessee the right of suing for specific performance.

Besides this, a lessee in possession may also be entitled to resist the suit for possession by the lessor on the ground of part performance under S. 53A if the conditions contemplated by that section exist.[4]

The lessee may, also be entitled to resist the lessor's suit on equitable grounds, such as estoppel, etc. For a discussion of these principles, see Notes 12, 20 and 55.

It may be noted here that the *English* doctrine of part performance or the principle of equity laid down in *Walsh* v. *Lonsdale*[4a] has no application to cases under this Act. Section 53A differs from the English doctrine of part performance in many respects. See Notes on section 53A.

Notwithstanding the invalidity of the lease, the tenant in possession will have a good title except against the true owner on the well-known principle that possession is a good title against the whole world except the true owner.[5]

A lessee in possession under a void lease will also be in the position of a licensee[6] and not a mere trespasser if the lease has been granted by the true owner and the lessee has entered with the owner's consent. As to the rights of a licensee in possession, see Note 13.

A person who has entered under a void lease is not liable for *rent*.[7] But he may be liable for compensation for use and occupation.[8] He will not be liable for

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Cas 285 (DB), *Pokan Sheikh* v. *Rajni Kamal.* (No lease.)

Section 105 Note 19

1. (1903) 1 K B 577 (580) : 72 LJKB 103 : 88 L T 46 : 51 W R (Eng) 343, *Zimbler* v. *Abrahams.*
('05) 29 Bom 580 (606) : 7 Bom L R 27 (DB), *Municipal Corporation* v. *Secretary of State.*
[But see ('30) 17 AIR 1930 All 678 (681) : 130 I. C. 8 (DB), *Safdar Ali* v. *Ambika Prasad.* (Unregistered lease—Independent collateral agreement not to eject for a certain period is good defence to suit for ejectment. NOTE.—Submitted wrong.)]
2. ('04) 27 All 190 (191) : 1904 All W N 212 (DB), *Beni* v. *Puran Das.*
('38) 25 AIR 1938 All 32 (33) : 172 Ind Cas 973, *Mirza Md. Hasan* v. *Buddhu.*
3. ('36) 23 AIR 1936 Bom 246 (248, 249) : 163 Ind Cas 579, *Chandulal* v. *Keshavlal.* (AIR 1931 P C 79 : 58 Cal 1235 : 58 Ind App 91 (P C) relied on.)
4. ('37) 24 AIR 1937 All 10 (12) : ILR (1937) All 312 : 166 Ind Cas 812 (DB), *Shyam Sundar Lal* v. *Din Shah.*
4a. (1882) 21 Ch D 9 (15) : 31 WR (Eng) 109 : 52 L J Ch 2 : 46 L T 858.
5. See Salmond, *Jurisprudence,* 9th Edn., 1937 page 364. See also A. I. R. Commentaries on the *Limitation Act,* 2nd (1942) Edn., Arts. 142 & 144, Note 4.
[But see ('25) 12 AIR 1925 Cal 1225 (1226) : 89 Ind Cas 180 (DB), *Year Mamud Mondal* v. *Paomocha Sarkar.* (Submitted not correct.)]
6. ('16) 3 AIR 1916 All 219 (220) : 38 All 178 : 32 Ind Cas 346 (DB), *Basdeo Rai* v. *Dwarka Ram.*
[*See also* ('15) 2 AIR 1915 All 56 (57) : 37 All 91 : 26 Ind Cas 445 (DB), *Ras Behari Lal* v. *Akhai Kunwar.* (Possession under unregistered gift.)]
[But see ('15) 2 AIR 1915 Oudh 165 (166) : 30 Ind Cas 258, *Ram Sarup* v. *Suraj Din.* (A perpetual lessee though he cannot be so treated owing to the lease having been subsequently found to be invalid owing to want of registration, may yet be treated as a tenant at will.)]
7. ('39) 26 AIR 1939 Lah 162 (163), *Mt. Malan* v. *Dayal Singh.*
8. ('42) 29 AIR 1942 Oudh 93 (95) : 17 Luck 205 : 196 Ind Cas 237 (DB), *Thakur* v. *Jagdambika Pratap Narain Singh.*

mesne profits where the lease has been granted by the true owner and the lessee has been let into possession by such owner. Because in such a case possession will not be *wrongful*. But where the invalidity of the lease is due to its having been granted by a person not entitled to the property, the lessee will be liable for mesne profits.[9] In some cases, the lessee may be liable for the amount payable as rent under the void lease, as damages for *breach of contract*, when such contract is provable under the law.[10]

Notwithstanding the invalidity of the lease, the possession of the property coupled with the payment and acceptance of rent and other circumstances may be sufficient to establish by implication a contract of tenancy between the parties.[11] (See also Note 8.)

The intended tenant may also prescribe by adverse possession for a *title* to a tenancy. See Note 82.

Registration.

Where there is an instrument which fulfils the definition of a lease either under the Registration Act or this Act and is compulsorily registrable but is not registered it will not be admissible in evidence (under S. 49 of the Registration Act) to prove the lease or the terms of the lease. But such instrument may be admissible in evidence in a suit for specific performance of the contract to grant a lease or for the purposes of S. 53A of this Act. Such an instrument will also be admissible in evidence to prove any *collateral* transaction which does not require to be registered. Thus, the instrument may be admissible in evidence to prove the nature of the lessee's possession and to show that it is not under any claim of ownership.[12] The matter sought to be proved must be distinct from the transaction embodied in the instrument, and must not require registration. Thus, in the above instance, the giving of possession to the lessee would be a transaction distinct from the granting of the lease (which would be complete by the execution of the instrument of

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('06) 9 Oudh Cas 296 (300) (DB), *Mt. Raj Kuar* v. *Nabi Bakhsh.*

†('12) 35 Mad 95 (106) : 8 Ind Cas 668 (673) (FB), *Ajam Sahib* v. *Meenatchi Devastanam.* (Per Krishnaswmi Aiyer, J.)

('32) 19 AIR 1932 Sind 60 (61) : 25 Sind L R 451 : 137 Ind Cas 156 (DB), *Kodulal* v. *Beharilal.*

('29) 16 AIR 1929 All 831 (832) (DB), *Baij Nath* v. *Kundan Lal.* (Unregistered sarkhat (lease) would be admissible to prove damages for use and occupation.)

('38) 25 AIR 1938 Mad 746 (748) : 182 Ind Cas 299, *Md. Rowther* v. *Tinnevelly Municipality.*

('12) 36 Bom 500 (503, 504) : 15 Ind Cas 830 (831) (DB), *Ramchandra* v. *Tama.* (Suit for rent—Lease invalid for want of registration—Lessee (defendant) admitting tenancy—Compensation for use and occupation may be decreed and if the rent mentioned in the lease deed is not excessive may be awarded at that rate.)

Also see Note 70, S. 107 Note 7 and Section 108 (I) Note 12.

9. ('11) 11 Ind Cas 381 (DB) (Mad), *Dakshnamurti Pillai* v. *Subbu Iyer.*

10. ('09) 12 Oudh Cas 140 (143) : 2 Ind Cas 920 (922) (DB), *Udit Narayan Singh* v. *Rampal Singh.* (He is also liable to pay interest.)

('12) 35 Mad 95 (106) : 8 Ind Cas 668 (673) (FB), *Ajan Sahib* v. *Meenatchi Devastanam.* (Per Krishnaswami Iyer, J. —The question depends on the existence of consideration.)

11. ('25) 12 AIR 1925 Cal 1225 (1226) : 89 Ind Cas 180 (DB), *Year Mamud Mondal* v. *Paomocha Sarkar.* (A tenancy can be proved otherwise than by the written lease.)

('16) 3 AIR 1916 Cal 664 (664) : 29 Ind Cas 502 (DB), *Kartik Mandal* v. *Bama Charan Mandal.* (Such tenancy is confined to the portion *actually* in possession of the tenant and will not cover the entire property attempted to be demised.)

('25) 12 AIR 1925 Cal 1171 (1172, 1173) : 90 Ind Cas 98 (DB), *Ramchandra Agarwala* v. *Syameswari Dasya.* (Possession taken under unregistered lease for a term of years—Tenants are only tenants at will.)

('28) 15 AIR 1928 Cal 376 (377) : 116 Ind Cas 155, *Rai Charan Pal* v. *Jadu Nath Pal.*

('31) 130 Ind Cas 14 (15) (DB) (All), *Qadir Khan* v. *Kesho Das.*

('03) 7 Cal W N 90 (93) (DB), *Lala Majlis Sahai* v. *Mt. Narain Bibi.*

[*See also* ('30) 17 AIR 1930 All 678 (681) : 130 Ind Cas 8 (DB), *Safdar Ali* v. *Ambika Prasad.* (In this case, an independent collateral agreement not to eject for a certain period was held to be good defence in a suit for ejection.)]

12. ('38) 25 AIR 1938 All 32 (34) : 172 Ind Cas 973, *Mirza Md. Hasan* v. *Bhuddhu.*

lease[12a]), and would not require registration. The intention of the parties in giving and taking possession would thus relate to a collateral matter not requiring registration. Similarly, an *independent* oral agreement of lease may be proved by the unregistered instrument.[13] So also, the rent fixed in the unregistered instrument may be referred to for determining what would be fair and reasonable compensation for use and occupation.[14] But where the agreement between the parties as to the letting is contained in the instrument and *there is no independent contract of letting*, it is not open to the parties to fall back upon the original agreement, if it is found that the instrument is not admissible in evidence.[15] For other instances see the cases noted below.[16]

See also section 107, Note 7.

20. Who can grant a lease.—Section 7 shows that the following conditions are necessary to entitle a person to transfer property—

(1) he must be the owner of the property or must be authorised to transfer such property;

(2) he must be competent to contract;

(3) he can transfer only in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.

The above principles are applicable to leases also as they are transfers of property. Thus, a person who is neither the owner of property nor authorised to transfer it cannot grant a lease of it.[1] (See also Note 21.) On the same prin-

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('31) 130 Ind Cas 14 (15) (DB) (All), *Qadir Khan* v. *Kesho Das.*

12a. See Section 107 which shows that where registration is required delivery of possession is not necessary for the completion of a lease.

13. ('10) 6 Ind Cas 201 (202, 203) (DB) (Mad), *Thambi* v. *Avayambal.*

('39) 26 AIR 1939 Lah 423 (425) : ILR (1940) Lah 70 (DB), *Taj Din* v. *Abdul Rahim.* (Oral lease accompanied by possession—Unregistered rent-deed can be used as corroborative piece of evidence.)

('30) 17 AIR 1930 All 678 (680) : 130 Ind Cas 8 (DB), *Safdar Ali* v. *Ambika Prasad.* (Independent agreement not to eject for a certain period held proved.)

14. ('32) 19 AIR 1932 Sind 60 (61) : 25 Sind L R 451 : 137 Ind Cas 136 (DB), *Kodulal* v. *Beharilal.*

('12) 36 Bom 500 (504) : 15 Ind Cas 830 (831) (DB), *Ramchandra* v. *Tama.*

15. ('22) 66 Ind Cas 904 (905) (Lah), *Firm of Karim Bakhsh Taej-ud-din* v. *Natha*

16. ('86) 1886 Pun Re No. 68, p. 144 (150) (DB), *Mrs. Martha Pool* v. *Secretary of State for India.* (Lease of furnished building—No separate lease as to furniture and no separate agreement to keep furniture in good repair—Lease inadmissible in evidence for want of registration—Lessor cannot recover damages for breach of covenant to be answerable for loss or damage to furniture.)

('32) 19 AIR 1932 Cal 83 (84) : 59 Cal 396 : 135 Ind Cas 725 (DB), *Haran Chandra* v. *Kali Prasanna.* (Lease deed not admissible to prove permission to erect permanent structures where there is no independent and separate permission apart from the unregistered instrument.)

Section 105 Note 20

1. ('43) 30 AIR 1943 All 82 (83) : 205 Ind Cas 76, *Ugar Sen Jain* v. *Tirbhuwan Narain.* (When nazul is entrusted to the management of Municipal Board the transfer of management confers no proprietary right in property—The lease is executed by Municipal Board as agent of Government that remains the owner.)

('35) 22 AIR 1935 Lah 958 (958) : 16 Lah 608 : 159 Ind Cas 983 (DB), *Ralla Ram Dina Nath* v. *Small Towns Committee Chuharkana.* (Vesting of public street in local body does not make it *owner* of the soil or empower it to grant leases of a public street.)

('34) 21 AIR 1934 Bom 140 (142) : 151 Ind Cas 156 (DB), *Govindlal Maneklal* v. *Manekchowk Spinning and Weaving Mills Co.* (Person whose land has been compulsorily acquired by the Government cannot grant lease thereof.)

('29) 16 AIR 1929 Rang 184 (185) : 7 Rang 144 (DB), *Russa Engineering Works Ltd.* v. *Wearne Brothers Ltd.* (Agreement by *C* to grant lease to *A*—*A* transferring his rights under the lease to *B* —*B* entering into possession and paying rent to *C*, the lessor directly—No relationship of landlord and tenant is created between *A* and *B*.)

[*See also* ('20) 7 AIR 1920 Nag 205 (206) : 58 Ind Cas 36, *Ramdin* v. *Kesho Prasad.* (No third person can set up as tenant a person who was not made a ten-

ciple a person cannot grant a lease so as to outlast his own interest in the property. Thus, a sub-lease will not be valid after the expiry of the main lease.[1a] So also, a minor not being competent to contract cannot grant a lease. (See Note 22.) The third requirement referred to above is a matter depending on the particular provisions of law that may be applicable in each case. For illustrations of such provisions reference may be made to the Notes on section 7.

The requirements set forth above are subject to various equitable principles of a general nature. The results of some of these principles may be formulated as follows:

(1) The grantor of a lease cannot dispute its validity on the ground of his own want of title to the property. This is apart from any question of estoppel under S. 115 of the Evidence Act. So even if the grantee knew about the want of title of the grantor, the latter will not be entitled to dispute the validity of the grant. The principle is based on the maxim that no man can take advantage of his own wrong.[2]

(2) Where the grantor has, by express or implied representation, induced the grantee to believe that the facts necessary to make the grant of a lease valid exist, and the grantee has accepted the grant under such belief, the grantor will be estopped under S. 115 of the Evidence Act from denying such facts. But this principle does not apply to representations as to competency to *contract*.[3] Nor does the principle of estoppel apply to a matter of pure law where both parties are aware of the material facts, as no estoppel can arise from ignorance of law, which both parties must be presumed to know.[4]

(3) Under the doctrine known as feeding the grant by estoppel, where a person not being entitled to any interest in the property professes to grant a lease of it and subsequently acquires an interest in the property, the lease will operate on such interest.[5] For further information on this principle, see the Notes on section 43.

Unless any such established principle of equity applies to the case, a lease which does not satisfy the requirements of S. 7 will be void and no effect, even as against the grantor.

Where a lease has been granted by a trespasser and the owner accepts rent from the tenant such acceptance will not amount to a *confirmation* of the lease.[6]

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ant by the landlord—There is no such status known to the tenancy law as benami tenant.)

('11) 11 Ind Cas 24 (24) (DB) (Mad), *Pullaya Chetti* v. *Vedachala Pillai.* (Defendant not put into possession by plaintiff—Payment of rent by defendent to plaintiff is only *prima facie* evidence of attornment — Notwithstanding payment of rent it is open to defendant to show that plaintiff's title is defective.)]

1a. ('71) 15 Suth W R 394 (394) (DB), *Abdul Mannah* v. *Buroda Kante.*

('22) 9 AIR 1922 Pat 429 (430) : 1 Pat 764 : 77 Ind Cas 929 (DB), *Jogendra Singh* v. *Kesho Prasad Singh.*

(1900) 27 Cal 156 (162) : 26 Ind App 216 (PC), *Beni Pershad* v. *Dudhnath Roy.*

2. Broom. *A Selection of Legal Maxims*, 10th Edn. 1939, page 192.

[See however ('29) 16 AIR 1929 Cal 433 (436) : 56 Cal 252 : 118 Ind Cas 561, *Nawab of Murshidabad* v. *Bilas Roy.* (In this case there was a statutory prohibition against a certain Nawab to grant a lease for a premium—He granted such a lease—It was held that he was not estopped from disputing the validity of the lease—The decision treats the lessor as not competent to contract.)]

3. See Pollock and Mulla, *Contract Act*, 6th Edn. 1931, pages 72, 73; Woodroffe and Ameer Ali, *Law of Evidence*, 6th Edn. 1915. page 765.

4. ('95) 18 Mad 53 (58) : 4 Mad L Jour 237 (DB), *Gurulingaswamy* v. *Ramalakshmamma.*

5. ('71) 15 Suth W R 394 (394) (DB), *Abdul Mannah* v. *Buroda Kant.* (Parties holding a permanent settlement from Government cannot question the validity of a mokurruree pottah previously granted by themselves when they held the property under a temporary settlement.)

6. ('03) 27 Bom 515 (531, 532) : 5 Bom L R 274 (DB), *Fatehsingji* v. *Bamaanji.*

Because, in such cases, the lease will be void and incapable of ratification or confirmation. The same principle will apply also to cases where a person with a limited interest in property grants a lease for a period exceeding his own tenure in the property. Thus, where a life-tenant grants a permanent lease, the sub-lease will be void against the superior landlord after the death of the life-tenant and the landlord cannot ratify it by mere acceptance of rent from the tenant inducted by the life-tenant.[7] But in all such cases acceptance of rent by the owner from the person inducted on the land may give rise to an inference of a fresh tenancy by implication[8] on the principles discussed in Note 8.

A lease by a Hindu widow in excess of her powers is not *void* after her death. It is only *voidable* by the reversioner who can, at his option, ratify the lease or repudiate it.[9] Hence, in such a case the acceptance of rent from the tenant by the reversioner will amount to a ratification of the lease by the widow.[10]

Where a Hindu reversioner is entitled to avoid a transfer by a widow he need not get the transfer *set aside* through Court. He can treat it as a nullity and sue for *possession*. This, however, does not mean that the transfer is *void*. Because, as seen above, he can *ratify* the transfer, which will not be possible if the transfer was void.[11]

It has been held that a *stanamdar* in Malabar is entitled to grant a lease for a term exceeding his own lifetime so as to make it binding on his successor provided the lease is beneficial to th estate.[12]

As to leases by minors see Note 22. As to the power of a mortgagor to grant leases, see S. 65A and Notes thereon.

21. **Lease by de facto proprietor.**—As section 7 provides, a transfer of property can only be made by a person who is entitled to it or who is authorised to transfer it. The mere fact that a person is in *possession* of a certain immovable property will not therefore entitle him to grant a lease of the same when he is not otherwise entitled to do so.[1] And a tenant inducted by such a person can be evicted by the true owner without notice. But such a lessee will have a good title as against persons *other* than the owner and his privies.[2]

The view is sometimes expressed that a person inducted on land as tenant by a *de facto* owner of the property who has no title to it is entitled to the tenancy even as against the true owner where both the grantor and grantee have acted in good faith.[3] The view purports to be based on the ruling of the Calcutta High

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(Lease by unauthorised person—Acceptance of rent will not estop the owner from questioning the lease.)

('97) 1 Cal W N 142 (DB), *Sheocharan Lal* v. *Purbhoo Dayal.* (Lease granted by trespasser—Acceptance of rent by owner—Lease not binding on purchaser from owner.)

7. (1900) 27 Cal 156 (162) : 26 Ind App 216 (PC), *Beni Pershad* v. *Dudhnath Roy.*

(1892) 1892 Bom P J 39 (39) (DB), *Bhagu* v. *Byramji.* (A permanent lease of vatan land by a Vatandar is not binding beyond the life of the lessor and lessee's possession becomes adverse thereafter.)

8. (1900) 27 Cal 156 (163) : 26 Ind App 216 (PC), *Beni Pershad* v. *Dudhnath Roy.*

9. ('98) 25 Cal 1 (8) : 24 Ind App 164 (PC), *Madhu Suddan* v. *Rooke.*

('01) 28 Cal 532 (539) : 5 Cal W N 279 (D B), *Sadai Naik* v. *Serai Naik.*

('07) 34 Cal 329 (333) : 34 Ind App 87 (PC), *Bijoy Gopal* v. *Krishna.*

Also see S. 111, Note 5.

10. ('98) 25 Cal 1 (8, 9) : 24 Ind App 164 (PC), *Madhu Sudan* v. *Rooke.*

11. ('07) 34 Cal 329 (333) : 34 Ind App 87 (PC), *Bijoy Gopal* v. *Krishna.*

12. ('21) 8 AIR 1921 Mad 80 (81) : 44 Mad 509 : 62 Ind Cas 62 (DB), *K. Kuttali* v. *Ummamma Amma.*

Section 105 Note 21

1. ('22) 9 AIR 1922 Pat 429 (431) : 1 Pat 764 : 77 Ind Cas 929 (DB), *Jogendra Singh* v. *Kesho Prasad.*

('04) 31 Cal 703 (706) : 8 Cal W N 320 (DB), *Upendra Narain* v. *Pratap Chunder*

('97) 1 Cal W N 142 (143) (DB), *Sheo Charan Purbhoo Dayal.*

2. *('93) 20 Cal 708 (713) (FB), *Binad Lal* v. *Kalu.*

3 ('07) 5 Cal L Jour 9 (14) (FB), *Peary Mohun* v. *Radhika Mohun.*

('14) 1 AIR 1914 Cal 685 (685) :24 Ind Cas 434 (DB), *Sukumari Ghose* v. *Haldhar Mandal.*

('04) 31 Cal 703 (706) : 8 Cal W N 320 (DB), *Upendra Narain* v. *Pratap Chunder.*

Court in *Binad Lal* v. *Kalu*.[4] But it is submitted that that ruling does not justify any such broad proposition which would so materially reduce the applicability of the general principle already stated, namely, that a person cannot confer a title to anything to which he himself has no title. The decision merely proceeds or the construction of S. 5, Sub-s. (2) of the Bengal Tenancy Act and holds that a person let into cultivating possession by a *de facto* proprietor without title is a raiyat within the meaning of that section. The decision does not support the proposition that in every case in which there is a *bona fide* letting by a trespasser who is in possession of an estate without title. the tenancy would be binding on the true owner. There is no doubt, a reference in the judgement to the fact of *bona fides*. But this is only by the way and is not the legal ground on which the decision is based.

22.—Lease by or in favour of a minor.—A lease is a transfer of property and as such is governed by S. 7. Hence, a minor, being a person not competent to contract, cannot grant a lease. A lease granted by a minor would be void.[1] He cannot even ratify it on attaining majority, by acceptance of rent or otherwise.[2] But where the lease has been granted by the guardian of a minor in excess of his authority, the lease is not *void* and the minor can ratily it on attaining majority.[3]

Though a lease by a minor is void, it has been held that the Court has power on general principles of equity to require the consideration paid by the lessee to be refunded before he is ejected from the property.[4]

As seen in Note 8 on S. 7 a transfer of property *in favour* of a minor is not void.[5] But where a lease in favour of a minor contains covenants to be performed by him it has been held that the lease would be invalid.[6]

('22) 9 AIR 1922 Pat 429 (431) : 1 Pat 764 : 77 Ind Cas 929 (DB), *Jogendra Singh* v. *Kesho Prasud*.

4. *('93) 20 Cal 708 (712, 713) (FB), (17 Cal 45 approved.)

Section 105 Note 22

1. ('31) 18 AIR 1931 Mad 147 (148, 149) : 129 Ind Cas 449, *Govinda Kurup* v. *Beekku*. (The mere fact that the instrument evidencing the lease has been executed not by the minor lessor but by the lessee makes no difference.)
2. ('31) 18 AIR 1931 Bom 178 (182) : 130 Ind Cas 598 (DB), *Indian Cotton Co. Ltd.* v. *Raghunath*. (Further, agreement for renewal of leases in future being a contract is void where the lessor is a minor while executing the lease.)
3. *See* ('12) 13 Ind Cas 606 (607) (DB) (Cal), *Mohoram Sheikh Chaprashi* v. *Telamuddin Khan*. (Lease granted by persons acting on behalf of minor whose authority was not questioned by the minor.)
4. ('28) 15 AIR 1928 All 286 (287) : 108 Ind Cas 566 (DB), *Bisheshar Pathak* v. *Rup Narain Singh*. (NOTE.—Ss. 64 and 65, Contract Act, will not apply in such cases—But relief is given on general principles of equity. 33 All 779 relied on.)
5. †('29) 16 AIR 1929 All 604 (605) : 121 Ind Cas 398 (DB), *Zafar Ahsan* v. *Zubaida Khatun*. (Mortgage in favour of minor—Minor having paid the full consideration for it he can enforce the mortgage. 30 Cal 539 : 30 Ind App 114 ed from.)
(PC), distingushed; 33 Mad 312 dissent-

†('16) 3 AIR 1916 All 366 (368) : 38 All 154 : 35 Ind Cas 23 (DB), *Narain Das* v. *Dhania*. (Sale—Minor purchaser can sue for possession.)
('15) 2 AIR 1915 All 478 (479) : 38 All 62 : 31 Ind Cas 792 (DB), *Munni Koer* v. *Madan Gopal*. (Sale.)
*('11) 33 All 657 (659) : 11 Ind Cas 20 (21) (DB), *Ulfat Rai* v. *Gouri Shankar*. (Sale by certificated guardian of minor in favour of minor—Sale upheld.)
('24) 11 AIR 1924 Lah 611 (612, 613) : 5 Lah 317 : 82 Ind Cas 96 (DB), *Thakur Das* v. *Putli*. (Sale in favour of a minor can be enforced especially when the consideration for the same has been paid and there is no further obligation on the minor.)
('30) 17 AIR 1930 Mad 425 (426) : 120 Ind Cas 77, *Subba Reddy* v. *Guruva Reddy*. (Sale.)
('15) 2 AIR 1915 Mad 412 (414) : 37 Mad 390 : 26 Ind Cas 195 (DB), *Munia* v. *Perumal*. (Sale—Property purchased for minor's benefit by his maternal uncle.)
†('19) 6 AIR 1919 Pat 561 (563) : 4 Pat L Jour 682 : 52 Ind Cas 338 (DB), *Madhab Koeri* v. *Baikuntha*. (Mortgage in favour of minor—He can enforce mortgage.)
6: ('18) 5 AIR 1918 Pat 626 (627) : 3 Pat L Jour 518 : 46 Ind Cas 670 (DB), *Pramila Bali Das* v. *Jogesher Mandal*.
*('17) 4 AIR 1917 Mad 630 (645) : 40 Mad 308 : 36 Ind Cas 921 (FB), *Raghava Chariar* v. *Srinivasa Raghava*.
7. *('17) 4 AIR 1917 Mad 630 (645) : 40 Mad 308 : 36 Ind Cas 921 (FB).

The above view proceeds on the ground that in such cases, the covenants being void under S. 11 of the Contract Act, the lease also would be void for want of consideration. The reasoning will not apply where the lease has been granted in consideration of a premium paid in a lump sum and there is no outstanding covenant to be performed by the lessee.

In *Raghavachariar* v. *Srinivasa Raghava*' Sreenivasa Iyengar, J., points out the distinction between cases in which the transfer is in *consideration* of certain promises or covenants and those in which the property transferred is itself *burdened* with certain liabilities, as for instance, the liability to pay taxes. The transfer in favour of a minor would be void in the former case but not in the latter case.

23. Lease of untransferable property.—A lease being a transfer of property, a valid lease implies that the property leased is *transferable* under the law. Section 6 provides that property of any kind may be transferred except as otherwise provided by this Act or any other law for the time being in force. If therefore a property is not transferable under the law it cannot be leased. Reference may be made to S. 6 and the Notes on it as regards the transferability of various kinds of property. Where a lease covers both transferable and untransferable properties but is separable as regards the two kinds of properties, it will be valid with regard to the transferable items. Thus, a lease of temple lands is not wholly invalid simply because the lessee is empowered under the terms of the lease also to manage the temple affairs, the transfer of the right of management being clearly separable from the lease of the land.[1] See also Note 20.

24. Commencement of lease.—Section 5 expressly defines a transfer of property as a conveyance of property in present or in future. Hence a lease which is to commence at a future date is valid.[1] But there must be an actual *conveyance* or *present demise* and not a mere agreement to convey in future. (See Note 4.)

Under S. 110 where no day is fixed for the commencement of a lease, it commences from the making of the lease.[1a] The mere fact that rent is fixed according to the Bengali year does not mean that the tenancy is to commence from the beginning of the Bengali year and not the date of the lease.[2]

English law.

(1) Under the English law, the lease must fix a date from which it is to begin. This is not necessary under this section.

(2) Under the English law a lease to commence more than 21 years after the date of the instrument is void. There is no such limit under this Act.[3]

25. "Certain time."—One of the requisites of a valid lease is that it must be granted for a certain time express or implied or in perpetuity.[1] Thus, a

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Section 105 Note23

1. ('09) 3 Ind Cas 104 (105) (DB) (Mad) *Ramanathan Chetty* v. *Lakshman Chetty.* (19 Mad 211 relied on.)

Section 105 Note 24

1. ('30) 17 AIR 1930 Bom 210 (212, 213) : 125 Ind Cas 428, *Sultan Ali* v. *Tyeb Pir.* (Letter stating agreement to take lease for five years—Certain sum deposited with addressees—Formal agreement to be executed later on—Letter held to constitute present demise and being unregistered held inadmissible in evidence.)

('13) 18 Ind Cas 496 (497) (DB) (Lah), *Mihan Khan* v. *Mohd. Baksh.* (A suit for specific performance is not necessary in regard to such a lease.)

('25) 12 AIR 1925 Cal 1087 (1093) : 52 Cal 695 : 91 Ind Cas 320, *Ramjoo Mahomed* v. *Haridas Mullick.* (5 Ind Cas 38 dissented.)

1a. ('44) 31 AIR 1944 Mad 518 (523, 524) :ILR (1945) Mad 355 (DB), *Raja of Vizianagaram.* v. *Maharaja of Jeypore.* (Lease not void for uncertainty though it does not give date of commencement.)

2. ('28) 15 AIR 1928 Cal 392 (396) : 55 Cal 435 : 110 Ind Cas 368 (DB), *Dinanath* v. *Janaki Nath.*

3. Williams and Eastwood, *Principles of the Law of Real Property,* 1933 Edn., page 110.

Section 105 Note 25

1. ('05) 29 Bom 580 (602, 603) : 7 Bom L R 27 (DB), *Municipal Corporation* v.

provision as to the period of the lease is an *essential* part of a lease. But the period may be express or implied. Further a provision implied by law or usage will be sufficient for the purpose.[2] This follows from S. 106 which provides that in the absence of a contract or local law or usage to the contrary a lease will be deemed to be one from year to year or from month to month according to the purpose of the lease.[2a]

A lease, however, need not be for a period which is *certain* on the date of the lease. It is sufficient if the period is fixed with reference to a future event on the happening of which the lease will be determined and the period of the lease will *become* certain, although on the date of the lease it may not be possible to say when such event will happen.[3] Thus, the word "certain" in the section means really certain or capable of being *made* certain at a future date.[4]

This is quite clear from the other provisions of this Chapter. For instance, Ss. 106 and 107 refer to leases from year to year. Section 108, clause (i) refers to a lease of uncertain duration.[4a] So also S. 111, clause (b) refers to the period of a lease being limited conditionally by the happening of a certain event. All these provisions show that the period of a lease need not be certain on the date of the lease. It is sufficient if the period is fixed (by actual contract or by implication of law) in such a way that it can be made certain at a future date.

On this principle a lease for the life-time of the lessee will be a valid lease, because the period of the lease will become certain on the tenant's death.[5] Similarly, it has been held that a lease for the duration of the world war of 1914 was valid.[6]

Secy. of State. (Uncertainty as to term will be fatal to validity of lease.)

2. ('78) 3 Cal 696 (699) : 1 Cal L R 577 (DB), *Prosunno Koomaree* v. *Shaikh Rutton.* (If there is no *express* agreement and a tenant is let into possession and pays rent he becomes tenant at will or from year to year or in other words, he holds by the landlord's permission upon what may be the usual terms of such a holding, by the general law, or by local custom and in such a case he is liable to be ejected by a reasonable notice.)

[See ('12) 14 Ind Cas 799 (800) (All), *Ismail Khan* v. *Mithulal.* (Lease of grove land in United Provinces—No certain time need be stipulated—According to custom and practice of these provinces a lease of grove land exists for such time as the trees stand on that land.)]

[But see ('40) 27 AIR 1940 Cal 89 (90) : ILR (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali* v. *Jamini Lal.* (There is a statement which occurs in the course of this judgment that a lease which is silent as to the duration of its term would not be a lease within the meaning of this section. In its literal sense this statement is obviously incorrect.)]

2a. ('40) 27 AIR 1940 Cal 89 (91) : ILR (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali* v. *Jamini Lal.* (Monthly tenancy.)

[*See* ('01) 5 Cal W N 801 (804) (DB), *Durga Mohun* v. *Rakhalchandra.* (This decision seems to be inconsistent with S. 106 in requiring six months' notice to determine a building lease.)

('37) 24 AIR 1937 Pat 391 (395) : 170 Ind Cas 316 (DB), *Secretary of State* v. *Rajendra Prasad.* (Building lease of Government land held to be lease from year to year—Due to Crown Grants Act, T. P. Act did not apply—English common law applied as justice, equity, and good conscience.)]

3. (1789) 3 Term Rep 462 (463) : 100 ER 678 (679), *Goodright D. Hall* v. *Richardson.*

4. ('36) 23 AIR 1936 Lah 890 (891) : 167 Ind Cas 198, *Ramchand Manchanda* v. *H. G. Lush.* (Term need not be for fixed period so long as it is definite.)

[*See* ('43) 30 AIR 1943 Bom 306 (310) : ILR (1943) Bom 553 : 213 Ind Cas 48 (DB), *Utility Articles Manufacturing Co.* v. *Motilal Bombay Mills, Ltd.* (Section 110 is not applicable to every lease—There may be a valid and legal lease of which the time is not "limited" within the meaning of S. 110.)]

[*See also* ('04) 27 Mad 332 (336) : 13 Mad L Jour 429 (DB), *Sree Sankarachari Swamiar* v. *Varada Pillai.* (The test to determine, whether a particular term in a contract is certain, is not to see whether the term is in itself certain but to see whether it is capable of being made certain—*Id certum est quod reddi certum potest.*)]

4a. [*See* ('45) 32 AIR 1945 Pat 162 (167, 168) : 23 Pat 871 (DB), *Shiba Prasad* v. *Lekhraj & Co.* *Words* "lease of uncertain duration" in S. 108 are apparently intended to apply to leases from year to year terminable by a notice to quit or to leases granted by a tenant for life to be terminated on the death of the grantor.]

5. ('36) 164 Ind Cas 837 (839) (Cal), *Chandi Charan* v. *Ashutosh Lahiri.*

6. (1916) 33 T L R 114 (115), *Great Northern Ry. Co.* v. *Arnold.*

So also, a lease to continue during the existence of certain institutions will be valid.[7] For other instances, see the undermentioned cases.[8]

But where the future event with reference to which the period of a lease is fixed is of so uncertain a character that it would be impossible to say at any time whether such event has happened or not, the period will not be certain. Thus, it was held by the Bombay High Court that a lease, till the lessor provided other suitable land to the lessee was, in the circumstances of the case, uncertain as to the period of the lease and was therefore void.[9] The reason was that the lease did not provide any method for determining the suitability of the land.[10] Even where the parties have intended the lease to go on *indefinitely* and have not laid down any limit of time for the lease either absolutely or relatively as above described, it cannot be said that the lease is for an uncertain time so as to become void under the section. Because, in such a case, the lease is ordinarily construed as being one for the lifetime of the lessee. (See Note 26.)

Where the lease is to go on indefinitely but subject to the liability of being put an end to at any time or at the end of any year or month or similar period, the term of the lease is fixed with reference to the future event which will terminate the lease and is not uncertain for the purpose of this section. Nor is the lease in such a case one for an *indefinite* period, as such period *is defined* though not *certain immediately*. A lease from month to month or year to year will fall under this category. (See Note 26.) A tenancy at will is also a lease of this type. (See Note 32.)

The section does not prescribe any minimum period of time for which a lease can be granted. Thus, a lease for a day would be valid.[11] Similarly, a tenancy at will would be a valid lease under the section, the term in such a case being fixed with reference to the exercise of will by either party which will terminate the lease. (See Note 32.)

25a. Concurrent lease.—See Section 108 cl. (1), Note 10.

26. Term of lease—Mode of determination.—A lease is the outcome of a contract. Hence the period of the lease is to be determined with reference to the contract between the parties in each case. But a provision as to such period need not be express. It may be implied. Further, such a provision may be implied by law or usage. In the absence of a contract, or local law or usage to the contrary, a lease will be deemed under S. 106 to be one from year to year or from month to month according to the purpose of the lease.

[*See* (1946) 1 K B 280 : (1946) 1 All E R 296 : 115 LJKB 228 *Hawtrey* v. *Beaufront, Ltd.* NOTE:— This case shows that such tenancy may be validated by special legislation (eg) validation of War Time Leases Act, 1944 even where otherwise they may be invalid.]

[*See however* (1944) 1 K B 368 : (1944) 1 All E R 305 : 113 L J K B 282 *Lace* v. *Chantler.* Where a house was let for the duration of the war, held that the term was uncertain and no valid tenancy was created.]

7. ('31) 18 AIR 1931 Bom 466 (471) : 133 Ind Cas 839 (DB), *Ramchandra* v. *Narasinha.* (The "Kesari" and "Maratha" institutions.)
('31) 18 AIR 1931 Bom 178 (181) : 130 Ind Cas 598 (DB), *Indian Cotten Co., Ltd.* v. *Raghunath.* (Lease to last during existence of a certain company is valid—Company is legal entity—A I R 1929 Bom 66 distinguished as being a case of lease to continue during existence of firm which has no legal existence as an entity.)
8. ('05) 7 Bom L R 772 (785), *Mahomed* v. *Ezekiel* (Lease to last as long as the pendency of a mortgage.)
('36) 23 AIR 1936 Lah 890 (891) : 167 Ind Cas 198, *Ramchand Manchanda* v. *H. G. Lush.* (A tenancy for the period during which a tenant remained in the station where the rented premises are situate.)
9. ('05) 29 Bom 580 (602, 603) : 7 Bom L R 27 (DB), *Municipal Corporation.* v. *Secy of State.*
10. See the observations in AIR 1931 Bom 466 which suggest the above explanation for the decision in 29 Bom 580.
11. (24) 11 AIR 1924 Rang 278 (279) : 82 Ind Cas 381 (DB), *Azee Meah* v. *Jeewa.*

In construing a lease with reference to the period for which it has been granted the following principles must be noted :

(1) A lease need not fix a definite period in terms of years, months and days as the term. Similarly, a lease need not fix a particular year, month and day in the future as the time, up to which the lease is to run. In other words, it is not necessary that on the *date of the lease,* it must be possible to foretell definitely how long the lease is to continue. It is sufficient if the term of the lease is fixed with reference to a future event on the happening of which the lease will come to an end and the term thereof will *become* certain. It is immaterial that on the date of the lease, the time when such event will happen is not certain. (See Note 25.)

(2) Where the parties have not fixed any term either absolutely or relatively as above described but have shown their intention that the lease is to go on indefinitely, the rule of construction discussed in Note 72 will apply. This rule shows that a lease for an indefinite period is *ordinarily* to be construed as enuring at least for the lifetime of the lessee.[1]

(3) The above rule of construction will not apply where the term of the lease has been fixed or can be definitely ascertained. As already seen, such term may be fixed absolutely or relatively. It may be fixed expressly or impliedly. It may be implied, for instance, from the nature and purpose of the lease, the manner in which rent has been reserved and other circumstances. Thus, the fact that a yearly rent is reserved may show that the tenancy is one from year to year.[2] But the test is not a conclusive one.[2a] In some cases, though a yearly rent is reserved, the lease may be held to be merely a tenancy at will.[3] In either case, however, the term of the lease is *fixed.* It is fixed with reference to a future event. This future event is the act by which the tenancy is terminated by either party under the option which he has under the lease. The above illustrations show that the mere fact that the duration of a lease is dependent on the will of the parties does not make it a lease under which a term is *not* fixed. In such cases, the lease is intended to go on *indefinitely* till it is determined by a valid notice or otherwise at the option of the parties. The termination of the lease is made to depend entirely on the will of the parties. Still, the above rule of construction cannot be invoked in such cases. It cannot be held that such a lease enures for the lifetime of the grantee.

(4) Even where the future event with reference to which the term of a lease is fixed is *uncertain* in character and it cannot be said at any time

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Section 105—Note 26

1. ('27) 14 AIR 1927 Cal 179 (181, 182) : 99 I. C. 200 (DB), *Ashutosh Lahiri* v. *Chandi Charan.*
('21) 8 AIR 1921 Cal 474 (476) : 47 Cal 979 : 60 I. C. 984 (DB), *Jogesh Chandra* v. *Mokbul Ali.*
Also see S. 111, Note 6.
2. ('97) 24 Cal 720 (722, 724) (DB), *Kishori Mohun* v. *Nand Kumar.*
('26) 13 AIR 1926 Cal 558 (558) : 53 Cal 95 : 94 I. C. 684 (DB), *Chandi Charan* v. *Ashutosh Lahiri.*
[*See* ('13) 18 Ind Cas 77 (79) (DB) (Mad), *Raja Ram* v. *Ram Boy.* (Where a document styled a *teerwa* lease deed provided that the lessee should pay *teerwa* money to the lessor every year and deliver up possession in case of failure to pay rent and no period was fixed by the document during which the lessee should be entitled to remain in possession of the land, held that the lessee had no permanent interest in the property leased to him and that he was only a tenant from year to year and was liable to be ejected (on a notice to quit.))]
Also see Note 31 and S. 106, Note 15.
2a. ('16) 3 AIR 1916 Cal 358 (359) : 44 Cal 403 : 33 Ind Cas 899 (DB), *Aklu* v. *Emman.* (Presumption of yearly tenancy from the rent being paid yearly does not apply to the case of lodgings.)
3. ('29) 118 Ind Cas 702 (704) (Bom), *Pandu Mahipat* v. *Shivshankar Das.*

whether such event has occurred, it must be held that the parties have fixed a term of the lease. In such a case, the lease will be *void* for uncertainty.[4] It cannot be treated as a lease for the lifetime of the lessee by invoking the above rule of construction. Nor can such a lease be held to be one from year to year or month to month under S. 106. Because, there is a "contract to the contrary" in such a case.

(5) Suppose a lease is intended to go on indefinitely and no term is fixed therefor, (absolutely or relatively) but that there is sufficient reason, on the construction of the lease, to hold that it is intended to confer a *hereditary* interest. Such a lease will not be treated as one for the *lifetime* of the lessee. It will virtually be one in perpetuity. (See Note 72.)

From the above discussion, it follows that wherever it is possible to gather clearly the intention of the parties as to the duration of a lease, there will be no room for the application of the presumption under S. 106. It is immaterial whether the parties have fixed a limit of time (absolutely or relatively) for the lease or have intended the lease to go on indefinitely. In either case, the term of the lease will be determined in accordance with the principles discussed above and not according to the presumption under S. 106.

27. **Lease entitling lessee to hold as long as he pays rent or as long as he may wish.**—There is a conflict of decisions as to the construction of leases, under which the lessee is entitled to hold as long as he pays rent or performs other obligation under the lease. It is conceived that a lease, under which the lessee would be entitled to hold as long as he requires the property or wishes to have the property, would also fall under the same class. There would be no difference in principle, it seems, between the two classes as regards the determination of their nature from the point of view of duration. In either case, it would be within the power of the lessee to put an end to the lease at any time he thinks fit without reference to the lessor. Hence the two classes of cases have been considered together in this Note. The decisions fall under the following classes:

(1) Such a lease is a permanent and heritable one.[1]

(2) Such a lease is one for the life of the lessee.[2] This is the view generally

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4. ('05) 29 Bom 580 (604) : 7 Bom L R 27 (DB) *Municipal Corporation* v. *Secy. of State.*

Section 105—Note 27

1. ('26) 13 AIR 1926 Bom 374 (374, 375) : 95 Ind Cas 524 (DB), *Bai Sona* v. *Bai Hiragavri.* (Lease to last, so long as the lessee regularly pays rent, is a permanent lease and does not terminate on the death of the lessee. Regarding cases like 4 Bom 424, in which it was held that a lease as long as lessee pleased, was a lease for life, held decided on rather fanciful grounds. NOTE.—Disapproved in AIR 1943 Bom 148.)

[*See also* ('05) 7 Bom LR 401 (404) (DB), *Navalram* v. *Javerilal.* (In this case, it was a building lease for no fixed period—There was a clause which ran: 'so long as we go on paying the amount of the rent you cannot ask us to remove the building which has been erected on the said land' —*Held* that this included payment not only by the original lessee but also by his successors. In favour of this view, attention was drawn to the change from the singular to plural.)]

2. ('43) 30 AIR 1943 Bom 148 (149) : 207 Ind Cas 62 (DB), *Donkangouda* v. *Revanshidappa.* (Lessor not to evict lessee so long as he receives agreed rent from lessee every year.)

('25) 90 Ind Cas 832 (833) (DB) (Cal), *Chandra Kumar Shaha* v. *Mafizar Rahman.* (Document providing for lessee building a house for a shop and carrying on business and paying rent every year to lessor—Further provision that if rent is not paid every year lessor would be entitled to recover khas possession—Further provision that if lessee did not carry on business he would give up land to lessor and lessee would not be entitled to give land to anybody else—*Held*, lease was for life of lessee subject to its determination in the events mentioned.)

(1903) 1 K B 577 (582) : 72 LJKB 103 : 88 L T 46 : 51 W R (Eng) 343, *Zimbler* v. *Abrahms.* (Lease entitling lessee to

adopted. The reason given is that the continuation of the lease depends on the *will* of the lessee which cannot be exercised after the lessee's death.[3]

(3) Such a lease is one for a period exceeding one year and requires registration.[4] This view is consistent with (1) and (2) above.

(4) Such a lease is not one for a term exceeding five years within the meaning of the proviso to S. 17, sub-s. (1) of the Registration Act.[5] This view is consistent with the view in (5) below.

(5) Such a lease is a tenancy at will.[6] The reason given is that such a lease is really a tenancy at the will of the lessee, which, by implication of law, is a tenancy at the will of both the parties.[7]

It is submitted with respect that the view taken in classes 1 and 2 above does not appear to be sound. The view involves the position that the lessee cannot by his own independent will terminate the lease. Because, a lease for life or permanent lease cannot, normally, be put an end to in this way. No doubt, S. 111 includes surrender as one of the modes of terminating a tenancy, and this is applicable to leases for life and permanent leases also. But the surrender referred to in S. 111 is one based on the mutual agreement of the parties. This result, viz., that the lessee cannot leave even if he wants to unless the lessor agrees to his doing so, is obviously against the intention of the parties in such cases.

It seems that the view of the decisions under class (5) is the correct view.

Considered purely with reference to the intention of the parties, it seems to be clear that a lease of the kind in question here is one at the *will* of the lessee. Under English law, a tenancy expressed to be at the will of the lessee is, by implica-

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hold as long as he paid rent regularly—*Held*, lease for life.)

('29) 16 AIR 1929 Bom 66 (67) : 114 Ind Cas 374 (DB), *Abdul Rahim* v. *Sarafalli*. (Lessee to be entitled to remain in possession so long as he paid the rent.)

†('77) 1877 Bom P J 177 (DB), *Suleman* v. *Asmad Isap*. (Lease, under which lessee is entitled to be in possession as long as he chooses, is not mere tenancy at will but a lease for the life of the lessee.)

('80) 4 Bom 424 (425) (DB), *Vaman Shripad* v. *Maki*. (Lessee entitled to hold as long as he pleases.)

('07) 11 Cal W N 809 (811) (DB), *F. W. Higgins* v. *Nobin Chunder*. (Tenancy for 5 years—Provision that tenant might continue thereafter on performing the conditions of the lease—*Held*, the lessee was entitled to hold till death.)

†('39) 26 AIR 1939 Cal 423 (424, 425) : 184 Ind Cas 216 (DB), *Mohammad Azizal* v. *Raziuddin*. (Tenancy to continue as long as the lessee paid rent and observed the covenants.)

[*See also* ('31) 18 AIR 1931 Bom 178 (181) : 130 Ind Cas 598 (DB), *Indian Cotton Co. Ltd.* v. *Raghunath*. (Where a lease contained a clause to the effect that the lessor would, at the expiration of the term fixed, renew the lease as long as the lessee (an incorporated company) might require it, is as held that the effect of the clause was to create interest in the land which would enure in favour of the company as long as it continued to exist.)]

3. ('29) 16 AIR 1929 Bom 66 (67) : 114 Ind Cas 374 (DB), *Abdul Rahim* v. *Sarafalli*.

('74) 1874 Bom P J 279 (DB), *Gopalrao* v. *Bhavanrao*.

4. ('22) 66 I. C. 904 (905) (Lah), *Karim Baksh* v. *Natha Singh*. (Lease enabling tenant to continue in possession so long as he paid his rent.)

(1900) 2 Bom LR 488 (489) (DB), *Mania* v. *Lallubhai*. (Lease providing that the leassee will vacate the land in case he failed to pay rent or perform the service agreed upon held to be a lease for a term exceeding one year.)

5. ('04) 27 Mad 43 (44) : 13 Mad L Jour 356 (DB), *Ramaswamy Ayyar* v. *Thirupathi Naik*.

[*See also* ('82) 4 Mad 381 (382) (DB), *Virammal* v. *K. Rungayyangar*. (Lease for indefinite period liable to be terminated by *either* party is not one for a period exceeding five years. Followed in 24 Mad 421.)]

6. ('13) 36 Mad 557 (558) : 16 Ind Cas 1002 (1002) (DB). *Manicka* v. *Chinnappa*. (Lease entitling lessee to hold as long as he may wish or require.)

('86) 8 All 198 (200) : 1886 All W N 56 (DB), *Khayali* v. *Husain Bakhsh*. (Lease for a term certain, with option to lessee to continue in possession thereafter as long as he paid the rent.)

7. ('41) 28 AIR 1941 Pat 228 (230) : 20 Pat 115 : 195 I. C. 583 (DB), *Ram Lal* v. *Mt. Bibi Zohra*.

('13) 36 Mad 557 (558) : 16 Ind Cas 1002 (1002) (DB). *Manicka* v. *Chinnappa*.

tion of law, one at the will of the lessor also. As pointed out by the Madras High Court in *Manicka* v. *Chinnappa*[8] there seems to be no reason why this principle should not be followed in India also. It seems to be based on common sense and quite in accordance with justice, equity and good conscience.

The decisions under class (4) are consistent with this view.

It is conceived that on the principles discussed in Note 26 the rule, that a lease for an indefinite period will be regarded *prima facie* as a lease for the lifetime of the grantee, will not apply to the kind of leases under discussion here.[9] The reason is that in such cases, the term of the lease is not indefinite but fixed by the lease. The term is fixed with reference to a future event, such as the discontinuance of the payment of rent by the lessee, which will terminate the lease.

It is a question of construction in each case, whether the lessee is entitled to hold as long as he pays the rent or as long as he wishes or requires the property. An agreement by the lessor not to raise the rent, so long as the lessee kept the premises, does not imply that the lessee is to be entitled to keep the premises as long as he wishes.[10] Similarly, where a tenant takes up a property under an agreement that he would pay the assessment, this does not imply that he would be entitled to keep the property so long as he pays the assessment.[11]

See also the undermentioned decision.[12]

28. Lease for indefinite period—Construction of.—See Notes 26 and 72.

29. Lease for a term certain with a provision for continuation thereafter.—Suppose, a lease is granted for a term certain with a provision that after the expiry of the term the lessee shall be entitled, at his option, to continue to hold for a further period. It is the general view that such a lease is only for the term fixed and the further period is not to be counted as a part of the term.[1] The reason is that in such cases, the actual demise is to be regarded as being only for the term fixed and the provision as to the future as only entitling the lessee, at his option to a *renewal* of the tenancy.[2]

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8. ('13) 36 Mad 557 (558) : 16 I. C. 1002 (1002) (DB).
9. But see ('39) 26 AIR 1939 Cal 423 (425) : 184 Ind Cas 216 (DB), *Mohammad Azizal* v. *Raziuddin.* (NOTE.—The contrary opinion expressed in this case is, it is submitted not correct.)
10. ('13) 19 Ind Cas 493 (495) (DB) (Lah), *Jamasjee Boga* v. *Duni Chand.*
11. ('85) 1885 Bom P J 160 (DB), *Harcharandas* v. *Sadashiv.*
12. ('28) 15 AIR 1928 Lah 937 (938) : 113 Ind Cas 543, *Rulia* v. *Bodhraj.* (Lease which merely says that the lessor will be entitled to eject the tenant in case of non-payment of rent does not necessarily imply that the tenant could not be ejected so long as he paid his monthly rent—But see 2 Bom L R 488, in which such a lease was held to be one for a period exceeding one year.)

Section 105—Note 29

1. †('86) 8 All 198 (200) : 1886 All W N 56 (DB), *Khayali* v. *Husain Bakhsh.*
('06) 8 Bom L R 580 (583) (DB), *Yousaf* v. *Poleologo.*
('90) 17 Cal 548 (555, 556), *Boyd* v. *Kreig.*
('32) 19 AIR 1932 Sind 217 (218, 219) : 26 Sind L R 377 : 140 Ind Cas 681 (DB), *Devidas* v. *Aluwalla Bros.*
[*See also* ('47) 34 AIR 1947 Mad 424 (425) *Ramakrishna* v. *Bargavi Amma.* (Lease for one year—Provision in lease for possibility that after expiry of one year tenant would continue on same terms—Provision does not have effect of extending period of lease beyond one year.)]
[See however ('86) 1886 Pun Re No. 68, p. 144 (149) (DB), *Pool* v. *Secretary of State.* (In this case a distinction is made between cases where the option is with the lessor—It is held that in the former case the lease is one for a period exceeding the lessee and those in which the option is with the lessor—It is held that in the former case the lease is one for a period exceeding the term fixed and that in the latter case it is not such a lease.)]
2 †(1877) 2 Ex D 355 (358), *Hand* v. *Hall.*
[*See also* ('86) 8 All 198 (200) : 1886 All W N 56 (DB), *Khayali* v. *Husain Bakhsh.* (This decision holds that the principle of *Hand* v. *Hall,* (1877) 2 Ex D 355 cited above will apply to such cases—It is said that after the expiry of the term the tenant would be only tenant at will.)]

Where, the right of the lessee to continue in possession after the expiry of the term fixed is subject to the concurrence of the lessor, it is clear, on the above principle, that the lease is to be treated only as one for the period fixed.[3]

But it seems that the above is only a rule of *construction*. Where it is clear from the provisions of a lease that the intention is to confer a further interest on the lessee in continuation of the interest created in the first instance and not merely an option of obtaining a renewal of the lease, the lease will be one for a period exceeding that fixed therein as the primary term.[4]

In the decisions noted below[5] where a lease was granted for a period of years and contained a provision that the lessee might continue in possession thereafter as long as he performed the conditions of the lease, it was held that the lease conferred a life-interest on the lessee. See also Notes 27 and 37.

30. Lease expressed to be terminable before end of term fixed.— A lease, which fixes a certain period as the term thereof but provides that it may be terminated before the end of the term in a certain contingency, is a good lease.[1]

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3. ('68) 5 Bom H C R (AC) 92 (94) (DB), *Moro Vithal* v. *Tukaram*. (Provision that lessee might after six months remain in occupation at a monthly rent, till the lessor called upon him to vacate, did not extend the term for which the lease was granted, as at the conclusion of that term the lessee would be only a monthly tenant of the lessor.)
('77) 26 Suth WR 98 (98) (DB), *Mahunto Southo Purshad Dass* v. *Rughoo Podhan*.
('84) 8 Bom 493 (494) (DB), *Jagjivandas* v. *Narayan*. (A kabuliyat of lease under which the tenant might claim possession of the land for one year but was to pay rent to the landlord so long as the landlord might leave the land with the tenant, did not require registration—There was no interest created by way of lease extending beyond one year.)
('78) 3 Bom 21 (22) (DB), *Apu* v. *Narhari*. (Lease for one year certain containing an expression of the tenant's readiness to hold longer at the same rent should the landlord so desire is not a lease for more than one year.)
('86) 1886 Pun Re No. 68, p. 144 (149) (DB), *Pool* v. *Secretary of State*.

4. ('86) 13 Cal 113 (114) (DB), *Bhobani Mahto* v. *Shignath Para*. (A zur-i-peshgi lease, granted on the advance of a loan, was in the first place to remain in force for one year. But it further provided that if the loan was not repaid, it will continue in force. *Held* that the lease was for a term exceeding one year.)
('36) 164 Ind Cas 55 (56, 57) (Cal), *Banamali Das* v. *Kamala Kanta Majumdar*. (Lease for fixed period—Clause that tenant will make new arrangement with landlord at end of period and if no such arrangement made, to continue on same rent—*Held*, later clause amounted to present demise for further period).
[*See* ('31) 18 AIR 1931 Nag 128 (128) : 134 Ind Cas 263, *Sadaram* v. *Sundar Singh*. (Lease for five years with provision for enhanced payment of rent in case lessee continued in possession thereafter—*Held*, on construction that it was only a lease for five years.)
('34) 21 AIR 1934 Lah 129 (130) : 149 Ind Cas 948 (DB), *Kirat Singh* v. *Bhai Kalu*. (The mere fact that clause in lease deed for fixed term provides for payment of damages by way of enhanced rent for use and occupation after the term does not mean that the relationship of landlord and tenant continues in such case ; tenant is liable to ejectment after the period.)]
[See also ('82) 4 Mad 381 (382) (DB), *Virammal* v. *Kasturi Rungayyangar*. (Muchalka executed for one fasli to remain in force until the execution of a fresh muchalka for rent less than Rs. 50, is exempted from registration by virtue of notification of Local Government under S. 17 of the Indian Registration Act which exempts from registration leases, the terms granted by which do not exceed five years and the rent does not exceed Rs. 50.)]

5. ('29) 16 AIR 1929 Bom 66 (67) : 114 Ind Cas 374 (DB), *Abdulrahim* v. *Sarafalli*.
('07) 11 Cal W N 809 (811) (DB), *F. W. Higgins* v. *Nobin Chunder Sen*.

Section 105—Note 30

1. ('39) 26 AIR 1939 Bom 215 (219, 220) : ILR (1939) Bom 320 : 182 Ind Cas 835, *Dewarkhand Cement Co. Ltd.* v. *Secy. of State*. (The transaction is nonetheless a lease, because the interest may be determined before or after the expiry of the time fixed.)
[See (1881) 44 L T 293 (297) : 10 L J Q B 121, *Cheshire Lines Committee* v. *Lewis & Co.* (A lease to *A B* for life, with a proviso that if the lessor wanted it for a certain purpose before *A B's* death, the lease should determine, would be a good lease, if made by deed.)]

Such a lease will be one for the period fixed as the term.[2]

Under S. 110 where a lease is expressed to be terminable before the expiration of the period fixed by it, and the lease omits to mention at whose option it is to be so terminable, the lessee and not the lessor shall have such an option.

31. Periodic leases.—A reference to S. 106 will show that it refers to two forms of leases, the lease from year to year and that from month to month. There are similar leases under the English law also.[1] Such leases may be conveniently called periodic leases.

The following are the essential elements of such leases:

(1) The lease must be intended, normally,[2] to go on indefinitely, till it is terminated by either the lessor or the lessee.[3]

(2) The termination contemplated must be by a notice which satisfies certain requirements. These requirements are[4]—

(a) *In the case of a lease from year to year,* the notice must be at least of six months and must expire with the end of a year of the tenancy.

(b) *In the case of a lease from month to month,* the notice must be at least of 15 days and must expire with the end of a month of the tenancy.

From the above, the following propositions emerge:

(1) A periodic lease can be terminated in any year or month of the tenancy, as the case may be, by a notice which fulfils the requirements above-mentioned.

(2) Such a lease cannot ordinarily be terminated in any other manner.[5]

Both the above elements are necessary to make a lease one from year to year or one from month to month. If either of such elements is wanting, the lease will not be a periodic lease.

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2. ('22) 9 AIR 1922 Cal 436 (437, 438) : 49 Cal 507 : 69 Ind Cas 877, *Sanjib Chanra* v. *Santosh Kumar.* (Lease for five years, with clause for termination before, in certain event—*Held*, lease was for period exceeding one year.)

[*See also* (1869) 4 Q B 293 (305) : 17 WR (Eng) 414 : 38 LJQB 81, *Morton* v. *Woods.* (That if one makes a lease for ten years at the will of the lessor, this is a good lease for ten years certain, and the last words are void for the repugnancy.)]

[See however ('23) 10 AIR 1923 All 382 (383) : 75 Ind Cas 603, *Ghasi Ram* v. *Maloni Club.* (Lease for 30 years determinable at the will of the lessor—*Held*, lessee was liable to be ejected at the will of the lessor.)

('86) 8 All 405 (408) : 1886 All W N 170 (DB), *Khuda Baklish* v. *Sheo Din.* (Lease for six years and reserving yearly rent and providing that it is determinable at any time by lessor by giving 15 day's notice —*Held* that later clause prevailed and nothing more than tenancy at will was created.)]

Section 105—Note 31

1. Williams and Eastwood, *Principles of the law of Real Property*, 1933 Edn., page 106.
Topham, *New Law of Property*, 4th Edn., 1932, page 254.

2. Such leases are not exceptions to the law that a lease can be determined by surrender or forfeiture.

3. ('94) 17 Mad 218 (219) : 3 Mad LJour 287 (DB), *Unhammad Devi* v. *Veikunta Hegde.*

†('28) 112 Ind Cas 651 (652) (Lah), *Muhammad Budha* v. *Ghulam Qadir.*

4. [*See also* (1946) 50 Cal WN 461 (464), *Usharani Debi* v. *The Research Industries Ltd.* Monthly tenancy commencing on 1st September—Tenancy can properly be determined on last day of subsequent month.]

NOTE.—Section 106 does not *define* a lease from year to year or from month to month and the provision as to notice contained in the section is not given as a part of the *definition* of such leases; it is conceived, that such a provision lays down an *essential* element of such leases for the purpose of the Act.

5. ('28) 112 Ind Cas 651 (652) (Lah), *Muhammad Budha* v. *Ghulam Qadir.*

As regards the first element.—If the lessor or lessee cannot determine a lease by simply giving a notice which fulfils the above requirements, the lease will not be a periodic lease.[6] Thus, a lease till the lessor provides "other suitable land" to the lessee and the expiry of six months from the time when the lessor does so, is not a lease from year to year.[7] The reason is that the lessor cannot determine the lease by giving notice in *any* year of the tenancy. He can only do so *after* he has provided other suitable land.

As regards the second element.—If a lease can be determined *without* notice, it will not, ordinarily, be a periodic lease.[8] Thus, a lease which can be terminated by the lessor at any time is a tenancy at will and not a lease from year to year, although an annual rent may be reserved under the lease.[9] Where a notice is not required to determine a tenancy, the mere fact that it is determinable only at the end of a year or month of the tenancy will not make it a lease from year to year or from month to month.[10]

Suppose, a lease *requires* a notice for its determination. Even then, the lease will not be a periodic lease, if the notice required is not one which is of the kind described above. Thus, take for instance, a lease which provides that it is determinable at 15 days' notice. The lease will not be one from month to month,[11] unless it is provided that the notice must *expire* with the end of a month of the tenancy.

Whether a lease is one from year to year or from month to month is a question of construction of the lease in each case.[12] The mere fact that the rent is fixed on an annual basis will not necessarily show that a lease is one from year to year.[13]

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6. (1903) 1 K B 577 (582) : 72 LJKB 103 :88 LT 46 : 51 W R (Eng) 343, *Zimbler* v. *Abrahams.* (Lease entitling lessee to hold as long as he paid rent regularly is not a weekly tenancy though weekly rent is reserved. NOTE.—In this case, it was assumed that such a lease would be one for the life-time of the lessee. For a criticism of this view see Note 27.)

[*See also* ('80) 44 LT 293 (297) : 50 LJ Q B 121, *Cheshire Lines Committee* v. *Lewis & Co.* (Weekly letting—On the same day, the lessor signing a document saying that the lessee might have the premises till they were required "in order to pull them down"—*Held* on construction that it was only a letting terminable by notice and that the order document was merely a statement assuring the lessee that he would not be disturbed till the lessor wanted the premises.)]

7. ('05) 29 Bom 580 (602, 603) : 7 Bom L R 27 (DB), *Municipal Corporation* v. *Secy. of State.* (Such a lease is void for *uncertainty* as to the term. NOTE.—It may be noted that in this case the notice was not required to be one expiring with a year of the tenancy.)
8. ('90) 14 Bom 319 (320) (DB), *Jivraj Gopal* v. *Atmaram Dayaram.* (Lease held to be tenancy at will, although an annual rent was reserved.)
9. ('29) 118 Ind Cas 702 (704) (Bom), *Pandu Mahipat* v. *Shivshankardas Shivlaldas.*
10. *See* ('95) 19 Bom 150 (152) (DB), *Balkrishna* v. *Jasha Faris Shirel.* (In this case it was held that the lease was determinable only *at the end* of any year but no previous notice was necessary—It is conceived that such a lease would not be a lease from year to year.)

[*See also* ('16) 3 AIR 1916 Lah 353 (354) 1915 Pun Re No. 97 : 32 Ind Cas 35 (DB), *Umar Bakhsh* v. *Baldeo Singh.* (Lease to go on indefinitely but terminable by either party at the end of any month not a lease exceeding one year. NOTE.—This necessarily means that it is not a lease from year to year—This decision was followed in AIR 1928 Lah 937.)]

11. ('86) 8 All 405 (408) : 1886 All W N 170 (DB), *Khudabakhsh* v. *Sheodin* (Such a lease held to be tenancy at will.)

[*See* ('86) 1886 All W N 115 (117) (FB), *Hanso* v. *Har Narain.* (*Held* that such a lease is "*not even* for a month certain" which necessarily implies that it is not a lease from month to month.)]

12. *See* ('81) 3 Mad 358 (359) : 5 Ind Jur 636 (DB), *Venkatachellam Chetti* v. *Audin.* (Patta granted for one fasli to remain in force until another patta was granted—*Held*, it was a lease from year to year.)
13. ('25) 12 AIR 1925 Pat 256 (257) : 85 Ind Cas 77 (DB), *Ramdhani Gope* v. *C. V. Scott.*

('21) 8 AIR 1921 Lah 96 (96) : 60 Ind Cas 226, *Mangal Singh* v. *Atra.* (Lease fixing a monthly rent but rent made payable annually—Lease held to be a monthly one.)

A lease from year to year or month to month is a *single* lease for the whole period till it is determined.[14] Such a lease is not a succession of distinct leases each for a year or month as the case may be.[15] There is no re-letting at the beginning of each successive period.[16] The lease is *at least* for one year or one month so that the lease can be terminated by notice expiring with the end of the second year or second month of the tenancy as the case may be.[17]

Under S. 106, in the absence of a contract, local law or usage to the contrary, a lease for an agricultural or manufacturing purpose will be deemed to be one from year to year and a lease for any other purpose will be deemed to be one from month to month.

32. Tenancy at will.—A tenancy at will has been defined as arising "when a person lets to another to hold at the will of the lessor or the person letting. The lessee or the person taking the lands is called a tenant at will and as he may be turned out when his landlord pleases, so he may leave when he likes."[1] Hence, where a lessor has the option of determining a lease at any time he thinks fit and there is no other limit of time for the lease, the lease will be a tenancy at will.[2] In such cases, the law gives the *lessee* also the right of determining the

14. (1946) 50 Cal W N 461 (464) *Usharani Debi* v. *The Research Industries Ltd.*
('43) 30 AIR 1943 Bom 306 (309) : ILR (1943) Bom 553 : 213 Ind Cas 48 (DB), *Utility Articles Manufacturing Co.* v. *Motilal Bombay Mills, Ltd.* (A characteristic of a periodical tenancy is that as each period commences, it is not a new tenancy; it is really an accretion to the old tenancy. (1924) 1 K B 117 (Per Salter, J.) followed.)
('40) 27 AIR 1940 Cal 89 (91) : ILR (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali* v. *Jaminilal.* (Lease from month to month or from year to year—Tenant holding such a tenancy has an interest for one year or one month certain as the case may be with an accuring interest during every year or month thereafter springing out of the original contract as part and parcel of it.)

15. (1946) 50 Cal W N 461 (464) *Usharani Debi* v. *The Research Industries Ltd.*
[*See* ('37) 24 AIR 1937 Nag 321 (321) : ILR (1937) Nag 406 : 172 Ind Cas 543, *Rajib Husain* v. *Nawab Yanuskhan.* (In this case there is a remark "Even if a lease from month to month is nothing but a succession of definite terms, each of a month's duration . . " It is clear that this is only an assumption for the sake of argument and it was not intended to be laid down that a lease from month to month is a succession of definite terms.)]

16. ('45) 32 AIR 1945 Pat 385 (385) : 24 Pat 449 (DB), *Firm Ganesh Das Ram Gopal* v. *Jamuna Das.* [Tenancy from month to month—Tenancy does not expire at end of each month, nor is there re-lating at the commencement of each month of the tenancy.]
(1894) 1 Q B 164 (167) : 58 J P 213 : 42 W R (Eng) 236 : 10 R 47, *Bowen* v. *Anderson.*
28 L J Ch 352 : (1859) 70 E R 905 (909) : 1 John & H. 651 (660) *Cattley* v. *Aranold.* [A tenant from year to year has a lease for a year certain with a growing interest during every year thereafter, springing out of the original contract and pareel of it.]
('49) 36 AIR 1949 Pat 265 (267) (DB), *Rama Bahadur* v. *Harkhu Singh.* [A tenant from year to year has an interest for *one year certain* with a *growing* interest during every year thereafter springing out of the original contract and as partee of it.]
(1946) 50 Cal W N 461 (464) *Usharani Debi* v. *The Research Industries Ltd.* [Monthly tenancy commencing on 1st of Sept.—Tenancy can be properly terminated on last day of subsequent month.]
(1844) 153 E R 87 (89) : 13 M. & W. 209 *Oxley* v. *James.*
(1709) 91 E R 359 (359) : 2 Salk 414 : 11 Mod Rep 203, *Legg* v. *Strudwick.*

Section 105—Note 32

1. Williams & Eastwood, *Principles of the Law of Real Property*, 1933 Edn., page 105.
('42) 29 AIR 1942 Pesh 74 (75) : 202 Ind Cas 627 (DB), *Abdul Ghafur Khan* v. *Jetamal.* (Tenant having no power to alienate his right of residence without permission of owner of site, selling it—Owner receiving rent from purchaser—No document executed to witness tenancy—Purchaser is tenant at will—Such a tenant can be evicted at any time.)
[*See also* (1811) 4 Taunt 128 (131) : 13 R R 570 : 128 E R 277, *Richardson* v. *Langridge.* (Agreement to let premises so long as both parties like—No term fixed —Tenancy at will is created.)]

2. ('86) 8 All 405 (408) : 1886 All W N 170 (DB), *Khuda Bakhsh* v. *Sheodin.* Lease expressed to be for six years but

lease at any time he thinks fit. Conversely, a lease under which the *lessee* is entitled to hold the land as long as he wishes (or pays the rent) is really one at the will of the lessee which in law is one at the will of the lessor also and hence is a tenancy at will. (See Note 27.)

A tenancy at will cannot arise by presumption under S. 106.[3] When there is no provision as to the duration of a tenancy, it will be presumed to be one from year to year or month to month according to the purpose of the tenancy and not a tenancy at will. But an intention to create a tenancy at will may be implied and need not be express.[4] It will depend on the facts a tenancy and circumstances of each case whether the intention of the parties has been to create a tenancy at will.[5] Where such a tenancy arises expressly or impliedly, the presumption under S. 106 will not be applicable, such presumption only arising when there is no contract or local law or usage to the contrary.

A tenancy at will being an interest in property like any other lease, it must be determined before the lessor can sue for the ejectment of the tenant from the property.[6] As in such cases, the contract itself implies that the lease can be put an end to at any time, a *notice* is not necessary for its determination. It can be terminated by the lessor by a simple demand for possession,[7] and by the lessee by

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determinable at any time by fifteen day's notice by lessor—*Held*, lease was tenancy at will—The later clause was held to override the previous clause as to the term of the lease being six years.)

('29) 118 Ind Cas 702 (702) (Bom), *Pandu Mahipat* v. *Sheashankardas*. (Although an annual rent was payable and the lease provided for the payment of the rent from year to year so long as the tenant held possession—AIR 1917 Bom 274 : 41 Bom 458 distinguished as in that case the lessor had no absolute right to determine the tenancy but could only do so in certain contingencies.)

('90) 14 Bom 319 (320) (DB), *Jivraj Gopal* v. *Atmaram Dayaram*.

[*See also* ('95) 19 Bom 150 (152) (DB), *Balkrishna* v. *Jasha*. (Landlord entitled to demand possession at the end of any year without any previous notice.)]

3. NOTE.—Under the English law also a tenancy at will can only arise by express contract; see Williams & Eastwood, *Principles of the Law of Real Property*, 1933 Edn., pages 105, 106.

4. *See* ('42) 29 AIR 1942 Cal 341 (341, 342) : 200 Ind Cas 660 (DB), *Mozam Shaikh* v. *Annada Prasad*. (A tenancy at will arises by implication of law in cases of permissive occupation—Where the tenancy is created by express contract between the parties there is no scope for characterising the tenancy as one at will.)

('78) 3 Cal 696 (699) : 1 Cal L R 577 (DB), *Prosunno Coomaree Debea* v. *Rutton Bepary*. (Terms of holding as between landlord and tenant are matter of contract—In the absence of express agreement, if the owner lets another into possession and the latter pays rent a tenancy at will or from year to year is created.)

5. ('36) 23 AIR 1936 Pat 275 (281, 282) : 162 Ind Cas 797 (DB), *Darbar Saheb* v. *Bare Lal*. (Where in a lease deed besides the use of the expression 'bemiadi thica patta' the lease is granted to the lessee and his heirs and they are to pay rent to the lessor and to his disciples and the rent payable is referred to as 'a fixed rent' and moreover the lease permits the lessee not only to enjoy the property himself in any manner he thinks proper by holding it in direct possession by planting orchards, cultivating it, building houses but also to let to tenants as he thinks fit the lease is a permanent lease and does not create tenancy terminable at the will of the landlord by a notice to quit.)

('85) 8 All 198 (200) : 1886 All W N 56 (DB), *Khayali* v. *Husain Bakhsh*. (Lease for one year providing that thereafter the lessee shall pay the annual rent regularly every year—Subsequent to the year, there is only a tenancy at will.)

[*See* ('26) 13 AIR 1926 Sind 71 (74) : 21 Sind LR 185 : 90 Ind Cas 1007 (DB), *Sidik Haji* v. *Mahomad Faruq*. (*A* occupying *B's* land with his permission and without paying rent—*A* is tenant at will—Submitted this view is not correct as there can be no tenancy in the absence of consideration in form of premium or rent.)

('26) 13 AIR 1926 Sind 98 (100) : 97 Ind Cas 248, *Mulibai* v. *Vassibai*. (Living on premises without payment of rent, on account of business and family relationship —*Held*, a tenancy at will was constituted. NOTE.—This view is not correct. If tenancy at will is a lease, as it is submitted it is, there cannot be such a tenancy unless there is consideration in the form of premium or rent.)]

6. ('75) 24 Suth W R 172 (173), *Radha Kishore Roy* v. *Sitto Sirdar*.

7. ('07) 34 Cal 57 (63, 64) : 5 Cal LJour 181 (DB), *Deo Nandan Pershad* v. *Meghu Mahton*.

simply communicating to the lessor his intention to give up the lease and actually vacating the property.[8]

The difference between a notice to quit and a demand of possession is this. Notice to quit contemplates the giving of a certain *time* to the lessee within which he has to leave. But a demand of possession does not require any *time* to be given to the lessee for vacating. The demand may be for vacating the property immediately. The idea of notice may also involve the *reasonableness* or otherwise thereof both with regard to the *length* of the notice as well as to the time at which the notice is to expire.[9] Sometimes the *law* itself lays down the limits for these matters (e. g., S. 106). But though a notice to quit is not *necessary* to terminate a tenancy at will, such a notice (by the lessor) will be *sufficient* to terminate it.[10] In the undermentioned case,[11] though the lease provided that it was to be terminable by the lessor at his option, at any time, by giving 15 days' notice, it was held that the lease was a tenancy at will. It will be remembered that a *periodic* lease like a lease from year to year cannot ordinarily be determined without a *valid notice.*

It is sometimes said that a tenancy at will is not a *lease* under this section.[12] The reason given is that such a lease is not for a *certain* time express or

('25) 12 AIR 1925 Pat 256 (258) : 85 Ind Cas 77 (DB), *Ramadhani Gope* v. *C. V. Scott.*

('33) 20 AIR 1933 Pat 561 (562) : 145 Ind Cas 567 (DB), *Ram Kishun* v. *Sohila.*

[*See* ('96) 23 Cal 200 (201), *Ramlal* v. *Dinanath.* (In this case it was held that the suit for ejectment might be treated as itself the demand for possession—Submitted this view is not correct as in the absence of such a demand there will be no cause of action for the suit at all.)]

[*See also* ('95) 19 Bom 150 (152) (DB), *Balkrishna* v. *Jasha.* (Lease of agricultural land—Tenant entering under agreement that he would pay the amount of the annual rent every year as long as the landlord would keep the *wadi* (part) with him and would give back the same when the landlord would demand it—*Held* that the contract between the parties took the case out of S. 84 of the Land Revenue Code of Bombay of 1879 and that as the rent would not be payable until the end of the year the landlord might put an end to the tenancy and demand the land at the end of any year without giving any previous notice of any particular period but he could not demand immediate possession in the middle of a year.)]

Also see S. 106, Note 6 and S. 111, Note 24

[See however ('12) 16 Ind Cas 351 (352) (DB) (Cal), *Raimala Piprajugi* v. *Shibasundari.* (NOTE.—In this case, the judgment says that the suit was for ejectment on the basis that the defendant was a tenant at will under the plintiff and that his tenancy had been determined by a valid notice to quit—But the judgment does not consider whether the tenancy really was one at will and whether notice was necessary for its determination—The judgment merely finds that the notice given in the case was reasonable notice and sufficient to determine the tenancy—But on the whole it appears as if the case is not one under the T. P. Act. 36 Cal 927 which is followed was not such a case.)]

NOTE.--Topham in his *New Law of Property*, 4th Edn., 1932, p. 252, says that a tenancy at will is determinable by lessor or lessee by notice. He does not say that a simple demand of possession by the lessor will not be sufficient to determine the tenancy.

8. *See* ('20) 7 AIR 1920 Lah 217 (217) : 57 Ind Cas 269, *Des Raj* v. *Jaimal Singh.* (Tenancy at will is not determined by mere non-payment of rent.)

('26) 13 AIR 1926 Sind 71 (74,75) : 21 Sind LR 185: 90 Ind Cas 1007 (DB), *Sidik Haji* v. *Mahomed Faruq.* (NOTE—The view expressed in this case that an open assertion by a tenant of title as owner is enough to determine the tenancy, though he does not give up possession is, it is submitted, not correct. It is only a periodic lease such as a lease form year to year that can be determined by simple notice by lessor or lessee. This is the peculiarity of such a lease. The principle does not apply to tenancy at will and the lessee cannot determine such tenancy without surrendering possession.)

9. ('09) 36 Cal 927 (933) : 2 Ind Cas 656 (659) (DB), *Paratap Narain* v. *Maighu Lall.*

10. ('78) 3 Cal 696 (699) : 1 Cal L R 577 (DB), *Prosunno Coomaree Debea* v. *Rutton Bepary.*

('26) 13 AIR 1926 Sind 98 (100) : 97 Ind Cas 248, *Mulibai* v. *Vassibai.*

('36) 23 AIR 1936 Pat 275 (281, 282) : 162 Ind Cas 797 (DB), *Darbar Saheb* v. *Barelal.*

11. ('86) 8 All 405 (408) : 1886 All W N 170 (DB), *Khuda Bakhash* v. *Sheo Din.*

12. ('40) 27 AIR 1940 Cal 89 (91) : ILR (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwar Ali* v. *Jamirilal Roy.*

('33) 20 AIR 1933 Pat 561 (562) : 145

implied.[13] It is difficult to appreciate this reason.[14] As seen in Note 25 the term of a lease can be fixed with reference to a future event, though it may not be possible to say on the date of the lease, when such event will occur. It is not clear why the act by which the lessor or the lessee may manifest his intention to terminate the lease should not be considered as the event, with reference to which the term of the lease is fixed in such cases.

No doubt, It is considered that a tenancy at will is not a *heritable*[15] or *transferable* interest.[3] But this does not necessarily lead to the conclusion that a tenancy at will is not a *lease* at will. It is conceived that the above features of such tenancies are only the result of the *presumed* intention of the parties in such cases. The intention being to create an interest whose continuance is to depend on the will of the parties, it is apparently considered (as it may be very reasonably considered), that the intention is that such interest should be confied in its enjoyment to the grantee personally and should neither be heritable nor transferable. Section 108, clause (j), under which a lease is transferable, is expressly made subject to there being no contract or local usage to the contrary. It is clear that such a contract may be express or implied. A tenancy at will may be regarded as containing such an implied provision against transfer. The non-transferable nature of a tenancy at will may thus be only the result of such an implied contract. There does not seem to be anything in *principle* against parties agreeing that a tenancy at the lessor's will should be a heritable and transferable interest. As an instance of a lease which, though terminable at any time at the will of the lessor, was held to be both heritable and transferable, reference may be made to the case of *Lekhraj Roy* v. *Kunhya Singh*.[17] (See Note 72.)

A tenancy at will is not a lease for a period exceeding one year for purposes of registration.[18]

It will be noticed that a tenancy at will is not a lease for an indefinite period, under which no term is fixed, so as to attract the rule of construction discussed in Note 26, viz., that a lease for an indefinite term enures, generally speaking, for the life-time of the lessee.

33. Tenancy by sufferance.—See Notes 37 to 40.

Ind Cas 567 (DB), *Ramkishun* v. *Bibi Sohila*.

[*See also* ('26) 13 AIR 1929 Sind 71 (73) : 21 Sind L R 185 : 90 Ind Cas 1007 (DB), *Sidik Haji* v. *Mahomed Faruq*. (Permissive occupation without payment of rent is not a regular lease within S. 105 —It is a tenancy at will.)]

13. ('33) 20 AIR 1933 Pat 561 (562) : 145 Ind Cas 567 (DB), *Ramkishun* v. *Bibi Sohila*.

14. It may be noted that a tenancy at will is referred to as a lease in English text books of authority, like, for instance, Williams and Eastwood, *Principles of the Law of Real Property*, 1933 Edn., pages 106-107 —It will also be noted that a tenant at will is referred to as a lessee and the creation of a tenancy at will is referred to as letting—A tenancy at will is actually referred to as a lease at will—But a tenancy at will is not a "legal estate" under the English law—But this is the result of express statutory enactment—See Topham, *New Law of Property*, 4th Edn., 1932, page 252, foot-notes.

15. ('42) 29 AIR 1942 Pat 397 (401) : 200 Ind Cas 769 (DB), *Ram Ranbijaya* v. *Ramjivan Ram*.

('38) 25 AIR 1938 Nag 506 (509) : ILR (1940) Nag 269 : 182 Ind Cas 581 (DB), *Abdul Razak* v. *Nandlal Sheolal*. (A tenancy at will in English law is determined by the death of either party or by either doing any act, inconsistent with the continuance of the tenancy.)

('40) 27 A I R 1940 Cal 89 (91) : I L R (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwar Ali* v. *Jaminilal Roy*.

Also see Note 72.

16. ('33) 20 AIR 1933 Pat 561 (562) : 145 Ind Cas 567 (DB), *Ramkishun* v. *Bibi Sohila*.

[*See also* ('14) 1 AIR 1914 Oudh 220 (220, 221) : 25 Ind Cas 6 *Indal Sah* v. *Bhabhuti Singh*. (Admitted—Person claiming as transferee from tenant at will cannot claim rent from sub-tenant of tenant at will—Between transferee and sub-tenant, no relationship of landlord and tenant exists.)]

17. ('78) 3 Cal 210 (213) : 4 Ind App 223 (PC).

18. ('90) 14 Bom 319 (320) (DB), *Jivraj Gopal* v. *Atmaram Dayaram*.

34. Lease for life.—A lease for the life of the lessee would be a valid lease under this section. Though on the date of the lease the period of such a lease is not certain, it will *become* certain on the death of the lessee and this is enough for the purpose of the requirement as to certainty under this section. (See Note 25.)

The general rule of construction of leases is that where the parties have indicated their intention that the lease is to go on indefinitely but have not fixed any term for the lease, either absolutely or with reference to a future event, the lease is ordinarily to be regarded as one for the life of the grantee, unless there are some words showing an intention to grant a hereditary interest. (See Note 26.)

An estate granted to A for life with remainder to A's son is different from a *hereditary* estate granted to A. In the former case, an interest is conferred by the grant on A's son. But in the latter case, A's son gets no interest in the property under the grant.[1]

But it must be noted that there cannot be a *lease* for life in favour of A with *remainder* to A's son. Where there is a lease, a *reversion* to the lessor's estate is essential. Otherwise, the transaction would not be a *lease*. But there can be a lease to A for his life with a lease over to his son on the death of A. In such a case, A's son is not entitled to a *remainder*. He is only entitled to a *leasehold* interest. After the determination of his interest, the property will *revert* to the lessor.

A lease granted for the life of two persons enures till the death of the survivor of them.[2]

A lease for life is regarded as one for a period exceeding one year for the purpose of registration, although on the date of the lease it is not certain whether the life will expire only after a year from the commencement of the lease.[3]

See also Notes 27, 29 and 72.

35. Lease with a clause for renewal—General.—A provision in a lease to the effect that on the expiry of the term of the lease, the lease is to be renewed is a valid provision. Such a provision, however, does not *ipso facto* extend the term of the lease. The provision only entitles the lessee to obtain a new lease in his favour after the expiry of the original term.[1] Where the lessee dies

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Section 105—Note 34

1. See ('01) 28 Cal 720 (732, 733) : 28 Ind App 152 (PC), *Pudmanund Singh* v. *G. S. Hayes.*
2. ('24) 11 AIR 1924 Pat 572 (573) : 3 Pat 534 : 78 Ind Cas 511 (DB), *Hari Gir* v. *K. Kamakhpa Narain Singh.*
3. ('94) 18 Bom 109 (110) (DB), *Parshotam Vishnu* v. *Nana Prayag.*

Section 105—Note 35

1. (1877) 2 Ex D 355 (358) : 46 LJQB 603 : 36 L T 765 : 25 W R (Eng) 734, *Hand* v. *Hall.*

*('78) 5 Ind App 164 (168) (PC), *Jardine Shinner & Co.* v. *Rani Surut Soondari.*

('26) 13 AIR 1926 Cal 1065 (1067) : 53 Cal 590 : 95 Ind Cas 831 (DB), *Jogesh Chandra* v. *Ananda Charan.* (Following 5 Ind App 164 (PC).)

('44) 31 AIR 1944 Bom 210 (212), *Bhikaji Vishnu* v. *Ramchandra Krishna.* (Tenancy for term of years—Renewal clause—Option to renew not exercised by tenant before expiry of tenancy—Tenancy held became annual after expiry of period of lease—Tenant held liable to be ejected.)

('90) 17 Cal 548 (555, 556), *Boyd* v. *Krieg.* (A lease for one year containing an option of renewal for a period of one year is not a lease for a term exceeding one year.)

('68) 1 Beng LR (AC) 7 (9) (DB), *Radhika Prasad* v. *Ramsunder Kur.*

('33) 20 AIR 1933 Rang 220 (221, 222) : 148 Ind Cas 301 (DB), *Syriam Land Co.* v. *J. D. Rodriguez.*

[*See also* ('73) 20 Suth W R 357 (357) (DB). *Deb Pooree Boistobee* v. *Kenoo Singh Roy.* (Where an old lease has expired, and the lessee, having the option of renewal on applying within a specified time does not choose to take a new lease, the landlord's claim to re-entry cannot be styled a penalty in the sence in which forfeiture of a lease would be upon non-performance of a contract.)

('32) 19 AIR 1932 Mad 305 (306) : 55 Mad 519 : 138 Ind Cas 78 (DB), *Valiya Kalyani v. Krishnan* (Subsequent agree-

before the expiry of the term of the lease and his heirs are in possession at the time of the expiration of the term they will be entitled to obtain the renewal.[1a] Where the covenant for renewal is made conditional on observance of certain conditions by the lessee, the covenant for renewal cannot be enforced if at the time of renewal there is a subsisting breach of the conditions by the lessee.[1b] If the lease does not state at whose option the lease is to be renewed, such option would *prima facie* be held to belong only to the lessee.[2] The question whether such option should be exercised before the expiry of the original lease or within a reasonable time after the expiry of the lease would depend on the question whether time was of the essence of the contract. If time was of the essence of the contract the lessee must exercise the option before the expiry of the lease; but if time was not of essence of the contract he can exercise the option within a reasonable time even after the expiry of the lease.[2a] Where a term of the lease was that : "After the expiration of the said term, if the lessee shall so desire, the executant shall have no objection whatever to renew the lease for a further term of 20 years," it was held that time was not of the essence of the contract and that it was only obligatory upon the lessee to require a renewal to be granted to him within a reasonable time after the expiration of the original lease.[2b] Where the execution of the fresh lease is dependent on a re-assessment at the instance of the lessor, it is for the lessor to make the re-assessment and then call upon the tenant to exercise his option. In such a case the lessor is bound to give notice to the lessee for exercising the option of renewal before he can treat the lease as determined and re-enter on the land.[2c] Where the lessor bound himself to give the lessee such leases as he might require from time to time after the expiry of the original lease on the same conditions and the lessee did not call upon the lessor to execute a fresh lease until eight years after the expiry of the original lease it was held that as the lessee was in possession and willing to carry out his part of the contract but was never called upon to take renewal by the lessor his right to enforce the option of renewal was not lost by laches.[2d] The period, for which the lease is to be renewed, will be the same as the original period unless it is otherwise provided for in the lease.[3] As regards the other terms of the renewed lease,

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ment to renew lease does not constitute a present *demise*.)

('03) 30 Cal 831 (837, 838) (DB), *Macnaughten* v. *Rameshwar*. (Unless the parties were agreed to the terms and conditions of the new lease, a mere offer on the part of the lessor to grant a new lease would not amount to the giving of such a lease.)]

1a. ('25) 12 AIR 1925 Cal 516 (517, 518) : 79 Ind Cas 317 (DB), *Shulochana* v. *Kali Bibi*.

1b. ('18) 5 AIR 1918 Cal 59 (61) : 51 Ind Cas 690 (DB), *Ramlal* v. *Secy. of State*.

2. ('12) 17 I. C. 180 (183) (DB) (Cal), *Secy. of state* v. *Forbes*. (Option may be exercised by lessee personally or his representative in interest.)

2a. †('05) 27 All 696 (698) : 1905 All W N 154 (DB), *Jaggilal* v. *Cooper*.

('18) 5 AIR 1918 Cal 59 (61) : 51 Ind Cas 690 (DB), *Ramlal* v. *Secy. of State*. (In cases in which there is an unconditional covenant for renewal expressly requiring the lessee to notify to the lessor his intention to take a renewal before the termination of the term the lessee loses his right if he fails to give notice in time. But relief will be granted against failure to give notice in time under special circumstance.)

[*See also* ('35) 20 AIR 1933 Cal 477 (480) : 144 I. C. 889 (DB), *Hemanta Kumari Debi* v. *Sefatulla Biswas*. (Where a lease confers a right on the lessee to apply for renewal and no time is fixed for it, the lessee will not necessarily lose his right of renewal by not having made the application within the currency of his term if he continues in possession afterwards with the sanction of the lessor.)

('19) 6 AIR 1919 Cal 972 (973) : 45 Ind Cas 983 (DB), *Secy. of State* v. *Siba Prasad*. (Lessee being in a position to enforce covenant for renewal on the expiry of first lease—Fact that lease was not renewed may in the absence of an explanation raise a presumption that lessee abandoned his right of renewal.)]

2b. ('05) 27 All 696 (698) : 1905 All W N 154 (DB), *Jaggilal* v. *Cooper*.

2c. ('38) 25 AIR 1938 Cal 724 (726, 727) (DB), *Prodyot Coomar* v. *Maynuddin Mia*.

2d. ('21) 8 AIR 1921 Mad 541 (541) : 44 Mad 230 : 60 I. C. 591 (DB), *Pichi Naidu* v. *Jafferson*.

3. †('78) 5 Ind App 164 (169) (PC), *Jardine Skinner & Co.* v. *Rani Surut Soondari*.

prima facie the intention of the parties will be deemed to be that the renewed lease should also contain the same provisions as the original lease.[4] But the lessee will not be entitled to a repetition of the clause for *renewal* in the new lease.[5]

('21) 8 AIR 1921 Cal 574 (576) : 64 Ind Cas 824 (DB), *Guruprasanna Bhattacharjee* v. *Madhusudan Chowdhury*.

('39) 26 AIR 1939 Cal 77 (78) : 179 Ind Cas 813, *Srish Chandra* v. *Doa Mahammad*

('38) 25 AIR 1938 Cal 724 (727) (DB), *Prodyot Coomar* v. *Maynuddin Mia*.

('19) 6 AIR 1919 Cal 972 (973) : 45 Ind Cas 983 (DB), *Secy. of State* v. *Siba Prasad*. (Original lease for 22 years—*Held* intention was that lease should continue so long as rent was not altered by a survey and settlement proceeding and this happened to be a period of 22 years—Lease renewed for the period extending from the date of the expiry of the original lease till the completion of the next periodical settlement and not for 22 years.)

('17) 4 AIR 1917 Cal 526 (526) : 33 Ind Cas 450, *Rasul Gazi* v. *Abdul Jalil Khan*. (Silence in the condition as to the term for which the settlement was to be made does not render the covenant unenforceable.)

('17) 4 AIR 1917 Cal 509 (510) : 33 Ind Cas 448 (DB), *Lani Mia* v. *Muhammed Easin Mia*. (Covenant for renewal should as far as possible be interpreted so as to make it operative and not futile.)

('24) 11 AIR 1924 Pat 560 (561) :3 Pat 403 : 83 Ind Cas 741 (DB), *Harnarayan Singh* v. *Darshan Deo*.

('24) 11 AIR 1924 Cal 346 (348) : 69 Ind Cas 600, *Nava Kishore Das* v. *Madan Mohan Das*.

4. ('12) 17 Ind Cas 180 (183, 184) (DB) (Cal), *Secy of State* v. *Forbes*.

('39) 26 AIR 1939 Cal 77 (78) : 179 Ind Cas 813, *Srish Chandra* v. *Doa Mahammad*.

('38) 25 AIR 1938 Cal 724 (727) (DB), *Prodyot Coomar* v. *Maynuddin Mia*.

('20) 7 AIR 1920 Cal 96 (97) : 55 Ind Cas 375, *Epasan Ali* v. *Ram Kumar De*.

('19) 6 AIR 1919 Cal 972 (973) : 45 Ind Cas 983 (DB), *Secy of State* v. *Siba Prasad*.

('17) 4 AIR 1917 Cal 526 (526) : 33 Ind Cas 450, *Rasul Gazi* v. *Abdul Jalil Khan*.

('17) 4 AIR 1917 Cal 509 (510) : 33 Ind Cas 448 (DB), *Lani Mia* v. *Mahammad Easin Mia*.

Also see S. 111, Note 3.

5. ('39) 26 AIR 1939 Cal 77 (78) : 179 Ind Cas 813, *Srish Chandra* v. *Doa Mahammad*.

('38) 25 AIR 1938 Cal 724 (727) (DB), *Prodyot Coomar* v. *Maynuddin Mia*.

('19) 6 AIR 1919 Cal 972 (973) : 45 Ind Cas 983 (DB), *Secy of State* v. *Siba Prasad*.

4 AIR 1917 Cal 526 (526) : 33 Ind Cas 450 *Rasul Gazi* v. *Abdul Jalil Khan*.

('17) 4 AIR 1817 Cal 509 (510) : 33 Ind Cas 448 (DB), *Lani Mia* v. *Muhammad Easia Mia*.

('26) 13 AIR 1926 Cal 1065 (1067) : 53 Cal 590 : 95 Ind Cas 831 (DB), *Jogesh Chandra* v. *Ananda Charan*.

('12) 17 Ind Cas 180 (183) (DB) (Cal), *Seyc, of State Forbes*.

('14) 1 AIR 1914 Low Bur 241 (243) : 8 Low Bur Rul 64 : 24 Ind Cas 911 (DB), *Secy of State* v. *Ma Dwe*.

Also see S. 111, Note 3.

('47) 34 AIR 1947 Cal 378 (382) : ILR (1946) 2 Cal 80 (DB), *Narendra Nath* v. *Ramjal Singh*. [Right to renewal under covenant entirely subject to pleasure of lessor covenant held not in essence a covenant for renewal with lessee—The new lease need not be for a period similar to that of the original lease.]

('21) 8 AIR 1821 Mad 80 (80) : 44 Mad 509 : 62 Ind Cas 62 (DB), *Kutetalik* v. *Ummamma Amma*. (Malabar *Taraga*—Undertaking to improve the land and take *Taraga—Held* there was a covenant for renewal.)

('19) 6 AIR 1919 Cal 972 (973) : 45 Ind Cas 983 (DB), *Secretary oj State* v. *Siba Prasad*. (The kabuliyat executed by the grantee contained a covenant to the following effect. "If I agree to the enhancement of the rent to be fixed at the time of the next settlement, in future, the Government shall have the power to settle the lands with me and then only with others:"—*Held* that the clause in the lease was in essence a covenant for renewal.)

('17) 4 AIR 1917 Cal 249 (253) 34 Ind Cas 82 (DB), *Rajani Kant* v. *Yousuf Ali*. (Fresh settlement on the expiry of the lease was to be "'according to the terms on which the lessor wished to lease it out in future"—*Held* the terms being undefined and depending upon the will of the lessor could not be enforced.)

(1911) 9 Ind Cas 923 (923 925), (DB,) (Cal), *Jogendra Chandra* v. *Rajendra Nath*. (Provision in a lease deed that if on the expiry of the term, lessee or his representatives be unwilling to take ijara of the leased property, then lessee or his representatives shall be entitled to remove whatever improvements lessee might have created—*Held*, there was nothing in this clause to give lessee a right to demand at the expiry of the term that a fresh lease for the same period and at the same rate should be granted.)

It is a matter depending purely on the interpretation of each lease, whether it contains a provision for renewal. See the undermentioned decisions[6] for illustrative cases. There is no presumption that, unless a contrary intention is shown, the lessee will have an option of renewal.[7] On the other hand, the 'prima facie' presumption is that on the expiry of the term fixed by a lease, the lessee's right is intended to come to an end. But the provision for renewal may be in any form. An express covenant to renew in appropriate technical language is not essential.[8]

A clause for the perpetual renewal of a lease is valid.[9] Thus, for instance, if the original lease is for a period of eleven years, the lessee may be entitled to a renewal of the lease at the beginning of every successive period of eleven years.[10]

A perpetual lease and a lease with a clause for perpetual renewal are not the same.[11] In the former case a perpetual 'interest' in immovable property is created once and for all. But in the latter case, the lessee has merely an option of having the lease renewed in his favour at the end of every successive period. The right under such option of renewal is not an 'interest' in immovable property.

(1883) 7 Bom 109 (115), *In re Purmanandas Jeewandas.* (A lease for 99 years containing a covenant that the lessor upon application of the heirs, executors, administrators and assigns of the lessee would regrant and renew the lease "on the terms and conditions" mentioned in the lease—*Held*, the covenant was not for perpetual renewal but for a single renewal only.)

(1869) 12 Suth W R 538 (538) (DB), *Fakeeroonissa Begum* v. *Chunder Monee Dasee.* (Lease for five years—Condition that on the expiration of the term the lessor shall have no right to let the land to any other tenant—*Held* that lessor was not absolutely bound to re-let the land to the lessee but he was not at liberty to re-let the land to any other person.)

('19) 6 AIR 1919 Cal 529 (530): 51 Ind Cas 415 (DB), *Shamsoonessa* v. *Satya Sebak.* (Tenant for a year holding over after one year with landlord's consent—The new tenancy can be terminated by the lanlord by giving notice—This right is not affected by the covenant in the lease deed that on the expiry of the period of one year the landlord might settle another tenant on the land if the tenant (previous) refused to pay the additional rent demanded by him.)

('12) 17 Ind Cas 180 (182, 183) (DB) (Cal), *Secy. of State* v. *Forbes.* (Lease for a term with provision that after the expiry of the term the lessor would have *power* to resettle the land with the lessee on a fair rent—*Held* that the clause was intended to be a covenant for renewal and not merely one reserving liberty to lessor to renew—If latter sense were adopted the clause would be entirely superfluous.)

('14) 1 AIR 1914 Cal 382 (384): 21 Ind Cas 920 (DB), *Bengal Coal Co.* v. *Rajendra Lal.* (Clause providing that if the lessee should be unwilling to take a fresh settlement after the expiry of the present term he and his representatives should be entitled to take away such appurtenances as they might make at their own cost—*Held* that this did *not* constitute a covenant for renewal. NOTE.—For a similar case see 9 Ind Cas 923 (924).)

('15) 2 AIR 1915 PC 59 (63): 39 Bom 625: 42 Ind App 229: 30 Ind Cas 303 (PC), *Secy. of State* v. *Bai Rajbai.* (First patta expressly providing that there would be no right of renewal — Subsequent pattas not containing this provision—This alone is not sufficient to imply that a right of renewal was conferred.)

7. ('15) 2 AIR 1915 PC 59 (63): 39 Bom 625: 42 Ind App 229: 30 Ind Cas 303 (PC), *Secy. of State* v. *Bai Rajbai.*

8. ('12) 17 Ind Cas 180 (182) (DB) (Cal), *Secy. of State* v. *Forbes.*

9. ('21) 8 AIR 1921 Mad 541 (541, 542): 44 Mad 230: 60 Ind Cas 591 (DB), *Pichi Naidu* v. *Jafferson.*
('07) 30 Mad 300 (303): 17 Mad L Jour 189 (DB), *Gopalan Nair* v. *Kunhan Menon.*
[*See also* ('38) 25 AIR 1938 Cal 724 (727) (DB), *Prodyot Coomar* v. *Maynuddin Mia.* (In the circumstances of the case the meaning of the renewal clause was held to be that the tenant was entitled to such a renewal clause in all succeeding leases as a substantive part of the conditions of the tenancy.)]

10. (1914) 2 Ch 705 (712): 84 L J Ch 203: 111 L T 1016, *Wynn* v. *Conway Corporation.*

11. ('38) 25 AIR 1938 Cal 724 (726) (DB), *Prodyot Coomar* v. *Maynuddin Mia.*
[*See* ('33) 20 AIR 1933 Mad 852 (853): 147 Ind Cas 735, *Raman* v. *Karunakara.* (In this case it was pointed out that though in such cases, the lease may not be strictly in perpetuity the grantee by exercising his option may enjoy the property permanently.)]

A covenant for perpetual renewal being a serious derogation from the rights of the landlord must be strictly proved. There must be unequivocal and unambiguous ground for holding that a lease contains such a convenant. Otherwise such a covenant cannot be held to exist.[12]

A covenant for renewal contained in a lease may be specifically enforced as any other contract for the transfer of immovable property, and the principles and considerations applicable in both cases would be the same. The undermentioned are illustrative cases.[13]

It has been held that a covenant for renewal does not operate as a present demise but is a mere contract which can be given effect to, by enforcing specific performance only, in case of refusal to perform it by the lessor; and as the contract of lease and the covenant for renewal are two separate contracts the ratification of the lease does not necessarily amount to a ratification of the covenant for renewal.[13a]

An agreement to renew a lease may be a term in the lease itself or it may form a separate contract subsequently entered into between the parties. In the former case, it would be a covenant running with the land enforceable both by the original lessee and the assignees of the lease. (See Note 36). But in the latter case it would be merely a 'personal' right of the lessee with

12. (1944) 1944 Ch 328: (1944) 1 All ER 670: 113 L J Ch 223, *Green* v. *Palmer*.
[By an agreement in writing the owner of a furnished house let it to a tenant at a weekly rent for six months certain with an option to the tenant to continue the tenancy at the expiration of the term on the same terms & conditions "including this clause" on giving notice in writing. The tenant twice renewed the tenancy & then held over, claiming a right of perpetual renewal:—*Held:* under the agreement the tenant was entitled on exercising the option contained in the original tenancy agreement to a tenancy for six months with a right to renew for one further period of six months & no more.]
('39) 26 AIR 1939 Cal 77 (78): 179 Ind Cas 813, *Srish Chandra* v. *Doa Mahammad*. (The leanings of Court are always against perpetual renewals.)
('37) 24 AIR 1937 All 328 (331): 169 Ind Cas 145 (DB), *Sewak Ram* v. *Municipal Board, Meerut*.
('07) 30 Mad 300 (303): 17 Mad L Jour 189 (DB), *Gapalan Nair* v. *Kunhan Menon*.
('12) 17 Ind Cas 180 (183) (DB) (Cal), *Secy. of State* v. *Forbes*.
('15) 2 AIR 1915 P C 59 (62, 63): 39 Bom 625: 42 Ind App 229: 30 Ind Cas 303 (PC), *Secy. of State* v. *Bai Rajbai*.

13. ('29) 16 AIR 1929 Cal 50 (55): 55 Cal 841: 109 Ind Cas 298 (DB), *Mahendra Nath* v. *Kailash Nath*. (The right of renewal is a privilege granted to the lessee and therefore the renewal can only be of the contract as made. For example, if the contract is made with tenants, one of them cannot enforce the contract, or where the position of the parties changes, the renewal cannot be enforced.)
('27) 14 AIR 1927 Mad 513 (521): 50 Mad 595: 102 Ind Cas 246 (DB), *Secy. of State* v. *Volkart Bros.* (Covenant for renewal in a lease for 99 years "upon such terms and conditions as shall be judged reasonable" held not too vague to be enforced.)
('24) 11 AIR 1924 Cal 346 (347, 348): 69 Ind Cas 600, *Nava Kishore Das* v. *Madan Mohan Das*. (Covenant in lease for term for renewal at lessee's option—Covenant vague and uncertain as to rent—Specific performance refused.)
('28) 15 AIR 1928 PC 258 (260): 51 Mad 885: 55 Ind App 423: 111 Ind Cas 404 (PC), *Secy. of State* v. *Volkart Bros*. (A lease of land provided among other things, "this lease shall and may be renewed for a further term of 99 years upon such terms and conditions as shall be deemed reasonable." Before expiry of the term the lessees transferred their interest in a portion of the property and after expiry claimed renewal in virtue of the above clause—*Held* on construction that the covenant only applied to the premises as a whole, and that since lessees lost interest in a portion of the property, the circumstances did not justify a renewal of the lease. AIR 1927 Mad 513: 50 Mad 595 reversed.)
('25) 12 AIR 1925 Nag 281 (283): 23 Nag L R 26: 89 Ind Cas 273, *Onkar Prasad* v. *Badri Das*. (Where a lease contains a condition that renewal of the lease would be dependent upon the performance of certain covenants during the terms of the lease that condition is deemed to have been satisfied if there is no subsisting breach at the time renewal is applied for, although there may have been breaches of covenants during the term of the lease which have been impliedly condoned by the lessor.)

13a. ('29) 16 AIR 1929 Cal 50 (54, 55): 55 Cal 841: 109 Ind Cas 298 (DB), *Mahendra Nath* v. *Kailash Nath*.

whom the contract is made and would not be enforceable by the assignees of the lease.

'Stamp'.—In the case cited below,[14] it was held that a lease containing a clause for renewal was not an instrument comprising two distinct matters for the purpose of stamp duty.

36. Covenant for renewal — Enforceability against assignee from lessor or lessee. — A covenant for renewal contained in a lease is what is known as a covenant running with the land.[1] The burden and benefit of such a covenant passes with the estate of the covenator and the covenantee. (see Note 25 on S. 40.) Hence, such a covenant is binding on any person, in whom the property is vested for the time being. Such a covenant is, therefore, enforceable against the transferees of the property from the lessor. The question whether the transfer was for consideration or not, or whether the transferee had notice of the covenant or not, is immaterial in such cases.[2]

But a covenant for renewal contained in a lease granted by a person with a limited interest will not bind the persons who would take the estate by succession after the expiry of such an interest. Thus, a covenant for renewal contained in a lease granted by a Hindu widow will not bind the reversioners succeeding to the estate after her death.[3]

On the principle referred to above, a covenant for renewal contained in a lease can be enforced by any person in whom the *leasehold* estate is vested for the time being. Thus, the assignee of a lease can enforce such a covenant.[4]

The covenant can also be enforced *against* such an assignee.

Where a lessee holds over after the expiry of the original term with the assent of the lessor and the tenancy is *renewed* under S. 116 from month to month or year to year as the case may be, the lessee has a transferable interest in the property. If he is entitled to an option of renewal of the original lease such option also will pass to an assignee of his interest.[5] It must be noted that in such a case there is no 'distinct' and separate lease formed by the holding over under S. 116.[6] The effect of such holding over is to 'renew' the old lease on different terms as to the period of the lease.

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14. ('02) 25 Mad 3 (5, 6) (FB), *Reference under Stamp Act, S. 57.*

S. 105—NOTE 36

1. See Note 1 on S. 40 for a discussion of the subject of covenants running with the land. Note 25 on that section deals specially with covenants between landlord and tenant.
('27) 14 AIR 1927 Mad 513 (521, 522): 50 Mad 595: 102 Ind Cas 246 (DB), *Secy. of State* v. *Volkart Bros.* (It is apportionable.)
('21) 8 AIR 1921 Mad 541 (541): 44 Mad 230: 60 Ind Cas 591 (DB), *Pichi Naidu* v. *Jafferson.* (It is not subject to any rule against perpetuities.)
('02) 25 Mad 3 (6) (FB), *Reference under Stamp Act, S.* 57.
2. It would be useful to note in this connexion that an obligation attached to the ownership of immovable property would not bind transferees for consideration without notice of the property.
3. ('37) 24 AIR 1937 All 328 (331): 169 I. C. 145 (DB), *Sewak Ram* v. *Municipal Board, Meerut.*
4. ('12) 17 Ind Cas 180 (183) (DB) (Cal), *Secy. of State* v. *Forbes.* (Option of renewal may be exercised not only by lessee personally but also by his representative in interest, e. g., his trustee in bankruptcy.)
('24) 11 AIR 1924 Cal 346 (347): 69 Ind Cas 600, *Nava Kishore Das* v. *Madan Mohan Das.*
('25) 12 AIR 1925 Nag 281 (283): 23 Nag L R 26: 89 Ind Cas 273, *Onkarprasad* v. *Badri Prasad.*
('27) 14 AIR 1927 Cal 100 (102): 91 Ind Cas 501 (DB), *BenoyKrishna* v. *Fanindra Nath.*
('63) 9 Moo Ind App 431 (445) (PC), *Prannath Chowdry* v. *Surnomoyee Dasee.*
5. ('27) 14 AIR 1927 Cal 725 (730): 54 Cal 813: 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath.*
6. ('27) 14 AIR 1927 Cal 725 (729): 54 Cal 813: 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath.* (Section 116 must be regarded as supplemental to and in qualification of cl. (a) of S. 111 which states that a lease determines by the effilux of the time limited thereby.)

Such a 'renewal' implies that the lease is the 'same'. The covenant for renewal, therefore, 'continues' to be an incident of the lessee's interest in such a case, even after the expiry of the original term. The assignee in such a case gets therefore the 'very' lease which contained the covenant for renewal. But if the tenancy formed after the expiry of the original term is not a 'renewal' of the original lease but a 'fresh' and distinct tenancy the covenant for renewal contained in the original lease would not be an incident of such a 'fresh' tenancy and the assignee of such a tenancy would not be entitled to enforce such a covenant.

A mortgagee is not an 'assignee' of the lease.[7] Because, the whole of the leasehold estate is not transferred to the mortgagee. It is only an interest in the leasehold estate that is transferred to the mortgagee. But this rule does not apply to an 'English' mortgage. In such a case, the property is transferred 'absolutely' to the mortgagee. The mortgagor has only a right to a re-transfer of the property on the discharge of the mortgage. (See S. 58.) Hence, an 'English' mortgagee would be an assignee of the lease[8] entitled to enforce a covenant for renewal.

But it has been held that 'specific performance' of a covenant for renewal ought not to be enforced even against an 'English' mortgagee of the interest of a lessee holding over after expiry of the original term.[9] The reason given is that specific performance is an 'equitable' remedy, and that there is no 'equity' in compelling a 'mortgagee' to perfect his title so as to become legally liable for rent to the lessor.

An 'independent' contract (not forming a covenant contained in a lease) for the renewal of a lease will not run with the land. Such a contract will only give rise to an obligation attached to the ownership of immovable property. Under S. 40, such an obligation will not be enforceable against transferees of the property for consideration 'without' notice of the contract.[10] Such a contract will bind only 'gratuitous' transferees and transferees for consideration 'with notice' of the contract.[11]

37. Lessee holding over after expiration of lease — General. — On the determination of a lease, the lessee's right of possession of the property comes to an end. He has not even a 'personal' right of possession not amounting to an interest in the property. Nor is his possession 'ipso facto permissive'. Hence in such cases, the lessee is not even in the position of a 'licensee'. His possession is, therefore, wrongful.[1] (As to whether and to what extent it can be adverse, see Note 80.) In legal parlance he is known as a tenant by sufferance.[2] Thus, the expression tenant by sufferance does

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7. ('27) 14 AIR 1927 Cal 100 (102): 91 Ind Cas 501 (DB), *Benoy Krishna* v. *Fanindra Nath.*
   ('27) 14 AIR 1927 Cal 725 (729 to 733): 54 Cal 813: 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath.*
8. ('27) 14 AIR 1937 Cal 725 (729): 54 Cal 813: 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath.*
9. ('27) 14 AIR 1927 Cal 725 (729): 54 Cal 813: 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath.*
10. ('02) 25 Mad 3 (6) (FB), *Reference under Stamp Act, S.* 57.
11. *See* ('32) 19 AIR 1932 Mad 305 (307): 55 Mad 519: 138 Ind Cas 78 (DB), *Valia Kalyani* v. *Krishnan.* (Case relating to kanom in Malabar.)

S 105—NOTE 37

1. See S. 116, Note 13.
   [But see ('30) 17 AIR 1930 All 177 (179): 122 Ind Cas 865 (DB), *Onkar Prasad* v. *Dhani Ram.*]
2. ('98) 22 Bom 893 (898) (DB), *Kantheppa Reddi* v. *Sheshappa.*
   ('33) 20 AIR 1933 All 756 (758): 146 Ind Cas 762 (DB), *Kundan Lal* v. *Deepchand.*
   (1900) 2 Bom L R 93 (104) (DB), *Raghunath* v. *Lakshman.*
   ('28) 112 Ind Cas 651 (652) (Lah), *Muhammad Budha* v. *Ghulam Qadir.*
   ('10) 37 Cal 674 (678): 6 Ind Cas 339 (340) (DB), *Ramchandra Singh* v. *Bhikambar Singh.*
   [*See also* ('42) 29 AIR 1942 Cal 341 (341): 200 Ind Cas 660 (DB), *Mozam Shaikh* v. *Annada Prasad.* (Tenancy by sufferance is merely a fiction to avoid continuance in possession operating as a trespass—It cannot be created by contract and arises by implication of law when a person who

not imply any 'existing' tenancy.[3] It refers to an ex-tenant continuing in possession without any right to do so and without any positive permission from the lessor after the determination of his tenancy. His position is different from that of a tenant at will. In the latter case, there is a 'subsisting' tenancy. It follows from the above that a tenant by sufferance can be sued in ejectment by the lessor without there being any notice to quit or even a demand of possession before the suit.[4] But as seen in Note 32 a suit for ejectment cannot be brought by the lessor against a 'tenant at will' without first determining the tenancy by notice to quit or demand of possession.

A tenant by sufferance cannot, however, be dispossessed by the landlord otherwise than in due course of law.[5] If he is so dispossessed, he can sue for possession against the lessor under S. 9 of the Specific Relief Act.[5a]

A lessee holding over after the expiry of his term without the lessor's assent has a right to the property which is good as against the whole world except the true owner. This is based on the general principle that possession itself constitutes a good title except against the true owner.[6]

If the landlord assents to the tenant continuing in possession after the expiry of a lease, the lease is renewed from year to year or month under S. 116 according to the purpose of the tenancy. The assent of the lanlord may be express or implied. (See Note 38.)

Even where the lease provides for 'damages' by way of enhanced rent

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has been in possession under a lawful title continues in possession after that title has determined without the consent of the person entitled.)]

3. (1900) 24 Bom 504 (508): 2 Bom L R 491 (DB), *Chandri* v. *Daji Bhau*. (Tenant by sufferance is only in by the laches of the owner and so there is no privity between them.)
('09) 31 All 514 (517): 3 Ind Cas 566 (567) (DB), *Pusa Mal* v. *Makdum Baksh*. (No privity.)
[*See* ('10) 33 Mad 260 (262): 4 Ind Cas 1080 (1080, 1081) (DB), *Subraveti Ramiah* v. *Gundala Ramanni*. (It seems doubtful whether the fiction of a tenancy by sufferance should be kept up after the Transfer of Property Act, according to which a lease is determined by effilux of the time limited thereby.)]

4. ('49) 36 AIR 1949 Nag 282 (284): ILR (1948) Nag 922 (DB), *Hasanali* v. *Dara Shah*.
('33) 20 AIR 1933 All 756 (758): 146 Ind Cas 762 (DB), *Kundan Lal* v. *Deepchand*.
('98) 22 Bom 893 (898) (DB), *Kantheppa* v. *Sheshappa*.
('18) 5 AIR 1918 Cal 601 (602): 45 Ind Cas 317 (DB), *Gobindi Chandra* v. *Nanda Dulal*.
(1900) 2 Bom L R (104) (DB), *Raghunath* v. *Lakshman*.
('21) 8 AIR 1921 Cal 574 (575): 64 Ind Cas 824 (DB), *Guruprosanna* v. *Madhusudan*.
('23) 10 AIR 1923 Pat 130 (131): 2 Pat 171: 70 Ind Cas 290 (DB), *Raghubir Singh* v. *Jethu Mahton*.
('12) 13 Ind Cas 59 (60) (All), *Gokul Chand* v. *Shib Charan*.
('36) 164 Ind Cas 837 (840) (Cal), *Chandi Charan* v. *Ashutosh Lahiri*.
(1840) 7 M & W 226 (234, 235): 151 E R 749, *Deo d. Bennett* v. *Turner*.
('09) 31 All 514 (517): 3 Ind Cas 566 (567) (DB), *Pusa Mul* v. *Makdum Baksh*.
('75) 24 Suth W R 172 (173), *Radha Kishore* v. *Sittoo Sirdar*.
Also see S. 106, Note 3 and S. 116, Note 13.

5. ('68) 9 Suth W R 123 (124) (DB), *Sofaoll Khan* v. *Woopean Khan*. (Dispossession by subsequent lessee.)
('05) 29 Bom 213 (216): 7 Bom L R 12 (DB), *Rudrappa* v. *Narsingrao*.
[See however (1891) 1 Q B 730 (732, 733): 60 L J Q B 464: 64 L T 538: 39 W R (Eng) 510, *Jones* v. *Foley*. (After the termination of the tenancy the tenant must give up—The lanlord is entitled to enter on the premises and pull down the building and if it unavoidably causes damage to tenant's furniture the landlord is not liable—This does not amount to forcible entry which the landlord is not entitled to do except under a warrant. NOTE.—This decision shows that under English law if *force* is not used the dispossession need not be in due course of law.)]

5a. ('05) 29 Bom 213 (216): 7 Bom L R 12 (DB), *Rudrappa* v. *Narsingrao*.
('19) 6 AIR 1919 Bom 97 (98, 99): 43 Bom 531: 51 I. C. 193 (DB), *Gulam Mahomed* v. *Emperor*.
Also see S. 108 (q), Note 1 and S. 116, Note 13.

6. ('67) 8 Suth W R 386 (390) (DB), *Khajah Enaetoollah* v. *Kishen Soondur*.
See also A.I.R. Commentaries on the *Limitation Act*, 2nd (1942) Edn., Art. 3, Note 5 and Arts. 142 & 144, Note 4.

till the date of vacating the property, if the lessee should continue in possession after the expiration of the term, there would be no subsisting relationship of 'landlord and tenant' between the parties after such expiration.[7] Similarly, under English law a contract of tenancy would seem to imply a contract to pay rent till the date of giving up possession of the property, if the lessee should continue in possession after the expiration of the lease.[8] But even this does not necessarily import the continuation of the relationship of landlord and tenant between the parties after the term.[9]

But where by usage, although a lease may be executed nominally for certain period, a term is 'implied' that the lessee and his representatives should be entitled to continue in possession even after the expiry of such period, the lessee or his representative so continuing in possession will not be a tenant by sufferance. It is this principle which underlies the observations of Sadasiva Iyer, J., in the case noted below.[10] In that case he pointed out the inappropriateness of treating as a mere trespasser an agricultural tenant in the Madras Presidency holding over after the expiry of alleged term of his lease. (See also Note 29.)

The term tenant by sufferance has also been applied to the 'heirs' of a life-tenant who continue in possession after the death of such tenant.[11] In the undermentioned case [12] the right in question was held to be 'licence' and it was remarked that if it was a 'tenure' of any sort, it was a tenancy by sufferance. But as seen already, a licence imports a permission of the owner while a tenancy by sufferance does not import such a permission.

In 'Adimulam v. Pir Ravuthan'[13] the Madras High Court held that a tenancy by sufferance was a form of tenancy and that it required to be determined before the lessee could be sued in ejectment. This view is not correct and is not good law.

Topham in his 'New Law of Property,' 4th Edn., 1932, classes a tenancy by sufferance as a form of 'leasehold' interest. He calls it the smallest estate known to the law, though he says the landlord can turn such a tenant out of possession by an action of ejectment without giving him notice. Topham also points out that a tenancy by sufferance is not a 'legal' estate under the English law. Topham's classification may be understood in the following light. Although the possession of a tenant by sufferance is 'wrongful,' he has a good title except against the 'owner' of the property. In this sense, there does not seem to be anything wrong in referring to a tenant by sufferance as having an 'estate' in the land. But it is not clear how a tenancy by sufferance can be said to be a form of 'leasehold' interest, seeing that there is no privity between the parties in such a case. It is clear that the mere fact that the lessor 'suffers' the tenant to continue in possession is not sufficient to create a 'leasehold' interest in the legal sense of the term. But a similar objection may be taken also to the use of the words "tenant" and "tenancy" to describe the position of a tenant who holds over after the

7. ('34) 21 AIR 1934 Lah 129 (130): 149 Ind Cas 948 (DB), *Kirat Singh* v. *Bhai Kalu.*
8. *See* ('17) 4 AIR 1917 Mad 901 (902): 39 Mad 54: 33 Ind Cas 705 (DB), *Madar Sahib* v. *Kader Moideen.*
9. *See* ('10) 33 Mad 260 (262): 4 Ond Cas 1080 (1080, 1081) (DB), *Subraveti Ramiah* v. *Gundala Ramanni.* (Tenancy by sufferance in England does not interrupt the running of time against the lessor.)
10. ('15) 2 AIR 1915 Mad 345 (348): 25 Ind Cas 109 (DB), *Ganapathi Mudali* v. *Venkatalakshmi Narasayya.*
11. ('10) 37 Cal 674 (678): 6 Ind Cas 339 (340) (DB), *Ramchandra Singh* v. *Bhikambar Singh.*

    ('24) 11 AIR 1924 Pat 572 (575): 3 Pat 534: 78 Ind Cas 511 (DB), *Hari Gir* v. *Kumar Kamakhya.*
12. ('18) 5 AIR 1918 Cal 601 (602): 45 Ind Cas 317 (DB), *Gobinda Chandra* v. *Nanda Dulal.* (*Doe d. Knight* v. *Quigley,* (1810) 11 R R 780 referred to.)
13. ('85) 8 Mad 424 (426, 427): 9 Ind Jur 309 (DB).

expiry of his lease without the assent of his landlord. It only seems to be a case of a loose use of terms adopted for the sake of convenience where such loose use is not likely to create any confusion.

It has been held that a tenancy by sufferance, assuming that it is an 'interest' in property, terminates on the death of the tenant[14] or on transfer by him.[15]

There is no substantial difference between a tenant by sufferance and a trespasser, as he is sometimes called.[36] But a tenant by sufferance enters by lawful demise or title though he afterwards wrongfully continues in possession. But a trespasser's entry on the property is itself wrongful.

38. Lessee holding over after expiration of lease — Lessor's assent.— Under S. 116, if a lessee continues to hold possession of the property after the determination of the lease and the lessor by acceptance of rent from him, or otherwise, assents to his doing so, the lease is renewed from year to year or from month to month according to the purpose of the tenancy. But apart from the provisions of S. 116 the payment and acceptance of rent may give rise by implication to a fresh tenancy between the parties after the expiry of the original one. Such a tenancy also would, in the absence of a contract, local law or usage to the contrary, be deemed under S. 106 to be one from year to year or month to month.[1] But there is one important difference between a tenancy renewed under S. 116 (or under the principle thereof, where such principle is applicable) and a fresh tenancy created between the parties. In the former case, the tenancy continues to be the same.[2] But in the latter case the tenancy is not the same as the original one but a distinct and separate one. In the undermentioned case[2a] the lease deed provided for the lessee building a house for the purpose of a shop on the land and carrying on business and paying rent every year to the lessor. There was a further provision that if rent was not paid in any year the lessor would be entitled to recover khas possession of the land. The lessee failed to pay rent and the lessor instead of recovering possession under the provisions of the lease deed,

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14. ('98) 22 Bom 893 (898) (DB), *Kantheppa Raddi* v. *Sheshappa.*
('85) 8 Mad 424 (427): 9 Ind Jur 309 (DB), *Adimulam* v. *Pir Ravuthan.*

15. ('85) 8 Mad 424 (426, 427): 9 Ind Jur 309 (DB), *Adimulam* v. *Pir Ravuthan.*

16. ('09) 31 All 514 (517): 3 Ind Cas 566 (567) (DB), *Pusa Mal* v. *Makdum Baksh.*
('15) 2 AIR 1915 Low Bur 47 (48): 8 Low Bur Rul 270: 30 Ind Cas 753, *Maung Po Shin* v. *Mohamed Thambi.*
('98) 22 Bom 893 (898) (DB), *Kantheppa Raddi* v. *Sheshappa.* (*Roe v. Ward*, 1 H Bl 96 followed.)

S 105—NOTE 38

1. ('98) 22 Bom 893 (898) (DB), *Kantheppa Raddi* v. *Sheshappa.*
('24) 11 AIR 1924 Pat 560 (563): 3 Pat 403: 83 Ind Cas 741 (DB), *Tekait Harnarayan Singh* v. *Darshan Deo.*
('28) 112 Ind Cas 651 (652) (Lah), *Muhammad Budha* v. *Ghulam Quadir.* (Transfer of Property Act not applicable but principle of S. 116 applied.)
('11) 9 Ind Cas 141 (146) (DB) (Mad), *Sullee Abhoyee* v. *Krishna Rao.*
('27) 14 AIR 1927 Cal 725 (730): 54 Cal 813: 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath Roy.* (Tenancy renewed under S. 116—Tenant has an assignable interest in land and assignee is liable for rent.)
('15) 2 AIR 1915 Cal 64 (65): 24 Ind Cas 183 (DB), *Durgi Nikarini* v. *Gobardhan.* (Section 116 held inapplicable.
('10) 6 Ind Cas 339 (340) (DB) (Cal), *Ram Chandra Singh* v. *Bhikambar Singh.* (Lease for life—Death of lessee—Lessee's heirs continuing in possession thereafter.)
('70) 14 Suth W R 262 (265) (DB), *Lekhraj Roy* v. *Kanhaya Singh.* (Lease for life —Lessee's heirs continuing in possession after lessee's death.)
[*See* ('83) 9 Cal 908 (912): 13 Cal L R 69 (DB), *Surnomoyee* v. *Deonath Gir.* (But when the ex-tenant is not in exclusive possession but there is a scramble for possession the above principles will not apply.)]

2. ('27) 14 AIR 1927 Cal 725 (729): 54 Cal 813: 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath Roy.*
[*See also* ('66) 3 Bom H C R (A C) 27 (30) (DB), *Sayaji* v. *Umaji.* (Lessee alllowed to continue as yearly tenant—He holds on terms contained in the expired lease.)]

2a. ('25) 90 Ind Cas 832 (833) (DB) (Cal), *Chandra Kumar Shah* v. *Mafizar Rahman*

obtained a rent decree and in execution brought the property to sale. The property was purchased in auction by a third person. In a suit brought by the lessor against the third person for ejectment on the ground that the tenancy was a tenancy at will and was determined by a proper notice to qult, ¡it was held that the lease was a lease for life of the lessee subject to its determination if he failed to pay rent in any year; that when the original lessee failed to pay rent the lessor could have recovered possession; but as he did not do so and caused the property to be sold, the effect of the auction sale coupled with receipt of rent from the auction-purchaser was to create in him a tenancy in the terms of the original lease, that is to say, during the life of the original lessee determinable on the grounds mentioned in the lease.

Whether, the tenancy by sufferance by the tenant continuing in possession after the expiry of a tenancy is converted into a tenancy in the legal sense of the term by renewal or otherwise, depends on the facts and circumstances of each case.[3] But slight evidence would be sufficient for this purpose.[4]

Where after the expiry of a tenancy, a fresh lease-deed is executed but it is inadmissible in evidence owing to want of registration, the tenant can fall back upon the tenancy formed or renewed by payment and acceptance of rent and would not be without title.[5]

39. Lessee holding over after expiration of lease — Renewal clause in lease, effect of. — As seen in Note 35, a covenant for renewal contained in a lease does not, by itself, extend the term of the lease, but only entitles the lessee to obtain a fresh lease. Hence, if the lessee continues in possession after the expiration of the original lease, he will not be entitled to any 'interest' in the property merely by virtue of the covenant for renewal. If the lessor assents to such holding over by the lessee, the lease will be renewed from year to year or month to month under S. 116 or a 'fresh' tenancy of a similar kind may be created by implication from payment and acceptance of rent. (See Note 38.)

Apart from this, if the lessor sues for the ejectment of the lessee before the expiration of the period for which renewal has been promised, the lessee may be entitled to resist such a suit on various equitable grounds, such as the principle of part performance, the doctrine of 'Walsh v. Lonsdale,'[1] etc. In such cases, the position of the lessee will be no higher than that of a person who is in possession of immovable property under a contract for the transfer of such property. As seen in Note 4 such a contract does not 'ipso facto'

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3. ('25) 12 AIR 1925 Pat 499 (500): 88 Ind Cas 483 (DB), *Kumar Kamekhya Narain Singh* v. *Bechu Singh*. (Marfatdari receipts given for rent—*Held*, no tenancy was created.)
('26) 13 AIR 1926 Cal 952 (953): 95 Ind Cas 101 (DB), *Sadananda* v. *Jyotish Kanta*. (Where rent receipts are granted with the word 'marfatdar' it is not conclusive that there was no recognition by the landlord of the person who pays the rent as a tenant as per Jenkins, C. J,, in 20 Ind Cas 664.)
('25) 12 AIR 1925 Pat 216 (221): 4 Pat 139: 84 Ind Cas 586 (DB), *Ram Rachhya* v. *Kamakhya Narain*. (Where the assignees of an istumrari mokurari lessee are in possession of the property after the death of the lessee, mere receipt of rent by the landlord would not make the assignees tenants from year to year—In order to make them tenants from year to year the rent must have beeen padid and received upon the understanding that they were so.)
('08) 7 Cal L Jour 90 (94, 95) (DB), *Syed Mahammad Khan* v. *Maharaja Nam Narain Singh Bahadur*. (Grant for life—Receipts of rent in ignorance of grantee's death do not constitute recognition of the heirs as the tenant on the part of the—grantor—No notice to quit is necessary.)
4. ('98) 22 Bom 893 (898) (DB), *Kantheppa Raddi* v. *Sheshappa*.
[*See* ('88) 11 Mad 77 (80), *Thiagaraja* v. *Giyana Sambandha Pandara Sannadhi*. (Whenever a tenant or raiyat gets possession of land for one year and continues in possession at the expiration of that year, he is *prima facie* held to so continue on the terms of that lease.)]
5. ('17) 4 AIR 1917 Mad 735 (736): 34 Ind Cas 6 (DB), *Govindswamy* v. *Ramaswami*.

S. 105—NOTE 39

1. (1882) 21 Ch D 9 (15): 52 L J Ch 2: 46 L T 858: 31 W R (Eng) 109.

constitute a good defence to a suit for ejectment against the intended transferee. For an account of the development of the law regarding the equitable grounds mentioned above, reference may be made to S. 53A and the Notes thereon.

Under the principles discussed in those Notes, the lessee in such cases will not be entitled to rely on the 'English' doctrine of part performance, such doctrine having been held inapplicable to India. He will, however, be entitled to rely on the principle of that doctrine 'as embodied' in S. 53A, if the conditions required by that section are present. In cases in which specific performance of the covenant can be enforced, the lessee can obtain a stay of the suit for ejectment and sue for specific performance, on the principle laid down in 'Ariff v. Jadunath.[2] But it must be noted that the doctrine of 'Walsh v. Lonsdale[3] under which the lessee would be entitled to an equitable 'estate' in the property, if the contract for the grant of a lease is specifically enforceable, does not apply to India. (See Note 3 on section 53A.)

Where, for any reason the lessee is not entitled to rely on the above-mentioned grounds of defence, but the tenancy has been renewed from year to year or month to month under S. 116 (or a fresh tenancy of a similar nature has been formed) the lessee can rely on his rights under such tenancy.[4]

As regards the case-law on the subject, some decisions simply hold that a covenant for renewal would be a good defence to a suit for ejectment by the lessor in such cases.[5] With regard to such decisions the caution is necessary that a covenant for renewal will not be a good defence, if specific performance is not enforceable at the date of the suit.

In 'Jardine Skinner and Co. v. Rani Surut Soondari Debi[6] the Privy Council expressed the view that if the lessor sought to turn out the lessee before the expiry of the period for which renewal has been promised, the lessee can 'compel' him to renew the lease according to the covenant. This clearly implies that the covenant for renewal must be capable of being specifically enforceable at the time of the suit, if it should be available as a defence to the suit for ejectment by the lessor. Their Lordships have clearly pointed out that the lessee does not get any 'interest' in the property merely by virtue of the clause for renewal. This is also the view which accords with the latest decisions of the Privy Council. (See Note 3 on S. 53A.) See also the undermentioned cases[7] which proceed on the same basis.

Some decisions speak of the lessee in such cases as having an 'estate' in the property.[8] Others hold that the lessee is in the same position 'as if the

2. *('31) 18 AIR 1931 P C 79 (82): 58 Ind App 91: 58 Cal 1235: 131 Ind Cas 762 (PC).

3. (1882) 21 Ch D 9 (15): 52 L J Ch 2: 46 L T 858: 31 W R (Eng) 109.

4. ('23) 10 AIR 1923 Cal 130 (134): 69 Ind Cas 707 (DB), *Gajendra Nath* v. *Ashraf Hossain.*
('27) 14 AIR 1927 Cal 725 (730): 54 Cal 813: 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath Roy.*

5. ('12) 13 Ind Cas 364 (365) (DB) (Cal), *Abdul Karim* v. *Abdul Rahman.*
('23) 10 AIR 1923 Pat 236 (237, 238): 84 Ind Cas 536 (DB), *Mohit Narayan Jha* v. *Kamal Nath.*

6. ('77-78) 3 Ind App 164 (168): 3 Cal L R 140 (PC).

7. ('37) 24 AIR 1937 All 328 (332): 169 Ind Cas 145 (DB). *Sewak Ram* v. *Municipal Board, Meerut.*
('32) 19 AIR 1932 Mad 305 (307): 55 Mad 519: 138 Ind Cas 78 (DB), *Valiya Kalyani* v. *Krishnan.* (Case relating to subsequent agreement for renewal.)
('26) 13 AIR 1926 Cal 1065 (1067): 53 Cal 590: 95 Ind Cas 831 (DB), *Jogesh Chandra* v. *Annada Charan.* (5 Ind App 164 (P C) followed.)

8. ('31) 81 AIR 1931 Bom 178 (181): 130 Ind Cas 598 (DB), *Indian Cotton Co. Ltd.* v. *Raghunath.*
('27) 14 AIR 1927 Cal 725 (730): 54 Cal 813: 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath Roy.*

promised renewal has been made."[9] Such decisions obviously proceed on the applicability of the doctrine of 'Walsh v. Lonsdale[10] to India—a view which is not correct. (See Section 53A, Note 3.)

Where a lessee has been allowed to be in possession of the property for the full term for which renewal had been promised, he cannot thereafter rely on the covenant for renewal in defence to the suit for ejectment by the lessor,[11] because in such a case, there would be no equity in his favour and the covenant for renewal would not be specifically enforceable.

Where a lessee holds over after the expiry of his term and the landlord assents to his doing so, the effect is not to renew the lease for the 'full period' provided for under the covenant for renewal but only from year to year or from month to month according to the purpose of the tenancy.[12] Where a lease is thus 'renewed' from year to year or month to month, the lease so renewed is only a continuation of the original lease and not a distinct lease.[13] Hence, the covenant for renewal which forms part of the original lease constitutes also a part of the renewed lease, and an assignee of such lease can enforce the covenant. (See Note 36.)

40. Lessee holding over after expiry of lease — Basis of liability for compensation. — As seen in Note 37 where a lessee holds over after a lease has expired, and the landlord has not assented to such holding over, the lessee's possession is 'wrongful.' Hence, he is liable for mesne profits from the date of the determination of the lease.[1] He will not be liable for 'rent' as there is no subsisting relationship of landlord and tenant between the parties. Nor will he be liable for damages for 'use and occupation'[2] as his continuing in possession is not with the 'permission' of the landlord. (See Note 70.) His liability for compensation is 'ex delicto' i. e., based on his liability for a 'tort' whereas a claim for use and occupation is one arising 'ex contractu,' i. e., based on a contract (implied by law).[3]

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9. ('23) 10 AIR 1923 Pat 236 (238): 84 Ind Cas 536 (DB), *Mohit Narayan Jha* v. *Kamal Nath Jha.*
('21) 8 AIR 1921 Cal 574 (575): 64 Ind Cas 824 (DB), *Guru Prosanna Bhattacharjee* v. *Madhusudan.*
('12) 17 Ind Cas 180 (184) (DB) (Cal), *Secretary of State* v. *Forbes.*

10. (1882) 21 Ch D 9 (15): 52 L J Ch 2: 46 L T 858: 31 W R (Eng) 109.

11. ('78) 5 Ind App 164 (169): 3 Cal L R 140 (PC), *Jardine Skinner* v. *Rani Surut Soondari Debi.*
('26) 13 AIR 1926 Cal 1065 (1067): 53 Cal 590: 95 Ind Cas 831 (DB), *Jogesh Chandra* v. *Annada.*

12. ('27) 14 AIR 1927 Cal 725 (729): 54 Cal 813: 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath Roy.*

13. ('27) 14 AIR 1927 Cal 725 (729): 54 Cal 813: 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath Roy.*

S. 105—NOTE 40

1. ('23) 10 AIR 1923 Bom 398 (398): 73 Ind Cas 442 (DB), *Ghulam Mohiuddin* v. *Dayabhai Chimanlal.*
('15) 2 AIR 1915 Low Bur 47 (48): 8 Low Bur Rul 270: 30 Ind Cas 753, *Maung Po Shin* v. *Mohd. Thambi.*

2. ('10) 7 Ind Cas 492 (493) (DB) (Cal), *Kani Lal* v. *Netai Chand.*
('15) 2 AIR 1915 Low Bur 47 (48): 8 Low Bur Rul 270: 30 Ind Cas 753, *Maung Po Shin* v. *Mohd. Thambi.*
[But see] ('49) 36 AIR 1949 Nag 282 (284): ILR (1948) Nag 922 (DB), *Hasanali* v. *Dara Shah.*
[NOTE: In this case after holding that the ex-tenant holding over is no better than a trespasses and as such is not liable for *rent*, their Lordships proceed to say that he is only liable for compensation for *use and occupation.* It is submitted that the description of the nature of liability is not correct.]
[See however ('30) 17 AIR 1930 Mad 434 (438, 439): 125 Ind Cas 242, *Saldanha* v. *R. C. Church, Mermajal.* (Lessee entitled to remain in possession after expiration of lease till payment of value of improvements—He is liable not for mesne profits but only for rent at rate fixed under the lease. NOTE.—It will be noted that in such a case the possession of the lessee is not wrongful. He is a licensee. The so called rent in this case is really compensation for use and occupation, the rate at which such compensation is to be paid being the same as the rate of rent under the expired lease.)]

3. ('35) 22 AIR 1935 Mad 307 (308): 157 Ind Cas 246, *Guruyya* v. *Sathiraju.*
('17) 4 AIR 1917 Mad 901 (902): 39 Mad 54: 33 I. C. 705 (DB), *Madar Sahib* v. *Kader Moideen.*

41. Permanent lease. — This section expressly provides that a lease may be granted in perpetuity.[1] Under English law, a permanent lease is not valid.[2] The question whether a lease is a permanent one or not is one of construction depending on the facts and circumstances of each case. Merely because a lease is silent as to its term, it cannot be held to be a permanent lease. In such a case, it will be deemed to be a lease from year to year or month to month under S. 106.[3] Similarly, where the lease is intended to go on 'indefinitely' and no definite term is fixed for the lease, it will be deemed to be a lease for the life of the lessee, and not a permanent lease. (See Note 28.)

This section refers to the creation of a permanent lease by 'act of parties.' But a permanent tenancy can also arise by local usage or Act of the Legislature.[4] Such a tenancy, however, will not be directly governed by the provisions of this Act.

A permanent tenancy can also be acquired by prescription. See Notes 79 to 81.) A landlord may also be 'estopped' from denying the permanent character of a tenancy. (See Note 55.) A permanent lease is liable to forfeiture as any other lease.[5] (See also Note 47.)

42. Permanent lease and creation of absolute estate — Difference. —

('17) 4 AIR 1917 Mad 735 (736, 737): 34 Ind Cas 6 (DB), *Govindaswami Pillai* v. *Ramaswamy Aiyar.*

('99) 26 Cal 338 (347) (SB), *Madhubmoney Dassee* v. *Nundo Lal Gupta.* (To enable the plaintiff to recover upon the footing of use and occupation there must be a tenancy, expressed or implied, there must be evidence of the existence of the relation of landlord and tenant, and of an entry into and occupation of the premises attributable to that tenancy.)

[See however] ('44) 1944 A M L G 21 (22), *Harbilas Sarda* v. *Chand Mal.*

[Suit in ejectment after notice to quit—Suit is not an action in tort but under the T. P. Act—Tenant is liable for use and occupation.]

S. 105—NOTE 41

1. ('10) 33 Mad 253 (254): 5 Ind Cas 437 (437) (DB), *Gangamma* v. *Bommakka.*
2. The following is from Williams and Eastwood, *Principles of the Law of Real Property*, 1933 Edn., page 109: "There is no limit to the number of years for which a lease may be granted: a lease may be made for 99, 100, 1000, or any other number of years; the only requisite on this point is that there be a *definite* period of time fixed in the lease at which the term granted must end; and it is this fixed period of ending which distinguishes a *term* from an estate of freehold."
3. ('78) 3 Cal 696 (699): 1 Cal L R 577 (DB), *Prosunno Coomaree* v. *Sheikh Rutton.* (Occasionally there are local customs by which special terms and incidents are engrafted upon the contract of tenancy; but the existence of the custom in such cases must be a matter of proof and no Judge has a right to act upon such custom unless their existence is duly established.)

[*See* ('02) 25 Mad 507 (512): 12 Mad L Jour 119 (DB), *Sheshamma Shettati* v. *Chickaya Hegade.* (*A* lets *B* into possession of his land as tenant—*B* claiming permanent tenancy but failing to establish the same—The presumption is that *B* is a tenant from year to year.)]

4. *See* ('24) 11 AIR 1924 P C 65 (67): 51 Ind App 83: 47 Mad 337: 82 Ind Cas 226 (PC), *Naina Pillai* v. *Ramanathan.* (Permanent right of occupancy can only be obtained by custom, or by a grant from an owner of the land who happens to have power to grant such a right, or under an Act of the Legislature.)

('10) 6 Ind Cas 632 (632) (Cal), *Singheeram* v. *Bhagbat Chander.* (In this case it was held that the *alleged* custom of permanence was not proved.)

NOTE.—Section 83 para (2) of the Bombay Land Revenue Code provides for a presumption of permanence to be made in respect of ancient tenancies in certain circumstances.

5. †('98) 2 Cal W N 292 (294) (SB), *Monmohini Dassi* v. *Kali Das Ahiri.* (Forfeiture on lessee renouncing his character as lessee by claiming title in himself.)

†('97) 24 Cal 440 (448): 1 Cal W N 321, *Kally Dass Ahiri* v. *Monmohini Dassee.* (Do.)

('83) 9 Cal 908 (912): 13 Cal Cal L R 69 (DB), *Surnomoyee* v. *Denonath Gir.*

('18) 5 AIR 1918 Cal 639 (641): 41 Ind Cas 530 (DB), *Sarda Kripalala* v. *Akhil Chandra.*

('31) 18 AIR 1931 Cal 160 (163): 130 Ind Cas 564 (DB), *Bejoy Chand* v. *Md. Yasin.*

('33) 20 AIR 1933 Oudh 161 (162): 8 Luck 377: 142 Ind Cas 885 (DB), *Bhagwati Prasad* v. *Balgobind.* (Forfeiture clause on non-payment of rent does not affect permanency of tenure.)

Even a permanent lease is only a transfer of the right of 'possession'. The right of 'ownership' or any interest therein is not transferred in such a case.[1] This distinguishes a permanent lease from a sale.[2] This also distinguishes it from various kinds of tenures in India of a permanent and hereditary character. Such tenures, no doubt, do not constitute the 'full' ownership of property. They are interests of a subordinate character. But the interest is one in the 'ownership' of the property and not merely the right of possession. Hence, the transfers in such cases are of an 'absolute' character. The transfer is not merely that of a right which comes back to the transferor, the moment it ceases to belong to a different person. On the right ceasing to belong to any one by the death of the last possessor intestate and without leaving any heirs, it will pass by escheat to the Crown. (See Note 6.)

In 'Sonet Kooer v. Himmut Bahadur'[3] a mokarrari hereditary tenure granted for the purpose of maintenance by a zamindar in Bengal was held by the Privy Council to be an 'absolute' interest in the land of the above kind. A grant of what is referred to in the decisions as "underproprietary rights" will also come under this category. When it is made for a price such a grant has been treated as a sale.[4] On the same principle an inam is different from

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S. 105—NOTE 42

1. ('1859-61) 8 Moo Ind App 327 (338): 4 Suth W R P C 73 (PC), *Venkataswara Yettiapah* v. *Alagoo Moottoo*. (A portion of a zamindari in the Madras Presidency was held *not* to be a transfer within the words of S. 8 of Madras Regulation XXV of 1802 (which required sales, gifts and transfers of the proprietary rights of zamindars to be registered.)
†('28) 15 AIR 1928 P C 234 (237): 56 Cal 1: 55 Ind App 320: 111 Ind Cas 345 (PC), *Bejoy Singh* v. *Surendra Narayan Singh*. (The word "lease" implies an interest still remaining in the lessor.)
†('33) 20 AIR 1933 Bom 97 (98): 57 Bom 194: 142 Ind Cas 481 (DB), *Venkatesh* v. *Bhujaballi*.
('15) 2 AIR 1915 Cal 403 (404): 31 Ind Cas 549 (551), *Madan Mohan* v. *Sashi Bhusan*. (Hence it is doubtful whether a permanent tenant can acquire by prescription easement on the land of another permanent tenant holding under the same landlord.)
('98) 2 Cal W N 292 (294) (SB), *Monmohini Dassi* v. *Kalidas Ahiri*. (Perpetual lease is liable to forfeiture.)
*('97) 24 Cal 440 (447): 1 Cal W N 321, *Kally Dass Thiri* v. *Monmohini Dassee*. (Liable to forfeiture.)
[*See also* ('36) 23 AIR 1936 Cal 727 (734): 170 Ind Cas 690 (DB), *Mati Lal Daga* v. *Iswar Radha Damodar Chandra*. (Lease for 499 years is different from conveyance in fee simple.)]
[But see ('26) 13 AIR 1926 Cal 993 (994, 995): 53 Cal 816: 98 Ind Cas 173 (DB), *Panchu Bala* v. *Jotindra*. (In this case the transaction is referred to as a permanent lease but still held to create an absolute hereditary mokarari tenure.)]
2. ('76) 25 Suth W R 43 (45) (DB), *Ram Golam Singh* v. *Nursingh Suhoy*. (Leases in perpetuity, however small the reserved rent, are not sales.)
('09) 36 Cal 1003 (1014, 1015): 36 Ind App 148: 4 Ind Cas 449 (451, 452) (PC), *Abhiram Goswami* v. *Shyama Charan*. (24 Cal 440, approved.)
('12) 14 Ind Cas 717 (718) (Oudh), *Triloki Nath* v. *Sheo Mangal*. (Permanent lease gives no right of pre-emption.)
('67) 8 Suth W R 106 (107) (DB), *Moorooly Ram* v. *Huree Ram*. (A lease in perpetuity, however small the reserved rent, is not a sale.)
('27) 14 AIR 1927 Oudh 161 (161): 101 Ind Cas 193 (DB), *Oudh Behari* v. *Rameshwar Singh*. (Permanent lease—No right of pre-emption.)
[But see ('11) 33 All 104 (106): 7 Ind Cas 930 (930) (DB), *Lalji Misir* v. *Jaggu Tiwari*. (Where a lease purports to create a perpetual interest in the land reserving merely a nominal rent and is granted in consideration of a substantial sum paid as premium, held that the transaction is in reality a sale—Submitted not correct.)]
3. ('76) 1 Cal 391 (398): 3 Ind App 92 (PC).
4. †('35) 22 AIR 1935 Oudh 217 (226): 10 Luck 392: 153 I. C. 334 (FB), *Jagdeo Singh* v. *Ram Naresh Singh*.
('25) 12 AIR 1925 Oudh 714 (714): 87 I. C. 347, *Har Bux Singh* v. *Ram Autar*. (Fraud will be presumed when sale is purposely called a lease.)
('24) 11 AIR 1924 Oudh 426 (428): 27 Oudh Cas 243: 84 Ind Cas 667 (DB), *Sant Baksh Singh* v. *Bhawani Prasad*. (In every instance the question whether a document is a sale or permanent lease will depend on a construction of all its terms.)
('24) 11 AIR 1924 Oudh 203 (204): 27 Oudh Cas 167: 77 Ind Cas 79 (DB), *Ram Narayan* v. *Ram Sukh*. (Where in a lease by a superior proprietor, the rent reserved is equal to, or only nominally in excess of, the revenue the transfer will be considered to be one of an underproprietary interest, while in the case where the rent reserved is considerably in excess of the revenue, the transfer will

a permanent lease.[5] So in 'Tarachand Biswas v. Ram Govind Chowdhry'[6] it was held by the Calcutta High Court that putnis, darputnis, seputnis, etc., in India are not mere leases but substantial interests in land. But at the same time it was held that such transactions were not out and out sales in spite of the payment of consideration. It was held that the transferee under such a transaction was entitled to possession. In 'Arumugham v. Subramaniam'[7] Varadachariar, J., pointed out in his Judgment of Reference to the Full Bench that under Indian law, an 'under-tenure' is not the same as 'tenancy.'

Whether a transaction is a permanent lease or a sale or the creation of a subordinate proprietary right is a question depending on the facts and circumstances of each case. The payment of something corresponding to rent is not a conclusive test. Such payment is quite consistent even with a sale. In the undermentioned cases[8] the transaction was held to be a 'lease'

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be a lease as it purports to be—In this case the perpetual lease was held to be not a sale.)
('22) 9 AIR 1922 Oudh 229 (231): 68 Ind Cas 966, *Saheb Baksh* v. *Thakur Din.* (Rent more than Government revenue—Deed is lease and not sale.)
('22) 9 AIR 1922 Oudh 81 (81, 82): Oudh Cas 310: 65 Ind Cas 97, *Zulfar Khan* v. *Sant Baksh Singh.* (Perpetual lease—Annual rent reserved substantially equal to Government revenue—No right of re-entry—Lease amounts to sale.)
('11) 14 Oudh Cas 41 (44): 8 I. C. 725 (726) (DB), *Ram Autar* v. *Drigpal.* (Grant of birt shankalp in respect of land receiving money consideration therefor—Lessee to pay revenue—No right of entry—Grant held to be of under-proprietary right and not of lease.)
[But see ('14) 1 AIR 1914 Oudh 360 (360, 361): 17 Oudh Cas 299: 25 Ind Cas 855 (DB), *Data Ram* v. *Deo Kali.* (A grant by a superior proprietor of under-proprietary rights by means of leases (birt sankalap), giving heritable and transferable rights in lieu of a premium taken in advance, and an annual rent reserved thereby, cannot be treated as a sale.)]

5. ('26) 13 AIR 1926 Mad 526 (528): 92 Ind Cas 814 (DB), *Seetayya Garu* v. *Appadu.*
6. ('79) 4 Cal 778 (781, 782): 4 Cal L R 20 (DB).
7. ('37) 24 AIR 1937 Mad 882 (891): ILR (1937) Mad 638: 171 Ind Cas 444 (FB).
('46) 33 AIR 1946 Oudh 129 (143): 21 Luck 194 (DB), *Sant Bux Singh* v. *Ali Raza Khan.*
[*See also*] The difference between a lease of immovable property and a sale of an under-proprietary tenure is well understood. An under-proprietary tenure is a tenure peculiar to Oudh and has its special incidents. Though in one sense a subordinate right, it partakes of the character of a proprietary interest in land. The rules governing the rights of the superior proprietor and the under-proprietor differ materially from those which apply to leases of immovable property contained in Chapter V of the T. P. Act. Transaction in this case held amounted to lease, though the rights intended to be transferred were analogous to those of an under proprietor.]
8. ('48) 35 AIR 1948 Oudh 7 (9), *Kamla Prasad* v. *Ram Narain.*
[Transfer of under-proprietary rights—Transferor's liability to rent not affected—Transfer is lease.]
('24) 11 AIR 1924 All 60 (61): 75 Ind Cas 404 (DB), *Bhairo Tiwari* v. *Ramnath Rai.* (Premium almost equal to value, and small rent do not constitute sale.)
('23) 10 AIR 1923 All 560 (561): 74 Ind Cas 971, *Inder Deo* v. *Ram Chariter.* (Lease deed conferring on lessee extensive rights including right to sink well or to construct house—No right of re-entry reserved—Lease is not sale.)
('23) 10 AIR 1923 Bom 146 (147): 77 Ind Cas 952 (DB), *Chaturbhai Lallubhai* v. *Moti Bhai Bapuji.* (Right to hold land for 500 years conveyed — Alienation is not sale but lease.)
('20) 7 AIR 1920 Cal 47 (48): 55 Ind Cas 500, *Kailash Nath* v. *Kamakhya Charan.* (Agreement under kobala that sadar jama should be paid to proprietor—Payment however recorded as rent—Person paying recorded as tenant—Relationship of landlord and tenant held existed.)
('07) 1907 Pun Re No. 136, p. 652 (655, 656): 1907 Pun W. R. No. 189 (DB), *Bhagwan Das* v. *Sidher.* (Agreement creating right of occupancy in consideration of money payment plus annual rent and services—Right of reversion stipulated for on happening of certain event—Agreement is lease.)
('26) 13 AIR 1926 Mad 55 (57): 48 Mad 821: 90 Ind Cas 725 (DB), *Venkatacharyulu Ayyavarlam* v. *Venkatasubba Rao.* (Agraharamdar granting kudiwaram rights in consideration of rent and premium—Promissory note executed for premium—Grant amounts to lease.)
('95) 8 C P L R 33 (35), *Bisni Ram* v. *Ram Prasad.* (In spite of the use of the word "sell" it was held the instrument was a lease.)

and not a sale or any other kind of transfer of a proprietary interest. In the cases noted below,[9] the transaction was held to be a sale or other kind of transfer of a proprietary right, notwithstanding the reservation of a payment corresponding to rent.

Where the transaction is a permanent lease, on the death of the last holder of the lease intestate and without leaving any heirs, the interest will revert to the grantor on the principle discussed in Note 6.[10] But if the interest is an 'absolute' one it will pass by escheat to Crown.[11] The undermentioned decisions [11a] must be understood in the light of the above principles.

A lease in perpetuity is not recognised as a lease under the English law. It is treated as a transfer of the fee simple. But this section expressly provides that a lease may be one in perpetuity.

('42) 29 AIR 1942 Oudh 151 (155): 17 Luck 401: 197 Ind Cas 665, *Bhondu Singh* v. *Mahadeo Singh*. (Rent payable annually and transferor reserving rent for himself —Deed held lease and not sale—Omission of re-entry clause held not material.)

('27) 14 AIR 1927 Oudh 161 (161): 101 Ind Cas 193 (DB), *Oudh Behari* v. *Rameshwar Singh*. (Land transferred in perpetuity for premium and on condition that transferee should pay revenue and malikana—Transfer held to be lease.)

('24) 11 AIR 1924 Oudh 203 (204, 205): 27 Oudh Cas 167: 77 Ind Cas 79 (DB), *Ram Narayan* v. *Ram Sukh*. (Under-proprietary share perpetually leased out with heritable and transferable rights—Lease held not to be sale.)

('22) 9 AIR 1922 Oudh 229 (231): 68 Ind Cas 966, *Saheb Baksh Singh* v. *Thakur Din Singh*. (Rent more than Government revenue—Deed is lease.)

('12) 14 Ind Cas 717 (718) (Oudh), *Triloki Nath* v. *Sheo Mangal*. (Deed of permanent lease giving right of permanent possession to lessee in consideration of money as zar-i-peshgi and of an annual rent is not sale deed.)

('32) 19 AIR 1932 Pat 97 (98): 11 Pat 98: 136 Ind Cas 54 (DB), *Sachindra Mohan* v. *Ramjas Agarwalla*. (Deed creating settlement of land in lieu of future recurring annual payment is lease.)

('33) 20 AIR 1933 Oudh 329 (331): 143 Ind Cas 887, *Ram Anand* v. *Ram Das*. (In spite of the use of the words "malikana" and "nazrana" the deed was held to be sale.)

('30) 17 AIR 1930 Oudh 300 (301): 5 Luck 721: 123 Ind Cas 53, *Gopal Sahu* v. *Nand Kumar*. (Document called lease but on proper construction appearing to be sale —Court is not bound to hold it as lease.)

('21) 8 AIR 1921 Oudh 240 (241): 65 Ind Cas 707, *Lachhman Das* v. *Bhagwant Ram*. (The words *"naslan bad naslan" prima facie* import intention to convey an absolute lease.)

('27) 14 AIR 1927 Pat 254 (255): 6 Pat 358: 103 Ind Cas 435 (DB), *Secy. of State* v. *Natabar Mangraj*. (Permanent tenure-holder leasing in perpetuity part of his tenure for nominal rent which represented proportionate amount of rent payable by him in respect of tenure—Transaction was held to be sale.)

('26) 13 AIR 1926 Pat 80 (80): 90 Ind Cas 352 (DB), *Prasana Kumar* v. *Kalyan Charan*.

[*See also* ('20) 7 AIR 1920 Cal 693 (693, 694): 59 Ind Cas 565 (DB), *Chandra Kanta* v. *Adinath Shom*. (*A* transferring to *B* a share of lands and then receiving rent for long time—This alone does not create a tenancy where the facts show that the parties were in co-ordinate position.)

('37) 24 AIR 1937 Lah 97 (98): ILR (1937) Lah 202: 172 Ind Cas 104 (DB), *Ganesha* v. *Sadiq*. (Vendee entered in mutation proceedings as tenant—No lease but sale.)]

9. ('79) 4 Cal 327 (330) (DB), *Bejoy Chunder* v. *Kally Prosonno*. (A person who holds as owner on the terms of paying a fixed sum annually to the former owner is not a lessee.)

   ('29) 16 AIR 1929 Lah 583 (583, 584): 119 Ind Cas 734 (DB), *Lachhu* v. *Mela Ram*. (Alienation of land on nazrana, nominal rent and full powers of transfer is sale.)

   ('14) 1 AIR 1914 Lah 290 (292): 23 Ind Cas 970 (DB), *Amar Singh* v. *Sadhu Singh*. (Deed purporting to be perpetual lease but transferring proprietary rights for valuable consideration is deed of sale.)

   ('41) 28 AIR 1941 Oudh 12 (14): 190 Ind Cas 782, *Maharaja Pande* v. *Kali Din Pande*. (Deed purporting to be perpetual lease of under-proprietary right held to be sale.)

10. ('24) 11 AIR 1924 All 60 (61): 75 Ind Cas 404 (DB), *Bhairo Tiwari* v. *Ramnath Rai*.

    [But see ('26) 13 AIR 1926 Cal 993 (994, 995): 53 Cal 816: 98 Ind Cas 173 (DB), *Panchu Bala* v. *Jotindra*. (In this case the transaction is referred to as a permanent lease and yet it is held to create an absolute estate which escheats to the Crown on the death of the last holder intestate and without leaving any heirs.)]

The decision of the Privy Council in 'Sonet Kooer's case,[11b] referred to above, must not be taken to lay down that on the death of the last holder of a permanent 'lease,' intestate and without leaving any heirs, his interest will pass by escheat to the Crown and not revert to the grantor of the estate. The interest in question in that case is expressly held to be an 'absolute' one. In 'Panchubala v. Jotindra'[12] the interest is referred to as a permanent 'lease' and yet is held to be an 'absolute' interest which escheats to the Crown on the death of the last holder intestate and without leaving any heirs. Reliance is placed for this purpose on the decision in 'Sonet Kooer's case'. It looks as if their Lordships have not correctly appreciated the decision in 'Sonet Kooer's case'.

43. Permanent tenancy — Onus of proof. — Where the relationship of landlord and tenant is established between two persons and the tenant claims that the tenancy is a permanent one, it is for him to prove his claim. It is not for the landlord to prove that the tenancy is not permanent. Unless the contrary is proved, the law will presume the tenancy not to be permanent. This principle is recognised in S. 106 which provides that, in the absence of an agreement to the contrary, a lease will be deemed to be one from year to year or from month to month according to the purpose of the lease. It is true that a tenancy may be permanent by custom or under a statutory provision, irrespective of the agreement between the parties. But in every case it is for the tenant to establish that by agreement, custom or law his tenancy is permanent.[1] So, in 'Nainapillai v. Ramanathan'[2] the Privy

11. ('76) 1 Cal 391 (402): 3 Ind App 92 (PC), *Sonet Kooer* v. *Himmut Bahadur*. (Absolute hereditary mokurary tenure.)
('26) 13 AIR 1926 Cal 993 (994, 995): 53 Cal 816: 98 Ind Cas 173 (DB), *Panchubala* v. *Jotindra*. (In this case the interest is referred to as a permanent lease yet held to be an absolute interest.)

11a. ('25) 12 AIR 1925 Pat 57 (59): 3 Pat 818: 84 Ind Cas 293 (DB), *Srikanta Prasad* v. *Jag Sah*. (A hereditary and rent-free service tenure is not necessarily permanent.)
('32) 19 AIR 1932 All 437 (438): 138 I. C. 366 (DB), *Arjun Singh* v. *Mahesha Nand*.
('02) 15 C P L R 89 (90), *Sheoshankarpuri Guru Padampuri Gosai* v. *Mt. Rukhma*. (1 Cal 391: 3 Ind App 92 (PC) followed.)
('02) 15 C P L R 175 (177), *Ganpat* v. *Bhangi*. (If absolute occupancy rights under C. P. Tenancy Act could form the subject of an escheat then the escheat would be to the Crown and not to the landlord.)
('32) 19 AIR 1932 All 53 (55): 136 Ind Cas 69 (DB), *Basdeo Rai* v. *Jai Mangal*. (Rights of exproprietary tenant extinguised by ejectment—The rights do not escheat to the Crown but revert to the zamindar. 33 All 111 (SB) followed.)
('11) 33 All 111 (116): 7 Ind Cas 231 (233) (SB), *Tulshiram Sahu* v. *Gur Dial Singh*. (30 All 488 overruled.)

11b. ('76) 1 Cal 391 (398): 3 Ind App 92 (P C), *Sonet Kooer* v. *Himmut Bahadur*.

12. ('26) 13 AIR 1926 Cal 993 (994, 995): 53 Cal 816: 98 Ind Cas 173 (DB).

SECTION 105—NOTE 43

1. ('42) 29 AIR 1942 Bom 161 (171): ILR (1942) Bom 357: 201 Ind Cas 420 (DB), *Secy. of State* v. *Chimanlal Jamnadas*. (Mere existence of building on land leased does not show that it is permanent.)
('39) 26 AIR 1939 Pat 448 (449): 18 Pat 571: 184 Ind Cas 363 (DB), *Mahomed Zayauddin* v. *Shaikh Dargahan*.
('33) 20 AIR 1933 Pat 664 (666): 147 Ind Cas 1177, *Telanga Marandi* v. *Chandra Mohan Singh*.
('28) 15 AIR 1928 Pat 431 (434): 7 Pat 341: 109 Ind Cas 306 (DB), *Chota Nagpur Banking Association, Ltd.* v. *Kamakhya Narain Singh*.
('24) 11 AIR 1924 All 915 (916): 82 Ind Cas 594, *Chob Singh* v. *Daryai Singh*.
('24) 11 AIR 1924 Mad 828 (828): 79 Ind Cas 845, *Chellamma* v. *Pentayya*.
('23) 10 AIR 1923 Pat 111 (112, 113): 68 Ind Cas 653 (DB), *Budhan Teli* v. *Madan Mohan Lal*. (Lessee not producing lease deed, though it was in his possession—Inference is that the lease was only a temporary one.)
('21) 8 AIR 1921 Bom 224 (224): 45 Bom 350: 59 Ind Cas 751, *Manek Lal Vamanrao* v. *Bai Ainba*.
('21) 8 AIR 1921 Mad 462 (463): 70 Ind Cas 27 (DB), *Ponnalaya Konan* v. *Sinniah Odayan*.
('15) 2 AIR 1915 Cal 711 (712): 27 Ind Cas 500 (DB), *Kaluram Srimul* v. *Puran Chand*.
('03) 7 Cal W N 734 (740) (DB), *Ismail Khan Mahomad* v. *Aghore Nath*.
*('20) 7 AIR 1920 P C 67 (69): 43 Mad 567: 47 Ind App 76: 56 Ind Cas 117 (PC), *Seturatnam Aiyar* v. *Venkatachela Goundan*. (Permanent occupancy right claimed against ryotwari pattadar.)

Council observed as follows:

"It cannot now be doubted that when a tenant of lands in India in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant.... A permanent right of occupancy in land in India is a right, subject to certain conditions, of a tenant, to hold the land permanently which he occupies. It is a heritable right, and in some places it possibly may be transferable by the tenant to a stranger. That permanent right of occupancy can only be obtained by a tenant by custom, or by a grant from an owner of the land who happens to have power to grant such a right, or under an Act of the Legislature."

In 'Seturatnam Aiyar v. Venkatachela Goundan[3] the Privy Council said as follows:

"Permanence is not a universal and integrent incident of an under-ryot's holding; if claimed, it must be established. This may be done by

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('29) 16 AIR 1929 P C 156 (157): 52 Mad 549: 56 Ind App 248: 116 Ind Cas 601 (PC), *Subrahmanya Chettiyar* v. *Subrahmanya Mudaliyar.*

*('24) 11 AIR 1924 P C 65 (66): 47 Mad 337: 51 Ind App 83: 82 Ind Cas 226 (PC), *A. S. N. Nainapillai* v. *T. A. R. A. Rm. Ramanathan.* (Proof of long occupation at a fixed rent does not satisfy the onus.)

('05) 32 Cal 51 (61): 31 Ind App 149 (PC), *Nilratan Mandal* v. *Ismail Khan Mahomed.*

('89) 16 Cal 223 (232): 16 Ind App 6 (PC), *Secretary of State* v. *Luchmeswar Singh.*

('61) 8 Moo Ind App 327 (332) (PC), *Venkataswara Yettiappah Naicker* v. *Alagoo Moottoo Servagaren.*

('29) 16 AIR 1929 Cal 37 (38, 40, 41): 56 Cal 738: 116 Ind Cas 378 (DB). *Kamal Kumar* v. *Nandalal.* (Whether the tenant has succeeded in discharging the onus is to be judged by the well-recognized rule of circumstantial evidence that such evidence should not merely point to the inference that is to be drawn, but that the evidence must be of such a nature that it can possibly lead to no other evidence.)

('26) 13 AIR 1926 Cal 322 (325): 90 Ind Cas 781 (DB), *Jabeda Khatun* v. *Mohammad Mozaffar.*

('14) 1 AIR 1914 Mad 564 (567): 37 Mad 1: 7 Ind Cas 202 (DB), *Rajah of Venkatagiri* v. *Mukku Narsaya.*

('22) 9 AIR 1922 Bom 402 (402, 403): 47 Bom 4: 76 Ind Cas 71 (DB), *Narayan* v. *Pandurang.* (Overruled in AIR 1940 P C 192: ILR (1941) Bom 107: ILR (1940) Kar P C 380 (PC), on a different point.)

('19) 6 AIR 1919 Mad 293 (296, 301): 52 Ind Cas 247 (DB), *Ponniah Nadan* v. *Deivanai Ammal.*

('02) 25 Mad 507 (510): 12 Mad L Jour 119 (DB), *Seshamma Shettati* v. *Chickaya Hegade.*

('90) 13 Mad 249 (253) (DB), *Rangayya Appa Rau* v. *Kadiyala Ratnam.*

('88) 11 Mad 77 (80) (DB), *Thiagaraja* v. *Giyana Sambandha Pandara Sannadhi.*

('11) 9 Ind Cas 141 (142) (DB) (Mad), *Sullee Abhoyee* v. *Krishna Rao.* (Mokhasa right set up.)

('31) 18 AIR 1931 Bom 436 (444): 134 Ind Cas 721 (DB), *Hiralal* v. *Secy. of State.* (Origin of lease known — Lease is title of lessee—He is therefore responsible for preserving it and for producing it to substantiate his claim—Its loss does not entitle him to an inference in his own favour.)

('21) 8 AIR 1921 Bom 454 (454): 63 Ind Cas 935, *Sidhanath* v. *Chiko.*

('78) 3 Cal 696 (699): 1 Cal L R 577 (DB), *Prosunno Coomaree* v. *Sheikh Ruttan.*

('07) 5 Cal L Jour 178 (179) (DB), *William M. Grant* v. *Mrs. Robinson.*

('97) 24 Cal 440 (446): 1 Cal W N 321, *Kally Dass Ahiri* v. *Monmohini Dassee.*

('31) 18 AIR 1931 Mad 577 (578, 579): 133 Ind Cas 369, *Gopala* v. *Juvappa.*

('99) 22 Mad 264 (266), *Rangasami Reddi* v. *Gnana Sammantha Pandara Sannadhi.* [*See also* ('19) 6 AIR 1919 Mad 1135 (1136, 1137): 43 Ind Cas 977 (DB), *Chandra Sekhara Swami* v. *Nainar Ammal.* (Principles affecting the onus of proof and presumptions arising in ejectment suits discussed.)

('85) 1885 Bom P J 160 Reprint P. 150 (150, 151) (DB), *Harcharandas* v. *Sadashiv.* (Person executing kabuliyat in favour of inamdar and taking possession of land under such kabuliyat in consideration of the agreement contained therein to pay the assessment—Whether kabuliat must be deemed by virtue of *local usage* to imply a term that the lessee is to be entitled to continue in possession as long as he pays the assessment, is a matter in regard to which the onus of proof is on the tenant.)]

2. ('24) 11 AIR 1924 P C 65 (66, 67): 47 Mad 337: 51 Ind App 83: 82 Ind Cas 226 (PC).

3. ('20) 7 AIR 1920 P C 67 (69): 43 Mad 567: 47 Ind App 76: 56 Ind Cas 117 (PC).

proving a custom, a contract, or a title and possibly by other means."[4]

Where, however, the entire evidence on both sides is once before the Court, the question as to onus of proof is not material and is purely of academic interest and the issue as to permanence will be determined on the evidence before the Court and not with reference to the question of burden of proof.[5]

Where a tenant sets up a permanent tenancy but fails to establish his claim, he can fall back upon any lesser title which may be proved.[6]

44. Principle of lost grant as applied to permanent tenancies. — Under S. 107 a permanent lease can only be created by a registered deed. But neither writing nor registration was necessary for the granting of such a lease before this Act was passed.[1] Under S. 2, rights created under leases granted before the Act are not affected by the provisions of this Act.

If such lease has been granted by a written instrument, then under S. 91 of the Evidence Act, the terms of the lease can only be proved by producing such document or by secondary evidence thereof. In such cases, the question whether a permanent lease has been granted will be a question of construction of the document. But in case of ambiguity in the document evidence of the conduct of the parties and other circumstances would be admissible to prove the nature of the interest created.[2] Such evidence would also be admissible for a similar purpose, if no direct evidence is forthcoming of a 'verbal' lease. Where the origin of the tenancy is not known, then the history and mode of enjoyment of the property and other circumstances connected with it constitute the only evidence, from which to infer the nature of the tenancy.[3] But there is an important distinction between the last mentioned case and the two cases previously mentioned.

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4. *See also the following cases to the same effect:*
('29) 16 AIR 1929 P C 156 (157): 52 Mad 549: 56 Ind App 248: 116 Ind Cas 601 (PC), *Subrahmanya Chettiyar* v. *Subrahmanya Mudaliyar.*
('32) 19 AIR 1932 Cal 398 (403): 137 Ind Cas 658 (DB), *Narendra Nath* v. *Sannyasi Charan.*

5. ('22) 9 AIR 1922 P C 292 (302): 45 Mad 586: 49 Ind App 286: 68 Ind Cas 538 (PC), *Chidambara* v. *Veerama Reddi.*
('20) 7 AIR 1920 P C 67 (69): 43 Mad 567: 47 Ind App 76: 56 Ind Cas 117 (PC), *Seturatnam Aiyar* v. *Venkatachela Goundan.*
('31) 18 AIR 1931 Bom 436 (443): 134 Ind Cas 721 (DB), *Hiralal* v. *Secy. of State.*
†('21) 8 AIR 1921 Mad 462 (463): 70 Ind Cas 27 (DB), *Ponnalagu Konan* v. *Sinniah Odayan.*

6. ('90) 13 Mad 249 (253) (DB), *Rangayya Appa Rau* v. *Kadiyala Ratnam.*

SECTION 105—NOTE 44

1. ('29) 16 AIR 1929 Cal 37 (38): 56 Cal 738: 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nandalal.*
('79) 3 Bom 340 (344, 345), *Babaji* v. *Narayan.* (A sanad is not indispensable to the proof of mirasi tenure. Mirasi right or perpetuity of tenure, like other facts, may be proved by various means.)

2. ('25) 12 AIR 1925 Cal 340 (340, 341): 80 I. C. 898 (DB), *Lal Ghose* v. *Nilkantha Das.*
('18) 5 AIR 1918 Cal 1 (2): 46 Cal 160: 45 I. C. 43 (DB), *Secretary of State* v. *Digambar Nanda.*
('15) 2 AIR 1915 Cal 250 (253): 27 Ind Cas 471 (DB), *F. F. Christian* v. *Narbada Koeri.*

3. ('28) 15 AIR 1928 Cal 597 (599): 55 Cal 1029: 112 Ind Cas 180 (DB), *Nibaran Chandra* v. *Kristo Mohan.* (Where the origin of the tenancy is unknown, the tenant must needs prove such facts that the reasonable inference therefrom is that the tenant had been granted a permanent right of occupancy.)
('18) 5 AIR 1918 Cal 1 (2): 46 Cal 160: 45 Ind Cas 43 (DB), *Secy. of State* v. *Digambar Nanda.*
('25) 12 AIR 1925 Cal 340 (340, 341): 80 Ind Cas 898 (DB), *Lal Ghose* v. *Nilkantha Das.*
('24) 11 AIR 1924 Cal 465 (466): 73 Ind Cas 2 (DB), *Makhan Lal De* v. *Arun Bala Devi.*
('24) 11 AIR 1924 Cal 156 (157): 80 Ind Cas 580 (DB), *Kazemini Mutwali* v. *Manik Chandra.*
*(1900) 27 Cal 570 (582): 4 Cal W N 210 (DB), *Ismail Khan Mahomed* v. *Jaigun Bibi.*
('74) 21 Suth W R 386 (387, 388) (DB), *Nidhee Kristo* v. *Nistarinee Dossee.* (The maxim *optimus interpres rerum usus* (usage is the best interpreter of things)

This distinction consists in the presumption of an origin in a lawful title which would be applicable to a case where the origin of the tenancy is 'not known'. This presumption does not apply where the origin of the tenancy is 'known'. In such cases, circumstantial evidence, where admissible, must establish 'conclusively' that the tenancy is a permanent one.[4] No doubt, under S. 114 of the Evidence Act, the Court 'may' presume the grant of a permanent tenancy, if the proved facts make such grant 'likely' in the opinion of the Court. But the Court is not 'bound' to presume such grant. But where the origin of the tenancy is 'not known', the presumption of a lawful origin is one of 'law' which the Court is 'bound' to make if the evidence justifies such a presumption. Further, much less evidence would be sufficient to justify such presumption than would be necessary to make a grant of permanent tenancy 'likely'. To raise such presumption of origin in a lawful title, it is sufficient if the evidence is such that a grant of permanent tenancy is in its nature practicable and 'reasonably capable of being presumed' without doing violence to the probabilities of the case.[5] This presumption of lawful origin is also referred to as the presumption of a "lost grant," it being presumed that there was a grant, the evidence of which has been lost.

But apart from the presumption of lawful origin above referred to, even considering the matter as one of likelihood under S. 114 of the Evidence Act, the fact that the origin of a tenancy is not known will make it easier to draw an inference of permanence in favour of the tenant than if the origin of the tenancy is known.[6]

When can the origin of a tenancy be said to be not known? It has been held by the Calcutta High Court that where it is known who the original parties to a lease were, the mere fact that the date of the letting is not known will not make the tenancy one of unknown origin.[7] In a Bombay case,[8] the date of a tenancy was known but the records containing evidence as to the

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applies even to cases of landlord and tenant.)
('25) 12 AIR 1925 Cal 309 (315): 52 Cal 43: 85 Ind Cas 103 (DB), *Abdul Hakim Khan* v. *Elahi Baksha Sha*.
('29) 16 AIR 1929 Cal 37 (38): 56 Cal 738: 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nandalal*.

4. ('39) 26 AIR 1939 Pat 296 (299): 182 Ind Cas 618, *Ramlal Sahu* v. *Mt. Bibi Zohra*. (Where origin of tenancy is known, it is impossible to hold, as a matter of inference from facts proved that tenancy is other than what it purports to be.)
[*See* ('29) 16 AIR 1929 Cal 37 (38): 56 Cal 738: 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nandalal*. (NOTE.—In this case the origin of the tenancy was not known. But the question is treated as purely one of *inference* from facts and the presumption of lawful origin is not considered as capable of making any difference. The case shows the degree of proof that would be necessary if the question is one of *inference*. In such cases, it is stated by Mukerji J. (page 41 of AIR 1929 Cal) that the well known rule of circumstantial evidence will apply, viz., that the evidence must be of such a nature that it can possibly lead to no other *inference*. There is no reference to S. 114 of the Evidence Act under which if the evidence makes the grant of a permanent tenancy *likely* the Court *may* presume such grant till the contrary is proved. But it should be taken that his Lordship includes an inference drawn by means of a presumption under S. 114 of the Evidence Act within his proposition. Because, when a Court chooses to presume a fact under S. 114, and the presumption is not rebutted, "no other inference would be possible" in the circumstances of the case.)]

5. *('30) 17 AIR 1930 P C 103 (105): 57 Cal 1293: 57 Ind App 125: 123 Ind Cas 722 (P C), *Md. Muzaffaralmusavi* v. *Bibi Jabeda Khatun*.

6. ('29) 16 AIR 1929 Cal 37 (38): 56 Cal 738: 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nandalal*.
(1900) 27 Cal 570 (582): 4 Cal W N 210 (DB), *Ismail Khan Mahommed* v. *Jaigun Bibi*. (In this case there was a kabuliyat from which it was held a *fresh* tenancy commenced.)
('26) 13 AIR 1926 Cal 634 (636): 92 Ind Cas 963, *Gopal Chandra* v. *Satya Bhanu*. (Tenancy for residential purposes—Origin known—*Held*, not permanent.)

7. ('32) 19 AIR 1932 Cal 398 (402): 137 Ind Cas 658 (DB), *Narendra* v. *Sannyasi*.

8. ('31) 18 AIR 1931 Bom 436 (444): 134 Ind Cas 721 (DB), *Hiralal* v. *Secy. of State*.

terms of the lease were destroyed during riots. It was held that the tenancy was not of unknown origin. Decisions bearing on S. 83 para. (2) of the Bombay Land Revenue Code may usefully be referred to in this connection.[9]

In the case-law on this subject there is generally no reference to the presumption of lawful origin or lost grant. But there is no room for thinking that such a presumption is considered not applicable to such cases. In 'Nainapillai v. Ramanathan'[10] the Privy Council remarked that "as no grant of a right of permanent occupancy has been produced or even alleged, it is not apparent how a right of permanent occupancy could have been obtained by the defendants or by any predecessor in title of theirs, except by a lost grant or grants, and that is not even suggested." This clearly implies that in their Lordships' opinion the presumption of "lost grant" may apply to such cases. And in 'Abdul Hakim v. Elahi Baksha[11] Chakravarti, J., expressly stated that the principle on which a permanent tenancy is proved by circumstantial evidence in cases of tenancies of unknown origin is the principle of lost grant. Rankin, J., in 'Kamal Kumar v. Nandalal', [12] however, considered that the reference to a "lost grant" in such cases is "confusing and misleading." It would appear that in his Lordship's view such a theory is useful only where there is a question of the 'law fulness' of a permanent grant. As permanent tenancies before the Transfer of Property Act could be created without writing or registration, there could be no question of any legal defect on account of their mode of creation and where there is no question of any other legal defect the theory of lost grant need not be invoked. But his Lordship has overlooked the observations (above referred to) in 'Nainapillai v. Ramanathan' which show that the presumption of lost grant may be usefully resorted to in such cases, even though the 'legality' of the grant may not be in question.

9. See for instance—(1900) 2 Bom L R 93 (94) (DB), *Raghunath* v. *Lakshuman.* (The saving clause of S. 83, seems to contemplate that though the commencement and duration of the tenancy may be lost in the obscurity of antiquity, still there may be vested in the landlord a right by agreement to enhance rent and evict for its non-payment.)

10. ('24) 11 AIR 1924 P C 65 (72): 47 Mad 337: 51 Ind App 83: 82 Ind Cas 226 (PC). NOTE.—As their Lordships have stated that the only possible way in which a permanent tenancy could be proved in the case was by a lost grant, their discussion of the probabilities of the case must be taken to relate to the question whether a lost grant can be presumed in the case. They hold that in the circumstances of the case, a lost grant cannot be presumed. This is what they mean by saying that such grant is "not even suggested," and not that the *plea* has not been taken and therefore they are not going to consider the question. In AIR 1930 P C 103: 57 Cal 1293: 57 Ind App 125 (P C) their Lordships presumed the *legality* of a permanent grant but in this case they refused to do so. This is because in AIR 1930 PC 103: 57 Cal 1293: 57 Ind App 125 (PC) there was sufficient material before the Court to presume the legality, while in this case there was no sufficient material for the purpose.)
[*See also* ('20) 7 AIR 1920 P C 67 (70): 43 Mad 567: 47 Ind App 76: 56 Ind Cas 117 (PC), *Seturatnam Aiyar* v. *Venkatachela Goundan.* (NOTE.—Confirming on evidence the finding of the High Court that a permanent tenancy had been granted, the Privy Council observed "nor is it in their opinion (opinion of Privy Council) to be regretted that effect has been given to the very long possession, 'immemorial' in the High Court's view, of the defendants and their predecessors.")]

11. ('25) 12 AIR 1925 Cal 309 (312): 52 Cal 43: 85 Ind Cas 103 (DB).

12. ('29) —16 AIR 1929 Cal 37 (40): 56 Cal 738: 116 Ind Cas 378 (DB). (NOTE.—Both the learned Judges in this case (Rankin and Mukerji, JJ.) treat the question as one purely of inference of fact, though the tenancy was of an unknown origin. Mukerji, J., pointedly says that the circumstantial evidence in support of the claim of permanent tenancy must be so strong that it can possibly lead to no other inference. This brings out clearly what difference it would make if the presumption of lost grant is resorted to. For raising such presumption, the above high degree of proof is not necessary. It is not even necessary that the grant of permanent tenancy must be *likely* on the evidence in the case. It is sufficient if such grant is *reasonably capable of being presumed* from the evidence, which is a very different thing from the grant being *likely.*)

As already pointed out, this presumption is distinct from an 'inference' of permanent tenancy and may establish such tenancy, even though as a mere matter of inference from evidence such tenancy may not be held as proved. In 'Muhammad Mazaffaralmusavi v. Bibi Jabeda Khatun',[13] the Privy Council expressly applied the presumption of a lawful origin to a case of permanent tenancy. No doubt, in that case, their Lordships were concerned with the 'legality' of the grant. But their Lordships' observations are quite general and do not imply that they are confined to cases where the 'legality' of a grant is questioned. The principle of lost grant was referred to and applied in as old a decision as 'Gooroo Pershad v. Bykunto Chunder Roy,'[14] and though this does not seem to have been a case of 'permanent tenancy,' it shows that the principle is of general application.

The following passage from 'Muhammad Mazaffaralmusavi v. Bibi Jabeda Khatun'[15] shows the nature of a presumption of lawful origin and how it differs from an 'inference' of such origin under S. 114 of the Evidence Act :

> "The presumption of an origin in some lawful title, which the Courts have so often readily made in order to support possessory rights, long and quietly enjoyed, where no actual proof of title is forthcoming, is one which is not a mere branch of the law of evidence. It is resorted to because of the failure of actual evidence. Hence their Lordships cannot accept the appellant's contention that the provisions of the Evidence Act, S. 114, prevent the inference of a consent by the Kazi in the absence of any evidence of an application to the Kazi for leave, or some other proved fact of that kind. The matter is one of a presumption, based on the policy of the law but even considered as an inference from proved facts, the leave presumed is a thing, which may well be regarded as likely to have happened. At the same time it is not a presumption to be capriciously made, nor is it one which a certain class of possessor is entitled to 'de jure.' In a case such as this, where it is necessary to indicate what particular kind of lawful title is being presumed, the Court must be satisfied that such a title was in its nature practicable and reasonably capable of being presumed, without doing violence to the probabilities of the case. The presumption is not an "open sesame," with which to unlock in favour of particular kind of claimant a closed door, to which neither the law nor the proved facts would in themselves have afforded any key. It is the completion of a right, to which circumstances clearly point, where time has obliterated any record of the original commencement."

Note.—The reference to the permission of the kazi in the above passage is to be understood in this way. If the kazi had permitted the transaction it would be valid.

45. Permanent tenancy—Presumption of validity of grant in case of tenancies of unknown origin.—It has been seen in Note 44 that in the case of tenancies of unknown origin it may be presumed from the circumstances of the case that a permanent interest was granted, although as a matter purely of inference from evidence such a result may not necessarily follow. This presumption is one based on the 'policy of the law' and is not a part of the law of 'evidence.' The presumption will apply not only to the 'factum' of a grant but also as to its 'legality.' In 'Muhammad Mazaffaralmusavi v.

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13. *('30) 17 AIR 1930 PC 103 (105): 57 Cal 1293: 57 Ind App 125: 123 Ind Cas 722 (PC).
14. ('66) 6 Suth W R 82 (83) (DB).
15. *('30) 17 AIR 1930 P C 103 (105): 57 Cal 1293: 57 Ind App 125: 123 Ind Cas 722 (PC).

Bibi Jabeda Khatun,'[1] the presumption was applied to the legality of the grant of a permanent lease by the mutwalli of a wakf. It was held that the permission of the kazi which would have validated the lease must be presumed, in the circumstances of the case, although they might not be sufficient to make such permission 'likely' within the meaning of S. 114 of the Evidence Act. The decision followed 'Bawa Magniram v. Kasturbhai,'[2] where a similar presumption was made in respect of legal necessity for a permanent lease granted by the shebait of a mutt. But in 'Nainapillai v. Ramanathan'[2a] the Privy Council refused to presume the grant of a permanent lease in the circumstances of the case and one of the grounds given for its decision was that the lands in question were the property of a temple which could not be alienated except for legal necessity. In this case their Lordships approved of the decision of the Calcutta High Court in 'Satya Sri v. Kartik Chandra'[3] in which it was held that though normally the circumstances of the case would have been sufficient to justify a presumption that a permanent lease was granted, no such presumption could be made if the property was a debutter property. But these and similar decisions[4] have to be considered with reference to the clear enunciation of the law by the Privy Council in 'Muhammad Mazaffaralmusavi v. Bibi Jabeda Khatun' and cannot be regarded as affecting the proposition that the 'legality' as well as the 'factum' of a permanent lease can be presumed, if on the evidence before the Court such legality is reasonably capable of being presumed. The above decision also shows that this rule applies to transfers of property belonging to religious and charitable endowments. The decision in 'Nainapillai v. Ramanathan' must be taken to mean only that in that case the materials before the Court were not sufficient to draw the presumption of legality. From their Lordships' judgment it appears that such materials were not even sufficient to raise a presumption of the 'factum' of the grant. As regards the decision of the Calcutta High Court in 'Satya Sri v. Kartik Chandra' it is not clear if it was a case where the origin of the tenancy was 'unknown.' If the origin was 'known', then the presumption mentioned in 'Muhammad Mazaffaralmusavi v. Bibi Jabeda Khatun' would not apply. In such a case the question would purely be one of presumption of 'fact' under S. 114 of the Evidence Act and it may be considered that their Lordships have held that it cannot be presumed under that section that what is 'prima facie' an illegal act has been committed. The presumption referred to in 'Muhammad Mazaffaralmusavi v. Bibi Jabeda Khatun' based, as it is said to be, on the policy of the law, is, it is clear from that decision, not subject to any such considerations.

SECTION 105—NOTE 45

1. ('30) 17 AIR 1930 P C 103 (105): 57 Cal 1293: 57 Ind App 125: 123 Ind Cas 722 (PC). (Affirming AIR 1926 Cal 322.)

2. ('22) 9 AIR 1922 P C 163 (165): 46 Bom 481: 49 Ind App 54: 66 Ind Cas 162 (PC). [*See also* ('44) 31 AIR 1944 Pat 109 (111): 212 Ind Cas 273, *Baldeb Jiu Thakur* v. *Jogi Sahu*. (If suitable circumstances a presumption will be made, either that a permanent tenancy has been granted in a case where the landlord was legally entitled to grant it, or that the landlord was not debarred by law from making the grant where a permanent tenancy had been granted. Under suitable circumstances it is permissible to make both presumption in the same case. The aforesaid presumption can be made even in the case of debuttar property.)]

2a. ('24) 11 AIR 1924 P C 65 (72): 47 Mad 337: 51 Ind App 83: 82 Ind Cas 226 (PC). [*See also* ('20) 7 AIR 1920 Mad 504 (505): 59 Ind Cas 241 (DB), *Chinnammal* v. *P. Ratnasabapathy Chettiar*. (Lease by trustee is presumed to be not permanent —Burden of proving such a tenancy is upon those who allege its existence.)]

3. ('12) 13 Ind Cas 596 (596) (DB) (Cal).

4. ('30) 17 AIR 1930 Mad 434 (435, 436): 125 I.C. 242, *Saldanha* v. *R. C. Church, Mermajal*.

[*See* ('32) 19 AIR 1932 Cal 398 (403): 137 Ind Cas 658 (DB), *Narendra Nath* v. *Sannyasi Charan*. (The grant of a permanent right by a shebait or a trustee is in breach of his duty and therefore cannot be presumed.)]

46. Permanent tenancy—Presumption of lawful origin.—See Notes 44 and 45.

47. Permanent tenancy—Construction of leases.—Where there is an instrument creating the tenancy, the question whether it is a permanent tenancy is one of construction of the instrument. The main rules as to construction of deeds have been discussed in S. 8, Note 20 and these rules will apply to such cases also. Under such rules, where the document is ambiguous or of doubtful import, the Court is entitled to take into consideration the surrounding circumstances and the mode of enjoyment of the property and the actings of the parties in coming to a conclusion if a permanent interest has been granted. In such cases, the Court can hold that a permanent tenancy has been granted, notwithstanding that the instrument itself is not clear on the point.[1] As to the nature of evidence that will be useful in this connexion, see Notes 48 to 51. But where the meaning of the document is clear, this course is not open to the Court and it must confine itself to the words used in the instrument.[2]

In considering the question whether an instrument confers a permanent lease, the use of formal words conveying the idea of permanency and the title of the document will have some importance. But this is not a factor which will be conclusive. The task of the Court is to consider the document as a whole and not to attach undue importance to the use of formal expres-

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NOTE 47

1. *('75) 24 Suth W R 176 (177) (PC), *Watson and Co.* v. *Mohesh Narain.*
('72) 11 Beng L R 71 (74): 14 Moo Ind App 247 (256) (PC), *Kooldeep Narain* v. *Government.* (Ghatwali tenure—Omission of words of inheritance does not show conclusively that the tenure is not hereditary—It being shown that ghatwali tenure had descended from father to son for several generations it was held that it was an hereditary tenure.)
('69) 12 Moo Ind App 263 (268): 11 Suth W R P C 10 (PC), *Suttosurrun Ghosal* v. *Mohesh Chunder.* (*Held* that the absence of words of limitation in the pottah which created an istemrari tenure was supplied by evidence of long and uninterrupted enjoyment at a fixed rent and of the descent of the tenure from father to son by which the hereditary character was to be presumed.)
('67) 11 Moo Ind App 433 (463, 466): 9 Suth W R P C 3 (P C), *Dhunpat Singh* v. *Gooman Singh.* (Do.)
('85) 1885 Bom P J 205 (DB), *Narayan* v. *Ramchandra.* (The question whether a lease creates a permanent tenancy is to be determined by the terms of the instrument itself, but to a certain extent by the circumstances existing at the time of its execution and further by the conduct of the parties since its execution.)
('01) 3 Bom L R 768 (768, 769) (DB), *Babu* v. *Sitaram.* (The mere fact that words of inheritance do not occur in a lease does not make it the less a permanent lease, if from the language of the document, taken as a whole, the object of the lease and other surrounding circumstances, such as the conduct of the parties, it appears that their intention was that it should operate as a lease in perpetuity.)
('28) 15 AIR 1928 Cal 392 (394): 55 Cal 435: 110 Ind Cas 368 (DB), *Dinanath Kundu* v. *Janaki Nath.* (Unless the words clearly indicate permanency of lease, the surrounding circumstances and the entire terms of the lease must be looked into to ascertain the nature of the grant.)
('25) 12 AIR 1925 Cal 340 (340): 80 Ind Cas 898 (DB), *Lal Ghosh* v. *Nilkantha Das.*
('18) 5 AIR 1918 Cal 823 (824): 41 Ind Cas 227 (DB), *Jagadish Chandra* v. *Biswe-swari Debya.*
('18) 5 AIR 1918 Cal 639 (640): 41 Ind Cas 530 (DB), *Sarada Kripalala* v. *Akhil Chandra.* (Interest created by taluka patta and called "taluka" constitutes *prima facie* permanent tenure.)
('75) 24 Suth W R 301 (301) (DB), *Nubo Doorga* v. *Dwarka Nath.*
('70) 14 Suth W R 107 (107) (DB), *Kuroonakur Mahotee* v. *Neeladhro.*
('19) 6 AIR 1919 Mad 886 (886): 48 Ind Cas 301 (DB), *Venkatachariar* v. *Narasimha.*
('29) 16 AIR 1929 Pat 376 (382): 121 Ind Cas 360 (DB), *Jagadishwar* v. *Bulak Mahto.*
2. ('29) 16 AIR 1929 Pat 376 (381): 121 Ind Cas 360 (DB), *Jagadishwar* v. *Bulak Mahto.*
('31) 18 AIR 1931 Cal 160 (162): 130 Ind Cas 564 (DB), *Bijoychand* v. *Md. Yasil.*
('19) 6 AIR 1919 Mad 338 (339): 52 Ind Cas 239 (DB), *Chockalinga Nayakan* v. *Arunachalam Chettiar.* (*Prima facie*, terms of document must be looked at to ascertain nature of grant; only in case of doubt other considerations such as the extent of the grantor's right can be taken into consideration.)

sions by the parties. Hence, a document may be held to confer a permanent lease, notwithstanding the absence of any specific formal expressions denoting permanence. Similarly, notwithstanding the use of such expressions, the Court may hold that a permanent lease has not been granted. Thus, words providing that the lessee is to enjoy the property from generation to generation and words to similar effect 'prima facie' indicate a permanent right,[3] and their absence is a factor 'against' permanence.[4] But their presence[5] or absence[6] is not conclusive either way.

The following considerations may be noted in interpreting such documents:

The fact that a lease has been granted for the purpose of reclamation does not necessarily prove the lease to be permanent?

Where a lease has been granted for the purpose of erecting buildings, the fact may indicate that the lease is a permanent one.[8]

Where the terms of a lease and other circumstances indicate on the whole the grant of a permanent lease, the mere fact that the lease contains a provision for forfeiture in case of non-payment of rent or for other reason does not make the lease not permanent.[9]

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3. ('44) 31 AIR 1944 Nag 280 (281): ILR (1944) Nag 838 (DB), *Ramchandra* v. *Rantanlal.*
('25) 12 AIR 1925 Pat 228 (234, 235): 82 Ind Cas 204 (DB), *Gopal Ojha* v. *Ramadhar Singh.*
('23) 10 AIR 1923 Cal 351 (352): 76 Ind Cas 324 (DB), *Krishnendra Nath* v. *Kusum Kamini.*
('19) 6 AIR 1919 Mad 338 (338): 52 Ind Cas 239 (DB), *Chockalinga Nayakan* v. *Arunachalam Chettiar.* (Lease providing for permanent rate of rent coupled with words of inheritance.)
('76) 1 Cal 391 (398): 3 Ind App 92 (PC), *Sonet Kooer* v. *Himmut.*
('26) 13 AIR 1926 Cal 533 (535): 53 Cal 270: 91 Ind Cas 649 (DB), *Rajendra* v. *Moheshata Debi.*
Also see S. 8 Note 4.

4. †('67) 11 Moo Ind App 433 (463, 466): 9 Suth W R P C 3 (PC), *Dhunpat Singh* v. *Gooman Singh.*
†('30) 17 AIR 1930 Mad 434 (435, 436, 437): 125 I.C. 242, *Saldanha* v. *R. C. Church, Mermajal.*
('91) 15 Bom 704 (707), *Ramabai Saheb* v. *Babaji.*
('02) 6 Cal W N 134 (140) (DB), *Ismail Khan* v. *Kali Krishna.*
('01) 5 Cal W N 846 (855, 856) (DB), *Ismail Khan* v. *L. P. D. Broughton.*
(1900) 27 Cal 570 (582): 4 Cal W N 210 (DB), *Ismail Khan* v. *Jaigun Bibi.*
('06) 33 Cal 511 (530): 3 Cal L Jour 306 (DB), *Shama Charan* v. *Abhiram.* (Reversed in 36 Cal 1003 on a different point.)

5. ('26) 13 AIR 1926 Oudh 72 (74): 89 Ind Cas 221, *Kalka Singh* v. *Bishunath Singh.* (The mere use of the word "perpetual" in a lease does not transfer heritable interest.)
('89) 1889 Oudh S C No. 155, p. 184 (185), *Babugin Sheopal* v. *Raja Rampal.*
('25) 12 AIR 1925 Mad 732 (733): 87 Ind Cas 433, *Rama Rao* v. *Thimmappa.*
('26) 13 AIR 1926 Oudh 260 (261): 93 Ind Cas 927, *Sitla Bakhsh* v. *Gulab Singh.*

6. ('29) 16 AIR 1929 Nag 23 (25): 110 Ind Cas 487, *Biju Bapu* v. *Munnalal.*
('05) 32 Cal 648 (651): 9 Cal W N 463 (DB), *Promada Nath* v. *Sri Gobind.* (The absence of the words "maurasi, mokarari" in a lease do not necessarily indicate that it was not the lessor's intention to grant a permanent lease.)
('86) 12 Cal 117 (130): 12 Ind App 205 (PC), *Tulshi Pershad* v. *Ram Narain.*
('18) 5 AIR 1918 Cal 459 (459): 41 Ind Cas 875 (DB), *Baikanta Nath* v. *Lakshan Chandra.*

7. ('82) 8 Cal 664 (673): 9 Ind App 33 (PC), *Bilasmoni* v. *Sheo Persad.*
('24) 11 AIR 1924 Pat 560 (561): 3 Pat 403: 83 Ind Cas 741 (DB), *Tekait Harnarayan* v. *Darshan Deo.*

8. †('05) 32 Cal 648 (651): 9 Cal W N 463 (DB), *Promoda Nath* v. *Sri Gobind.*
('35) 22 AIR 1935 All 492 (493): 154 Ind Cas 305 (DB), *Md. Ismail* v. *Jawahir Lal.*
('14) 1 AIR 1914 Cal 300 (300): 20 Ind Cas 907 (DB), *Elahi Baksh* v. *Hukum Baksh.*
('99) 26 Cal 204 (216): 2 Cal W N 718, *Rungo Lall* v. *Wilson.*
('91) 1891 Bom P J 248 reprint p. 131 (132) (DB), *Nagapaya* v. *Anantaya.* (The condition about permission to build and to surrender the land showed a certain want of equality of benefit inconsistent with the theory of permanent tenancy.)

9. ('07) 34 Cal 358 (361): 5 Cal L Jour 208 (DB), *Meghlal* v. *Rajkumar.*
('33) 20 AIR 1933 Oudh 161 (162): 8 Luck 377: 142 Ind Cas 885 (DB), *Bhagwati Prasad* v. *Balgobind.*
('32) 19 AIR 1932 Cal 764 (765, 766): 59 Cal 1282: 140 Ind Cas 743 (DB), *Bhaba-*

Though a clause restraining transfer is 'prima facie' inconsistent with the grant of a permanent right, it is not conclusive.[10]

Though the fixing of rent without any liability for enhancement may suggest permanence, such liability for enhancement does not necessarily import that the lease is not permanent.[11]

A substantial premium suggests permanence.[12]

A clause which throws the entire cost of improvements on the lessee may indicate some degree of continuity but not necessarily perpetuity.[13]

See also the undermentioned cases.[14]

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taran Pahari v. *Trailokyanath.*
('10) 37 Cal 918 (927): 37 Ind App 198: 7 Ind Cas 549 (550) (PC), *Bhagwat Sahai* v. *Bipin Behary.*

10. ('32) 19 AIR 1932 Cal 764 (766): 59 Cal 1282: 140 Ind Cas 743 (DB), *Bhabataran Pahari* v. *Trailokyanath.* (Prohibition against sale or mortgage.)
('26) 13 AIR 1926 Cal 533 (535): 53 Cal 270: 91 Ind Cas 649 (DB), *Rajendra* v. *Moheshata Debi.* (Covenant against alienation is inoperative if there is no re-entry clause in case of its breach.)
('17) 4 AIR 1917 Cal 746 (783): 43 Cal 332: 36 Ind Cas 321 (SB), *Ram Narain* v. *Chota Nagpur Banking Association.*
('12) 14 Ind Cas 152 (153) (DB) (Cal), *Baroda Prasad* v. *Prosanna Kumar.*
('21) 8 AIR 1921 Cal 474 (476): 60 Ind Cas 984 (DB), *Jogesh Chandra* v. *Mokbul Ali.* (Lease—Tenant covenanting not to transfer—No clause for re-entry—Transfer is not illegal.)
('89) 13 Bom 373 (375) (DB), *Vinayak* v. *Baba Shabudin.*
[*See* ('18) 5 AIR 1918 Cal 517 (520): 40 Ind Cas 513 (DB), *Prodyat Coomar* v. *Krishnamoni Dasia.* (Tenancy continuing for 70 years—Kabuliyat restraining transfer or partition—Tenancy held not permanent.)]

11. ('31) 18 AIR 1931 P C 207 (209): 133 Ind Cas 732 (PC), *Janaki Nath* v. *Dina Nath.*
(1900) 2 Bom L R 93 (94) (DB), *Raghunath* v. *Lakshuman.*
('26) 13 AIR 1926 Cal 533 (535): 53 Cal 270: 91 Ind Cas 649 (DB), *Rajendra* v. *Moheshata Debi.*

12. ('17) 4 AIR 1917 Cal 746 (783): 43 Cal 332: 36 Ind Cas 321 (SB), *Ram Narain* v. *Chota Nagpur Banking Association.*
('31) 18 AIR 1931 P C 207 (209): 133 Ind Cas 732 (PC), *Janaki Nath* v. *Dina Nath.*

13. ('17) 4 AIR 1917 Cal 746 (783): 43 Cal 332: 36 Ind Cas 321 (SB), *Ram Narain* v. *Chota Nagpur Banking Association.*
('30) 17 AIR 1930 Mad 434 (437): 125 Ind Cas 242, *Saldanha* v. *R. C. Church, Mermajal.*

14. ('25) 12 AIR 1925 Mad 919 (920): 85 Ind Cas 964, *Elagan* v. *Nanjappan.* (Lease conferring all rights of cultivation and enjoyment on the lessee and providing for determination of tenancy only in case of non-payment of rent—*Held,* that intention of parties was to create a permanent lease.)
('19) 6 AIR 1919 Cal 482 (489): 50 Ind Cas 222 (DB), *Manmatha Nath Mitter* v. *Anath Bandhu Pal.* (Existence of hats does not raise any presumption of permanency.)
('12) 13 Ind Cas 364 (365) (DB) (Cal), *Abdul Karim* v. *Abdul Rahaman.* (Where an under-raiyati lease provided that the tenant was at no time to be ejected from the land, but that, after the expiry of nine years, a fresh settlement would be made and until it was made the conditions of the kabuliyat were to remain in force—*Held* that the lease was intended to be a permanent lease.)
('05) 8 Oudh Cas 61 (64, 65) (DB), *Madho Singh* v. *Deputy Commissioner of Bara Banki.* (Lease providing that lessee should remain in possession on payment of annual rent and should not be ejected so long as he paid rent regularly—*Held* lease was not permanent.)
('26) 13 AIR 1926 Cal 558 (558): 53 Cal 95: 94 Ind Cas 684 (DB), *Chandi Charan* v. *Ashutosh Lahiri.* (A man may have a permanent right of tenancy in a house and a site but he would not necessarily have the same right to another piece of land adjoining it of which he had taken settlement for the purpose of enlarging the compound of the house.)
('17) 4 AIR 1917 Cal 746 (783): 43 Cal 332: 36 Ind Cas 321 (SB), *Ram Narain* v. *Chota Nagpur Banking Association.* (The fact that a lease is in favour of two persons points to the conclusion that though some measure of continuity was desired, perpetuity was not intended.)
('32) 19 AIR 1932 P C 105 (108): 138 Ind Cas 234 (PC), *Bechu Singh* v. *Kumar Kamakhya.* (The plaintiff sued in ejectment alleging the defendants to be yearly tenants — Defendants set up raiyati or occupancy rights under Chota Nagpur Tenancy Act — *Held* on construction of the patta under which the defendants originally came into possession and the facts of the case that the defendants were not entitled to raiyati rights in the land.)
('30) 17 AIR 1930 Mad 434 (436): 125 Ind Cas 242, *Saldanha* v. *R. C. Church, Mermajal.* (Grant for indefinite period is *prima facie* for lessee's life only.)
('31) 18 AIR 1931 Nag 128 (128): 134 Ind Cas 263, *Sadaram* v. *Sundar Singh.*

The significance of various vernacular expressions which are commonly used in lease deeds in this country with reference to the question whether a permanent tenure is created is discussed below :

The word 'bemiad' simply means "without any term." It does not in itself import a permanent lease. But along with other circumstances it may indicate such lease.[15]

The words 'putra poutradi krame' support the theory of permanence.[16]

The term 'mirasi' denotes heritability and permanence of tenure.[17]

The term 'mourasi' implies a permanent hereditary tenure.[18]

(Kabuliyat stating that the tenant would pay rent at Rs. 10 for five years and would give up possession after five years and that if he further remained in possession he would pay Rs. 25 as rent — *Held* that this did not mean that he had the right to occupy the sites for ever subject simply to the payment of Rs. 25 per annum.)
('88) 11 Mad 77 (79, 80) (DB), *Thiagaraja* v. *Giyana Sambandha.* (When the right of possession or right to continue in possession is proved to have arisen under a written instrument which does not provide for right of permanent occupancy, then the right to possession must *prima facie* follow the terms of the instrument in the absence of any subsequent agreement.)

15. ('30) 17 AIR 1930 Cal 94 (95): 57 Cal 775: 126 Ind Cas 550 (DB), *Janakinath Roy* v. *Mohendra Narain.* (The word "bemiadi" does not mean permanent tenancy.)
('17) 4 AIR 1917 Pat 46 (46): 2 Pat L Jour 180: 39 Ind Cas 658 (DB), *Parshan Kuer* v. *Tulsi Kuer.* (Mere fact that the deed confers mineral rights on the lessee or on the heirs and successors of the lessee will not make the lease a permanent one.)
†('31) 18 AIR 1931 P C 207 (209): 133 Ind Cas 732 (PC), *Janaki Nath* v. *Dina Nath.* (After consideration of all the provisions of the kabuliyat it was held that the word "bemiadi" referred to a lease not determinable at will on notice.)
('29) 16 AIR 1929 Pat 68 (70): 115 Ind Cas 554 (DB), *Kamakhya Narayan* v. *Bechu Singh.* (Lease held not permanent.)
('22) 9 AIR 1922 Pat 161 (162): 6 Pat L Jour 687: 65 Ind Cas 303 (DB), *Kangalicharan* v. *Surja Narain.* (Bemiadi tenancy does not necessarily mean that it can never be a permanent lease although there is no rule that it imports a permanent tenancy.)
('24) 11 AIR 1924 Pat 88 (89): 2 Pat 452: 77 Ind Cas 32 (DB), *Forbes* v. *Hanuman Bhagat.* (Provision for erection by lessee of pucca buildings with lessor's consent indicated permanent tenure.)
('36) 23 AIR 1936 Pat 275 (277): 162 Ind Cas 797 (DB), *Darbar Saheb* v. *Bare Lal.* (Lease held permanent.)
('25) 12 AIR 1925 Oudh 270 (271): 78 Ind Cas 47, *Kalu Singh* v. *Hansraj.* (The words "bila miad" in their common acceptance may mean either undetermined or perpetual — The terms of the document must be examined in order to see which of the two meanings applies to the particular document.)

16. ('23) 10 AIR 1923 Cal 505 (505): 76 Ind Cas 586 (DB), *Golam Rahaman* v. *Kundu Choudhri.*
('16) 3 AIR 1916 Cal 664 (665): 29 Ind Cas 502 (DB), *Kartic Mandal* v. *Bama Charan.*
('26) 13 AIR 1926 Oudh 260 (261): 93 Ind Cas 927, *Sitla Baksh* v. *Gulab Singh.* (The use of the word "aulad" does not show that the lease is hereditary.)
[*See also* ('43) 30 AIR 1943 Bom 149 (149): 207 Ind Cas 62 (DB), *Donkangonda* v. *Revanshidappa.* (A permanent tenancy may be created without the use of any words of inheritance although if the intention be to create a permanent tenancy one would expect to find a reference to heirs or successors.)]

17. ('23) 10 AIR 1923 Cal 705 (706) (DB), *Ajimannessa* v. *Pannalal.* ("Miras" is an Arabic word meaning heritability.)
('91) 15 Bom 407 (408) (DB), *Vithu* v. *Dhondi.*
('69) 4 Mad H C R 153 (161) (DB), *Saminathaiyan* v. *Saminathaiyan.* ("Mirasidar" in Tanjore district is a hereditary tenant under the Government. Tenancy is determinable on default in payment of the motha faisal assessment payable for the land and the tenant is subject to no restriction in regard to the disposition of his right and interest.)
('94) 18 Bom 507 (511) (DB), *Vithalbowa* v. *Narayan.* (In the Bombay Presidency the mirasdar on inam estates is only a tenant at quit-rent or at a reasonable rent not subject to ejectment so long as he pays it.)

18. ('29) 16 AIR 1929 Cal 454 (456): 56 Cal 180: 117 Ind Cas 534, *Giribala* v. *Kedar Nath.*
('18) 5 AIR 1918 Cal 459 (459): 41 Ind Cas 875 (DB), *Baikanta Nath* v. *Lakshan Chandra.* (The words "istumirari mourasi mokarrari" have always been held to mean permanent and heritable.)
('35) 62 Cal L Jour 551 (559) (DB), *Prodyat Kumar* v. *Hirendra Nath.*
('23) 10 AIR 1923 Cal 705 (706) (DB),

But the words 'istimrari mokarari' do not in themselves import the idea of heritability.[19] But they may establish a permanent and heritable right, when there are also other factors indicative of such right.[20]

The word 'purakudi' does not imply a permanent occupancy right.[21] So also, the expression 'ulavadai' does not import a permanent tenancy.[22]

'Mulgeni' is a permanent lease.[23]

'Taluk' imports a permanent tenure.[24] So also the word 'zamindari.[25]

See also the undermentioned cases.[26]

Ajimannessa v. *Pannalal*. (The word "mourasi" is a variation of the term "miras".)

19. †('28) 15 AIR 1928 P C 146 (148): 7 Pat 649: 55 Ind App 212: 109 Ind Cas 663 (PC), *Kumar Kamakhya* v. *Ram Raksha*.
†(1900) 27 Cal 156 (165, 166): 26 Ind App 216 (PC), *Beni Pershad* v. *Dudhnath*.
*('86) 12 Cal 117 (130): 12 Ind App 205 (PC), *Tulshi Pershad* v. *Ram Narain*.
†('17) 4 AIR 1917 Cal 746 (783, 785): 43 Cal 332: 36 Ind Cas 321 (SB), *Ram Narayan* v. *Chota Nagpur Banking Association*.
('03) 30 Cal 883 (892, 893) (DB), *Narsingh Dyal* v. *Ram Narain Singh*.
('03) 30 Cal 20 (31): 7 Cal W N 314 (DB), *Agin Bindh Upadhya* v. *Mohan Bikram*.
(1900) 1900 All W N 27 (28), *Nageshar* v. *Ram Autar*.
('26) 13 AIR 1926 Cal 322 (325): 90 Ind Cas 781 (DB), *Jabeda Khatun* v. *Mohommad Mozaffar*.
('86) 8 All 569 (572): 1886 All W N 227 (DB), *Gaya* v. *Ramjiawan Ram*.
('26) 13 AIR 1926 Oudh 260 (261): 93 Ind Cas 927, *Sitla Bakhsh* v. *Gulab Singh*.
('24) 11 AIR 1924 Pat 572 (573): 3 Pat 534: 78 I. C. 511 (DB), *Hari Gir* v. *Kumar Kamakhya*.
('25) 12 AIR 1925 Pat 216 (219): 4 Pat 139: 84 Ind Cas 586 (DB), *Ram Rachhya* v. *Kamakhya Narain*.
('82) 8 Cal 664 (672, 673): 9 Ind App 33 (PC), *Bilasmoni* v. *Raja Sheopersad*.
('80) 5 Cal 543 (555 to 558): 5 Cal L R 138 (DB), *Sheo Pershad* v. *Kally Dass*.
(1851-54) 5 Moo Ind App 467 (498): 1 Sar 472 (PC), *Bengal Government* v. *Nawab Jafur*.
Also see S. 8, Note 4.

NOTE.—In some early decisions of the Calcutta High Court, for instance, 12 Suth W R 3 and 5 Suth W R 101, it was held that the words "istimrari mokarari" by themselves imply a perpetual and heritable tenure, unless their effect is curtailed by other factors—1 Cal 391: 3 Ind App 92 (PC) also may seem capable of being interpreted as supporting this view —But in that case the words "generation to generation" also were used and the Privy Council gave this as the reason for their decision that the tenure was an absolute, hereditary mokarari one—The later decisions of the Privy Council, as well as of the High Courts, leave no doubt in the matter.

20. ('76) 1 Cal 391 (398): 3 Ind App 92 (PC), *Sonet Kooer* v. *Himmut*. (The words "generation to generation" imported heritability.)
('17) 4 AIR 1917 Cal 746 (749): 43 Cal 332: 36 Ind Cas 321 (SB), *Ram Narayan* v. *Chota Nagpur Banking Association*. (Words "from generation to generation" or similar words are not indispensable to show permanency.)
†('72) Ind App Sup Vol 181 (186): 13 Beng L R 124 (PC), *Leelanund Singh* v. *Munoarunjun Singh*.

21. ('04) 27 Mad 291 (299): 31 Ind App 83 (PC), *Mayandi Chettiyar* v. *Chockalingam*.
('88) 11 Mad 77 (78) (DB), *Thiagaraja* v. *Giyana Sambandha*. (5 Mad 345 referred to.)
('99) 22 Mad 264 (267) (DB), *Rangasami Reddi* v. *Pandara Sannadhi*.

22. ('99) 22 Mad 264 (267) (DB), *Rangasami Reddi* v. *Pandara Sannadhi*. (Distinguishing 19 Mad 485 where it was held that *ulavadi mirasdar* imported a permanent tenancy.)
[*See also* ('24) 11 AIR 1924 P C 65 (74): 47 Mad 337: 51 Ind App 83: 82 Ind Cas 226 (PC), *Nainapillai* v. *Ramanathan*. ('Kudimiras' does not import permanent right.)]

23. ('10) 33 Mad 253 (254): 5 Ind Cas 437 (437) (DB), *Gangamma* v. *Bommakka*.
('94) 17 Mad 218 (219, 220): 3 Mad L Jour 287 (DB), *Unhamma Devi* v. *Vaikunta Hegde*.
('91) 15 Bom 407 (413) (DB), *Vithu* v. *Dhondi*. (Mulgenidar is substantially the same as mirasdar.)

24. ('22) 65 Ind Cas 145 (150) (DB) (Cal), *Secy. of State* v. *Ananda Mohan Roy*.
('69) 12 Suth W R 413 (415, 416) (DB), *Tarini* v. *Watson*.
('18) 5 AIR 1918 Cal 799 (800): 38 Ind Cas 56 (DB), *Upendra Lal* v. *Jogesh Chandra*.
('21) 8 AIR 1921 Cal 474 (475, 476): 47 Cal 979: 60 Ind Cas 984 (DB), *Jogesh Chandra* v. *Makbul Ali*.
('13) 21 Ind Cas 47 (48) (DB) (Cal), *Budyar Rahman* v. *Matiar*.

25. ('03) 25 All 1 (15): 29 Ind App 203 (PC), *Rampal Singh* v. *Balbhaddar*.

26. *Leases held not permanent*.
('18) 5 AIR 1918 Cal 849 (850): 29 Ind Cas 461 (DB), *Meher Ali* v. *Kalai Khalashi*. (The description of a kabuliyat

48. Permanent tenancy—Circumstantial evidence as to—General.—As seen in Note 44, even the presumption of lawful origin or lost grant is not independent of all evidence. There must be sufficient evidence before the Court to make a grant of permanent tenancy reasonably capable of being

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as 'Sahayee Karsha Kabuliyat' does not necessarily imply that the grantee was intended to have a permanent heritable interest. The use of the term 'Kayami' in a kabuliyat imports no fixity of rent but only permanence of occupation of the land.)

('85) 9 Bom 419 (422) (DB), *Gangabai* v. *Kalapa*. (The words: "You must pay every year Government dues and enjoy the fields along with the garden lands without disturbance *(sukhrup rahane)*, besides the fixed amount there will be no oppression on account of cesses" held do not create a permanent tenancy but only a tenancy from year to year.)

('17) 4 AIR 1917 Mad 826 (826): 33 Ind Cas 57 (DB), *Murugappa* v. *Rangasami*. (A lease should not be regarded as permanent merely because it prescribes no time, even when the lessee occupies the land for 60 years at a low rate of rent.)

('31) 18 AIR 1931 Bom 466 (469, 470): 133 Ind Cas 839 (DB), *Ramchandra* v. *Nara-Sinha*. (Lease for "aniyamit" period—*Held* not permanent.)

('14) 1 AIR 1914 Bom 294 (296): 39 Bom 316: 27 Ind Cas 523 (DB), *Yeshwant* v. *Keshavrao*. (Term "fazendari," although indicating nature of rent, does not necessarily decide nature of tenure.)

('01) 4 Oudh Cas 264 (267), *Balgovind* v. *Raja Rampal*. (Sankalp rent free grant held not to be a perpetual lease.)

('92) 15 Mad 199 (202) (DB), *Rajaram* v. *Nara Singa*. (Words "Kayam saswata" do not *per se* convey an estate of inheritance.)

('19) 6 AIR 1919 Mad 897 (898, 899): 46 Ind Cas 62 (DB), *Rama Iyenger* v. *Guruswami*. (Kayam saswatham patta.)

('32) 19 AIR 1932 Cal 398 (404): 137 Ind Cas 658 (DB), *Narendra Nath* v. *Sanyasi Charan*. (Word "bharatia" is seldom used with regard to a permanent tenant.)

('16) 33 Ind Cas 264 (264) (Oudh), *Tribhuwan Dat* v. *Muhammad Abdul Hasan*. (No interest after the life of the lessee or grantee is created by the use of *'hamesha'* or *'dawami'*.)

('89) 1889 Bom P J 321 reprint page 325 (326) (DB), *Gangadhar* v. *Mahadu*. (The use of word "nehemi" in the lease—The word not occurring in the clause defining the duration of the tenancy but in the clause providing the deduction to be allowed by the landlord from the highest assessment—Permanent tenancy held not created.)

('26) 13 AIR 1926 Oudh 260 (261): 93 Ind Cas 927, *Sitla Bakhsh* v. *Gulab Singh*. ("Dawami" does not necessarily import permanency or heritability.)

Leases held permanent.

(1859-61) 8 Moo Ind App 327 (330): 4 Suth W R P C 73 (PC), *Vencataswara* v. *Alagoomoottoo*. (A 'cuttoogootaga' lease is a lease in perpetuity.)

('76) 1876 Bom P J 227 (DB), *Gangava* v. *Konher*. (Use of word "nirantar" confers a perpetual interest.)

('27) 14 AIR 1927 All 788 (789): 100 Ind Cas 652 (DB), *Abdul Karim* v. *Gauri Shankar*. (The word "intiqal" is a word of wide import and certainly includes a transfer by way of perpetual lease.)

('90) 1890 Bom P J 211, reprint page 420 (421) (DB), *Narsingrao* v. *Narayanrao*. (In this case the word 'nirantar' was immediately followed by the words 'as long as you please' and hence the case of 1876 Bom P J 227 which held this word to mean perpetual could not be followed.)

('85) 1885 Bom P J 205 (DB), *Narayan* v. *Ram Chandra*. (The words 'kayam karun dilhe' at least in the district of Ratnagiri imports a permanent tenure.)

('19) 6 AIR 1919 Mad 886 (886): 48 Ind Cas 301 (DB), *Venkatachariar* v. *Narasimha*. (Expressions "saswatham" and "kayam" ordinarily import permanent lease.)

('07) 34 Cal 358 (361): 5 Cal L Jour 208 (DB), *Meghlal* v. *Rajkumar Thakur*. (Lease including the words "Mai hak hakuk" convey to the lessee all the lessor's rights and interest in the land demised including subsoil rights and it is a permanent lease.)

('31) 18 AIR 1931 Cal 87 (89): 129 Ind Cas 855 (DB), *Eshaque Miah* v. *Dula Miah*. (Words "sanba sani kaimi asat jotedari" indicate a permanent right.)

('28) 15 AIR 1928 Cal 392 (395): 55 Cal 435: 110 Ind Cas 368 (DB), *Dinanath Kundu* v. *Janaki Nath*. ("Sarasari bemiadi kabuliyat.")

('23) 10 AIR 1923 Cal 705 (706) (DB), *Ayimannessa* v. *Panna Lal*. (Words "mireshorotto janmaiya" indicate permanent tenancy.)

('34) 21 AIR 1934 Cal 861 (862): 153 Ind Cas 623, *Surendra Kumar* v. *Bepin Chandra*. (The words "Daimi Kaimi" can be relied on to hold that permanency is indicated.)

('07) 30 Mad 203 (205) (DB), *Mana Vikrama* v. *Karnavan Gopalan Nair*. (The word 'Adimayavana' when applied to a tenure of land imports a permanent tenure, but it may be used with reference to an allowance of money or grain rent charged on the land, and in that case it will not imply any tenure in favour of the grantor but only an allowance.)

presumed.[1] Hence, whether such presumption is resorted to or not, the question of permanent tenancy, where an 'express' grant is not established, is one depending on the facts and circumstances of each case.[2]

The following are the elements which are usually taken into consideration in determining the permanent nature of a tenancy[3]: 1. The unknown origin of the tenancy. 2. Long and undisturbed possession by the tenant and his predecessors in title. 3. The payment of the same rent for a long period. 4. The tenancy being for residential or building purposes. 5. The erection of pucca buildings, etc., by the tenant on the land without any objection by the landlord. 6. The tenancy having been held by the same family, generation after generation. 7. Transfers of the tenancy and their recognition by the landlord.

But the above is not an exhaustive enumeration. None of these factors are by themselves conclusive. But the co-existence of a number of them will be of more or less probative force according to the circumstances of a case in establishing a permanent tenancy. In determining the question, therefore, the facts and circumstances of a case must be considered as a 'whole.' It is their 'cumulative' effect that must be considered.[4]

For the sake of greater convenience, however, the decisions bearing on the subject have been summarised in the following Notes 49 to 51 under headings which have reference to some of the main factors involved in such cases. See also the undermentioned cases.[5]

SECTION 105—NOTE 48

1. NOTE—In AIR 1924 P C 65 (72, 73, 74): 47 Mad 337: 51 Ind App 83 (PC) having expressly held that a permanent tenancy in the case could only be proved, if at all, by a lost grant, their Lordships consider the circumstances of the case and hold that a permanent tenancy is not established—This can only be understood as a decision that the materials before the Court were not such as to justify the presumption of lost grant—But in AIR 1930 P C 103 (105, 106): 57 Cal 1293: 57 Ind App 125 (PC) their Lordships considered the materials before the Court as sufficient to justify such a presumption.
2. ('32) 19 AIR 1932 Cal 398 (400): 137 Ind Cas 658 (DB), *Narendra* v. *Sannyasi.*
3. ('19) 6 AIR 1919 P C 11 (11): 47 Cal 1: 1919 Pun Re No. 81: 46 Ind App 131: 50 Ind Cas 749 (P C), *Afzalunnissa* v. *Abdul Karim.* (Their Lordships quoted with approval the headnote in 28 Cal 738 the chief points of which were: Long possession, transfers by succession or sale, buildings of pacca structures with landlord's permission, the landlord having acquiesced in or having knowledge of the successive transfers, etc.—All these raise the presumption of permanency, although the origin of the tenancy may not be known — Their Lordships observed that this did not apply only to Bengal (the case was from the Punjab and it applied to it).)
('39) 43 Cal W N 828 (829, 831) (DB), *Probhas Ch. Malik* v. *Debendra Nath Das.*
('28) 15 AIR 1928 Lah 720 (721): 111 Ind Cas 76, *Ishar Das* v. *Bulaqi Das.*
('23) 10 AIR 1923 Mad 54 (55): 71 Ind Cas 330 (DB), *Abdur Salam Sahib* v. *M. Kandaswami.*
('22) 9 AIR 1922 Lah 329 (336): 72 Ind Cas 177, *Moti Sagar* v. *Dhanna Mal.*
(1908) 8 Cal L Jour 513 (518, 519) (DB), *Ismail Khan Mahomad* v. *Nanigopal Mukerji.*
NOTE—The decisions of the Calcutta High Court in AIR 1925 Cal 309 (310 to 314): 52 Cal 43 (DB); AIR 1929 Cal 37 (38 to 40): 56 Cal 738 (DB) and AIR 1932 Cal 198 (199, 200) (DB) contain an exhaustive discussion of the question in different aspects and may be usefully referred to.
4. ('48) 35 AIR 1948 Oudh 54 (68): 22 Luck 93: 229 Ind Cas 421 (DB), *U. P. Govt.* v. *C. M. T. Association Ltd.*
(32) 19 AIR 1932 Cal 198 (199): 136 I.C. 889 (DB), *Debendra Nath* v. *Pashupathi.* (It should also be noted that the effect of a number of facts may be destroyed in some cases by a single fact.)
('40) 27 AIR 1940 Cal 393 (395): 190 Ind Cas 622, *Sukumar* v. *Nagendrabala.*
('35) 62 Cal L Jour 201 (203) (DB), *Jamiruddin* v. *Hazi Mal Gani.* (*Held* that the facts did not unmistakably point to permanence and were not inconsistent with a supposition to the contrary.)
5. ('48) 35 AIR 1948 Oudh 54 (68): 22 Luck 93: 229 Ind Cas 421 (DB), *U. P. Govt.* v. *C. M. T. Association Ltd.*
[Where (1) the land was given on lease at the same time as the building upon it was sold for residential purposes to the lessee and (2) no period was fixed for the lease and (3) the land was held at a uniform rent for 69 years and (4) several transfers had taken place and the trans-

The question whether a permanent tenancy can be inferred from circumstances is a question of law.[6]

ferability of the lessee rights was clearly recognised and (5) the lessor never claimed that the lease was terminable—*Held* that the cumulative effect of all of them taken together was to establish that the land was held under a perpetual lease.]

('48) 35 AIR 1948 Pat 12 (14), *Dinabandhu* v. *Gopinath.*

[Long possession with fixed rent, heritability and transferability of tenure held raised presumption of permanent tenancy.]

('41) 28 AIR 1941 Pat 228 (230): 20 Pat 115: 195 Ind Cas 583 (DB), *Ram Lal* v. *Mt. Bibi Zohra.* (Lease for construction of house with tiled or thatched room—Rent payable on monthly basis — Lessee free to give up house and remove materials thereof whenever he chose—Tenancy held not permanent.)

('38) 25 AIR 1938 Pat 7 (8): 173 Ind Cas 259, *Madhusudan Swain* v. *Durga Prasad.* (Origin of tenancy unknown—Substantial structures erected—Repeated transfers — Uniform rent—Presumption of permanent tenancy held could be drawn.)

('25) 12 AIR 1925 Bom 390 (391): 91 Ind Cas 272 (DB), *Juvansingji Motisingji* v. *Dola Chhala.* (Existence of tenancy shown for nearly 80 years—No evidence to show origin of tenancy—Tenant held entitled to the presumption under S. 83 of Bombay Land Revenue Code (1879) that he was a permanent tenant at fixed rent.)

('24) 11 AIR 1924 Mad 828 (829): 79 Ind Cas 845, *Chellamma* v. *Pentayya.* (Mere reclaiming land in a zamindari and making it cultivable not enough to confer permanent occupancy rights.)

('20) 7 AIR 1920 Nag 62 (62): 57 Ind Cas 311, *Manalal* v. *Sukhlal.* (Mere fact that land was given for cultivation when it was waste and money was spent upon it, does not necessarily raise presumption of permanent tenancy.)

(1912) 20 Ind Cas 374 (384, 385) (DB) (Mad), *Venkatachala Goundan* v. *Rangaratnam Iyer.* (Long possession, payment of uniform rate of rent, the fact that the lands were reclaimed and brought under cultivation by the ryots and that they have been making alienation for a time, necessarily raise a presumption that the defendants have occupancy rights.)

('12) 16 Ind Cas 213 (214) (Cal), *Mohim Chandra* v. *Rup Manjari Dassi.* (Leasehold property descending for one generation only — Masonry buildings costing a few hundred rupees only erected not by lessee but by sub-lessee—No presumption of permanent tenancy.)

('30) 17 AIR 1930 P C 103 (104): 57 Cal 1293: 57 Ind App 125: 123 Ind Cas 722 (PC). *Md. Mazaffaralmusavi* v. *Bibi Jabeda.* (Tenure described as istimrari mukarari in rent receipts and Court proceedings — Failure of proceedings for enhancement of rent — Circumstances such as these are ordinarily, and *prima facie* a sufficient proof of permanent tenancy.)

('22) 9 AIR 1922 P C 292 (303, 304): 45 Mad 586: 49 Ind App 286: 68 Ind Cas 538 (PC), *Chidambara* v. *Veerama Reddi.* (*Held*, defendants had established their prescriptive rights of occupancy—They had been dealing with the property as their own for at least 100 years—They had received compensation from Government for lands taken out of their holdings for public purposes and that the plaintiff's evidence was found to be mostly false and fabricated.)

('05) 1 Cal L Jour 572 (575, 577) (DB), *Robert Watson & Co. Ltd.* v. *Radha Nath.* (Lease for reclamation—Time of origin not known —*Held* permanent.)

('34) 21 AIR 1934 Cal 51 (52): 150 Ind Cas 30 (DB), *Annanda Charan* v. *Manmatha Nath.* (Entry in record of rights in favour of tenant raises statutory presumption as to permanency of tenure and transferability.)

('19) 6 AIR 1919 P C 84 (84, 85): 50 Ind Cas 856 (PC), *Surendra Nath* v. *Dwarkanath Chakravarti.* (Tenancy described as at will in rent receipts — Description not shown as known by tenants or consented to by them—Other facts showing tenancy as permanent — Tenancy cannot be held as one at will.)

('29) 16 AIR 1929 P C 156 (158): 52 Mad 549: 56 Ind App 248: 116 Ind Cas 601 (PC), *Subrahmanya* v. *Subrahmanya.* (Purchase of kudivaram rights in a portion of the lands by tenants throws doubt on the theory of having permanent rights.)

('15) 2 AIR 1915 Mad 1070 (1070): 28 Ind Cas 599 (DB), *Raghava* v. *Secy. of State.* (Assertion of mulgeni lease for long time —*Held*, mulgeni lease proved.)

6. ('41) 28 AIR 1941 Pat 228 (231): 20 Pat 115: 195 Ind Cas 583 (DB), *Ram Lal* v. *Mt. Bibi Zohra.*

('39) 26 AIR 1939 Pat 448 (449): 18 Pat 571: 184 Ind Cas 363 (DB), *Mahomed Zayauddin* v. *Shaikh Dargahan.*

('28) 15 AIR 1928 Cal 597 (599): 55 Cal 1029: 112 Ind Cas 180 (DB), *Nibaran Chandra* v. *Kristo Mohan.*

('28) 15 AIR 1928 Cal 315 (317): 55 Cal 355: 107 I. C. 81 (DB), *Monmotha Nath* v. *Rajeswar Rai.*

('23) 10 AIR 1923 Mad 54 (54): 71 Ind Cas 330 (DB), *Abdur Salam Sahib* v. *M. Kandaswami Chettiar.*

*('27) 14 AIR 1927 P C 102 (105): 8 Lah 573: 54 Ind App 178: 101 Ind Cas 355 (PC), *Dhanna Mal* v. *Moti Sagar.*

('34) 21 AIR 1934 Cal 288 (289): 61 Cal 32: 150 Ind Cas 238 (DB), *Manmatha*

49. Circumstantial evidence as to permanent tenancy — Long and undisturbed possession at fixed rent.—Long and undisturbed possession at fixed rent is not by itself sufficient to establish a claim of permanent tenancy.[1] Even when the origin of the tenancy is not known, long and uninterrupted possession at unvarying rent is not sufficient by itself to give rise to an inference of permanency.[2] In some decisions, however, the view has been taken that length of possession at an unvarying rent coupled with the un-

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Nath v. *Promatha Nath.*
('32) 19 AIR 1932 Cal 398 (400): 137 Ind Cas 658 (DB), *Narendra Nath* v. *Sannyasi Charan.*
('29) 16 AIR 1929 Cal 37 (39): 56 Cal 738: 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nandalal.* (View doubted by Rankin, J., but followed.)
('28) 15 AIR 1928 Nag 153 (155): 111 Ind Cas 488, *Deolia* v. *Raje Janardhan.*
('32) 19 AIR 1932 Cal 198 (199): 136 Ind Cas 889 (DB), *Debendra Nath* v. *Pashupathi.*
[*See* ('98) 25 Cal 896 (898): 2 Cal W N 405 (FB), *Nabu Mondul* v. *Cholim Mullik.*]
[*See also* ('42) 29 AIR 1942 Pat 397 (398): 200 Ind Cas 769 (DB), *Ram Ranbijaya* v. *Ramjivan Ram.* (It is a mixed question of law and fact.)]

SECTION 105—NOTE 49

1. ('47) 34 AIR 1947 Mad 88 (89), *Lakshmi Naidu* v. *Someswararao.*
('34) 21 AIR 1934 Cal 716 (717): 153 Ind Cas 1047, *Moslem Molla* v. *Subal Chandra.*
('27) 14 AIR 1927 Nag 376 (376): 104 Ind Cas 558, *Ramrao Hiji* v. *Dattatraya Krishna.*
('26) 13 AIR 1926 Cal 592 (593): 92 Ind Cas 899 (DB), *Baikuntha Nath* v. *Sheikh Hari.*
('25) 12 AIR 1925 Cal 309 (314): 52 Cal 43: 85 Ind Cas 103 (DB), *Abdul Hakim Khan* v. *Elahi Baksha Shah.* (Origin of tenancy not unknown.)
('24) 11 AIR 1924 Mad 828 (829): 79 Ind Cas 845, *Chellamma* v. *Pentayya.* (Mere length of possession not sufficient to confer permanent occupancy rights.)
('18) 5 AIR 1918 Nag 210 (212): 48 Ind Cas 354, *Banmali* v. *Nihal Singh.* (Rent not alleged to be uniform — Mere long possession not sufficient to raise presumption of permanent tenancy—Onus is on tenant to show that tenancy had become permanent.)
('86) 1886 Bom P J 61 (DB), *Ramkrishna* v. *Kesho.* (Long possession at fixed rent not sufficient in absence of words of inheritance in the lease.)
('67) 3 Mad H C R 1 (3), *Vasudeva Patrudu* v. *Sanyasiraz Peddabaliyara.* (On facts the tenancy was held to be one from year to year.)
†('24) 11 AIR 1924 P C 65 (67): 47 Mad 337: 51 Ind App 83: 82 Ind Cas 226 (PC), *A. S. N. Naina Pillai* v. *T. A. R. A. Rm. Ramathan.*
('29) 16 AIR 1929 P C 156 (158): 56 Ind App 248: 52 Mad 549: 116 Ind Cas 601 (PC), *Subrahmanya* v. *Subrahmanya.*
†('29) 16 AIR 1929 Cal 37 (40): 56 Cal 738: 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nanda Lal.*
†('31) 18 AIR 1931 Mad 577 (578, 579): 133 Ind Cas 369 (DB), *Gopala* v. *Juvappa.* (The rule is applicable to South Kanara.)
('31) 18 AIR 1931 Bom 436 (443, 444): 134 Ind Cas 721 (DB), *Hiralal* v. *Secretary of State.* (Tenancy for 80 years at low and uniform rent.)
('73) 10 Bom H C R 324 (326) (DB), *Narayan Visaji* v. *Lakshuman.*
('91) 15 Bom 647 (649) (DB), *Narayanbhat* v. *Davlata.* (Tenancy at fixed share of produce.)
('37) 24 AIR 1937 Pat 391 (396): 170 Ind Cas 316 (DB), *Secy. of State* v. *Rajendra Prasad.*
†('23) 10 AIR 1923 Cal 682 (683): 75 Ind Cas 105 (DB), *Kedar Nath* v. *Madhu Sudan.*
('12) 14 Ind Cas 152 (153) (DB) (Cal), *Baroda Prosad Burman* v. *Prasanno Kumar Das.* (Lease in writing.)
('11) 9 Ind Cas 141 (145) (DB) (Mad), *Sullee Abhoyee* v. *Krishna Rao.*
('22) 9 AIR 1922 Bom 402 (402): 47 Bom 4: 76 Ind Cas 71 (DB), *Narayan* v. *Pandurang.* (Per Pratt, J, overruled in AIR 1940 P C 192: I L R (1941) Bom 107: ILR (1940) Kar P C 380 (PC), on a different point.)
('88) 11 Mad 77 (80) (DB), *Thiagaraja* v. *G. S. Pandara Sannadhi.*
('19) 6 AIR 1919 Mad 293 (296): 52 Ind Cas 247 (DB), *Ponniah* v. *Deivanai Ammal.*
('04) 8 Cal W N 155 (157, 158) (DB), *J. Winterscale* v. *Sarat Chandra Banerjee.* (But the circumstances of a particular case may lead to such an inference.)
('32) 19 AIR 1932 Cal 398 (403): 137 Ind Cas 658 (DB), *Narendra Nath* v. *Sannyasi Charan.*

2. ('29) 16 AIR 1929 Cal 37 (42): 56 Cal 738: 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nanda Lal.*
('98) 25 Cal 896 (908): 2 Cal W N 405 (FB), *Nabu Mondul* v. *Cholim Mullick.*
('01) 5 Cal W N 801 (803) (DB), *Durga Mohun Das* v. *Rakhal Chandra Roy Chowdhury.*
('21) 8 AIR 1921 Cal 453 (454, 455): 63 Ind Cas 109 (DB), *Jyoti Prosad Chatterjee* v. *Dasarath Ghose.*
[*See* ('78) 3 Cal 696 (699): 1 Cal L R 577 (DB), *Prosunno Coomaree* v. *Sheikh Rutton.* (Possession for fifty or sixty years.)]

known origin of the tenancy would be sufficient to prove the tenancy to be permanent.[3]

In 'Secretary of State for India v. Luchmeswar Singh,'[4] the Privy Council observed as follows:

> "The Government undoubtedly are tenants of the Darbhanga Raj. It is for them to show why the landlord may not recover his property, and they can only do that by proving that there is some agreement between them and their landlord, that they shall have something more than the ordinary tenancy at will or from year to year. All they offer is some conjecture of such an agreement founded simply on their long possession at a uniform rate of payment. If we could not find out the origin of these things, there would be strength in that argument, but as the origin of them is known, the argument loses its force."

But in view of the general position of the case-law on this point, it does not seem as if the Privy Council intended in the last sentence of the above passage, to lay down that where the origin of a tenancy is unknown, long and undisturbed possession at an unvarying rent would be sufficient in every case to raise a presumption of permanence.

It must also be noted here that the presumption of lawful origin in cases of tenancies of unknown origin, referred to in Note 44 does 'not' involve as a rule of law the proprosition that, whenever in such cases the tenant is known to have been in possession for a long time at a fixed rent, it ought to be presumed that a permanent tenancy has been granted. As pointed out in that Note, such a presumption does not arise automatically and 'de jure' in favour of a particular kind of possessor. It is a presumption that arises only when there is positive evidence to sustain it. There must be evidence from which a grant of permanent tenancy must at least be reasonably capable of being presumed, though the evidence need not be sufficient to make such grant 'likely.'

Length of possession at a fixed rent when it co-exists with other factors may give rise to an inference of permanence of tenancy, especially if the origin of the tenancy is not known.[5] For instance, if the value of the pro-

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3. ('30) 17 AIR 1930 Bom 39 (43): 123 Ind Cas 492 (DB), *Mansukh* v. *Trikambhai*. (Tenant proving undisturbed occupation at fixed rent for nearly a century—Presumption of permanent tenancy arises—If landlord proves an approximate point of commencement of tenancy the presumption is defeated.)
('24) 11 AIR 1924 Mad 833 (834): 79 Ind Cas 619, *Chidambaram Gurukkal* v. *Sivagnana Sundaram Pillai*. (When the origin of a tenancy is not known, evidence of the acts and conduct of the parties constitutes the best and the only evidence to prove the nature of the tenancy.)
('89) 16 Cal 223 (231, 232): 16 Ind App 6 (PC), *Secretary of State for India* v. *Luchmeswar Singh*.
('90) 17 Cal 144 (146, 147) (DB), *Dunne* v. *Nobo Krishna Mookerji*.
('07) 30 Mad 528 (530): 17 Mad L Jour 252 (DB), *Kittu Hegadthi* v. *Channamma Shettathi*. (Not followed in A. I. R. 1931 Mad 577.)
('07) 31 Bom 183 (201, 202): 9 Bom L R 50 (DB), *Nananchand* v. *Modi Kekhushru*.
4. ('89) 16 Cal 223 (231, 232): 16 Ind App 6 (PC).
5. ('48) 35 AIR 1948 Pat 12 (14), *Dinabandhu* v. *Gopinath*.
[Long possession with fixed rent, heritability transferability of tenure raises a presumption of permanent tenancy.]
('44) 31 AIR 1944 Pat 109 (110): 212 Ind Cas 273, *Baldeb Jin Thakur* v. *Jogi Sahu*.
('39) 26 AIR 1939 Pat 448 (450, 451): 18 Pat 571: 184 Ind Cas 363 (DB), *Mahomed Zayauddin* v. *Shaikh Dargahan*. (Origin of tenancy unknown—Tenant's predecessors in possession for 100 years having built substantial structures consisting of mud walls and tiled roofs—Possession for generation after generation without paying rent to landlord—Tenancy held permanent.)
('23) 10 AIR 1923 Mad 54 (55): 71 Ind Cas 330 (DB), *Abdur Salam Sahib* v. *M. Kandaswami Chettiar*.
('20) 7 AIR 1920 Cal 325 (326): 58 Ind Cas 189 (DB), *Banga Chandra* v. *Kailash Chandra*. (Tenancy treated by landlord as heritable—Tenancy for residential purposes and substantial improvements to homestead effected.)
('19) 6 AIR 1919 Mad 1135 (1137, 1138): 43 Ind Cas 977 (DB), *Chandra Sekhara*

perty in the locality has gone up very high and the rent fixed is comparatively low, the fact that it has not been raised 'may' suggest that the tenancy is a permanent one.[6] See also cases under Notes 50 and 51.

The fact that the rent paid has not been uniform or that the possession of the tenant has been interrupted, is a factor which will weaken a claim of permanent tenancy.[7]

50. Circumstantial evidence as to permanent tenancy — Lease for dwelling or residential purpose.—The fact that the lease has been granted for building or residential purposes may, in combination with other circumstances, suggest a permanent right.[1] This would especially be so where the

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Swami v. *Nainar Ammal.*
('18) 5 AIR 1918 Cal 34 (38): 52 Ind Cas 825 (DB). *Banwarilal Singh* v. *Dwarkanath Missir.* (Descent from father to son for three generations and various transfers.)
('12) 16 Ind Cas 937 (938) (Cal). *Haridas Tanti* v. *Upendra Narain.* (Long possession of a tenant without change in amount of rent, succession and transfer may give rise to the inference that a holding is a permanent one.)
('66) 3 Bom H C R (A C) 124 (127) (DB). *Annaji Appaji* v. *Kasi Atmaji.*
('95) 22 Cal 533 (542, 543): 22 Ind App 60 (PC). *Ram Ranjan Chakerbatti* v. *Ram Naran Singh.*
('35) 62 Cal L Jour 551 (558, 559) (DB). *Prodyot Kumar* v. *Hirendra Nath.*
[*See* ('27) 14 AIR 1927 Nag 147 (149): 23 Nag L R 16: 100 Ind Cas 438, *Manya* v. *Sitaram.* (Entry in Settlement records implying permanent tenancy.)]
[*See also* ('93) 16 Mad 131 (138) (DB). *Varadaraja* v. *Dorasami.* (Origin of tenancy known—Nearly sixty years' possession by the defendants at a uniform rent, nearly twelve of which were in open defiance to the landlord's claim to eject was held to strengthen the defendants' claim of permanent tenancy.)]

6. †('07) 34 Cal 902 (907, 908): 34 Ind App 160 (PC). *Naba Kumari Debi* v. *Behari Lal Sen.*
('26) 96 Ind Cas 315 (315) (DB) (Cal). *Bireswar Mookherji* v. *Troilokhya Dasi.* (No written lease—Series of successions —Rent not charged for at least 65 years —Land let out for dwelling purposes and situated within the Howrah Municipality —Value of land increased abnormally.)
('32) 19 AIR 1932 Cal 198 (201, 202): 136 Ind Cas 889 (DB). *Debendra Nath* v. *Pashupati Nath.*
('12) 15 Ind Cas 110 (115) (DB) (Cal). *Grey* v. *Ram Sashi Roy.*
†('29) 16 AIR 1929 Cal 473 (474): 56 Cal 275: 118 Ind Cas 353 (DB). *Pramatha Nath* v. *Champa Dasi.*

7. ('37) 24 AIR 1937 Pat 444 (446): 170 Ind Cas 677 (DB). *Secy. of State* v. *Beni Prasad Sahu.* (Variable rent—Mere erection of buildings with knowledge of landlord not in itself sufficient to raise presumption of permanent tenancy.)
('27) 14 AIR 1927 Nag 200 (201): 101 Ind Cas 252. *Fakir* v. *Dattatrayya Krishna.* (Enhancement of rent from time to time not necessarily destructive of permanent tenancy—But if also evidence of annual formal leases granted, presumption is against permanent tenancy.)
('27) 14 AIR 1927 P C 102 (105): 8 Lah 573: 54 Ind App 178: 101 Ind Case 355 (PC). *Dhanna Mal* v. *Moti Sagar.* (Enhancement of rent is entirely inconsistent with the notion of a permanent tenancy.)
†('14) 1 AIR 1914 Mad 564 (567): 47 Mad 1: 7 Ind Cas 202 (DB). *Rajah of Venkatagiri* v. *Narsaya.* (Case of enhancement of rent and disturbance of possession.)
('37) 24 AIR 1937 Pat 391 (396): 170 Ind Cas 316 (DB). *Secretary of State* v. *Rajendra Prasad.* (Enhancement of rent [*See* ('18) 46 Ind Cas 794 (795, 796) (Nag). *Madho Rao* v. *Govind Bhat.* (Mere change in the rate of rent will not necessarily extinguish the permanent nature of a lease.)]

SECTION 105—NOTE 50

1. ('40) 27 AIR 1940 Pat 24 (25): 18 Pat 805: 187 Ind Cas 691 (DB). *Commr., of Income-tax, Bihar and Orissa* v. *Visheshwar Singh.* (Lease for building a gola house and a platform for rice mill—Lease for indefinite period—Lessee not to sell residential rights without permission of landlord—Lease was held to be permanent.)
('28) 15 AIR 1928 Cal 315 (320): 55 Cal 355: 107 Ind Cas 81 (DB). *Monmotha Nath* v. *Bajeswar Rai.* (Land given for residential purposes—Unaltered rent paid for 57 years—Pucca structures—Presumption of permanent tenancy.)
('23) 10 AIR 1923 All 486 (487): 71 Ind Cas 370. *Nobin Chandra* v. *Bandi.* (Origin not known — Lessee constructing pucca houses — Tenancy transferred from time to time and landlord acquiescing in the transactions — Landlord's suits against other tenants dismissed on ground that tenancies were permanent—Inference is that tenancy is permanent.)
('19) 6 AIR 1919 Nag 144 (147): 51 Ind Cas 380. *Buneshwar* v. *Lal Bahadur Singh.* (Permanent works beyond those agreed upon at time of the lease constructed—Landlord encouraging their erection in circumstances leading lessees to believe that they are accepted as permanent tenants — New erection would raise an

origin of the tenancy is not known and the tenant and his predecessors-in-title have been in undisturbed possession of the property for a long time at a uniform rent.[2] The existence of 'pucca' structures will add to the strength of the inference. But the absence of such structures and the fact that there are only 'katcha' structures on the land will not necessarily defeat an inference of permanence suggested by other circumstances in the case.[3] But the mere fact that the tenancy has been created for dwelling purposes will not by itself give rise to an inference of permanence. As seen in Note 48, it is the 'combination' of several factors that generally gives rise to an inference of a permanent right. The Court may, in the peculiar circumstances of a case hold that the tenancy is not permanent though it may have been created for dwelling purposes and though there may be substantial structures on the land.[4]

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equitable estoppel against ejectment.)
('09) 1 Ind Cas 802 (803) (DB) (Mad), *Duraisamy Chettiar* v. *Kuppusami Padayachi*.
('82) 1882 Pun Re No. 34 p. 106 (106), *Muhammad Alam* v. *Ajab*. (Village proprietor giving vacant site to a non-proprietor for erecting residence thereon at his own cost — Presumption, in absence of any express stipulation or local custom to the contrary, is that both parties intend a permanent right of occupancy.)
('12) 15 Ind Cas 110 (115) (DB) (Cal), *Grey* v. *Ram Shashi Roy*.
†('33) 20 AIR 1933 Bom 97 (98): 57 Bom 194: 142 Ind Cas 481 (DB), *Venkatesh* v. *Bhujballi*. (Land given for building purposes and the tenancy is an *ancient one*—Presumption of permanent lease.)
('05) 7 Bom L R 401 (404) (DB), *Navalram* v. *Javerilal*.
('82) 8 Cal 960 (962) (DB), *Gangadhur Shikdar* v. *Ayimuddin*.
('26) 96 Ind Cas 315 (315) (DB) (Cal), *Bireswar* v. *Troilokhya Dasi*.

2. ('41) 28 AIR 1941 All 51 (54, 55): ILR (1941) All 27: 193 Ind Cas 407 (DB), *Ram Daur Rai* v. *Lachhmi Prasad*. (Lease originally granted for building and manufacturing purposes at fixed annual rent—Lessee and his successors in possession for long time during which transfers taking place without objection by zamindar—Lease must be deemed to be perpetual with transferable and heritable rights — Mere fact of land being subsequently cultivated does not affect nature of original lease.)
('37) 24 AIR 1937 Cal 373 (374): 173 Ind Cas 498, *Kumud Behari* v. *Himanshu Kumar*. (Tenancy created before Transfer of Property Act — Permanent structures standing on land for many years—Transfers in past—No change in rent—Tenancy is permanent and transferable.)
†('32) 19 AIR 1932 Cal 198 (199 to 204): 136 I.C. 889 (DB), *Debendra Nath* v. *Pashupati Nath*.
('40) 27 AIR 1940 Cal 393 (394): 190 Ind Cas 622, *Sukumar Chandra* v. *Nagendrabala Dasi*. (In determining the nature of a tenancy it is necessary to bear in mind the habits and customs of the people.)
†('27) 14 AIR 1927 All 342 (343): 100 Ind Cas 479, *Shah Jahan Begam* v. *Munna*.
('24) 11 AIR 1924 Bom 454 (455): 48 Bom 541: 83 Ind Cas 45 (DB), *Rukmini* v. *Rayaji*.
('10) 37 Cal 662 (669): 7 Ind Cas 881 (883) (DB), *Janaki Nath* v. *Kali Narain*.
('07) 5 Cal L Jour 178 (179): 11 Cal W N 242 (DB), *William M. Grant* v. *Mrs. Robinson*.
('27) 14 AIR 1927 Cal 234 (235, 236): 99 Ind Cas 910 (DB), *Pramatha Nath* v. *Bejoy Singh*.
†('24) 11 AIR 1924 Cal 465 (466): 73 Ind Cas 2 (DB), *Makhanlal De* v. *Arun Bala Devi*.

3. ('39) 26 AIR 1939 Pat 350 (351): 179 Ind Cas 940, *Anant Teli* v. *Ramdhan Puri*. (Correct test is not the materials used but the substantiality of the structure.)
('34) 21 AIR 1934 Cal 716 (717): 153 Ind Cas 1047, *Moslem Molla* v. *Subal Chandra*.
†('27) 14 AIR 1927 All 342 (343, 344): 100 Ind Cas 479, *Shah Jahan Begam* v. *Munna*.
('29) 16 AIR 1929 Cal 37 (40, 42): 56 Cal 738: 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nandalal*. (The absence of pucca masonry structures was explained by the fact that the tenant was only a labourer.)
('29) 16 AIR 1929 Cal 473 (474, 475): 56 Cal 275: 118 Ind Cas 353 (DB), *Pramatha Nath* v. *Champa Dasi*.
†('20) 7 AIR 1920 Cal 552 (552): 57 Ind Cas 877 (DB), *Sharoshi Charan* v. *Bhagloo Sah*.
('24) 11 AIR 1924 Cal 465 (467): 73 Ind Cas 2 (DB), *Makhanlal De* v. *Arun Bala Devi*.
('12) 13 Ind Cas 606 (609) (DB) (Cal), *Mahoran Sheikh* v. *Telamuddin Khan*.
('34) 21 AIR 1934 Cal 288 (290): 61 Cal 32: 150 Ind Cas 238 (DB), *Manmatha Nath* v. *Promatha Nath*. (But the residence cannot be confined to the case of tenant himself.)
[But see ('25) 12 AIR 1925 Cal 309 (313, 315): 52 Cal 43: 85 Ind Cas 103 (DB), *Abdul Hakim Elahi Baksh*.]

4. ('42) 29 AIR 1942 Bom 161 (171): ILR (1942) Bom 357: 201 Ind Cas 420 (DB), *Secy. of State* v. *Chimanlal Jamnadas*. (Lease for 99 years — There is nothing

51. Circumstantial evidence as to permanent tenancy — Successions and transfers.—The fact that a tenancy has been held in the same family from generation to generation would be some indication that tenancy is permanent.[1] But this is not a strong indication. Because as pointed out by Rankin, J., in 'Kamal Kumar v. Nandlal Dubey,[2] no reasonable landlord would eject a family from a homestead merely because the father or grandfather has died. But at the same time, the fact that a tenancy is not shown to be hereditary would weaken the case for permanency.[3]

The fact that there have been transfers of the holding which have been recognised by the landlord is strong indication of the tenancy being permanent.[4] Where the other circumstances show that the landlord has recognised

strange if pacca structures are built by grantee because in such a case the structures would be built in the expectation that the lease would be renewed even though at a higher rent on the termination of the period.)
('42) 29 AIR 1942 Pat 397 (399): 200 Ind Cas 769 (DB), *Ram Ranbijaya* v. *Ramjivan Ram.*
†('39) 26 AIR 1939 Pat 350 (351): 179 Ind Cas 940, *Anant Teli* v. *Ramdhan Puri.*
('37) 24 AIR 1937 Pat 399 (406): 171 Ind Cas 461 (DB), *Secy. of State* v. *Sarat Chandra.* (Land let out by Government for building without mention of duration of term—Tenancy is at will—It becomes one from year to year on payment of rent.)
('36) 23 AIR 1936 Cal 100 (101): 161 Ind Cas 247, *Rai Satyendra Nath* v. *Charu Sankar.* (Tenancy found to be for residential purposes — Origin of tenancy unknown—Rent not varied—Proof of one or two transfers—Inference that tenancy was in its origin of a permanent character does not arise.)
('28) 15 AIR 1928 Lah 554 (555): 9 Lah 576: 109 Ind Cas 90 (DB), *Mul Raj* v. *Indar Singh.*
('10) 5 Ind Cas 813 (814) (DB) (Mad), *Ponnusami Pillai* v. *Pasupathi Mudaliar.*
('05) 8 Oudh Cas 13 (18), *Rudra Partab Sahi* v. *Debi Pershad.*
('99) 3 Cal W N 255 (260) (DB), *Krishna Kishore* v. *Mir Mahomed Ali.* (Just as coupled with circumstances such as long possession and long acquiescence, the fact of a permanent building being allowed to be erected without objection may warrant an inference in favour of a permanent holding so there are circumstances which may go far to weaken the force of that inference and one of these is the circumstance of the landlord's interest being let out in ijara.)
('81) 8 Cal L R 50 (51) (DB), *Tarukpodo Ghosal* v. *Shyama Churn.*
('02) 6 Cal W N 134 (140) (DB), *Ismail Khan* v. *Kali Krishna.*
('82) 10 Cal L R 25 (29) (DB), *Prosunno Coomar Jagun Nath.*
†('78) 3 Cal 696 (699, 700): 1 Cal L R 577 (DB), *Prosunno Coomaree* v. *Rutton Bepari.*
('22) 9 AIR 1922 Pat 258 (259, 260): 1 Pat 717: 67 Ind Cas 744 (DB), *L. E. Sir Ralli* v. *A. H. Forbes.* (Though the fact that a lease is for the purpose of building permanent structures raises a presumption that it is a permanent one, yet such presumption cannot outweigh the terms of the lease itself.)
('12) 14 Ind Cas 152 (153) (DB) (Cal), *Baroda Prasad* v. *Prosanna Kumar.*
('24) 11 AIR 1924 Cal 156 (157): 80 Ind Cas 580 (DB), *Kazemini Mutwalli* v. *Manik Chandra.*
('37) 24 AIR 1937 Pat 391 (396): 170 Ind Cas 316 (DB), *Secy. of State* v. *Rajendra Prasad.*
('89) 16 Cal 652 (656, 657) (DB), *Rakhal Das* v. *Dino Moyi.*
†('32) 19 AIR 1932 Cal 398 (402): 137 Ind Cas 658 (DB), *Narendra Nath* v. *V. Sannyasi Charan.*
†('29) 16 AIR 1929 Cal 37 (38): 56 Cal 738: 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nandlal Dube.*
[*See also* ('42) 29 AIR 1942 Rang 11 (12): 198 Ind Cas 678 (DB), *U Dhammathena* v. *U Nyanoketara.* (A constructing building on *B*'s land knowing that it belongs to *B* in the expectation that building would be occupied by *C*—This does not give *C* permanent right of occupancy as against *B* unless it can be proved that before its construction *B* agreed with *A* that *C* should have such a permanent right.)]

SECTION 105—NOTE 51

1. ('26) 96 Ind Cas 315 (315) (DB) (Cal), *Bireswar Mukherji* v. *Troilokhya Dasi.* (Series of successions along with other facts held to prove permanent tenancy.)
2. ('29) 16 AIR 1929 Cal 37 (40): 56 Cal 738: 116 Ind Cas 378 (DB).
3. ('37) 24 AIR 1937 Pat 391 (393, 394): 170 Ind Cas 316 (DB), *Secretary of State* v. *Rajendra Prasad.*
4. *('07) 34 Cal 902 (907): 34 Ind App 160 (PC), *Naba Kumari Debi* v. *Behari Lal Sen.* (Sale deed of the holding stated as follows: "You have become entitled to make gift, or sale of the said land..... on paying expenses, etc., to the Maharaja Bahadur and on causing expunction of my name you shall take a patta in your name"—*Held,* the condition was not inconsistent with the permanent tenancy.)
('05) 32 Cal 51 (60, 61): 31 Ind App 149 (PC), *Nilratan Mondal* v. *Ismail Khan*

a transfer, the mere fact that in the rent receipts, the name of the old tenant is retained does not defeat such inference.[5]

Where, however, the transfers are recent and not such as to have come to the notice of the landlord they will not be evidence against him suggesting a permanent tenancy.[6]

52. Subsequent arrangements between landlord and tenant—Effect on inference of permanence.—On the principles discussed in Note 48, in the case of old tenancies which have gone on for a long time it may be inferred from the surrounding circumstances that a permanent lease was granted. But this rule will not hold good if there has been a subsequent arrangement between the parties, into which their original rights have merged. In such a case, their relations must be determined with reference to such arrangement.[1] But if the arrangement is only of a confirmatory character, the original rights will not be affected. So also, though annual 'kabuliyats' are sometimes executed there may be no 'intention' to act on them. In such cases, the original rights of the parties will not be affected.[2] Similarly, where the rent is not fixed and parties enter into periodic agreements as regards the rent payable, such agreements cannot affect the question of the 'duration' of the lease.[3] It is a question of fact and construction in each case as to what is the effect of the arrangement in question. In the cases cited below,[4] it was held that a new

Mahomed. (Reversing 6 Cal W N 352.)
('05) 32 Cal 41 (49, 50): 31 Ind App 144 (PC), *Upendra Krishna Mandal* v. *Ismail Khan Mahomed.*
('40) 27 AIR 1940 Cal 393 (394): 190 Ind Cas 622, *Sukumar Chandra* v. *Nagendrabala Dasi.* (Documents reciting transfers and sub-leases are admissible to show that lease is permanent.)
('34) 21 AIR 1934 Cal 288 (289, 290): 61 Cal 32: 150 Ind Cas 238 (DB), *Manmatha Nath* v. *Promatha Nath.*
('32) 19 AIR 1932 Cal 198 (199): 136 Ind Cas 889 (DB), *Debendra Nath* v. *Pashupati Nath.*
('29) 16 AIR 1929 Cal 37 (40): 56 Cal 738: 116 Ind Cas 378 (DB), *Kamal Kumar* v. *Nandlal.*
('21) 8 AIR 1921 Cal 474 (475): 60 Ind Cas 984 (DB), *Jogesh Chandra Roy* v. *Mokbul Ali Chowdhury.*
('15) 2 AIR 1915 Cal 709 (710): 16 Ind Cas 937 (DB), *Haridas Tanti* v. *Upendra Narain.*
('12) 15 Ind Cas 110 (115) (DB) (Cal), *Gray* v. *Ram Shashi Roy.*
('11) 12 Ind Cas 482 (483) (DB) (Cal), *Jyoti Prosad* v. *Lachipur Coal Co.*
('10) 5 Ind Cas 783 (784) (DB) (Cal), *Latifar Rahaman* v. *Forbes.*
('04) 8 Cal W N 301 (305) (DB), *Ismail Khan Mahomed* v. *Srimutty Mrinmoyi.*
('04) 8 Cal W N 297 (300, 301) (DB), *Ismail Khan Mahomed* v. *Asmatulla Sareng.*
('74) 21 Suth W R 386 (387, 388) (DB), *Nidhee Kristo Bose* v. *Nistarinee Dossee.*
('12) 1912 Pun Re No. 121: 17 I.C. 208 (209, 210) (DB), *Abdul Karim* v. *Allah Baksha.*
('09) 4 Ind Cas 173 (174) (DB) (Cal), *Nemai Chandra Bose* v. *Mahomed Basir.* (The fact mentioned in one of the sale deeds by which the tenure was sold that one-fourth of the purchase-money should be paid to the landlord is not sufficient to outweigh the presumption.)
('01) 28 Cal 738 (741): 5 Cal W N 858 (DB), *A. Caspersz* v. *Kedar Nath Sarbadhikari.*
[See however ('32) 19 AIR 1932 Cal 398 (402): 137 Ind Cas 658 (DB), *Narendra Nath* v. *Sannyasi Charan.* (Mukarrari tenancy—No admission by landlord that tenancy is mukarrari—One succession and one transfer to grandson do not lead to inference that tenancy is mukarrari.)]

5. ('12) 15 Ind Cas 110 (115) (DB) (Cal), *Gray* v. *Ram Shashi Roy.* (The mere retention of the name of the old tenant for the purpose of identifying the holding in the *sherista* of the landlord is not in itself sufficient to indicate that there was no recognition by the landlord that the tenancy was heritable and transferable.)
('21) 8 AIR 1921 Cal 474 (475): 60 Ind Cas 984 (DB), *Jogesh Chandra Roy* v. *Mokbul Ali Chowdhury.*
6. ('29) 16 AIR 1929 P C 156 (158): 56 Ind App 248: 52 Mad 549: 116 Ind Cas 601 (PC), *Subrahmanya* v. *Subrahmanya.*

S. 105—NOTE 52

1. (1900) 27 Cal 570 (582): 4 Cal W N 210 (DB), *Ismail Khan Mahomed* v. *Jaigun Bibi.*
2. ('28) 15 AIR 1928 Nag 153 (156): 111 Ind Cas 488, *Deolia* v. *Raje Janardhan.*
3. ('29) 16 AIR 1929 Pat 376 (382): 121 Ind Cas 360 (DB), *Jagadishwar* v. *Bulak Mahto.*
4. ('44) 31 AIR 1944 Bom 210 (211), *Bhikaji Vishnu* v. *Ramchandra Krishna.* (Permanent tenancy — Tenant accepting fresh lease for a limited period — Permanent tenancy must be taken to be given up.)
('37) 24 AIR 1937 Lah 56 (56): 165 Ind Cas 322, *Hamid Ullah* v. *Hafiz Abdul.*

tenancy had been created, while in the undermentioned cases[5] it was held that no new tenancy was created and that the original rights of the parties remained unaffected.

53. Acquisition of permanent tenancy after commencement of tenancy. —Possession for any length of time will not by itself be sufficient to convert a tenancy (which is not permanent) into a permanent one[1] in the absence of statutory provision or custom under which such permanent right is acquired. In the absence of such statutory provision or custom, the tenant setting up a permanent right must show that by a subsequent arrangement with the landlord his original tenancy has been converted into a permanent one.[2] As to acquisition of permanent rights by adverse possession, see Notes 79 and 80. As to the estoppel of the landlord from denying the permanent rights of the tenant, see Note 55.

The mere fact that a tenant has carried out reclamation work will not entitle him to permanent rights.[3]

54. Permanent tenancy—Acquisition of, by prescription.—See Notes 79 to 84.

55. Permanency by estoppel.—A landlord may be precluded on the principle of estoppel from denying that the tenant is entitled to a permanent

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(Permanent tenancy — Permanent tenant or his predecessors-in-title executing leases containing conditions inconsistent with permanent tenancy in favour of landlord — Strong presumption against permanent tenancy arises — Burden lies heavily on tenant to prove that tenancy was still a permanent one.)
('32) 19 AIR 1932 Bom 3 (6): 136 Ind Cas 801 (DB), *Shankar Yesu* v. *Khem Sawant*. (Permanent tenancy — Dispute between landlord and tenant — Compromise fixing term of tenancy—Such compromise held to have done away with permanent tenancy and landlord is entitled to evict tenant at the end of the term.)
('04) 27 Mad 291 (299): 31 Ind App 83 (PC), *Mayandi Chettiyar* v. *Chokkalingam Pillay*. (Permanent lease of temple lands by manager of temple—Some years later lessee petioning collector, under whose management temple then was, for lease of same land for one year without referring to former lease—Collector sanctioning lease. 19 Mad 485, reversed.)
('86) 9 Mad 307 (318): 13 Ind App 32 (PC), *Vizianagaram Maharajah* v. *Suryanarayan*. (Original permanent lease—Fresh document construed as grant of lease of similar tenure but on terms more favourable to lessor.)
('88) 11 Mad 77 (84) (DB), *Thiagaraja* v. *Giyana Sambandha Pandara Sannadhi*. (Approved in 27 Mad 291: 31 Ind App 83 (P C).)
('26) 13 AIR 1926 Cal 634 (636): 92 Ind Cas 963, *Gopal Chandra* v. *Satya Bhanu*. (Kabuliyat stating that it was being executed after the previous lease had expired.)
(1900) 27 Cal 570 (582): 4 Cal W N 210 (DB), *Ismail Khan Mahomed* v. *Jaigun Bibi*. (Origin of tenancy not known—Subsequently a kabuliyat executed by tenant—*Held*, new tenancy created.)

5. ('37) 24 AIR 1937 Lah 370 (377): ILR (1940) Lah 363: 176 Ind Cas 65 (DB), *Hafiz Muhammad Suleman* v. *Hari Ram*. (Permanent tenancy — Rent originally fixed subsequently raised by agreement of parties—Permanent nature of tenancy is not changed.)
('08) 8 Cal L Jour 513 (517) (DB), *Iswail Khan Mahomed* v. *Nanigopal Mukerji*.
('04) 8 Cal W N 155 (157, 158) (DB), *J. Winter Scale* v. *Sarat Chandra Banerjee*.
('04) 8 Cal W N 297 (300, 301) (DB), *Ismail Khan Mahomed* v. *Asmatulla Sareng*.

S. 105—NOTE 53

1. ('74) 21 Suth W R 386 (386) (DB), *Nidhi Kristo* v. *Nistarinee Dossee*.
('30) 17 AIR 1930 Mad 434 (438): 125 Ind Cas 242, *Saldanha* v. *R. C. Church, Mermajal*.
('24) 11 AIR 1924 Pat 560 (562): 3 Pat 403: 83 Ind Cas 741 (DB), *Tekait Harnarayan* v. *Darshan Deo*.
('88) 11 Mad 77 (79, 80) (DB), *Thiagaraja* v. *G. S. Pandara Sannadhi*.
2. *See* ('88) 11 Mad 77 (79, 84) (DB), *Thiagaraja* v. *G. S. Pandara Sannadhi*. (Lessor transferring property to another and the latter agreeing with the former not to disturb the existing tenants so long as they paid rent — This does not confer permanent rights on the tenants who were originally let in as year to year tenants.)
3. ('24) 11 AIR 1924 Pat 560 (561): 3 Pat 403: 83 Ind Cas 741 (DB), *Tekait Harnarayan* v. *Darshan Deo*.

right in the property.[1] The conditions necessary for raising such an estoppel have been exhaustively discussed in Note 22 on Section 51. See also Note 12.

56. Permanent lease of property belonging to religious and charitable endowments.—As seen in Note 7 on S. 7, managers of religious and charitable endowments in India have very limited powers of alienating endowed property and they cannot transfer such property except for unavoidable necessity. As to whether in the case of permanent leases granted long ago, where the circumstances under which they were granted are impossible to prove, the Courts will presume the existence of the conditions justifying the grant of such leases, see Note 45.

57. Consideration for lease.—One of the essentials of a lease under this section is the presence of 'consideration' for the transaction. This consideration must be either premium or rent as defined by the section. In other words if the consideration for the transfer is not either premium or rent as defined by the section, the transaction will not be a lease.[1] The section speaks of the consideration being premium 'or' rent. But it is conceived it will cover cases, where the consideration is partly premium and partly rent.[2]

A sum of money payable under a lease but not as a consideration for the 'grant of the lease' is not rent or premium within the meaning of this section (see Note 59). Thus, where a lease is granted in consideration of the lessee buying certain goods or accepting certain services from the lessor and paying for them at a certain rate, the 'lease' is not granted in consideration of the money to be so paid and such money is not rent.[3]

Where under a building agreement a builder agrees with the owner of land to erect houses thereon and to expend in so doing not less than a specified amount, in consideration of a lease thereof being granted to him on completion of the houses, the sum so expended on their erection is not a pay-

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S. 105—NOTE 55

1. ('37) 24 AIR 1937 Pat 374 (379): 169 Ind Cas 756 (DB), *Bhuneshwari Koer* v. *Secy. of State.*
(1899) 21 All 496 (502): 26 Ind App 58 (PC), *Beni Ram* v. *Kundan Lal.* (In order to raise an equitable estoppel against the lessors it is incumbent upon the lessees to show that the conduct of the owners, whether consisting in abstinence from interfering, or in active intervention, is sufficient to justify the legal inference that they had, by plain implication, contracted that the right of tenancy, under which the lessees, originally obtained possession of the land, should be changed into a perpetual right of occupation.)
('35) 62 Cal L Jour 551 (559) (DB), *Prodyot Kumar Tagor* v. *Hirendra Nath Dutt.*
('25) 12 AIR 1925 P C 146 (149): 4 Pat 707: 52 Ind App 178: 87 Ind Cas 318 (PC), *A. H. Forbes* v. *L. E. Ralli.*
[*See also* ('18) 5 AIR 1918 Mad 44 (55): 44 Ind Cas 894 (DB), *Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar.* (The mere fact of the tenants alienating the lands, without protest by temple trustees will not confer on tenants a right of permanent occupancy by estoppel or prescription.)
('18) 5 AIR 1918 Mad 932 (939, 940): 41 Ind Cas 788 (DB), *Naina Pillai* v. *Ramanathan Chetty.* (Acquiescence by temple trustees in transfers by tenants does not create estoppel against landlord.)]

S. 105—NOTE 57

('47) 34 AIR 1947 Cal 440 (441), *Rajendra Nath* v. *Jogjiban Hansda.*
[Rent payable under a lease is consideration from the promisee to the landlord. The contract is that the landlord would give the tenant the property for a certain period of time in return for a promise to pay a yearly rent. Agreement to pay rent is consideration within the meaning of that word as defined in S. 2 (d), contract Act.]

1. ('37) 24 AIR 1937 Mad 882 (893): ILR (1937) Mad 638: 171 Ind Cas 444 (FB), *Arumugham* v. *Subramaniam.* (Maintenance grant in the case was held to be not a lease as there was neither premium nor 'rent' as defined.)
('22) 9 AIR 1922 Oudh 201 (201): 25 Oudh Cas 39: 68 Ind Cas 333, *Sitaram* v. *Sarju Prasad.* (Agreement among co-owners for enjoyment of property by turns is not lease.)

2. ('34) 21 AIR 1934 Cal 803 (805, 806): 61 Cal 556: 152 Ind Cas 601 (SB), *In re U. P. Electric Supply Co.*

3. ('34) 21 AIR 1934 Cal 803 (807): 61 Cal 556: 152 Ind Cas 601 (SB), *In re U. P. Electric Supply Co. (Per Buckland, J.).*

ment made in consideration of the lease.[4] It is in the nature of a 'collateral' agreement. (See Note 59.)

As to whether a grant for maintenance is to be treated as a grant for consideration of the kind defined in this section, see Notes 60 and 68.

It has been held that under the Central Provinces Tenancy Act, a tenancy can be created without consideration.[5]

58. **Premium.**—The section defines premium as the price paid or promised for the lease. A similar expression occurs in S. 54 also and the principles discussed in Note 12 on that section will apply here also.- As seen in that Note "price" means money only.[1] But it will include not only actual cash but also money 'due.'[2] But it must be price paid or promised for the 'lease,' i. e., for the transfer of the right to 'enjoy' the property. If it is a price for the 'property' itself which is to vest in the lessee at the end of the period of the lease, though the agreement for such payment and purchase of the property may be 'consideration' for the granting of the lease, it will not be 'premium.'[3] (See Note 57.)

The amount due must be ascertained or capable of ascertainment at the time of the transfer. A grant in lieu of maintenance, where no definite sum of money is due as maintenance will not, therefore, be a lease.[4] (See Note 68.)

The distinction between rent and premium is that the latter is a 'lump sum,' though it may not be paid in cash at once but only 'promised' or may be payable in instalments,[5] while rent, if it is to be paid in money, is a 'periodical' payment.[6] The other points of distinction are that rent may be in money or in kind or in the form of services, while premium can only be in the form of money. Where, looking at the substance of the transaction,

4. (1913) 3 K B 570 (578): 82 L J K B 1300: 109 L T 165, *Stepney and Bow Educational Foundation (Governors)* v. *Inland Revenue Commissioners.*

5. ('25) 12 AIR 1925 Nag 90 (92): 82 Ind Cas 190, *Amarchand* v. *Sardar Singh.*

S. 105—NOTE 58

1. ('37) 24 AIR 1937 Mad 882 (887): ILR (1937) Mad 638: 171 Ind Cas 444 (FB), *Arumugham* v. *Subramaniam.* (Maintenance grant held not to be lease.)
[*See* ('22) 9 AIR 1922 Oudh 201 (201): 25 Oudh Cas 39: 68 Ind Cas 333, *Sita Ram* v. *Sarju Prasad.* (Agreement between co-owners for the enjoyment of the property by turns is not lease.)]
[See however ('98) 1898 Bom P J 49 (DB), *Jhumbra* v. *Raoji.* (Lease before T. P. Act—Possession of land made over for 10 years in consideration of a quantity of grain that was due was held to be lease. Note.—This will not be good law now.)]

2. *('02) 25 All 115 (119): 30 Ind App 54 (P C), *Nidha Sah* v. *Murli Dhar.* (Ostensible mortgage in consideration of a sum made up party of past advances held to be not mortgage but lease.)
('10) 6 Nag L R 65 (66): 6 Ind Cas 817 (817) *Beni Prosad* v. *Mulchand.*
('28) 15 AIR 1928 Bom 377 (378, 379): 114 I. C. 266, *Gulabbhai* v. *Bhagvan.*
('23) 10 AIR 1923 Nag 60 (61): 19 Nag L R 1: 69 Ind Cas 511, *Bhika* v. *Sheikh Amir.*
('87) 11 Bom 462 (466) (DB), *Abdulbhai* v. *Kashi.*

3. ('34) 21 AIR 1934 Cal 803 (807): 61 Cal 556: 152 Ind Cas 601 (SB), *In re U. P. Electric Supply Co.* (Lease by Municipality in favour of electric company—Annual rent—Provision that a certain sum due. from Municipality to Government must be paid by lessee by annual instalments and that on such payment it would become the owner of part of the premises —*Held* that the whole of this sum at any rate cannot be treated as premium.)

4. ('37) 24 AIR 1937 Mad 882 (892, 893): I L R (1937) Mad 638: 171 Ind Cas 444 (FB), *Arumugham* v. *Subramaniam.* (Note.—In this case, notwithstanding the provision for the payment of an annual sum of money by the grantee to the grantor it was held that the grant was not a lease — The annual payment was held not to be rent.)

5. *See* ('21) 8 AIR 1921 Nag 137 (138): 59 Ind Cas 419, *Jagannath* v. *Behari.* ("Premium" should be regarded as the equivalent of the vernacular nazarana.)

6. ('34) 21 AIR 1934 Cal 803 (805): 61 Cal 556: 152 Ind Cas 601 (SB), *In re U. P. Electric Supply Co.*

the payment is premium and not rent, it will not cease to be such merely because it is styled as "advance rent."[7]

Unlike a 'vendor' of immovable property who has a statutory lien for unpaid purchase-money, a lessor has no lien for unpaid premium.[8]

The consideration for a lease paid in the form of a premium is exhausted as soon as the lease is granted and the forfeiture of the lease does not entitle the lessee to a refund of the premium.[9] Similarly, where a part of the premium is paid and it is agreed that if the balance is not paid within a fixed time, the lessor is to be entitled to cancel the lease and recover possession and on the default of the lessee the lessor proceeds to do so, the lessee is not entitled to a refund of the part of the premium paid by him.[10]

59. Rent—General features.—As seen in Note 57, rent is one of the forms of consideration prescribed by the law as essential for a lease. The following are the elements of rent as defined by the section:

(1) It must be a consideration for the transfer of a right to enjoy immovable property for a certain time or in perpetuity.
(2) It must be money, share of crops, service or other thing of value. (See Note 61.)
(3) It must be rendered periodically or on specified occasions.
(4) The rendering must be to the lessor by the lessee. (See Note 60.)

The definition of rent in Woodfall's 'Law of Landlord and Tenant' is also similar.[1] But as a further element it seems to be required that the rent should be a source of 'profit' to the lessor.) See Note 60 for a further discussion of this point.)

The definition of rent in various local Tenancy Acts[2] corresponds in essential particulars with the definition under this section. But 'service' is not included as rent in such local Acts.

Tenancy Acts essentially dealing, as they do, only with tenancy of 'land,' the definition of rent in such Acts describes it as something rendered to the landlord by the tenant on account of occupation of 'land.'

The first essential in the definition of rent is, as seen above, that it is a consideration for the transfer of a right to enjoy immovable property. It has been seen in Note 3 that such right is an 'interest' in immovable property created in particular modes. Hence, before there can be any question of rent, there must be a transfer of this description. Otherwise the payment will not be rent. Thus, licence fee is not rent, because licence does not involve a transfer of any interest in immovable property.[3] Similarly, the

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7. ('29) 16 AIR 1929 Cal 433 (434): 56 Cal 252: 118 Ind Cas 561, *Nawab of Murshidabad* v. *Bilas Roy*.
8. ('26) 13 AIR 1926 Mad 55 (56): 48 Mad 821: 90 Ind Cas 725 (DB), *Venkatacharyulu* v. *Venkatasubba Rao*. (1877) 6 Ch D 597, not followed.)
9. ('94) 18 Mad 32 (33) (DB), *Kammaran Nambiar* v. *Chindan Nambiar*.
10. ('34) 21 AIR 1934 All 293 (294): 149 Ind Cas 621, *Hazari Kalwar* v. *Abdul Majid*.

S. 105—NOTE 59

1. Woodfall, *Law of Landlord and Tenant* by A. J. Spencer) 21st Edition, page 481.
2. Bengal Tenancy Act, VIII of 1885, S. 3 (13): Bihar Tenancy Act, VIII of 1934, S. 3 (5): C. P. Tenancy Act, I of 1920, S. 2 (9); Madras Estates Land Act, I of 1908, S. 3 (11); U. P. Tenancy Act, XVII of 1939, S. 3 (18).
3. ('28) 15 AIR 1928 Oudh 99 (100, 101): 3 Luck 282: 106 Ind Cas 491, *Ram Lal* v. *Badal Khan*. (Tradesman selling goods on municipal land and paying licence fee.)
(1863) 8 L T (NS) 429 (429, 430): 32 L J C P 252: 135 R R 847: 11 W R (Eng) 833, *Hancock* v. *Austin*. (Money due under a contract cannot be distrained for as rent. And if there really was no demise of the room, and the landlord only gave permission to the plaintiff to place his machines in it, with the use of the steam power, upon payment of a certain sum weekly, the sum payable for such permission could not be destrained for as rent.)
('14) 1 AIR 1914 Oudh 272 (273): 25 Ind Cas 666, *Sadiq Hussain* v. *Secretary of State*. (A theka of a right to fish and to

amount payable under a collateral agreement in consideration of the grant of the lease is not rent, because such agreement does not, by itself, create an interest in the property.[4] For other instances see the cases cited below.[5]

The next point is that the payment must be a consideration for the 'transfer.' Every payment that is to be made under a lease is not necessarily 'rent.' Thus, if the lessee has agreed to accept, in consideration of the lease, certain goods to be supplied by the lessor or certain services to be rendered by him and to pay for such goods or services, such payment is not consideration for the lease but for the goods or services, though it is made under the terms of the lease.[6]

Similarly, where a grant is made by the holder of an impartible estate for the maintenance of a junior member of the family, and as the income from the village set apart for maintenance is expected to exceed the proposed amount of maintenance, the grantee is required under the grant to pay to the grantor annually a certain sum of money, such sum cannot be said to be rent, as it is not the 'consideration' for the transfer, such consideration being the giving up by the grantee of his claim for maintenance.[7]

Rent being one of the 'essential' elements of a lease (unless there is a premium) there must be 'certainty' about the rent in the lease.[8] Otherwise, the lease will be void.[9] But though the exact amount is not stated, if it is

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collect produce from nazul lands belonging to Government is not a lease but merely a licence, and the money that the thekadar is bound to pay is not rent but fee.)

[See however ('26) 13 AIR 1926 Nag 174 (174, 175): 92 Ind Cas 683, *Indal* v. *Debi*. (Right to take cattle or cart along a definite strip of land held in the circumstances of this case to amount to a lease and not a licence and the quantity of grain agreed to be supplied in return for this is rent.)]

4. ('02) 25 Mad 603 (611): 29 Ind App 138 (PC), *Subramanian Chettiar* v. *Arunacham Chettiar*.
[*See also* ('44) 31 AIR 1944 Pat 293 (296): 23 Pat 334: 217 Ind Cas 14 (DB), *Ananta Lal* v. *Bibhuti Bhusan*. (Suit for recovery of possession of a tank—Defendant pleading that he was a tenant under a patta and was liable to pay only mukarrari rent of Rs. 3—Parties arriving at a compromise to the effect that as long as plaintiff possessed the village in which the tank was situate defendant and his heirs were to pay Rs. 12 over and above the mukarrari rent but if he transferred the village by sale or gift the defendant would not be bound to pay Rs. 12, held the stipulation was a personal obligation and the payment bargained for was not rent.)]

5. ('05) 32 Cal 567 (570): 3 Cal L Jour 141 (DB), *Girindra Chandra Pal* v. *Sree Nath Pal*. (One cosharer landlord occupying a separate portion of the common land is not liable for rent to the other cosharers but only to pay a share of the profits of the land, unless there is an agreement by him to pay rent. Merely because one cosharer landlord grants a putnee lease of certain portions to another person, he does not become liable to pay rent to the other cosharers.)
('83) 9 Cal 908 (912): 13 Cal L R 69 (DB), *Surnomoyee* v. *Denonath Gir Sunnyassee*. (After expiry of lease landlord is not entitled to rent.)
('01) 25 Bom 556 (563): 3 Bom L R 135 (DB), *Sadashiv* v. *Ramkrishna*. (Plaintiff an inamdar of certain village—Defendant holding certain land in the village but he was not placed in possession either by plaintiff or his predecessor in title under any agreement—Plaintiff sued to recover arrears of assessment — *Held*, the assessment was not rent.)

6. ('34) 21 AIR 1934 Cal 803 (807, 808): 61 Cal 556: 152 Ind Cas 601 (SB), *In re U.P. Electric Supply Co*. (Per Buckland, J.)
See also cases under Note 60.

7. ('37) 24 AIR 1937 Mad 882 (891, 892): I L R (1937) Mad 638: 171 Ind Cas 444 (FB), *Arumugham* v. *Subramanian*.

8. (1882) 21 Ch D 442 (458): 52 L J Ch 121: 47 L T 362: 31 W R (Eng) 19, *Re Knight; Ex parte Voisey*. (Otherwise it is not rent.)
('82) 8 Cal 730 (731, 732) (DB), *Mahomed Fayez Chowdhry* v. *Jamoo Gazee*. (A condition in a lease, that the tenant will pay to the landlord collection charges, along with the instalments of the annual rent, can be enforced if the condition is definite and certain in its nature, and forms part of the consideration for the lease.)

9. ('24) 11 AIR 1924 Cal 346 (347, 348): 69 Ind Cas 600, *Nava Kishore Das* v. *Madan Mohan Das*. (Covenant as regards rent vague—Specific performance of lease cannot be obtained.)
('88) 11 Mad 200 (201) (DB), *Ramasami* v. *Rajagopala*. (Agreement to pay whatever rent landlord might impose.)

capable of ascertainment, it is enough.[10] Further, the mere fact of rent being fluctuating does not make it uncertain. Thus, if a lease for a term certain provides that the rent should be increased at a certain rate at certain intervals, the rent is not uncertain.[11]

Rent under the Act being purely a matter of 'contract' the Court has no power to go behind the contract between the parties and pass a decree for what it considers to be a fair and equitable rent.[12]

So long as the contract of tenancy subsists, the liability of the tenant to pay rent continues. If he has any right to repudiate the tenancy on the ground of fraud, etc., he must do so in regard to the entire property and not with regard to only a portion of it. Though he may give up possession of any portion of the property and profess to repudiate the tenancy in respect of such portion, he will be liable for the whole of the stipulated rent.[13]

A covenant to pay rent is one running with the land. (See S. 40, Note 25.) Hence, the 'assignee' of a lease is liable to pay rent to the lessor.[14]

In a suit for rent, the landlord has to prove the existence of the relationship of landlord and tenant between him and the defendant. That means that he has to show that he has demised the property to the defendant on the terms alleged by him. It is not necessary for him to set out his 'title' to the property because the tenant is estopped under S. 116 of the Evidence Act from denying such title.[15]

A decree for rent necessarily implies a decision that the relationship of landlord and tenant exists between the parties and will be 'res judicata' in a future suit for rent.[16]

60. Rent—Illustrative cases.—One essential feature of rent, as has been seen in Note 59, is that it is something paid or given in consideration of the grant of the lease. In other words, the alleged rent must be consideration for the right of occupation which is transferred to the lessee. There may be an item payable by the lessee to the lessor under the terms of the lease but it may not be rent in the above sense. Thus, if the payment is in return of services to be rendered or goods supplied by the grantor of the right, such payment will not be rent, although the acceptance and payment for such services or goods may be part of the arrangements embodied in the lease.[1] It

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10. ('44) 31 AIR 1944 Mad 518 (523): ILR (1945) Mad 355 (DB), *Raja of Vizianagaram* v. *Maharaja of Jeypore*. (Actual figure of rent not fixed but method of fixing rent certain—Lease is binding.)
(1882) 21 Ch D 442 (458): 52 L J Ch 121: 47 L T 362: 31 W R (Eng) 19, *Re Knight; Ex parte Voisey*. (Per Brett, L. J.—Rent is certain if by calculation and happening of certain events it becomes certain.)
('24) 11 AIR 1924 Cal 346 (347, 348): 69 Ind Cas 600, *Nava Kishore Das* v. *Madan Mohan Das*. (If a mode is specified for ascertaining rent, it will not be uncertain.)

11. (1882) 21 Ch D 442 (458): 52 L J Ch 121: 47 L T 362: 31 W R (Eng) 19, *Re Knight; Ex parte Voisey*. (Per Brett, L. J.)

12. ('37) 24 AIR 1937 Pat 391 (392): 170 Ind Cas 316 (DB), *Secy. of State* v. *Rajendra Prasad*.
[*See also* ('42) 29 AIR 1942 Pat 86 (87): 196 Ind Cas 650, *Kripa Sanker* v. *Janki Prasad*. (In cases governed by Transfer of Property Act no suit for settlement of rent lies for the Court has no power to make a contract for the parties — An aggrieved landholder's remedy against a trespasser in possession is by way of ejectment.)]

13. ('82) 8 Cal 118 (120) (DB), *Anarullah Shaikh* v. *Koylash Chunder Bose*.

14. Note — But the assignment must be of the entire interest of the lessee under the lease—A mortgage of a leasehold interest not being ordinarily such an assignment, the mortgagee cannot be sued for rent by the lessor. *See* AIR 1927 Cal 725 (729): 54 Cal 813: 104 Ind Cas 484 (DB), *Bengal National Bank* v. *Janoki Nath Roy*.

15. ('35) 22 AIR 1935 Cal 368 (382): 62 Cal 346: 159 Ind Cas 98 (DB), *Kumar Raj Krishna* v. *Barabani Coal Concern Ltd*.

16. ('12) 16 Ind Cas 911 (912, 913) (DB) (Cal), *Raj Kumar Roy Chowdhury* v. *Alimaddi*.

S. 105—NOTE 60

1. (1895) 1 Q B 484 (492): 64 L J Q B 84, *Jones* v. *Commrs. of Inland Revenue*. (Agreement by *A* with a telephone company for the erection and maintenance in

is a question depending on the facts and circumstances of each case whether a particular item is rent or not. If the item satisfies the above test, it is rent irrespective of its description by the parties. Thus, where a cash rent was fixed and besides, it was provided that certain fixed quantities of named commodities must also be supplied by the tenant to the landlord every year, it was held on construction of the leases in question that such commodities formed part of the 'rent,' although they were not described as such.[2]

But, in the undermentioned cases,[3] such an item was held on the construction of the particular lease not to be rent. In the cases cited below,[4] "collection charges" were held to be rent on the application of the test stated above.

In the undermentioned case[5] it was held that a certain annual payment called 'muhatarifa' to be made by certain non-agricultural raiyats in occupation of house sites in the village abadi was rent.

The section says that the rent is something to be paid or rendered to the transferor, i. e., the 'lessor.' This question is involved in cases in which the item is of the nature of a tax or other public charge in respect of the property or (in the case of an underlease) relates to the rent payable to the superior landlord. It seems to be clear that an item does not cease to be payable to the lessor merely because it is paid on his behalf (under his authority or under the terms of the lease) to a third person or body. This view finds support from a decision of the Privy Council in which it was held that the remuneration payable to village officers by a tenant in a zamindari was paid by him only as 'agent' of the zamindar and when the Government relieved the zamindar of the burden of paying the village officers, the tenant was not entitled to any deduction from his dues to the zamindar.[6] On this principle, there seems to be no difficulty in holding that an amount payable to the Government or other public authority on behalf of the landlord is rent, provided that the payment is on the construction of the lease in question a part of the consideration for the lease. This view was taken in the cases mentioned below[7] in which such amounts were held to be rent. A similar

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working order telephonic lines and instruments — Covenant to pay certain sum for the use of the lines and instruments —The agreement was not a lease as no exclusive right of occupation was intended to be given and further because the payment was not in the nature of rent— It was a payment not merely for the occupation of the wires but also for services to be rendered by the company and expenses to be paid for by them in laying down the lines, etc.)
('34) 21 AIR 1934 Cal 803 (807, 808): 61 Cal 556: 152 Ind Cas 601 (SB), *In re U. P. Electric Supply Co.* (Per Buckland, J.)

21. ('17) 4 AIR 1917 All 483 (484): 38 All 286: 35 Ind Cas 208 (FB), *Rangilal* v. *Jassa*. (35 All 19 distinguished on the ground that in that ruling the plaintiff sued in the civil Court to recover the rasum zamindari as something over and above the rent.)
('11) 12 Ind Cas 37 (38) (DB) (Cal), *Sarada Kripa* v. *Mostfizar Rahman*.

3. ('14) 1 AIR 1914 Cal 781 (781): 25 Ind Cas 547 (DB), *Kalar Singh* v. *Mathura Prosad*. (Stipulation to pay one cartload of husk *besides* rent.)
('13) 35 All 19 (21, 22): 16 Ind Cas 422 (423, 424) (DB), *Sis Ram* v. *Ashgar Ali*. (Agreement to deliver to landlord agricultural produce over and above cash rent.)

4. ('04) 31 Cal 834 (837): 8 Cal W N 529 (DB), *Radha Charan* v. *Golak Chandra*.
('82) 8 Cal 730 (731, 732) (DB), *Mohomed Fayez* v. *Jamoo Gazee*.
('17) 4 AIR 1917 Cal 737 (738): 36 Ind Cas 404 (DB), *Upendra Lal* v. *Ataulla*.

5. ('04) 27 All 183 (185): 1 All L Jour 537 (540), *Md. Abdul Hai* v. *Nathu*. (It is not "cess"—The primary notion of a cess is a payment not for the benefit of the landlord but a payment for some purpose of public convenience, such as sanitation, police and the like—The words rent, cess and the like, must be interpreted with reference to the meaning attached to them at the time for which the payments are claimed, and the period during which a wajibularz is the authority for village customs.)

6. ('27) 14 AIR 1927 P C 206 (207, 208): 51 Mad 449: 104 I. C. 337 (PC), *Satyapati Rajeshwara* v. *Muthanan*.

7. ('85) 1885 Bom P J 160 (Reprint p. 150), *Harcharan Das* v. *Sadashiv*. (Government assessment.)
†(11) 38 Cal 278 (283): 9 Ind Cas 394

principle will apply also to a sum payable by an under-lessee to the superior landlord.[8]

But there are certain decisions which are inconsistent with the above view. Some of these decisions proceed on the particular facts of the case and hold that the sum in question does not form part of the consideration for the lease.[9] But they also advert to the aspect that the payment is not made to the landlord. As stated already, this ground does not seem to be a sound one.

Some of the decisions proceed on the ground that the payment is not a 'profit' in the landlord's hand.[10] They are based upon the conception of rent as given by Woodfall in his 'Law of Landlord and Tenant.' But there does not seem to be any reason for reading this idea into the definition of rent under this section. Some decisions have even gone to the length of holding that a letting on payment of the 'bare' assessment on the land would be a lease.[11] This view seems to be quite justified by the wording of the section.[12] Nor does there seem to be any difference in this respect between the definition under this section and the definition of rent contained in some of the Provincial Tenancy Acts.

'Tagore v. Bibi Jarao'[13] is a decision of the Privy Council in which it was held that the Government assessment payable by the tenant under the lease was not part of the 'rent.' This decision is based purely on the construction of the lease in question. It no doubt refers to the consideration that the relevant section, namely, S. 3 of the Bengal Tenancy Act, requires the payment to be made to the 'landlord' in order to constitute rent. But it must only be taken to mean that the payment in question was not intended to be made to the Government by the tenant as the landlord's agent, i. e., out of a fund due to the landlord.

Where, on an adjustment of accounts between the plaintiff and the defendant, the defendant is found liable for a certain amount on account of rent out of which a certain sum is left with him in deposit for payment to the superior landlord on account of rent payable by the plaintiff, such sum will not be rent where the facts show that there is a 'discharge' of the lessee's

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(396) (DB), *Dwaraka Nath* v. *Dumburudhur*. (Government revenue.)
('12) 15 Ind Cas 301 (302, 303) (DB) (Cal), *Janaki Ballav* v. *Gopal Lal*. (Government demand reduced — Lessor held entitled to that amount.)
†('95) 22 Cal 680 (688) (DB), *Assanulla* v. *Tirthabashini*. (Chaukidari tax.)
('74) 22 Suth W R 12 (13), *Jeeatoolla* v. *Jugodindro*. (Cesses.)
*('98) 2 Cal W N 455 (458) (DB), *Mohebut Ali* v. *Mohomed Faizullah*. (Cess and expenses of musjid on the land.)
('79) 4 Cal 576 (581) (DB), *Surnomoyee* v. *Koomar Purresh*. (Road cess.)
('94) 21 Cal 132 (133) (DB), *Watson* v. *Sree Kristo*. (Dak cess.)
('07) 6 Cal L Jour 212 (214) (DB), *Bholanath* v. *Chunder Madhub*. (Public works cess.)
(*Sec* ('35) 22 AIR 1935 Oudh 209 (212): 10 Luck 307: 152 Ind Cas 786 (DB), *Jwala Sahay & Sons* v. *Mathura Dutt*. (In this case, it was held on construction that the tenant was not liable to pay municipal taxes.)]

8. *(1900) 27 Cal 67 (73): 4 Cal W N 3 (FB), *Basanta Kumari* v. *Ashutosh Chuckerbutti*. (Rent payable under assignment.)
('11) 10 Ind Cas 382 (383) (DB) (Cal), *Kali Kumar* v. *Bindu Bhusan*.

9. ('05) 32 Cal 169 (172, 173, 174): 9 Cal W N 96, *Hemendra Nath* v. *Kumar Nath*.
('85) 11 Cal 221 (225, 226) (DB), *Rutnessur* v. *Hurish Chunder*.

10. ('15) 2 AIR 1915 Bom 49 (50): 39 Bom 434: 28 I. C. 584 (FB), *In re Gangaram Narayandas Teli*. (Quoting Woodfall on *Landlord and Tenant*.)
('26) 13 AIR 1926 Pat 80 (80): 90 Ind Cas 352 (DB), *Prasanna Kumar* v. *Kaleyan Charan*. (Amount payable to superior landlord.)

11. (11) 38 Cal 278 (283): 9 Ind Cas 394 (36) (DB), *Dwarka Nath* v. *Damburudhur*.
('85) 1885 Bom P J 160 (Reprint p. 150), *Harcharandas* v. *Sadashiv*.

12. See the decisions referred to above which hold that "collection charges" constitute rent.

13. ('06) 33 Cal 140 (149, 150): 33 Ind App 30 (PC).

obligation so far as that portion of the sum is concerned, by the adjustment of accounts.[14]

The question whether a certain item payable under a lease is rent or not is material under some of the local laws which prohibit or restrain the levy of any sum other than rent by the landlord. Their object is to prevent oppression of tenants by lanlords.[15]

If an amount payable under a lease to a third party, e. g., Government assessment or rent due to the superior landlord, is found on construction of the particular lease in question not to be 'rent,' then the lessor's remedy against the lessee on the latter's default is by means of a suit for damages for breach of contract. It has been held that in such cases not merely nominal damages but the full amount payable to the third party is recoverable as damages.[16]

As to whether a maintenance grant under which the grantee is to pay an annual sum to the grantor is a lease and as to whether such sum is rent, see Note 68.

61. Forms of rent.—Rent need not be 'money.'[1] The section expressly provides that rent may be in the form of money, a share of crops, service or any other thing of value. Premium, however, can only be in money. (See Note 58.) This also seems to be the conception of rent under the English law. The difinitions of rent under the various Provincial Tenancy Acts also include rent in money as well as in kind but not in the form of service. The rent may be partly in one of these forms and partly in another.[2] But unless the consideration takes one of these forms, it will not be rent.[3] In the case of "share of crops" it is clear, it should be a share of the crops of the demised field. But in the case of other things, there is no restriction that it must come out of the property leased. But, in a case under the United Provinces Land Revenue Act of 1901, one of the reasons for holding that the articles agreed to be delivered by the tenant to the landlord in that case constituted "cesses" and not "rent" was that such articles were not the produce of the field leased.[4] But it cannot be said to have been intended to be laid down that this is a 'conclusive' test of rent. Even the definitions of rent in the various Provincial Tenancy Acts do not restrict rent in kind to things produced on the land demised. But the question if the article is a product of the demised field or not may be 'one' of the matters to be considered in determining if it was a part of the 'consideration' for the lease.

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14. ('15) 2 AIR 1915 Cal 370 (371): 19 Ind Cas 759 (DB), *Lachmi Missir* v. *Deoki Kuar*.

15. ('95) 22 Cal 680 (686) (DB), *Assanulla* v. *Tirthabashini*.

16. ('85) 11 Cal 221 (226) (DB), *Rutnessur* v. *Hurish Chunder*.

S. 105—NOTE 61

1. ('34) 21 AIR 1934 Cal 747 (748): 152 Ind Cas 484, *Tofazzal Ahmed* v. *Masalat Khan*. (Rent fixed partly in cash and partly in kind—Same not to be altered on any account—Tenancy is at fixed rent.)
('07) 29 All 652 (656): 4 All L Jour 556 (DB), *Budh Singh* v. *Parbati*. (Tenants who render service to the landholder are tenants through the service they thus render.)
('26) 13 AIR 1926 Nag 174 (174): 92 Ind Cas 683, *Indal* v. *Debi*. (Agreement to pay certain amount of grain every year on account of damage caused by using land is lease and not licence.)

2. ('46) 33 AIR 1946 Mad 310 (311), *Sayi* v. *Subbanna*.
[*Defendant to render village service and to give half share in produce of land given to him to plaintiff—Arrangement to enure during plaintiff's life — Arrangement held amounted to lease.*]
('34) 21 AIR 1934 Cal 747 (748): 152 Ind Cas 484, *Tofazzal Ahmed* v. *Masalat Khan*.
For further cases see under Note 60.

3. ('22) 9 AIR 1922 Oudh 201 (201): 25 Oudh Cas 39: 68 Ind Cas 333, *Sitaram* v. *Sarju Prasad*. (Agreement among co-owners to enjoy the property by turns is not a lease as there is no provision for rent.)

4. ('13) 35 All 19 (21): 16 Ind Cas 422 (423) (DB), *Sis Ram* v. *Ashgar Ali*.

62. Rent in kind — Payment of money value. — Where a lease deed fixes a money rent but provides that a certain quantity of grain or other commodity may be delivered in lieu of it, the lessor is entitled on default by the lessee, to recover only the stipulated sum of money and not the market-value of the article.[1]

Where a lease-deed fixes rent in kind or partly in kind and partly otherwise, but states also the money value of the thing to be delivered, the question arises whether on default by the lessee, the lessor is entitled to the sum mentioned in the lease as the value or is entitled to the 'market-value' of the thing at the date on which its delivery was due. This is entirely a matter of construction of the particular lease, the question in each case being whether the value of the article is mentioned in the lease-deed merely by way of 'description' or is 'fixed' as an alternative form, in which the rent is to be recovered. In the former case, the market-value, and in the latter case the sum fixed in the lease-deed would be recoverable. The decisions on the subject have been classified on the above lines in the foot-note below.[2]

Unless the rent is fixed in the form of two 'equal' alternatives, the lessor is entitled to a decree in the first instance, for the particular thing and not for its value.[3]

63. Rent — Service as rent. — The section expressly recognises the rendering of service as a form of rent and so a lease in consideration of service to be rendered is valid.[1] But service 'can' also be the consideration for

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S. 105—NOTE 62

1. ('10) 8 Ind Cas 945 (945) (DB) (Cal), *Bipro Charan* v. *Suchand Roy*.
('27) 14 AIR 1927 Cal 243 (244): 98 Ind Cas 977 (DB), *Kailash Chandra* v. *Hamid Ali*.

2. *Market-value recoverable :*
('22) 9 AIR 1922 Pat 4 (5): 66 Ind Cas 780, *Jitendranath* v. *Jaku*. (Approximate value of article stated in the deed.)
('18) 5 AIR 1918 Cal 797 (798): 39 Ind Cas 720, *Basiruddin Baiddy* v. *Hari Mohan*.
('17) 4 AIR 1917 Cal 827 (828): 40 Ind Cas 819, *Nilmadhab* v. *Keshab Lal*.
('17) 4 AIR 1917 Cal 397 (398): 40 Ind Cas 836 (DB), *Kali Kanta* v. *Mohesh Chandra*.
('17) 4 AIR 1917 Cal 113 (114): 41 Ind Cas 833, *Sarat Chandra* v. *Abbas Ali*.
('10) 8 Ind Cas 896 (896) (DB) (Cal), *Sheik Isaf* v. *Gopal Chandra Dey*. (Covenant to pay interest at certain rate per month in case of default to pay in kind—*Held*, S. 74, Contract Act, did not apply.)
('94) 4 Mad L Jour 201 (203) (DB), *Soodamani Patter* v. *Somansundara Mudaliar*. (Lease providing for payment of paddy worth certain amount—*Held*, with reference to circumstances of case, that obligation was one for payment of paddy.)
('10) 37 Cal 626 (628): 7 Ind Cas 875 (876) (DB), *Baneshwar* v. *Umesh Chandra*. (The fact that the lease deed mentions the value of the paddy rent does not mean that the amount is fixed as cash rent. It may be mentioned only for purposes of stamp.)
Only the amount fixed in lease-deed can be recovered :
('31) 18 AIR 1931 Cal 468 (469): 58 Cal 72: 133 Ind Cas 210, *Mohit Krishna* v. *Mahendra Nath*.
('25) 12 AIR 1925 Cal 114 (115): 51 Cal 943: 84 Ind Cas 147 (DB), *Official Trustee of Bengal* v. *Benode Behari*. (Lease stating that tenant can pay in kind or certain sum as its price.)
('28) 15 AIR 1928 Cal 112 (112): 105 Ind Cas 756 (DB), *Saroj Bandhu* v. *Mati Lal*. (Rent payable in kind—Money to be paid in lieu of kind fixed—Tenant can choose between payment of rent in kind or money.)
('28) 15 AIR 1928 Cal 166 (167): 55 Cal 574: 106 Ind Cas 25 (DB), *Bangshiram* v. *Prasannamoyi Debi*. (Even treated as a claim for damages, it can only be awarded at the rate mentioned in the lease deed.)
('20) 7 AIR 1920 Cal 875 (880): 54 Ind Cas 914 (DB), *Gurudas Sen* v. *Gobinda Chandra*. (7 Ind Cas 842, followed.)
('19) 6 AIR 1919 Cal 901 (902): 47 Ind Cas 134, *Pran Krishna Nath* v. *Mohesh Chandra*.

3. ('31) 18 AIR 1931 Cal 468 (469): 58 Cal 72: 133 Ind Cas 210, *Mohit Krishna* v. *Mahendra Nath*.

S. 105—NOTE 63

1. ('05) 32 Cal 243 (246): 8 Cal W N 904 (DB), *Jyotish Chandra* v. *Ramanath Bhadra*. (Lease in lieu of medical service.)
('99) 23 Bom 602 (607): 1 Bom L R 61 (DB), *Komar Gowda* v. *Bhimaji Keshav*. (Mere non-performance of service does not make the holding adverse.)
('29) 16 AIR 1929 Cal 224 (224): 56 Cal

the grant of a 'licence' to occupy property. As to when occupation in lieu of service will be a lease and when it will be a licence, see Note 16.

64. Variation of rent.—Rent under this section is a matter of contract and once fixed it cannot be altered, so long as the lease continues, except by agreement.[1] Hence, the Court has no power to pass a decree for a fair and equitable rent by going behind the terms of the agreement between the parties. (See Note 59.)

The proof of an agreement varying the rent payable under a lease is subject to the provisions of S. 92 of the Evidence Act. For instance, in the case of a registered lease, a subsequent oral agreement to raise or lower the rent is not admissible in evidence.[2] As to whether an agreement varying the terms of a lease as to rent is itself a lease, see Note 11.

Where the original lease itself provides for a varying or fluctuating rent, there is no objection to such variation provided that there is no uncertainty about the matter. See Note 59.

In the case of agricultural tenancies not governed by this Act, the Court has power under some of the local laws to award a fair and equitable rent in variation of the agreement between the parties. In Bengal a zamindar under the Permanent Settlement is presumed to be entitled to vary the rent from time to time up to the limit allowed by the current rates prevailing in the purgana. But the parties can agree to have a fixed rent not liable to variation.[3]

862: 115 Ind Cas 34, *Radhu Hari* v. *Narendra Nath*. (Lease in consideration of service being rendered for 12 days in the year in lieu of rent is legal—It does not offend against S. 3 of Regulation V of 1812 or S. 14 of the Bengal Tenancy Act.)
('12) 13 Ind Cas 32 (33) (DB) (Lah), *Muhammad Badar* v. *Chiragh Shah*. (Sanjidar was a person who performed certain services in connection with the takyas in question in the suit and in consideration therefor was given a certain land to hold as tenant under the owners.)
('46) 33 AIR 1946 Mad 310 (311), *Sayi* v. *Subbanna*.
[Defendant to render village service and to give half share in produce of land given to him to plaintiff — Arrangement to enure during plaintiff's life—Arrangement held amounted to lease.]

S. 105—NOTE 64

1. ('42) 29 AIR 1942 Nag 119 (122): ILR (1942) Nag 721: 202 Ind Cas 317, *Tekchand Kapurchand* v. *Mt. Birzabai*.
('30) 17 AIR 1930 Bom 39 (43): 123 Ind Cas 492 (DB), *Mansukh* v. *Trikambhai*. (In the case of a permanent tenancy, the onus is on the landlord to prove a right to enhance rent by agreement, by usage or otherwise.)
('12) 1912 Pun Re No. 121: 17 Ind Cas 208 (210) (DB), *Abdul Karim* v. *Allah Baksh*. (In the case of permanent tenancy at fixed rate of rent, no enhancement can be allowed.)
('08) 7 Cal L Jour 284 (286) (DB), *Satis Chunder* v. *Rai Jotindranath*. (In this respect, there is no difference in principle between a lease in perpetuity and a lease for a definite term.)
('10) 8 Ind Cas 790 (791) (DB) (Cal), *Radha Raman* v. *Bhabani Prosad*. (Mere acceptance of reduced rent may be full acquittance for the particular year years but does not amount to a contract to reduce rent.)
2. ('10) 8 Ind Cas 790 (791) (DB) (Cal), *Radha Raman* v. *Bhabani Prosad*.
('99) 22 Mad 261 (264): 8 Mad L Jour 196 (DB), *Mayandi Chetti* v. *Oliver*.
3. *('69-70) 13 Moo Ind App 248 (262): 13 Suth W R P C 11 (PC), *Bama Soondery* v. *Radhika*.
('27) 14 AIR 1927 Cal 168 (171): 99 Ind Cas 258 (DB), *Saroda Prosad* v. *Uma Sankar*.
('20) 7 AIR 1920 Cal 594 (595): 58 Ind Cas 867 (DB), *Nirodchandra* v. *Harihar*.
('18) 5 AIR 1918 Cal 799 (800): 38 Ind Cas 56 (DB), *Upendra Lal* v. *Jogesh Chandra*.
('32) 19 AIR 1932 Cal 436 (437): 138 Ind Cas 139 (DB), *Satya Charan* v. *Rai Mohan*.
('27) 14 AIR 1927 P C 20 (21): 54 Cal 166: 54 Ind App 48: 100 Ind Cas 93 (PC), *Krishnendra Nath* v. *Kusum Kamini Debi*.
('23) 10 AIR 1923 Cal 351 (353): 76 Ind Cas 324 (DB), *Krishnendra Nath* v. *Kusum Kamuni*. (Permanent lease—Expression 'Mokarrari' not used in the patta — No stipulation that rent would not be increased but express provision that rent would not be reduced—*Held*, rent could be enhanced.)
('43) 30 AIR 1943 Pat 327 (332): 22 Pat 220: 210 Ind Cas 426 (DB) *Shiva Prasad* v. *Sris Chandra*.
[Though a lease may be described as *'mourushi' 'mukarrari,'* in which the rent or rate of rent is fixed for all time, the parties to the transaction may never con-

65. Rent-free grants.—A right to a rent-free grant may be acquired by grant or prescription. As will be seen in Note 79, a tenant, although originally liable to pay rent, may, by refusing to the landlord his enjoyment of the right to rent within Art. 131 of the Limitation Act, prescribe for the right to hold the property rent-free.[1] A rent-free grant may also be proved on the principle of lost grant[2] discussed in Note 44.

66. Interest on rent. — The statutory definition of mesne profits in S. 2 (12) of the Civil Procedure Code includes interest on mesne profits within the meaning of the expression. But this section does not specifically refer to interest on arrears of rent as part of rent. The question whether interest is 'payable' on rent is one of 'contract.'

Is interest agreed to be paid on arrears of rent a 'part' of the rent? It has been held by the Calcutta High Court that such interest is not rent.[1] The decision follows two earlier decisions of the same Court, in which it was held that interest on rent is not an "amount of rent annually payable" within the meaning of section 153 of the Bengal Tenancy Act.[2]

67. Lease for a premium and usufructuary mortgage—Distinction.—The points of distinction between a lease for a premium and a usufructuary mortgage are as follows:

(1) A lease for a premium is a transfer of the right to 'enjoy' the property. Under such a lease, the usufruct of the property will belong to the lessee till the lease is determined. But under a usufructuary mortgage only the right to 'possession' is transferred to the mortgagee. The usufruct of the property will not 'belong' to the mortgagee. He will have only the right to receive it. He must adjust it towards the mortgage-debt. This is the principle even in cases in which the mortgagee's remaining in possession and appropriating the profits of the property for a certain period is to wipe out 'ipso facto' the mortgage-debt without his being liable to account for such profits during that period. (See Note 5.)

(2) A usufructuary mortgage connotes a transfer of an interest in the 'fee simple' in the property, though not the entire fee simple or ownership of the property. The interest in immovable property which, according to the definition of a mortgage in S. 58, is transferred to the mortgagee is an interest in the 'fee simple.' But the interest transferred under a lease for a premium is not an interest in the fee simple. It is merely 'a right to the enjoyment' of the property. (See Note 6.)

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template a rate of rent fixed in perpetuity and may provide for a variation of the rent.)

S. 105—NOTE 65

1. ('29) 16 AIR 1929 Nag 123 (123, 124): 117 Ind Cas 287, *Kampta Prasad* v. *Ramsaran Singh*. (Mere non-payment for a number of years is not enough.)
('33) 20 AIR 1933 Pat 685 (687): 149 Ind Cas 976, *Kameshwar Singh* v. *Ramji Misser*.
2. ('42) 29 AIR 1942 Pat 86 (87): 196 Ind Cas 650, *Kirpa Sanker* v. *Janki Prasad*. (Ancestors of defendant and defendant himself in possession for a considerable time without payment of rent—Lost grant presumed.)
('33) 20 AIR 1933 Pat 685 (687): 149 Ind Cas 976, *Kameshwar Singh* v. *Ramji Misser*.
('47) 34 AIR 1947 Cal 209 (212), *Kumud Kanta* v. *Province of Bengal*.
[Lakheraj rights—Proof of—Tenant need not produce grant or title-deed—Long possession without payment of revenue may be sufficient to establish revenue free title.]

S. 105—NOTE 66

1. ('07) 5 Cal L Jour 69 (70) (DB), *Bhagabati Debya* v. *Basanta Kumari*. (Money paid by tenant to landlord as rent and accepted as rent cannot be appropriated by landlord towards interest on arrears of rent.)
Also see S. 108 (1), Note 2.
2. ('98) 25 Cal 571*n* (572*n*): 1 Cal W N 63*n* (DB), *Koylash Chandra* v. *Tarak Nath*.
('98) 25 Cal 571 (575): 2 Cal W N 297 (DB), *Rai Charan* v. *Kumud Mohun*.

(3) The premium for a lease is a 'price' paid or promised for the lease. But the consideration for a usufructuary mortgage is the advancement of a 'loan.'

(4) The transfer of an interest under a usufructuary mortgage is for the purpose of securing repayment of the loan. There is no such object in a lease. It is this difference that is at the root of the difference mentioned in item (1) above.

The above points of difference are involved in the very definition of the two kinds of transactions. The following points of difference in regard to their 'incidents' may also be noted :

(1) A provision entitling the transferee to continue in possession of the property after the term fixed for the mortgage, even if the mortgage-debt should be repaid to the mortgagee within such term, would be void as being a clog on the equity of redemption. But a provision, enabling the lessee to hold the property even after the term fixed for the lease would not be invalid.[1]

(2) A usufructuary mortgagee is entitled to remain in possession as long as the debt is not repaid, though the term of the mortgage may have expired. But a lessee is not entitled to remain in possession after the expiry of the term of the lease.[2]

(3) A clause prohibiting a transfer of the lease, when it is inserted for the benefit of the lessor, is valid. But a clause prohibiting a mortgagee from transferring his interest under the mortgage would be invalid.[3]

The question, whether a particular transaction is a lease for a premium or a usufructuary mortgage, is one of construction in each case. It must be seen whether the money paid is a loan advanced or price paid and whether possession of property is transferred for the purpose of securing the repayment of a loan.[4] If the money paid is a loan advanced and the transfer of possession is for the purpose of securing the repayment of such loan, the transaction would be a usufructuary mortgage.[5] But if the money is paid

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S. 105—NOTE 67

1. ('23) 10 AIR 1923 Nag 60 (61): 19 Nag L R 1: 69 Ind Cas 511, *Bhika* v. *Sheikh Amir.*
2. ('70) 13 Suth W R 445 (446) (DB), *Kewal Sahoo* v. *Rash Narain Singh.*
3. ('41) 28 AIR 1941 Oudh 198 (200): 192 Ind Cas 420, *Mahomed Jafar* v. *Lal Bahadur.*
4. ('41) 28 AIR 1941 Pat 296 (298): 193 Ind Cas 533 (DB), *Gulab Chand* v. *Ram Kumar.*
   ('41) 28 AIR 1941 All 56 (59, 60): 194 Ind Cas 347 (DB), *Ramman Lal* v. *Raghunath Shankar.*
   ('41) 28 AIR 1941 Oudh 198 (200): 192 Ind Cas 420, *Mahomed Jafar* v. *Lal Bahadur.*
   ('38) 25 AIR 1938 Pat 35 (36, 37): 172 Ind Cas 935 (DB), *Dildar Hussain* v. *Sheikh Saddip.*
   ('39) 26 AIR 1939 Pat 265 (266, 267): 180 Ind Cas 95, *Jageshar Singh* v. *Alakh Narain.*
   ('37) 24 AIR 1937 Oudh 146 (148): 12 Luck 161: 162 Ind Cas 225, *Tulshi Ram* v. *Munna Kuar.*
   ('35) 22 AIR 1935 Pat 360 (364): 158 Ind Cas 162 (DB), *Parameshwar* v. *Ramrudra Prasad.*
   ('19) 6 AIR 1919 Mad 322 (330): 41 Mad 959: 49 Ind Cas 291 (DB), *Meenakshisundara* v. *Rathnasami.*
   ('10) 6 Nag L R 65 (66, 67): 6 Ind Cas 817 (818), *Beni Prasad* v. *Mulchand.*
   ('22) 9 AIR 1922 Nag 156 (157): 65 Ind Cas 241, *Ram Prasad* v. *Chandulal.*
   ('25) 12 AIR 1925 Pat 319 (320): 83 Ind Cas 192 (DB), *Mathura Pandey* v. *Chandrika Rai.*
   ('33) 20 AIR 1933 Lah 786 (788): 149 Ind Cas 509 (DB), *Husain Ali* v. *Sardar Ali.*
   (1869) 4 Q B 293 (305, 306): 38 L J Q B 81: 17 W R (Eng) 414, *Morton* v. *Woods.*
   ('82) 6 Bom 674 (679, 680): 1882 Bom P J 263, *Gopal Sitaram* v. *Desai.*
   ('99) 12 C P L R 96 (100), *Manickchand* v. *Vishnu.*
   Also see S. 58, Note 36.
5. ('39) 26 AIR 1939 Nag 166 (167): ILR 1941) Nag 203: 182 Ind Cas 239 (DB), *Jabbarshah* v. *Kanchhedi Lal.*
   ('34) 21 AIR 1934 Pat 217 (219) (DB), *Rameshwar Narain* v. *Pani Ram.*
   ('30) 17 AIR 1930 Mad 160 (162, 167): 124 Ind Cas 282 (DB), *Seshayya* v. *Lakshminarsimha Rao.*
   ('25) 12 AIR 1925 Mad 881 (882): 87 Ind

as a price and not as a loan and there is no intention to provide any security for the repayment of a loan, the transaction would be a lease.[6]

The intention of the parties is to be gathered mainly from the document embodying the transaction, with such extrinsic evidence of surrounding circumstances as may be admissible for the purpose of showing in what manner the language of the document is related to existing facts.[7] The nomenclature used by the parties is immaterial for this purpose.[8] When the terms of a deed are not ambiguous, extrinsic evidence is not admissible for the purpose of determining the intention of the parties.[9]

A provision for the payment of interest or for redemption by repayment will show the transaction to be a mortgage and not a lease.[10] The absence

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Cas 669 (DB), *Gopinatha* v. *Kristno*.
('02) 26 Bom 252 (258): 3 Bom L R 778 (FB), *Tukaram* v. *Ramchand*.
('24) 11 AIR 1924 Pat 580 (581): 3 Pat 465: 78 Ind Cas 588 (DB), *Kharag Narayan* v. *Dwarka Prasad*.
('28) 15 AIR 1928 Pat 410 (411, 412): 7 Pat 690: 110 Ind Cas 469 (DB), *Umeshwardhari Singh* v. *Neman Singh*.
('21) 8 AIR 1921 Pat 43 (43, 44): 6 Pat L Jour 37: 61 Ind Cas 67 (DB), *Hitendra Singh* v. *Rameshwar Singh*.
('08) 32 Bom 569 (571): 10 Bom L R 742 (DB), *Mahmad Muse* v. *Bagas Amanji*.
('25) 12 AIR 1925 Pat 118 (119): 3 Pat 266: 78 Ind Cas 923 (DB), *Tilakdhari Singh* v. *Chaturgun Bind*.
('26) 13 AIR 1926 Pat 77 (79): 90 Ind Cas 785 (DB), *Nathan Prasad* v. *Kali Prasad*.
[*See also* ('05) 7 Bom L R 772 (785), *Mahomed Cassum* v. *Joseph Ezekiel*.]

6. ('35) 22 AIR 1935 Mad 320 (321, 322): 156 Ind Cas 873 (DB), *Peda Yerranna* v. *Somanna*.
('34) 21 AIR 1934 All 950 (951): 153 Ind Cas 607, *Jessa* v. *Dhaniram*.
('84) 7 Mad 203 (206) (FB), *Reference under Indian Stamp Act (1879), S. 46*.
('18) 5 AIR 1918 Oudh 279 (280): 48 Ind Cas 151, *Inder Bahadur Singh* v. *Bechan Singh*. (The use of the expression 'birt rahni' does not *prima facie* indicate the creation of some relation of mortgagor and mortgagee.)
[*See also* ('45) 32 AIR 1945 Mad 189 (189): ILR (1945) Mad 777 (DB), *Kotayya* v. *Annapurnamma*.
[Relationship of debtor and creditor between transfer and transferee—Transferee granted right to occupy and enjoy property for a period in satisfaction of amount due — Interest created held was not mortgage but lease, consideration being amount due by transferor.]
('16) 3 AIR 1916 Pat 161 (164): 1 Pat L Jour 1: 33 Ind Cas 408 (DB), *Sital Prasad* v. *Dildar Ali Khan*.]
Also see Section 58, Note 36.

7. ('40) 1940 Oudh W N 1233 (1236), *Makka Lal* v. *Ganga Singh*. (Document described as *thekanama* — Terms inconsistent with theka — Condition that lessee should not be ejected until a certain amount is paid off—*Held*, a lease.)
('34) 21 AIR 1934 Pat 217 (219, 221) (DB), *Rameshwar Narain* v. *Pani Ram*.
('19) 6 AIR 1919 Mad 322 (330): 41 Mad 959: 49 I.C. 291 (DB), *Meenakshisundara* v. *Rathnasami*.
('10) 6 Nag L R 65 (68): 6 Ind Cas 817 (818), *Beni Prasad* v. *Mul Chand*.
('99) 9 Mad L Jour 290 (294) (DB), *Valla Nayar* v. *Subramanian Pattar*.
('78) 1 Cal L R 256 (258) (DB), *Lala Doul Narain* v. *Runjit Singh*.
Also see Section 58, Note 33.

8. ('02) 26 Bom 252 (258): 3 Bom L R 778 (FB), *Tukaram* v. *Ram Chand*.
('40) 1940 Oudh W N 1233 (1234), *Makka Lal* v. *Ganga Singh*. (A document cannot be a lease or mortgage according to the interpretation put upon it by any of the parties to it.)
('35) 22 AIR 1935 Mad 320 (321): 156 Ind Cas 873 (DB), *Peda Veeranna* v. *Sommanna*. ("Cowle" ordinarily denoted a lease and not a mortgage.)
('30) 17 AIR 1930 Mad 160 (166, 167): 124 I.C. 282 (DB), *Seshayya* v. *Lakshminarasimha Rao*.
('87) 11 Bom 462 (466) (DB), *Abdulbhai* v. *Kashi*. (Document called 'karja rokha' held a lease.)
('28) 15 AIR 1928 Bom 377 (377): 114 Ind Cas 266, *Gulabbhai Ranchodbhai* v. *Bhagwan Kesur*. (*Held* that the deeds in question though called 'valatdan' deeds were really lease deeds.)
[*See also* ('21) 8 AIR 1921 Pat 43 (43, 44): 6 Pat L Jour 37: 61 Ind Cas 67 (DB), *Hitendra Singh* v. *Rameshwar Singh*. (Document described as 'sudbharana lease' held a mortgage.)]

9. ('25) 12 AIR 1925 Mad 881 (881): 87 Ind Cas 669 (DB), *Gopinath* v. *Kristno*.

10. †('97) 24 Cal 272 (279, 280): 23 Ind App 158 (PC), *Bengal Indigo Co.* v. *Raghobur Das*. (Provision for payment of interest.)
('41) 28 AIR 1941 Oudh 198 (200): 192 Ind Cas 420, *Mahomed Jafar* v. *Lal Bahadur*.
('19) 6 AIR 1919 Mad 322 (330): 41 Mad 959: 49 I.C. 291 (DB), *Meenakshisundara* v. *Rathnasami*.
('23) 10 AIR 1923 Mad 454 (455): 73 Ind Cas 733 (DB), *Kuppu Reddi* v. *Mandaluka*.
('41) 28 AIR 1941 Pat 296 (298): 193 Ind Cas 533 (DB), *Gulab Chand* v. *Ram Kumar*.

of such provisions may 'prima facie' indicate the transaction to be a lease.[11] Thus, where the stipulation is that the transferee is to remain in possession for a fixed term of years and then vacate the property irrespective of the question whether the amount paid by him has been recouped by him from the profits of the property or not, the transaction may 'prima facie' be held to be a lease.[12] But the test is not a conclusive one. Thus, where it was provided that the transferee was to be in possession for a certain period in lieu of the money paid by him but that if he was dispossessed in the meanwhile, he was to be entitled to recover the amount with interest, it was held that the transaction was a mortgage.[13]

In the undermentioned case,[14] where the transferee was placed in possession of the property for a term of years in discharge of the amount paid by him and there was no provision either for interest or redemption or rent and the document was described as a mortgage, it was held that the transaction was a mortgage and not a lease.

Where the transferee is to remain in possession till the amount paid by him is fully recovered from the usufruct of the property, the transaction may be taken to be a mortgage.[15]

Where rent is payable by the transferee, the transaction is indicated to be a 'lease.'[16] Where otherwise a transaction is shown to be a lease, the fact that the lessor is a debtor of the lessee and that the rent payable by the latter is to be adjusted to the interest payable by the lessor[17] or that the principal itself is to be deemed as repaid by the adjustment of such rent for a certain number of years[18] will not alter the character of the transaction.

('35) 22 AIR 1935 Pat 360 (364): 158 Ind Cas 162 (DB), *Parmeshwar Rai* v. *Ramrudra Prasad.* (Provision for interest.)
('25) 12 AIR 1925 Pat 118 (119): 3 Pat 266: 78 Ind Cas 923 (DB), *Tilakdhari Singh* v. *Chaturgun Bind.*
('15) 2 AIR 1915 Cal 769 (770): 28 Ind Cas 383 (DB), *Chulhan Singh* v. *Madho Singh.*
Also see S. 58, Note 36.

11. *('03) 25 All 115 (119): 30 Ind App 54 (PC), *Nidhasah* v. *Murlidhar.*
†('84) 7 Mad 203 (206) (FB), *Reference under Indian Stamp Act (1879), S. 46.*
('41) 28 AIR 1941 Pat 296 (298): 193 Ind Cas 533 (DB), *Gulab Chand* v. *Ram Kumar.*
('33) 20 AIR 1933 Lah 786 (788): 149 Ind Cas 509 (DB), *Hussain Ali* v. *Sardar Ali.*
('35) 22 AIR 1935 Mad 320 (321): 156 Ind Cas 873 (DB), *Peda Yerranna* v. *Somanna.*
('28) 15 AIR 1928 Mad 35 (36, 37): 106 Ind Cas 426 (DB), *Sundra Raju* v. *Seshadri.*
('23) 10 AIR 1923 Mad 454 (455): 73 Ind Cas 733 (DB), *Kuppu Reddi* v. *Mondaluka.*
('87) 11 Bom 462 (466) (DB), *Abdulbhai* v. *Kashi.*
('10) 6 Nag L R 65 (68): 6 Ind Cas 817 (818), *Beni Prasad* v. *Mulchand.*
('98) 1898 Bom P J 49 (DB), *Jumbra* v. *Raoji.*
('23) 10 AIR 1923 Nag 60 (61): 19 Nag L R 1: 69 Ind Cas 511, *Bhika* v. *Sheikh Amir.*

12. ('33) 17 R D 526 (528), *Kishan* v. *Pitam Prasad.*
('28) 12 RD 600 (602), *Bhagwan Das* v. *Ram Sarup.*

13. ('22) 9 AIR 1922 Nag 156 (157): 65 Ind Cas 241, *Ramprasad* v. *Chandulal.*
[*See also* ('06) 3 Cal L Jour 222 (223, 224) (DB), *Krishna Chandra* v. *Miran Bajania.* (Transaction called *girby* mortgage held usufructuary mortgage. Impliedly overruled in AIR 1915 Cal 242: 42 Cal 172 (FB) on a different point.)]

14. ('71) 15 Suth W R 331 (332) (DB), *Ishan Chunder* v. *Sooja Bebee.* (Document was termed as *bunducknamah.*)

15. ('35) 22 AIR 1935 Pat 360 (364): 158 Ind Cas 162 (DB), *Parmeshwar Rai* v. *Ramrudra Prasad.*

16. ('41) 28 AIR 1941 Pat 296 (298): 193 Ind Cas 533 (DB), *Gulab Chand* v. *Ram Kumar.*

17. ('34) 21 AIR 1934 All 950 (951): 153 Ind Cas 607, *Jassa* v. *Dhaniram.*
('30) 14 R D 83 (84), *Jodonandan Lal* v. *Jagnandan Tewari.*

18. ('43) 30 AIR 1943 Pesh 15 (17): 205 Ind Cas 497 (DB), *Akbar Khan* v. *Fateh Mohd.* (Mortgage in the form of *Mustaj* mortgage held a lease.)
('23) 10 AIR 1923 Nag 60 (61): 19 Nag L R 1: 69 Ind Cas 511, *Bhika* v. *Sheikh Amir.*
('16) 3 AIR 1916 Mad 642 (643): 28 Ind Cas 842 (DB), *Kamara Peda Subbayya* v. *Kakerla Chennapa.*
('10) 6 Nag L R 65 (67, 68): 6 Ind Cas 817 (818), *Beni Prasad* v. *Mulchand.*

68. Maintenance grants.—Where land is granted for the purpose of providing maintenance to the grantee, the question arises as to whether such a grant is to be treated as a 'lease.' There can be no general rule in such cases and the nature of the grant must be determined with reference to the facts and circumstances of each case. Because, though the purpose of the grant may be similar, the facts material for the determination of the question whether the grant fulfils the requirements of a 'lease' are bound to differ. For instance, in the case of 'Sonet Kooer v. Himmut Bahadur'[1] the Privy Council held a maintenance grant to be a grant of an 'absolute' interest. But in the undermentioned cases[2] such a grant was assumed to be a 'lease.' No doubt, these cases relate to grants made before the passing of the Act. But they show that though the purpose of a grant may be similar the nature of the grant may differ.

The decision of the Privy Council in 'Sonet Kooer's case[2a] brings home the point that if a grant for maintenance is of an 'absolute' character, i. e., if it creates an interest in the 'fee simple or ownership' of property, it would not be a 'lease,' not even a permanent lease. Similarly, it was doubted by Varadachariar, J., in the undermentioned decision[3] whether there is any intention of creating the relationship of landlord and tenant between a zamindar and the junior member of his family in whose favour he makes a grant for the purpose of his maintenance.

It seems fairly clear that ordinarily such grants would not be mere 'licences.' The intention may generally be presumed to be to create an 'interest' in the property.

One important question which arises in regard to such cases is whether a grant for maintenance is one made for a 'consideration' and if so, if the consideration can be said to be of the particular kind which this section requires in order to make the transfer a lease. A grant in lieu of maintenance cannot be said to be 'without' consideration when it is made in favour of a person who is entitled to a legal right of maintenance.[4] But the consideration cannot be said to be either 'premium' or 'rent' as required by this section and unless there are special factors which make the grant a lease, a giving up of the claim for maintenance will not, by itself, make the transaction a 'lease.'[5]

Even if an annual sum is made payable by the grantee to the grantor under the terms of the grant, the grant cannot be considered to be a lease, unless it appears in the peculiar circumstances of a case that such payment forms the consideration for the grant. Normally, it will not be such con-

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S. 105—NOTE 68

1. ('75) 1 Cal 391 (398): 3 Ind App 92 (PC).
2. (1900) 27 Cal 156 (163, 164): 26 Ind App 216 (PC), *Beni Pershad Koeri* v. *Dudhnath Roy*. (Principles of holding over, etc., discussed.)
   ('35) 22 AIR 1935 Cal 261 (262) (DB), *Nagendra Chandra* v. *Purna Chandra*. (Registration held necessary.)
   ('10) 37 Cal 674 (678): 6 Ind Cas 339 (340) (DB), *Ram Chandra Singh* v. *Bhikambar Singh*. (Principle of S. 116 applied.)

2a. ('76) 1 Cal 391 (398): 3 Ind App 92 (PC), *Sonet Kooer* v. *Himmat Bahadur*.

3. ('37) 24 AIR 1937 Mad 882 (891): ILR (1937) Mad 638: 171 Ind Cas 444 (FB), *Arumugham* v. *Subramaniam*. (Judgment of reference.)

4. ('37) 24 AIR 1937 Mad 882 (891): ILR (1937) Mad 638: 171 Ind Cas 444 (FB), *Arumugham* v. *Subramaniam*. (Per Varadachariar, J.—Judgment of reference to Full Bench.)

5. ('37) 24 AIR 1937 Mad 882 (893): ILR (1937) Mad 638: 171 Ind Cas 444 (FB), *Arumugham* v. *Subramaniam*.
   [See also] ('45) 32 AIR 1945 Pat 162 (167): 23 Pat 871 (DB), *Shiba Prasad* v. *Lekhraj & Co*.
   [Khorposh grant — Grantee to enjoy income of property in perpetuity in lieu of maintenance paying Government revenue and road cess—is not lease.]
   [But see ('11) 38 Cal 278 (282, 283): 9 Ind Cas 394 (396) (DB), *Dwarka Nath* v. *Dumburudhur Mohapatra*.]

sideration, the consideration in such cases being the giving up of the claim of maintenance.[6]

A maintenance grant made before the coming into force of this Act 'could' be a lease even though there was no other consideration than the provision of maintenance for a person entitled to demand it, as there was no statutory definition of a lease at that time.[7]

Under the Central Provinces Tenancy Act, it has been held that no consideration is necessary for the creation of a tenancy. Hence, the grantee under a maintenance grant can be a tenant under that Act.[8]

It would seem that ordinarily a grant for the maintenance of a person would be tenable for the lifetime of the grantee, though it 'can' be made hereditary by express or implied provision.[9] In 'Sonet Kooer's case,'[10] above referred to, the grant was held to be an 'absolute hereditary' grant, i. e., not a lease at all.

See also section 8, Note 5.

69. Resumption of service grants.—Where a grant of land is made

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6. ('37) 24 AIR 1937 Mad 882 (892): ILR (1937) Mad 638: 171 Ind Cas 444 (FB), *Arumugham* v. *Subramaniam.*

7. *See* ('10) 37 Cal 674 (678): 6 Ind Cas 339 (340), *Ram Chandra Singh* v. *Bhikambar Singh.*
('35) 22 AIR 1935 Cal 261 (262) (DB), *Nagendra Chandra* v. *Purna Chandra.*
(1900) 27 Cal 156 (163, 164): 26 Ind App 216 (PC), *Beni Pershad Koeri* v. *Dudhnath Roy.*

8. ('25) 12 AIR 1925 Nag 90 (92): 82 Ind Cas 190, *Amarchand* v. *Sardar Singh.*

9. ('20) 7 AIR 1920 Cal 192 (194): 56 Ind Cas 803 (DB), *Rajlakhi Debya* v. *Sarola Sundari.* (Grant held perpetual.)
('18) 5 AIR 1918 Mad 357 (358): 43 Ind Cas 654 (DB), *Pedda Chikka* v. *Sambasadasiva Chikka.* (Where deed of grant is in existence the heritability or otherwise of the grant must be determined with reference to the terms of the grant itself.)
('17) 4 AIR 1917 Nag 1 (5): 46 Ind Cas 913, *Mahomed Ali* v. *Shujat Ali.* (Maintenance grant is *prima facie* for life time of grantee or grantor—Use of the word, 'always' or 'for ever' does not per se create an inheritable estate — Circumstances and subsequent conduct of parties may show that grant was perpetual or otherwise.)
('16) 3 AIR 1916 Oudh 264 (270): 35 Ind Cas 764, *Buniyad Hussain* v. *Mt. Hazirunnisa.*
('13) 18 Ind Cas 127 (127, 128) (Oudh), *Mullu* v. *Raghubar Singh.* (The mere fact that the object of the grant is the maintenance of the grantee would not retract from the absolute nature of the grant, if otherwise it gives full right to the grantee—The presumption that it is for a life estate prevails only when there are no words making it heritable and transferable.)
('08) 7 Cal L Jour 202 (212) (DB), *Rameshar Koer* v. *Gobardhanlal.*
('06) 3 Cal L Jour 521 (524) (DB), *Bhaya Dirguj Deo* v. *Pande Fateh Bahadoor.*
('05) 1 Cal L Jour 517 (521) (DB), *Tituram* v. *Cohen.*
('03) 26 Mad 202 (211): 30 Ind App 14 (PC), *Rajaji Bahadur* v. *Parthasaradhi Appa Rao.* (Construction of grant—Partition by grantees made in the presence of Zamindar on assumption that lands were held on absolute and permanent tenure—On construction of documents and under circumstances of case *held* that it conferred an hereditary estate.)
('01) 25 Bom 563 (573): 28 Ind App 198 (PC), *Karim Nensey* v. *Heinrich.* (Gifts or contracts expressed to be for maintenance, and indefinite as regards duration, may be shown by the acts of the parties or other circumstances to be intended to operate in perpetuity; but *prima facie* they are limited to the life either of the grantor or the grantee.)
('82) 4 Mad 371 (372) (DB), *Ramchandra Raju* v. *Pedda Bhaliar Simhulu.* (Successive enjoyment for three generations without interference by landlord justifies the presumption that original grant was intended to be absolute.)
('74) 22 Suth W R 225 (226) (DB), *Rajah Woodoy Aditto* v. *Mukoond Narain Aditoo.*
('13) 21 Ind Cas 93 (94) (DB) (Cal), *Secretary of State* v. *Rashidul Huq.* (If property is vested in the grantee and his descendants by appropriate words creating a hereditary estate, it is not cut down to a life-estate and made inalienable merely by a direction that certain persons were to be maintained.)
[*See* (1900) 27 Cal 156 (161, 162): 26 Ind App 216 (PC), *Beni Pershad Koeri* v. *Dudhnath Roy.* (Grant by zamindar of village to member of his family in lieu of maintenance — *Held, prima facie* resumable on death of grantor, when there are no words purporting to grant a perpetual interest—At the latest, the interest came to an end at grantee's death.)]

10. ('76) 1 Cal 391 (398): 3 Ind App 92 (PC), *Sonet Kooer* v. *Himmat Bahadur.*

in consideration of service to be rendered by the grantee, the grant may fall under either of the two following classes:

(a) It may be a grant in lieu of wages for the services to be rendered. The grant of an office, the performance of whose duties is to be remunerated by the enjoyment of certain lands, will fall under this class.

(b) It may be a grant burdened with the performance of service.

In class (a) it is an implied condition of the grant that if the services are not performed or are not required the grant can be resumed.

In class (b) 'prima facie' the grant is not resumable even though the services may not be required. But an intention that the grant is to be resumable when the services are not required may appear from the provisions of the grant. Such intention may be express or implied. For instance, if the whole motive and consideration for a grant is the performance of the service, it may be presumed that the intention was that the services ceasing, the grant should be resumable. But where the grant is made partly as a reward for past services and partly in consideration of future services to be rendered, the grant will be presumed as not resumable even though the services may not be required. In such a case if owing to a change in circumstances the services are no longer required, the grant will continue practically freed from the liability of rendering the service.

One test to see if a grant is one in lieu of wages or one burdened with service is whether the service to be rendered is public or private. In the former case, the grant will 'prima facie' be treated as being one burdened with service and not one in lieu of wages. In the latter case, the grant will be 'prima facie' treated as one in lieu of wages and therefore resumable.

The above principles have been laid down in a series of decisions of the Privy Council,[1] beginning from 'Forbes v. Mir Mahomed Taki'[2] which is also the leading decision on the subject, and have been followed by various decisions of the High Courts.[3] It may be that the grants in some of the

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S. 105—NOTE 69

1. *('70) 13 Moo Ind App 438 (464, 465); 14 Suth W R P C 28 (PC), *Forbes* v. *Mir Mahomed Taki*.
('70) 14 Moo Ind App 247 (257): 11 Beng L R 71 (PC), *Kooldeep Narain Singh* v. *Government of India*.
('73) 1873 Ind App Sup Vol 181 (185): 13 Beng L R 124 (132) (PC), *Leelanund Singh* v. *Munorunjun Singh*.
('06) 29 Mad 52 (57): 33 Ind App 46 (PC), *Venkata Narasimha* v. *Sobhanadri*.
('31) 18 AIR 1931 P C 157 (157): 132 Ind Cas 736 (PC), *Lakhamgouda* v. *Baswantrao*.
('34) 21 AIR 1934 P C 182 (184): 13 Pat 589: 61 Ind App 333: 150 Ind Cas 807 (PC), *Kamakhya Narain Singh* v. *Abhiman Singh*. (Sanad for reciting Sri Bhagwat.)
[*See* (1857-59) 7 Moo Ind App 128 (132, 133, 142): 4 Suth W R P C 121 (PC), *U. R. R. Bommarauze* v. *P. Venkatadry Naidoo*. (Amaram grants, in the absence of all evidence to the contrary are resumable grants.)]

2. *('70) 13 Moo Ind App 438 (464, 465): 14 Suth W R P C 28 (PC).

3. ('49) 36 AIR 1949 Cal 208 (209), *Radha Gobind Jeu* v. *Shyam Ray Jeu*.
[*Resumption of — Grant burdened with service — Unwillingness or inability to perform service —Grant not resumable in absence of term in agreement of grant to that effect.*]
('49) 36 AIR 1949 Pat 85 (89): 27 Pat 313 (DB), *Padamlochan Mahapatra* v. *Budhram Christian*.
[Grants burdened with service of personal nature—prima facie not resumable.]
('36) 23 AIR 1936 Mad 831 (833, 834): 168 Ind Cas 498 (DB), *Sobhanadri Apparao Bahadur* v. *M. Ramudu*. (Primary burden is on zamindar to prove that the land is resumable — Grantee spending money over improvements and converting dry lands into wet lands—Enjoyment of that land since 1871—Even on default in service, land not resumed — Land held not resumable.)
('33) 20 AIR 1933 Bom 377 (378): 146 Ind Cas 329 (DB), *Sakharam* v. *Poornanand Saraswati Swami*.
†('30) 17 AIR 1930 Mad 755 (759): 127 Ind Cas 231 (FB), *Alakh Narayana* v. *Appalaswami*. (Where a zamindar wants to resume lands granted before the permanent settlement and held by the grantees from father to son and alienated without

decisions were not leases in the strict sense of the term and included a grant of an interest in the fee simple of the property.[4] In such cases, the grants might come under the category of revocable grants. But the above principles are equally applicable whether the grant is a leave or a revocable gift.[5]

question the onus is heavily on the zamindar to prove that grant was one in lieu of wages resumable at will.)
('23) 10 AIR 1923 Mad 572 (573, 574): 72 Ind Cas 627 (DB), *Ramasami Pattar* v. *Lakshmi Varessiar*. (Lands granted on condition of rendering Kazhagam service in the temple—*Held* that the grant was not a service grant liable to be resumed —Burden of proving a resumable tenure is on the grantor.)
†('18) 5 AIR 1918 Bom 115 (116): 43 Bom 37: 47 Ind Cas 330, *Chandrappa* v. *Bhima*. (Burden of proof is on grantor seeking resumption to show that the grant is resumable.)
†('17) 4 AIR 1917 Mad 918 (920, 921): 33 Ind Cas 901 (SB), *Kamaravutu Mrutyunjayadu* v. *Rajah of Pittapuram*.
('16) 3 AIR 1916 Bom 197 (197): 35 Ind Cas 860 (DB), *Baslingappa* v. *Chandrappa*. (Grant deed not produced — Evidence merely showing that grant was for services—Land is presumed to be not resumable—Burden of proving that the land is resumable lies on the party seeking to resume.)
('16) 3 AIR 1916 Mad 249 (260): 29 Ind Cas 365 (DB), *Maharaja of Jaipur* v. *Rucmani Paattamahadevi*.
('14) 1 AIR 1914 Cal 595 (596): 23 Ind Cas 300 (DB), *Jogendra Narain* v. *Ramchandra Adhikari*.
('14) 1 AIR 1914 Mad 669 (670, 671): 21 Ind Cas 833 (DB), *Bheema Kesari* v. *Sandi Prahaladha*.
('13) 20 Ind Cas 69 (70) (DB) (Cal), *Mahadeo Lal* v. *Kalanand Singh*.
('12) 12 Ind Cas 487 (490, 491) (DB) (Mad), *Vadisapu Appanddora* v. *Vyricherla Veerabhadraraju*. (A tenure has to be decided upon the evidence in each case—A grantee must show that a grant subsequent to the permanent settlement to which services personal as opposed to public are attached is not resumable.)
('07) 34 Cal 753 (782): 5 Cal L Jour 583 (DB), *Brojanath Bose* v. *Durga Prosad*.
('04) 27 Mad 202 (204, 205), *Theyyan Nair* v. *Zamorin of Calicut*. (An Adimayavana tenure in Malabar is a permanent tenure and when lands are granted in that tenure for past services, they are not resumable.)
('03) 26 Mad 403 (408, 409) (DB), *Sobhanadri Appa* v. *Venkta Narsimha Appa*. (Mokhassadars holding a permanent tenure subject to a burden of service — Grantor held only entitled to insist upon performance of the services but not entitled to dispense with the services and resume the land.)
('98) 22 Bom 422 (426, 428) (DB), *Bhimapaiya* v. *Ramchandra*.
('96) 1896 Bom P J 355 (355, 356, 358, 359) (DB), *Lakshman* v. *Narayanrao*. (Nothing in the grant showing that continued performance of service was a condition precedent to the continuance of lands—*Held* that cessation of service did not necessarily involve forfeiture of the inam land.)
('85) 8 Mad 72 (74) (DB), *Lakshmi* v. *Chendri*. (A grant may be hereditary but, nevertheless, resumable if the grantor is at liberty to dispense with the services of which the performance is the condition of the tenure—In such a case the holder cannot be ejected before a reasonable notice to surrender the land has been given.)
('84) 7 Mad 268 (271) (DB), *Sanniyasi Razu* v. *Zamindar of Salur*. (A zamindar is *prima facie* entitled to resume lands granted subject to a quit rent to tenants on condition of their rendering services when those services are dispensed with.)
('66) Beng L R Sup Vol 559 (566): 6 Suth W R 199 (FB), *Kooldeep Narain Singh* v. *Mahadeo Singh*.
('04) 28 Bom 305 (309): 6 Bom L R 364 (DB), *Lakham Gauda* v. *Keshav Annaji*.
('27) 14 AIR 1927 Cal 561 (562): 103 Ind Cas 542 (DB), *Sati Prasad* v. *Mahesh Bhunia*.
('29) 117 Ind Cas 848 (849) (DB) (Cal), *Official Receiver, Calcutta* v. *Kamdar Ali*. (*Held*, it was a grant burdened with services and not one in lieu of wages.)
('95) 22 Cal 938 (941) (DB), *Radha Pershad Singh* v. *Budhu Dashad*.
('15) 2 AIR 1915 Mad 606 (607, 608): 26 Ind Cas 78 (DB), *K. Mrutyunjayudu* v. *Suryarao*.
('14) 1 AIR 1914 Mad 564 (567): 37 Mad 1: 7 Ind Cas 202 (DB), *Rajah of Venkatagiri* v. *Mukku Narsaya*.

4. As seen in Note 6 an interest in the fee simple is inconsistent with a lease.

5. ('99) 23 Bom 602 (607): 1 Bom L R 61 (DB), *Komargowda* v. *Bhimaji*.
[*See also* ('23) 10 AIR 1923 Nag 163 (163): 67 Ind Cas 305, *Bed Prasad* v. *Kangalu*. (muafi khirati tenant may be exempt from paying rent for services to be rendered to the malguzar or for services to be rendered to the village. The distinction between the two classes is clear. A man may be entitled to hold certain land free of rent as long as he performs certain services, both tenure and exemption being dependent on the services and ending with them. This is one class. In the other, persons are entitled to hold land as tenants with an added condition that they shall pay no rent so long as they perform certain services, the exemption but not the tenure being dependent on the services and ending with them.)]

Hence, where a lease is granted 'in consideration' of services to be rendered by the lessee, i. e., in lieu of wages for such services, the lease will be presumed to be subject to the condition that on failure of the lessee to render the service the lease can be determined by the lessor. The cases cited below fall under this principle.[6] See also the undermentioned decision.[7]

It may be noted that a lease in lieu of service will be a valid lease though a definite period is not fixed in advance for the duration of the lease. As seen in Note 25, the fixing of such period is not necessary for a lease. It will also be noted that service is a valid form of rent under the section.

70. Damages for use and occupation.—A claim for damages for use and occupation arises under the following circumstances—

(1) the defendant must be in possession of the plaintiff's immovable property;[1]

(2) the possession of the defendant must be with the 'permission' of the plaintiff; and

(3) there must be 'no' relationship of landlord and tenant between the parties.[2]

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6. ('20) 7 AIR 1920 Mad 885 (887, 888): 42 Mad 673: 51 Ind Cas 366 (DB), *Secretary of State* v. *Gulam Mahboob Khan*. (Grant for charitable purpose with condition of service cannot be resumed so long as services are performed—Temporary alienation of endowed property is not a sufficient ground.)
('20) 7 AIR 1920 Pat 425 (426): 57 Ind Cas 41, *Rameshwar Singh* v. *Bhagwat Manjhi*. (Neither duration nor devolution from father to son can in such cases create a permanent tenure so as to prevent landlord from resuming on cessation of service.)
('19) 6 AIR 1919 Bom 45 (47): 52 Ind Cas 770 (DB), *Yamunabai* v. *Lagmanna*. (Grant partly for past and partly for future service is resumable on wilful default.)
('05) 2 Cal L Jour 403 (406) (DB), *Ansar Ali Jemadar* v. *C. E. Grey*. (The tenant is liable to be ejected even without a notice to quit.)
('19) 6 AIR 1919 Cal 1057 (1058): 45 Ind Cas 611 (DB), *Sanchiram De Behari* v. *Hara Priya*. (Services to be performed at the time of marriages in the landlord's house.)
('17) 4 AIR 1917 Cal 116 (117): 40 Ind Cas 348 (DB), *Ramnath Sil* v. *Siba Sundari*. (Barber.)
[*See* ('93) 16 Mad 97 (97) (DB), *Athakutti* v. *Govinda*. (Licensee allowed to occupy certain house site in a village on the condition of his doing certain work (blacksmith's work) is liable to be evicted on his ceasing to do that work, without notice to quit.)]
Also see Section 111, Note 22.

7. ('08) 7 Cal L Jour 90 (93) (DB), *Syed Mahammad Khan* v. *Maharaja Nam Narain*. (A document purported to convey certain village to a person "subject to faithful service." There were no other words in the document making the grant descendible to the heirs or other descendants of the grantee — *Held*, the words "subject to faithful service" clearly conveyed the idea of a grant for the life of the grantee only. Such a grant was therefore resumable on the death of the grantee.)

S. 105—NOTE 70

1. A claim for rent may be tenable notwithstanding that the tenant has not been in actual possession of the land. The reason is that a claim for rent is based on the contract of tenancy. See 8 Cal 118 which shows this. In that case, the tenant was held to be liable for rent for the whole of the demised land, although he was not in possession of a substantial portion of it. This shows that want of actual possession is not necessarily and always a ground for refusing to pass a decree for rent. But a claim for use and occupation will necessarily fail if there is no possession.

2. ('44) 31 AIR 1944 All 221 (222) ILR (1944) All 346 (DB), *Pyarelal* v. *Ram Sarup*. (Usufructuary mortgage—Mortgagor executing Kabuliat in favour of mortagagee and continuing in possession—*Held*, as no written lease was executed relation of lessor and leasee was not brought into existence; nevertheless possession of mortgagor was permissive and he was liable for compensation for use and occupation.)
('15) 2 AIR 1915 Low Bur 47 (48, 49): 8 Low Bur Rul 270: 30 Ind Cas 753, *Maung Po Shin* v. *Mohamed Thambi*.
('99) 26 Cal 739 (744) (DB), *Assanullah* v. *Mohini Mohan*. (Tenant occupying excess land—Liability for rent or for use and occupation—In absence of contract, no liability for rent—No liability for use and occupation also where under the law, the excess area forms part of the original tenure.)
[But see ('11) 12 Ind Cas 428 (429) (Mad), *Chinna Jogaya* v. *Verupati*. (A suit for damages for use and occupation will lie only where there is real or implied tenancy

In such cases the 'law' implies[3] a contract for the payment of compensation for use and occupation, although there may be no actual contract. But the circumstances must not be inconsistent with the raising of such a contract by implication. For instance, if there is an 'express' contract providing for a certain amount of consideration to be paid in return for the use of one's immovable property, the implied contract under the law cannot arise, although the relationship between the parties may not amount to that of landlord and tenant. Similarly, if the permission is intended to be 'gratis', there can be no right to any damages for use and occupation.

Where A has granted a lease of his immovable property to B, A cannot sue C, a 'third' person who may be actually in possession for damages for use and occupation.[4] The reason is that his occupation cannot be with the 'permission' of A. A mere demand of rent from the person in possession will not make his possession permissive so as to make him liable for damages for use and occupation.[5]

A lessee holding over after the expiry of his lease without the assent of the landlord will not be liable for damages for use and occupation because his continuing in possession is not with the 'permission' of the landlord. (See Note 40.)

Where a person enters into possession under an agreement for the grant of a lease and the lease is not actually granted, he will be liable for damages for use and occupation.[6] (See Note 4.) So also a person in possession under a void lease will be liable for damages for use and occupation.[7]

A 'trespasser,' i. e., one who occupies land without the owner's permission and without any right cannot be sued for damages for 'use and occupation.' He will be liable for 'mesne profits.' But the owner can 'waive' the trespass and claim compensation for use and occupation.[8] The position in

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under the plaintiff—Submitted that the observation is not correct—The same criticism applies to observations in 27 Cal 239 (242) also.)]

[See however ('25) 12 AIR 1925 Pat 517 (520): 88 Ind Cas 959 (DB), *Ram Gobind Singh* v. *Shashi Sekhar Prasad*. (In general where the relationship of landlord and tenant exists, without any arrangement for the payment of rent properly so called, there is always an implied promise on the part of the tenant to compensate the landlord for use and occupation of the premises. The relationship has been some times called in English law a quasi tenancy and that law always implies a contract or promise by the occupier to pay the landlord a reasonable sum for use and occupation. In Bengal and Behar the conditions are special and the law implies a contract to pay not compensation but rent.)]

3. ('10) 6 Ind Cas 766 (769) (DB) (Mad), *Chengiah* v. *Thimma Nayanim*. (Art. 115, Limitation Act, applies to suit for use and occupation.)

4. ('92) 16 Bom 568 (576), *Ragoonathdas* v. *Morarji Jutha*. (Lease to one partner—Suit against other partners not maintainable.)
('13) 7 Low Bur Rul 42 (43, 44): 21 Ind Cas 3 (4). *J. D. Pappademetrion* v. *Rose Halliday*. (Do.)
('10) 7 Ind Cas 492 (493) (DB) (Cal), *Kanai Lal* v. *Nitai Chand*. (Person inducted on land by sub-lessee continuing in possession after termination of lease and sub-lease — No consent of lessor—Lessor cannot sue for use and occupation.)

5. ('82) 6 Bom 79 (82) (DB), *Kalidas* v. *Vallabhdas*.

6. ('12) 15 Ind Cas 432 (432) (Mad), *In re Kaya Ramkrishnamma*.

7. ('69) 12 Suth W R 289 (290) (DB), *Puroma Soonduree* v. *Prollad Chunder*.
('38) 25 AIR 1938 Mad 746 (748): 182 Ind Cas 299, *Md. Rowther* v. *Tinnevelly Municipality*.
('30) 17 AIR 1930 Lah 915 (916): 129 Ind Cas 30, *Jawari Mal* v. *Jagan Nath*. (Lease deed inadmissible in evidence—Rent fixed in deed can be recovered as damages for use and occupation.)
('12) 36 Bom 500 (503): 15 Ind Cas 830 (831) (DB), *Ramchandra* v. *Tamo Ragho*.
('06) 9 Oudh Cas 296 (300) (DB), *Mt. Raj Kuar* v. *Nabi Baksh*.
†('09) 31 All 276 (278): 2 Ind Cas 211 (212) (FB), *Sheo Karan Singh* v. *Parbhu Narain*.
[*See also* ('92) 14 All 176 (178): 1892 All W N 25 (DB), *Gaya Prasad* v. *Baij Nath*. (Assignee of lease—Assignment invalid for want of registration—Assignee liable for damages for use and occupation.)]
Also see Note 19, S. 107 Note 7 and S. 108 (i) Note 12.

8. ('83) 9 Cal 908 (913, 914): 13 Cal L R 69 (DB), *Surnomoyee* v. *Denonath*.

such cases is this. The cause of action against a trespasser is based on 'tort' and not on 'contract.' An action for compensation for use and occupation is treated as based on 'contract,' as the 'law' implies such a contract, where the possession of the defendant is with the permission of the plaintiff. Even where such possession is not with the plaintiff's permission, it is open to him under the law to waive the tort or the wrong committed against him and sue, as if there was a permission, so that the action would be based on an implied contract as above explained. But the fact that he does so will not create a 'tenancy' between the parties, and a suit for possession against the occupant will not be barred by his having adopted the above procedure.[9]

The above discussion shows that it is only a 'licensee' that may be liable for damages for use and occupation, and neither a tenant nor a trespasser.

Suppose, a suit for 'rent' is brought against a person in possession of one's property, but the alleged tenancy is not established. In such a case, can the suit be converted into one for damages for 'use and occupation?' On this question the decisions are not uniform.[10] It is clear that the causes of action for a suit for rent and a suit for damages for use and occupation are different. The former is based on the 'existence' of a tenancy, while the latter is based on the 'absence' of a tenancy. The question, whether amendment of the suit should be allowed in such cases, falls within the province of the Civil Procedure Code. For a consideration of the principles applying to such matters, reference may be made to the Notes on O. 6 R. 17 of the A.I.R. Commentaries on the Code of Civil Procedure, 4th (1944) Edition.

71. Determination of lease.—Section 111 provides for the modes in which a lease can be determined. Mere non-payment of rent for however long a time will not put an end to the relationship of landlord and tenant

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9. ('15) 2 AIR 1915 Cal 494 (496): 21 Ind Cas 197 (DB), *Raj Krishna Rudra* v. *Fakir Dome*.
[But see ('83) 9 Cal 908 (913, 914): 13 Cal L R 69 (DB), *Surnomoyee* v. *Denonath*. (In this case, it was remarked that as the plaintiff had elected to waive the trespass and treat the defendants as tenants a decree for ejectment cannot be passed in plaintiff's favour, as the tenancy could be determined only by a proper notice to quit—It is submitted that this view is not correct—The election of the plaintiff in such cases cannot create a tenancy—It can only change the suit from being one based on tort into one based on contract.)]

10. ('44) 31 AIR 1944 Sind 49 (49): ILR (1943) Kar 382: 211 Ind Cas 535 (DB), *Haji Mahomed* v. *Hyderabad (Sind) Municipality*.
[When a plaintiff sues for rent only and he fails to establish his tenancy, he cannot be, allowed damages for use and occupation in the absence of any claim on that basis, since, when in a plaint a relief is based on contract, a remedy based on tort should not be allowed.]
('43) 1943 Nag L Jour 148 (152), *Gulabchand* v. *Himat Khetsingh*.
[Amendment allowed.]
('42) 29 AIR 1942 Pat 86 (87): 196 Ind Cas 650, *Kirpa Sanker* v. *Janki Prasad*. (Compensation for use and occupation cannot be awarded in a suit based upon an alleged contract of tenancy where plaintiff fails to prove the contract and has made no alternative prayer.)
('11) 11 Ind Cas 863 (864) (Low Bur), *O'Leary* v. *Maung On Gaing*. (Claim must be specifically laid for rent and, in the alternative, for use and occupation. Where the claim is for rent only, no damages will be decreed for use and occupation.)
('83) 9 Cal 908 (913, 914): 13 Cal L R 69 (DB), *Surnomoyee* v. *Denonath*. (Amendment allowed.)
('09) 12 Oudh Cas 140 (142): 2 Ind Cas 920 (921) (DB), *Udit Narayan Singh* v. *Rampal Singh*. (Do.)
('28) 15 AIR 1928 Nag 27 (29): 23 Nag L R 152: 105 Ind Cas 43, *Tribeniprasad* v. *Ramdas*. (Do.)
('15) 2 AIR 1915 Low Bur 47 (49): 8 Low Bur Rul 270: 30 Ind Cas 753, *Maung Po Shin* v. *Mohamed Thambi*. (Do.)
(1900) 27 Cal 239 (242) (DB), *Rachhea* v. *Upendra Chandra*. (Amendment refused.)
('95) 22 Cal 752 (756) (DB), *Surendra Narain* v. *Bhai Lal Thakur*. (Do.)
('12) 17 Ind Cas 646 (646) (DB) (Cal), *Bhukhi Koeri* v. *Ram Khelawan*. (Do.)
('27) 14 AIR 1927 Mad 182 (183): 99 Ind Cas 977, *Veerabhadra* v. *Vythinathaswami*. (Do.)

between the parties.[1] (See also Note 79.) Under S. 109 of the Evidence Act, where it is established that the relationship of landlord and tenant existed between the parties at a certain time, the burden of proving that the relationship has since ceased is on the party affirming the same.[2]

A clause in a lease entitling the lessor to re-enter on breach of certain conditions will not entitle him to re-enter 'by force.'[3] Even a licence by the lessee to the lessor to eject him without process of law would be void and would be no answer to a charge of forcible entry. Such a licence would be contrary to public policy as being likely to lead to a breach of the public peace.[4]

72. Heritability of lease.—A lease is 'prima facie' a heritable right.[1] Section 111 shows that the death of the lessee will not necessarily terminate a lease. This is in keeping with the nature of a lease as an 'interest' in immovable property and not merely a 'personal' right of the grantee. Hence, on the death of a tenant for a term of years, his interest will survive to his legal representatives.[2] Even where a lease is not for a 'fixed' term of years, it is a heritable right.[3] Thus, a lease from month to month is a heritable interest.[4]

S. 105—NOTE 71

1. †('81) 3 Mad 118 (120) (DB), *Tiruchurna Perumal Nadan* v. *Sanguvien*. (Non-payment of rent for twelve years.)
*('79) 4 Cal 314 (317, 318): 3 Cal L R 119 (DB), *Rungo Lall* v. *Abdul Guffoor*.
('12) 16 Ind Cas 911 (913, 914) (DB) (Cal), *Raj Kumar Roy* v. *Alimaddi*.
('04) 14 Mad L Jour 477 (478, 479) (DB), *Jagannatha* v. *Muthia Pillai*.
('28) 15 AIR 1928 Lah 937 (938): 113 Ind Cas 543, *Ralia* v. *Bodh Raj*.
('07) 6 Cal L Jour 72 (73, 74) (DB), *Bama Charan* v. *Administrator General of Bengal*. (Non-payment of rent for about fifty years.)
('08) 7 Cal L Jour 202 (214) (DB), *Mohammad Amir* v. *Kedar Nath*.

2. ('81) 3 Mad 118 (120) (DB), *Tiruchurna* v. *Sanguvien*.
†('79) 4 Cal 314 (317, 318) (DB), *Rango Lall* v. *Abdul Guffoor*.

3. ('12) 15 Oudh Cas 295 (300): 15 Ind Cas 857 (859), *Habibullah* v. *Surji*. (If the lessee resisted the exercise of the right the lessor's only remedy is to ejectment.) Also see S. 111, Note 18.

4. ('12) 15 Oudh Cas 295 (300): 15 Ind Cas 857 (859), *Habibullah* v. *Surji*.

S. 105—NOTE 72

1. (1846) 3 Moo Ind App 261 (275, 276): 6 Suth W R P C 48 (PC), *Maharaja Tej Chand* v. *Sri Kanth Ghose*. (A lease for a term (or in perpetuity) confers a heritable right.)
(1851) 4 Moo Ind App 321 (333): 7 Suth W R P C 15 (P C), *Raja Burdakanth Roy* v. *Aluk Munjoore*. (Suit for damages for ouster of representatives of lessees before expiry of term is maintainable.)
†('28) 15 AIR 1928 Lah 937 (938): 113 Ind Cas 543, *Ralia* v. *Bodh Raj*. (Even a lease not for fixed period is heritable.)
('28) 112 Ind Cas 651 (652) (Lah), *Muhammad Budha* v. *Ghulam Qadir*.
('29) 16 AIR 1929 Nag 23 (26): 110 Ind Cas 487, *Biju Bapu* v. *Munnalal*.
('21) 8 AIR 1921 Cal 453 (454): 63 Ind Cas 109 (DB), *Jyoti Prosad* v. *Dasarath*. (The fact of a son inheriting a tenancy from his father and paying rent to the landlord held had not the effect of creating a new tenancy in favour of the son, even though the son inherited after the passing of the Transfer of Property Act.)
('27) 14 AIR 1927 Lah 423 (423): 101 Ind Cas 166, *Bhola Nath* v. *Mahomed*. (Heirs and legal representatives are liable for the rent.)
[*See also* ('22 9 AIR 1922 Bom 45 (46): 46 Bom 816: 67 Ind Cas 230 (DB), *Chandmal* v. *Vishvanath*. (Lease to lessee *putra poutradi santati* — Death of lessee before expiry of lease—Lease would descend to his heir and is not resumable by grantor.)]

2. ('90) 17 Cal 686 (687, 688): 5 Sar 497 (P C), *Gobind Lal* v. *Hemendra*.
*(1846) 3 Moo Ind App 261 (275, 276): 6 Suth W R P C 48 (PC), *Maharaja Tej Chand* v. *Sri Kanth Ghose*.
('15) 2 AIR 1915 Cal 154 (154): 25 Ind Cas 530 (DB), *Khitish Chunder* v. *Bhikan*. (3 Moo Ind App 261 (PC) followed.)
('29) 16 AIR 1929 Nag 23 (26): 110 Ind Cas 487, *Biju Bapu* v. *Munna Ltl*.
('71) 16 Suth W R 147 (147) (DB), *Shaikh Dannoollah* v. *Amanutoolah*.
Also see S. 111, Note 6.

3. ('28) 15 AIR 1928 Lah 937 (938): 113 Ind Cas 543, *Ralia* v. *Bodh Raj*.

4. ('40) 27 AIR 1940 Cal 89 (91): I L R (1939) 2 Cal 254: 186 I. C. 625, *Anwarali* v. *Jaminilal*.
†('37) 24 AIR 1937 Nag 321 (322): I L R (1937) Nag 406: 172 Ind Cas 543, *Rajib Husain* v. *Nawab Yanuskhan*.
('28) 112 Ind Cas 651 (652, 653) (Lah), *Mohomed Budha* v. *Ghulam Qadir*.
Also see S. 106, Note 17.

But the above does not mean that a lease must 'always' be heritable.[5] Thus, a lease for the life of the grantee is a valid lease under the law and such a lease will obviously terminate on the death of the lessee.[5a] Similarly, a tenancy at will is regarded as not being a heritable interest.[6] (See Note 32.) In such cases the intention of the parties may be presumed to be that the interest is to last only till the lessee's death.

The question whether there is sufficient reason to hold that a lease confers only an interest to last during the lifetime of the grantee depends on the facts and circumstances of each case.[7] Thus, where a village was conveyed "subject to faithful service," it was held that, in the absence of words showing an intention to make the grant hereditary, it must be held to be one ceasing on the death of the grantee.[8] The fact that the lease has been granted for a residential or building purpose is generally regarded as indicating an intention to confer a hereditary interest.[9] The term "mokarari" by itself does not show that a lease is a hereditary one.[10] (For further information see Note 47.)

There is one general rule of construction of grants which has to be referred to here. This rule was enunciated by the Privy Council in 'Lakhraj Roy v. Kunhya Singh'[11] as follows:

> "If a grant be made to a man for an indefinite period, it enures, generally speaking, for his lifetime, and passes no interest to his heirs, unless there are some words showing an intention to grant a hereditary interest. That rule of construction does not apply if the term for which the grant is made is fixed or can be definitely ascertained."

On the above rule of construction, if a lease is granted for an indefinite period, i. e., where the intention of the lessor is that the lease is to go on for an indefinite period, the lease will generally be regarded as conferring only a life-interest on the lessee, unless there is sufficient reason to suppose that a hereditary interest was granted.[12]

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5. ('10) 37 Cal 377 (381): 5 Ind Cas 500 (501, 502) (DB), *Kishori Lal Roy* v. *Krishna Kamini*.

5a. ('43) 30 AIR 1943 Bom 148 (149): 207 Ind Cas 62 (DB), *Donkangauda* v. *Revanshidappa*. (The fact that lessee's interest is made transferable does not mean that it is heritable.)

6. ('40) 27 AIR 1940 Cal 89 (91): I L R (1939) 2 Cal 254: 186 I. C. 625, *Anwarali* v. *Jaminilal*. (A tenancy at will is determined by the death of either the tenant or the landlord.)
(1900) 10 Mad L Jour 201 (202) (DB), *Chemminian v. Udaya Varma*. (*James* v. *Dean*, 8 R R 185, followed.)
Also see Note 32.

7. ('16) 3 AIR 1916 Cal 358 (358): 44 Cal 403: 33 Ind Cas 899 (DB), *Aklu* v. *Emman*. (The fact that the area occupied by the brother of the original lessee after original lessee's death is different from that included in the original lease and the fact that the rent was different from that which was specified in the lease, held led to the conclusion that the holding was not a heritable one.)

8. ('08) 7 Cal L Jour 90 (93) (DB), *Syed Mahammad Khan* v. *Maharaja Nam Narain*.

9. ('12) 15 Ind Cas 137 (138) (DB) (Cal), *Hari Lal* v. *Rup Munjori*.
('32) 19 AIR 1932 Cal 215 (216): 136 I. C. 607, *Digambar Das* v. *Bepin Behari*.
*('10) 37 Cal 377 (382): 5 Ind Cas 500 (501, 502) (DB), *Kishori Lal* v. *Krishna Kamini*.
See also cases under Note 48.

10. ('88) 15 Cal 342 (344): 5 Sar 128 (PC), *Permeswar Pertab* v. *Padmanand*.
[See however ('26) 13 AIR 1926 Cal 993 (994): 53 Cal 816: 98 I. C. 173 (DB), *Panchubala* v. *Jotindra*. (The words in a mokurari tenure that the lessee will continue to enjoy and possess by residing through sons, grandsons, etc. (putra poutradi krame) create a hereditary tenure.)

11. ('77) 3 Cal 210 (212): 4 Ind App 223 (PC).
Also see S. 8, Note 7.

12. ('82) 8 Cal 664 (673): 9 Ind App 33 (PC), *Bilasmoni Dasi* v. *Raja*.
('12) 15 Ind Cas 137 (137, 138) (DB) (Cal), *Hari Lal* v. *Rup Manjori*.
†('18) 5 AIR 1918 Cal 823 (824): 41 Ind Cas 227 (DB), *Jagadish Chandra v. Bisweswari Debya*.
('30) 17 AIR 1930 Mad 434 (436, 437): 125 Ind Cas 242, *Saldanha* v. *R. C. Church, Mermajal*.

But as the Privy Council themselves have pointed out in the passage quoted above, the rule of construction referred to by them will not apply, where the term, for which the lease has been granted, is fixed or can be definitely ascertained. On this principle it was held in the above case by the Privy Council that, where the intention of the grantor is to create an interest which is to last as long as his own interest in the property, the period of the lease is capable of ascertainment by reference to such interest and hence, in such a case, the abovementioned rule, making the grant only a 'life-estate,' does not apply.[13]

The decision of the Privy Council in the above case shows that the period, for which a grant has been made, may be regarded as capable of being definitely ascertained, even though on the date of the grant the exact duration for which the grant will, continue is not certain, provided that it will 'become' certain at a future date on the happening of a certain event. Thus, in the above decision the grant was intended to continue so long as the grantor's own interest in the property lasted. But the grantor's interest in the property was of such a nature that on the date of the grant, it could not be definitely foretold how long it would continue. Because, the grantor's interest was a lease from the Government, which (though hereditary and allowed to go on indefinitely) was liable to be terminated at any time by the Government. Nevertheless, it was held by the Privy Council that the term, for which the grant (by the lessee from the Government) was made, was capable of being definitely ascertained by reference to the interest, which the grantor himself had in the property. Evidently, their Lordships intended to lay down that the rule as to the construction of grants for an indefinite period will not apply where the parties have shown their intention that the grant is to continue in force up to a certain limit of time, although such limit is not fixed absolutely but is made to depend on the happening of some collateral' event in the future.

It may be noted that, though the lease in favour of the 'grantor,' in the above decision of the Privy Council, was liable to be terminated by the 'lessor' (the Government) at any time, it was regarded as a heritable and transferable interest. This shows that even a lease, which is to go on 'indefinitely' subject to the liability of being terminated at any time by the parties, is to be regarded as a lease under which a 'term is fixed,' so as to make such interest a heritable one and not merely a life-interest.

Even where a lease is not heritable, if the tenant's heir continues in possession after the tenant's death and the landlord acknowledges the heir as his tenant, a new tenancy may arise by implication.[14] (See Note 38.)

Incidentally, it may be noted that the view of the Privy Council in the decision referred to above as to the question when the term of a lease can be said to be definitely ascertainable is exactly similar to the meaning of the words "certain time" in this section as explained in Note 25.

73. Construction of leases.—See Section 8 Note 20.

74. Escheat and reversion—Distinction.—See Note 6.

75. Zamindari and ryotwari lands—Tenants of.—The relationship between a 'zamindar' and his ryot is not that of a landlord and tenant in the strict sense of the term, though in common practice the terminology of the

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†('36) 164 Ind Cas 837 (839, 840) (Cal), *Chandi Charan* v. *Ashutosh Lahiri*. (This rule of construction, however, does not apply if the period for which the grant is made can be definitely ascertained from the other terms of the instrument.)

13. *See also* ('29) 16 AIR 1929 Nag 23 (25): 110 Ind Cas 487, *Biju Bapu* v. *Munnalal*. (This case was decided on the same principle.)

14. ('27) 14 AIR 1927 Cal 234 (235): 99 Ind Cas 910 (DB), *Pramatha Nath* v. *Rajah Bejoy Singh*.

law of landlord and tenant is loosely applied to such relationship.[1] The reason is that the ryot's right to 'possession' of the land is ordinarily not one 'derived' from the zamindar, so that there is no 'transfer' of the right of possession in such cases.[2] Hence, if such a ryot sets up permanent occupancy rights, the ordinary presumption applicable to cases of landlord and tenant that a tenancy of agricultural land is presumed to be one from year to year, until the contrary is established (so that the burden of proof is on the tenant to establish his claim to a permanent right) does not apply.[3] But 'ryotwari' pattadars are entitled to the actual possession of the land and the right of a tenant holding under them is only a 'derivative' right, i. e., there is a 'transfer' of such right by the ryotwari pattadar in such cases. The relationship of landlord and tenant exists in such cases, and the above-mentioned presumption will apply to them.[4]

76. Zuripeshgi lease.—See Section 58, Note 36.

77. Kanom leases.—See Section 58, Note 37.

78. Landlord and tenant—Adverse possession.—See Notes 79 to 84.

79. Nature of tenant's possession during tenancy—Adverse possession. —It is a fundamental principle that a person who is in possession of immovable property by virtue of a lawful title cannot deny such title and assert that his possession is hostile to the title of another person.[1] Hence, during the continuance of a tenancy the tenant's possession cannot be adverse to the landlord.[2] Mere denial of the landlord's title or assertion of a superior

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S. 105—NOTE 75

1. ('37) 24 AIR 1937 Mad 882 (891): I L R (1937) Mad 638: 171 Ind Cas 444 (FB), *Arumugham* v. *Subramaniam*. (Per Varadachariar, J., in his judgment of reference to the Full Bench.)
†('03) 26 Mad 252 (254, 255): 12 Mad L Jour 449 (DB), *Narayan Ayyangar* v. *R. G. Orr*.
('04) 27 Mad 401 (404) (DB), *Ekambara Aiyar* v. *Meenatchi Ammal*. (Ryot with right of occupancy (under-shrotriemdar) is not a mere lessee.)
('74) 12 Beng L R 82 (85): 20 Suth W R 139 (DB), *Bibee Sohodra* v. *M. Smith*. (The relation between the zamindar's right and the occupancy ryot's right is pretty much the same as that which obtains between the right of ownership of land in England and the servitude or easement which is termed profit a *prendre*, i. e., although the ryot's interest is greatly more extensive than a profit *a prendre*, the ryot's is the dominant, and the zamindar's the servient right.)

2. ('03) 26 Mad 252 (255): 12 Mad L Jour 449 (DB), *Narayan Ayyangar* v. *R. G. Orr*. (It originates in effective occupation and beneficial use of the soil.)
†('97) 20 Mad 299 (301, 302): 7 Mad L Jour 251 (DB), *Venkata Narasimha* v. *Dandamudi*.
('74) 12 Beng L R 82 (86): 20 Suth W R 139 (DB), *Bibee Sahodwra* v. *M. Smith*.
[*See* ('04) 27 Mad 401 (404) (DB), *Ekambara Aiyar* v. *Meenatchi Ammal*. ("Tenant" is a word which standing by itself denotes in law "one who holds lands by any kind of title whether for years or for life or in fee" and does not necessarily mean a lessee, unless it is used in opposition to landlord.)]
[See however ('07) 30 Mad 155 (157): 17 Mad L Jour 64 (DB), *Bodda Goddeppa* v. *The Maharaja of Vizianagaram*. (In this case it was held that zamindar has a reversionary interest in the land.)]

3. ('97) 20 Mad 299 (302): 7 Mad L Jour 251 (DB), *Venkata Narsimha* v. *Dandamudi*.
[See however ('11) 9 Ind Cas 141 (146) (DB) (Mad), *Sullee Abhoyee* v. *Krishna Rao*. (In this case the tenure set up was not that of a cultivating ryot. It was that of what was claimed to be a mokhasa right, an intermediate tenure between the zamindar and the ryot and a permanent right was claimed in respect of such right. It was held that the relationship of landlord and tenant existed and the burden of proof was on the tenant.)]

4. ('19) 6 AIR 1919 Mad 293 (300): 52 Ind Cas 247 (DB), *Ponniah* v. *Deivanai Ammal*.

S. 105—NOTE 79

1. See the A. I. R. Commentaries on the *Limitation Act*, 2nd (1942) Edition, Arts. 142 and 144, Note 18.

2. ('44) 31 AIR 1944 Pat 30 (33): 22 Pat 354 (DB), *Darbari Lal* v. *Raneeganj Coal Assocn. Ltd.*
('28) 15 AIR 1928 Pat 431 (434): 7 Pat 341: 109 Ind Cas 306 (DB), *Chota Nagpur Banking Association, Ltd.* v. *Kamakhya Narain Singh*. (Transferee from life-tenant cannot prescribe against the landlord during life-time of the life-tenant.)
('28) 15 AIR 1928 Pat 284 (292): 113 Ind Cas 703, *Kamakhya Narayan Singh* v. *Surendra Karan Deo*. (The principle that a tenant cannot question the title of his landlord applies only to cases where he

interest[3] by the tenant or non-payment of rent by the tenant will not determine the tenancy and make his possession adverse to the landlord.[4] (See

has been put into possession by the landlord and a case of mere attornment after previous possession as proprietor would not raise any estoppel.)
('27) 14 AIR 1927 Mad 1139 (1140): 102 Ind Cas 844. *Murugesa Mudali* v. *Syed Ali.* (Tenancy not put an end to—Purchaser from tenant does not hold adversely to the landlord.)
('06) 16 Mad L Jour 5 (6) (DB). *Lakshmi Nachiar* v. *Ramachandra Dorai.* (However notoriously the tenant may set up such inconsistent title.)
('81) 6 Cal 311 (316): 7 Cal L R 181 (DB), *Gobind Lall* v. *Debendranath Mullick.*
('16) 3 AIR 1916 Mad 642 (643): 28 Ind Cas 842 (DB), *Peda Subbayya* v. *Kakerla Chenappa.* (Under Madras Hereditary Village Offices Act (III of 1895), S. 13, an alienation of service tenures by way of leases is not prohibited—Hence a lessee of the holder of such tenure cannot set up an adverse title by alleging that leases are prohibited under the Act.)
*('02) 25 Mad 507 (511): 12 Mad L Jour 119 (DB), *Seshamma Shettati* v. *Chickaya Hegade.*
('81) 3 Mad 118 (120) (DB). *Tiruchurna Perumal* v. *Sanguviem.* (Where the relation of landlord and tenant is proved to have existed, it lies on the defendant in possession of the land to prove that the relation was put an end to at such a period anterior to the suit as would entitle the defendant to rely on his possession as adverse to the plaintiff for twelve years.)
('76 25 Suth W R 66 (66, 67) (DB), *Rajkishore Surma Chuckerbutty* v. *Grija Kant Lahiree.*

3. ('42) 29 AIR 1942 Oudh 374 (380): 17 Luck 805: 199 Ind Cas 776 (DB), *Bhairo Singh* v. *Ambika Baksh Singh.* (Perpetual lease in favour of *A*—*B* suing *A* claiming to be under-proprietor and cosharer of *A*—Decree passed in *B's* favour—Subsequently *A* also recorded as under-proprietor—*Held*, mere assertion by *B* in the suit that he was under-proprietor and mention of *A* as under-proprietor in the record could not convert title of *A* which was that of a perpetual lessee into that of an under-proprietor.)
('23) 10 AIR 1923 P C 118 (121): 50 Ind App 202: 26 Oudh Cas 231: 45 All 419: 74 Ind Cas 476 (P C), *Mumtaz Ali* v. *Mohan Singh.* (Claim of under-proprietary title by a tenant in a judicial proceeding.)
NOTE.—A denial of the lessor's title is, no doubt, a ground of forfeiture of the lease (see S. 111 (g).)—But such denial by itself does not terminate the lease—The lease is determined only if the lessor takes action on such forfeiture being incurred. Under S. 111, as it has been amended by Act XX of 1929, the lessor must give written notice determining the lease.)

4. ('25) 12 AIR 1925 Sind 36 (38): 79 Ind Cas 59. *Mahomed Faruq* v. *Sidik.*
('13) 19 Ind Cas 64 (65) (DB) (Cal), *Chintamoni Dutt* v. *Jogeshur Bhattacharya.*
('13) 19 Ind Cas 119 (120) (All), *Abdul Karim* v. *Chunni Bibi.* (Mere non-payment of rent by the tenant unless accompanied by a refusal to pay it and a denial of the landlord's title would not terminate the relationship or take away the landlord's right to rent.)
('12) 17 Ind Cas 523 (524) (All), *Deokinandan Pershad* v. *Bindeshwari Parshad.* (But non-payment of rent, if proved to have continued for a very long period, might give ground for the inference that the landlord has been ousted or had transferred his right to the tenant.)
('11) 14 Ind Cas 324 (325) (All), *Sheo Dayal* v. *Ganga.*
('08) 7 Cal L Jour 615 (623) (DB), *Madan Mohan* v. *Rameswar Malia.*
('08) 7 Cal L Jour 202 (214) (DB), *Rameshar Koer* v. *Gobardhan Lal.*
('94) 18 Bom 250 (255) (DB), *Rambhat* v. *Bababhat.*
('83) 7 Bom 40 (42): 7 Ind Jur 201 (DB), *Tatia* v. *Sadashiv.*
('84) 1884 Bom P J 82 (DB), *Twatadswami* v. *Shidlingaya.*
('81) 1881 Bom P J 198 (DB), *Ramchandra* v. *Balvant.* (Suit by landlord against tenant for rent—Primarily burden on landlord to prove existence of tenancy—If this is proved burden shifts to tenant to prove that his possession became adverse and continued to be so for more than 12 years before suit.)
('76) 1876 Bom P J 155 (DB), *Mathura Bhai* v. *Gunaji.*
('75) 1875 Bom P J 36 (DB), *Nanabawa* v. *Bawaji.*
('72) 1872 Bom P J 7, *Ramchandra* v. *Oomabai.* (The rule is, once a tenant always a tenant, at least it lies upon the tenant to show that by some means his possession has been rendered adverse to that of the landlord.)
*('78-80) 2 All 517 (520, 521): 4 Ind Jur 650 (FB), *Premsukh Das* v. *Bhupia.* (Term in lease that on default in payment of rent lessee should vacate—His possession does not become adverse on default.)
('99) 23 Bom 602 (607): 1 Bom L R 61 (DB), *Komar Gowda* v. *Bhimaji.* (Lands held for service—Mere non-rendering of service does not make possession of tenant adverse—Same principle applies as in case of rent.)
('14) 1 AIR 1914 Bom 294 (296): 27 Ind Cas 523 (DB), *Yeshwant* v. *Keshavrao.*
('85) 9 Bom 419 (421) (DB), *Gangabai* v. *Kalapa Dari.*
*('83) 7 Bom 34 (39) (DB), *Dadoba* v. *Krishna.* (Possession referable to lawful title is not adverse.)
('13) 40 Cal 173 (180): 16 Ind Cas 365 (366)

also S. 111, Note 14.) So long as the tenancy has not ended, the tenant cannot, by adverse possession, acquire a title either to the ownership of the property or to any higher interest in the property than that created by the lease.[5] Thus, where the lease is not a permanent one, the tenant cannot convert it into a permanent lease by adverse possession for the statutory period.[6]

(DB), *Prasanna Kumar* v. *Sri Kantha Raut.*
('11) 9 Ind Cas 119 (120) (Cal), *Ram Newaz* v. *Shashi Bushan.*
('07) 6 Cal L Jour 72 (73, 74) (DB), *Bama Charan* v. *Administrator General of Bengal.* (Further the fact that rent was never paid does not necessarily show that the instrument evidencing tenancy was not intended to be acted upon.)
('05) 9 Cal W N 122 (122) (DB), *Apurba Krishna Roy* v. *Ashutosh Dutt.*
('32) 19 AIR 1932 Lah 586 (587): 13 Lah 432: 140 Ind Cas 474 (DB), *Sohawa Singh* v. *Kesar Singh.* (Tenancy at will.)
('30) 17 AIR 1930 Lah 437 (437): 129 Ind Cas 889, *Allah Ditta* v. *Budha.* (Do.)
('28) 15 AIR 1928 Lah 937 (938): 113 Ind Cas 543, *Ralia* v. *Bodh Raj.* (The fact that the landlord had a right to eject the tenant in case of non-payment of rent does not cause a forfeiture of the tenancy, unless the landlord chose to exercise it.)
('20) 7 AIR 1920 Lah 217 (217): 57 Ind Cas 269, *Des Raj* v. *Jaimal Singh.* (Tenancy at will.)
[*See also* ('16) 3 AIR 1916 Lah 353 (354): 1915 Pun Re No. 97 : 32 Ind Cas 35 (DB), *Umar Baksh* v. *Baldeo Singh.* (Each case must, however, be decided on its own facts—No rent paid by tenant for nearly 30 years—No attempt to recover rent—Tenant denying on oath that he ever regarded himself as lessee or intended to pay rent —*Held* that this was sufficient to establish adverse possession.)]
NOTE.—Some of the above cases, (see A I R 1920 Lah 217 and A I R 1930 Lah 437) will show that above proposition is true even in the case of a tenancy at will —As seen in Note 32, such a tenancy can only be determined by the tenant by notice and surrender of possession—Mere notice of a claim to a higher right is not enough.

5. *('23) 10 AIR 1923 P C 118 (121): 26 Oudh Cas 231: 50 Ind App 202: 45 All 419: 74 Ind Cas 476 (PC), *Mumtaz Ali* v. *Mohan Singh.* (Under-proprietary right.)
('32) 19 AIR 1932 Lah 586 (589): 13 Lah 432: 140 Ind Cas 474 (DB), *Sohawa Singh* v. *Kesar Singh.* (Ownership.)
('08) 4 Nag L R 104 (108), *Hiria* v. *Mohd. Siraj-ud-din.* (Do.)
('26) 13 AIR 1926 Sind 71 (74): 90 Ind Cas 1007 (DB), *Sidik Haji Yacub* v. *Md. Faruq.* (Per Aston, A. J. C.)

6. ('32) 19 AIR 1932 Bom 3 (8): 136 Ind Cas 801 (DB), *Shankar Yesu* v. *Khem Sawant.* (Tenancy for fixed term—Tenant cannot acquire permanent tenancy by assertion of hostile title in judicial proceedings.)
('26) 13 AIR 1926 Bom 384 (385): 96 Ind Cas 827 (DB), *Satyadhyantirtha Swami* v. *Raghunath Daji.* (It was observed that authority of 27 Bom 515 and other Bombay cases which hold that permanent tenancy can be acquired by adverse possession was considerably shaken by AIR 1923 P C 205: 47 Bom 798: 50 Ind App 255 (PC) and AIR 1924 P C 65: 47 Mad 337: 51 Ind App 83 (PC).)
('21) 8 AIR 1921 Mad 462 (464): 70 Ind Cas 27 (DB), *Ponnalagu Konan* v. *Sinniah Odayan.*
*(1900) 27 Cal 156 (165, 166): 26 Ind App 216 (PC), *Beni Pershad Koeri* v. *Dudhnath Roy.* (Tenant for life cannot prescribe for permanent tenancy by giving notice to the landlord that he claims such right. NOTE.—Attention is drawn by the Privy Council to the fact that the landlord could not have sued for possession before the determination of the lease.)
*('24) 11 AIR 1924 P C 65 (73): 51 Ind App 83: 47 Mad 337: 82 Ind Cas 226 (PC), *Nainapillai* v. *Ramanathan.* (Following AIR 1923 P C 205: 47 Bom 798: 50 Ind App 255 (PC).)
('35) 22 AIR 1935 Bom 247 (250): 156 Ind Cas 1020 (DB), *Vaman* v. *Khanderao.* (AIR 1924 P C 65: 51 Ind App 83: 47 Mad 337 (PC), followed.)
('34) 21 AIR 1934 Bom 194 (197): 58 Bom 419: 150 Ind Cas 555 (DB), *Datto* v. *Babasaheb.* (In absense of evidence as to nature of tenancy, paying particular amount of rent would not establish permanent tenancy by prescription.)
('73) 10 Bom H C R (AC) 324 (326), *Narayan Visaji* v. *Lakshuman.* ("Mirasi rights" in Bombay Presidency.)
('26) 13 AIR 1926 Cal 634 (636, 637): 92 Ind Cas 963, *Gopal Chandra* v. *Satya Bhanu.* (Mokarrari mourashi right.)
('02) 25 Mad 507 (511): 12 Mad L Jour 119 (DB), *Seshamma Shettati* v. *Chickaya Hegade.*
('14) 1 AIR 1914 Mad 564 (568, 569): 37 Mad 1: 7 Ind Cas 202 (DB), *Raja of Venkatagiri* v. *Narsaya.* (*Semble.*—Where the landlord, on the tenant's assertion of hostile title, has unequivocally shown his intention to determine the lease, time would run in favour of the tenant.)
('32) 19 AIR 1932 Mad 328 (332): 137 Ind Cas 487 (DB), *Pereyanan* v. *Govinda.*
('31) 18 AIR 1931 Mad 577 (580): 133 Ind Cas 369, *Gopala* v. *Juvappa.*
('30) 17 AIR 1930 Mad 434 (438): 125 Ind Cas 242, *Saldanha* v. *Roman Catholic Church, Mermajal.* (AIR 1924 P C 65: 51 Ind App 83: 47 Mad 337 (PC), followed.)
[*See also* ('14) 1 AIR 1914 Cal 382 (384): 21 Ind Cas 920 (DB), *Bengal Coal Co.* v.

The rule that a tenant's possession cannot be adverse to the landlord during the continuance of the tenancy can also be traced to other principles. These are:

(1) A tenant is estopped from denying the ownership of the lessor. This principle is embodied in S. 116 of the Evidence Act. It will be noted that this principle only precludes the tenant from denying the 'ownership' of the landlord. It does not preclude the tenant from asserting a lesser right although such right may be higher than the one conferred by the lease. But the principle above referred to, namely, that possession referable to a lawful title cannot be adverse comes in the way of the tenant doing so.

(2) The possession of the tenant is 'permissive' i. e., not in denial of the title of the lessor, but in consonance with it.

(3) So long as the tenancy is outstanding the lessor cannot sue the tenant for possession. If it is held that his possession can become adverse even before the tenancy ends, the result will be that limitation will begin to run against the landlord at a time when he has no right of suit at all—a result which is repugnant to the law. This aspect of the matter is pointed out by the Privy Council in 'Beni Pershad v. Dudhnath Roy.[7]

(4) Adverse possession implies a present right to possession in another person. (See the A. I. R. Commentaries on the Limitation Act, 2nd (1942) Edn., Arts. 142 & 144, Note 78.) But so long as tenancy continues, the right to possession is vested in the tenant and not in the landlord.

But where the tenant refuses to the landlord the "enjoyment of his right" to the rent reserved by the lease, such right will, under Art. 131 read with S. 28 of the Limitation Act, be extinguished at the end of twelve years from such refusal.[8] To constitute "refusal of enjoyment" of the right within the meaning of the Article, mere non-payment of rent is not enough. There must be a demand and refusal[9] and a denial of the landlord's title to the rent.[10] It must be noted that the effect of Art. 131 si 'not' to make the tenant's possession of the 'leased property' adverse to the landlord from the date of the refusal by the tenant. The subject-matter of adverse possession in such cases is the right to the 'rent' of the leased property. Such right is itself a kind of property,[11] (apart from the leased property) which is capable of adverse possession by the lessee or a stranger.

It is sometimes held or assumed that there can be adverse possession

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Rejendra Lal. (Permanent lease granted by lessee under a lease for a term of years — Sub-lessee's possession is not adverse to lessor till main lease ends.)]

7. (1900) 27 Cal 156 (166): 26 Ind App 216 (PC).

8. See the A.I.R. Commentaries on the *Limitation Act*, 2nd (1942) Edition, Art. 131, Notes 2 and 3.
[*See also* ('97) 21 Bom 394 (396) (DB), *Gopalrao Krishna* v. *Mahadeorao.* (*Held*, in this case that the landlord's right to enhanced rent was extinguished by adverse possession.)]

9. See the A.I.R. Commentaries on the *Limitation Act*, 2nd (1942) Edn., Art. 131, Note 9.

10. †('06) 29 Mad 42 (44): 16 Mad L Jour 35 (DB), *Lakshminarayan* v. *Venkata Narasimha.*
†('13) 18 Ind Cas 243 (243) (Mad), *Adivi Sreenivasa Pantulu Garu* v. *Palatala Jogiraju.*
('19) 6 AIR 1919 Mad 758 (763): 48 Ind Cas 615 (DB), *Kamulammal* v. *Sangali Subba.*
('12) 15 Ind Cas 338 (339) (All), *Anroop Miser* v. *Kedar Pande.* (Non-payment of customary dues to zamindar.)
[*See also* ('68) 5 Bom H C R A C 85 (86) (DB), *Hari* v. *Mahadaji.* (Non-payment of rent for 12 years is no bar to recovery of rent for 3 years before suit.)]

11. See the A.I.R. Commentaries on the *Limitation Act*, 2nd (1942) Edn., S. 28, Note 5.

by a tenant in respect of the land covered by the lease even during the continuance of the lease.

It is said or implied that an open assertion of a hostile title or open repudiation of the landlord's title may make the possession of the tenant adverse to the landlord.[12] In 'Fatesingji v. Bamanji'[13] it was held that although a tenant cannot prescribe by adverse possession for title as 'full owner,' a tenant who is not a permanent tenant can, by adverse possession for twelve years, convert his tenancy into a permanent tenancy. The judgment proceeds on the ground that S. 116 of the Evidence Act precludes the tenant only from asserting a right to the 'ownership' of the property. It is submitted that such decisions are contrary to sound principle. They fail to take note of the principle (above referred to) under which the tenant is 'precluded' during the continuance of the tenancy from claiming adversely to the landlord. This principle is wider than S. 116 of the Evidence Act.

In 'Mumtaz Ali v. Mohan Singh'[14] the Privy Council observed that the mere assertion in a judicial proceeding of an underproprietary title by tenant would not deprive the landlord of his proprietary rights and continued as follows: "The case might have been different if, in addition to the judicial assertion by the plaintiff, there had been any change in the money payment which he thereafter made to his landlord." It is submitted that the above observations of the Privy Council do not mean that the possession of the 'leased property' by a tenant would become adverse to the landlord, if the assertion of a higher title had been accompanied by a change in the money

12. ('43) 30 AIR 1943 Bom 148 (149): 207 Ind Cas 62 (DB), *Donkangouda* v. *Revanshidappa*. (Permanent tenancy—Possession of tenant would not become adverse until he disputes landlord's title.)
('23) 71 Ind Cas 812 (812, 813) (Pesh), *Rahimuddin* v. *Shahbaz Khan*.
('14) 1 AIR 1914 Cal 645 (646): 22 Ind Cas 796 (DB), *Shyama Charan* v. *Ram Prosad*.
('13) 20 Ind Cas 823 (824) (Cal), *Protab Narain* v. *Biraj Dasi*. (A disclaimer, in order to determine tenancy, must be a renunciation by the party of his character of tenant either by setting up a title in another or by claiming title in himself.)
('08) 7 Cal L Jour 615 (622) (DB), *Madan Mohan* v. *Rameswar Malia*. (Lessee cannot acquire any title by adverse possession against his lessor pending the term of the lease unless he distinctly asserted such a title to his knowledge and gave him notice that he asserted such a title.)
('21) 8 AIR 1921 Bom 227 (227, 228): 45 Bom 508: 59 Ind Cas 718 (DB), *Babusingh Ramachandra* v. *Pandu*. (Where a tenant wishes to acquire a larger claim (permanent right of tenancy) by adverse possession, he must give the landlord specific notice of the claim.)
('99) 23 Bom 602 (606): 1 Bom L R 61 (DB), *Komargowda* v. *Bhimaji*. (To make possession by service tenant adverse to lessor there must be, over and above the non-rendering of service, an active assertion of an adverse right.)
('13) 37 Bom 284 (286): 17 Ind Cas 943 (944) (DB), *Vinayak* v. *Sitaram*. (Mere non-payment of rent by a tenant does not make him owner of the land by adverse possession, unless the tenant does some act which is inconsistent with the owner's title and thereby turns his possession as tenant into possession adverse to that of the owner.)
('97) 21 Bom 509 (516) (DB), *Budesab* v. *Hanmanta*. (Assertion of permanent tenancy in judicial proceeding and continuing to hold under that assertion—There is adverse possession. NOTE.—This decision is clearly against the decision of the Privy Council in AIR 1923 P C 118: 26 Oudh Cas 231: 50 Ind App 202: 45 All 419 (PC) and is submitted to be wrong.)
('85) 9 Bom 419 (421) (DB), *Gangabai* v. *Kalapa Dari*. (Unless made to the knowledge of landlord mere assertion of the permanent tenancy by tenant does not start adverse possession.)
('11) 9 Ind Cas 119 (120) (Cal), *Ram Newaz* v. *Shashi Bushan*.
('32) 19 AIR 1932 Lah 586 (589): 13 Lah 432: 140 Ind Cas 474 (DB), *Sohawa Singh* v. *Kesar Singh*. (Per Bhide, J.—Assertion of adverse title would terminate tenancy at end of agricultural year and must be looked upon as a notice to the landlord that the tenant no longer intends to hold the land under him.)
('26) 13 AIR 1926 Sind 71 (72): 90 Ind Cas 1007 (DB), *Sidik Haji Yacub* v. *Md. Faruq*. (Per Kennedy, J. C.)

13. ('03) 27 Bom 515 (540): 5 Bom L R 274 (DB). (But bare assertion of permanent tenancy to landlord's knowledge is not enough—If tenant proceeds to enjoy benefits claimable only by a permanent tenant, his possession becomes adverse.)

14. ('23) 10 AIR 1923 P C 118 (121): 50 Ind App 202: 26 Oudh Cas 231: 45 All 419: 74 Ind Cas 476 (PC).

payment. There is no reason why a change in the money payment should make a difference in the character of the possession of the 'leased property.' As seen already, it is well established that mere non-payment of rent does not make such possession adverse to the landlord. All that the Privy Council says is that the landlord's "proprietary rights" might be affected in such a case. It is quite possible that their Lordships had in mind the landlord's right to the 'rent' reserved by the lease and meant to say that 'this' right might be affected in the circumstances stated. Such a view is quite understandable in the light of Art. 131 of the Limitation Act which has already been referred to.

It must also be mentioned that the decisions of the Privy Council in 'Ram Chunder v. Madho Kumari'[15] and 'Chidambara Sivaprakasa v. Veerama Reddi[16] do not affect the position that a tenant cannot during the 'continuance' of the tenancy prescribe by adverse possession for any higher title than that conferred by the lease. 'Ram Chunder v. Madho Kumari' was the case of a tenant by sufferance continuing in possession 'after' the determination of the tenancy. There is nothing to show that in 'Chidambara Sivaprakasa v. Veerama Reddi,' the permanent tenancy was acquired by prescription by persons who had 'entered' as 'tenants.'

80. Nature of tenant's possession after determination of tenancy—Adverse possession. — Where a lessee continues in possession after the determination of the lease without the assent of the landlord, time begins to run in his favour under Art. 139 of the Limitation Act. Under that Article read with S. 28 of that Act the ex-lessee will acquire at the end of twelve years from the determination of the tenancy, such right to the property as he has been claiming while in possession. If the ex-lessee has been in possession in the assertion of a right to the full ownership, he can acquire such right at the end of the statutory period. If he has been asserting any lesser right, he can acquire such lesser right.[1] 'But this is a part from any question of adverse possession.' It is purely as the effect of the above two provisions that such a result occurs.

But 'can' a tenant's possession after the determination of the tenancy be adverse to the landlord and if so, to what extent? As seen in Note 37 the tenant's possession in such cases is 'wrongful.' But it is not 'ipso facto adverse' to the landlord. Nor 'can' it be adverse to the 'full' extent. In other words, such possession can be adverse to the landlord to a limited extent but not to the full extent so as to enable the ex-tenant to prescribe for 'full ownership' by adverse possession. Hence, 'but for Art. 139 read with S. 28,' a tenant continuing in possession after the determination of the tenancy for any length of time would not be able to acquire by prescription a title to the 'full ownership' of the property. But he can, 'independently of Art. 139.'

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15. ('85) 12 Cal 484 (492, 493): 12 Ind App 188 (PC).

16. ('22) 9 AIR 1922 P C 292 (302, 303): 45 Mad 586: 49 Ind App 286: 68 Ind Cas 538 (PC).

S. 105—NOTE 80

1. †('26) 13 AIR 1926 Cal 952 (953): 95 Ind Cas 101 (DB), *Sadananda Mandal* v. *Jotish Kantha Roy*. (Death of tenant—Landlord entitled to take possession, but not doing so and accepting rent from person in possession claiming to remain on land as tenant—Tenancy is acquired.)
('02) 25 Mad 507 (511): 12 Mad L Jour 119 (DB), *Seshamma Shettati* v. *Chickaya Hegade*. (Tenant from year to year can acquire right of permanent occupancy.)
('08) 7 Cal L Jour 615 (626) (DB), *Madan Mohan* v. *Rameswar Malia*.
('24) 11 AIR 1924 Pat 572 (575): 3 Pat 534: 78 I. C. 511 (DB), *Hari Gir* v. *Kamakhya Narain Singh*. (Tenant by sufferance.)
[*See* ('10) 33 Mad 260 (262): 4 Ind Cas 1080 (1080, 1081) (DB), *Subravti Ramiah* v. *Gundala Ramanni*. (Even under English law tenancy by sufferance does not interrupt the running of time.)]
[*See also* ('25) 12 AIR 1925 Pat 216 (228): 4 Pat 139: 84 Ind Cas 586 (DB), *Ram Rachhy* v. *Kamakaya Narain*. (Transferee from life tenant continuing in possession after life-tenant's death—Possession under claim of permanent tenancy.)]
See also the A. I. R. Commentaries on the *Limitation Act*, 2nd (1942) Edn., Art. 139, Note 11.

acquire by adverse possession a title to a 'lesser' interest in the property although such interest may be higher than that under the expired tenancy.

This position results like this: After the determination of the tenancy, the principle referred to in Note 79, that possession referable to a lawful title cannot be adverse, does not apply for the simple reason that the tenant's possession is no longer referable to a lawful title. But, though the above principle does not apply to such a case, the 'principle' of S. 116 of the Evidence Act applies. (The principle applies even after the tenancy has ceased, so long as the tenant has not surrendered possession.[2]) This principle precludes the ex-tenant from asserting a claim for the full 'ownership' of the property. But it does not preclude him from asserting a claim for a lesser title, say a title to permanent tenancy, although such title may be higher than that conferred by the expired lease.[3]

Even as to a limited extent, the tenant's possession does not 'ipso facto' become adverse to the landlord from the moment of the termination of the tenancy. The possession will not become adverse, till an adverse claim is actually put forward by the tenant against the landlord.[4]

A lessee who, after the determination of the tenancy, discontinues possession or is dispossessed but afterwards again enters into possession of the same property is in the position of a mere stranger and on the principles discussed in Note 84, he can prescribe by adverse possession for 'any' title which he may assert.[5]

Where a lessor assents to the continuation in possession of a tenant after the determination of the original tenancy, the tenancy is renewed under S. 116. In such cases, the principle which precludes a tenant from asserting a claim by adverse possession against his landlord during the continuance of the tenancy will come into play again, and there will be no adverse possession till the tenancy is determined.[6]

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2. See Woodroffe and Ameer Ali, *Evidence Act*, 6th Edn., 1915, p. 800 and S. 111, Note 17.

3. *('86) 12 Cal 484 (494): 12 Ind App 188 (PC), *Ramchunder Singh* v. *Madho Kumari*. (Maintenance grant by ghatwal —Grant not valid after grantor's death—Grantee continuing in possession thereafter is tenant by sufferance—He can set up adverse possession as a permanent tenant.

NOTE.—In this case, however, the full period of limitation had not run from the setting up of adverse possession.)

('26) 13 AIR 1926 Cal 634 (635): 92 Ind Cas 963, *Gopal Chandra* v. *Satya Bhanu*.

('22) 9 AIR 1922 Cal 193 (194): 69 Ind Cas 7 (DB), *Satyendra Nath* v. *Krishnasakha*. (Chaukidari chakran lands resumed by Government and settled with zamindar—Zamindar taking no steps to eject lessee, claiming under a lease granted before resumption—Lessee continuing in possession for more than 12 years after resumption, held acquired the status of a tenant.)

('03) 26 Mad 535 (536, 537) (DB), *Parameshwaram* v. *Krishnan*. (Yearly tenancy—Tenant continuing in possession after termination of tenancy—Tenant so continuing in possession under claim of permanent tenancy — His possession is adverse and he acquires permanent tenancy by prescription.)

('32) 19 AIR 1932 Mad 328 (332): 137 Ind Cas 487 (DB), *Periyanan* v. *Govinda*.

4. *('86) 12 Cal 484 (494): 12 Ind App 188 (PC), *Ramchunder Singh* v. *Madho Kumari*.

[*See also* ('84) 18 Bom 507 (512) (DB), *Vithalbowa* v. *Narayan*.

5. *See* ('14) 1 AIR 1914 Mad 564 (569): 37 Mad 1: 7 Ind Cas 202 (DB), *Rajah of Venkatagiri* v. *Narsaya*. (Determination of lease by lessor and resumption of possession by him—Lessee getting back into possession and paying rent at the old rate which is accepted by the lessor—Nothing to show that the tenant asserted a right to permanent tenancy—Tenant does not acquire right to permanent tenancy by prescription.)

6. ('10) 37 Cal 674 (679): 6 Ind Cas 339 (340) (DB), *Ramchandra Singh* v. *Bhikambar Singh*.

('15) 2 AIR 1915 Mad 345 (348): 25 Ind Cas 109 (DB), *Ganapathi* v. *Venkatalakshminarasayya*. (Per Sadasiva Ayyar, J.—While the clear words of Art. 139, Limitation Act, should be given effect to there is no reason why Courts should not, having regard to the usual course of events and probabilities, view with favour evidence adduced to show that though the original tenancy for a fixed period had expired, the relationship as between a landlord and tenant from year to year had been afterwards created by conduct bet-

80a. Lease terminating on tenant's death—Tenant's legal representative continuing in possession—Nature of possession.—Where a lease terminates on the death of a tenant as in the case of a life-tenancy, and the legal representative of the deceased tenant continues in possession of the leased property, it is clear that his possession is one without any lawful title. The lessor can sue him for possession without giving him any notice to quit. As will be seen in Note 4 on S. 116, that section will not apply to such a case and consequently there will be no renewal of the lease in favour of the legal representative under S. 116 by the mere assent of the landlord to the legal representative's continuing in possession. But the actings of the parties may give rise to a fresh tenancy by implication on the principles discussed in Notes 7 and 8 or may give rise to an estoppel against the landlord on the principles referred to in Note 12. But even in the absence of such a fresh tenancy being established, the possession of the legal representative will not be 'ipso facto' adverse to the landlord, for the simple reason that the mere fact that A is in possession of B's property without title and without B's permission will not necessarily make such possession adverse to B in the absence of something to show that it is in active assertion of a hostile title.[1] Where, however, the legal representative asserts such a hostile right and claims to be in possession by virtue of such right his possession will be adverse to the landlord and the tenant will prescribe for such title as he has been asserting.[2]

81. Tenant encroaching on other land of the landlord — Adverse possession.—Where a tenant encroaches on other land of the lessor he does not thereby 'ipso facto' become a tenant of such land also. So, such land is not covered by the tenancy. The principles referred to in Note 79 which preclude a tenant from setting up adverse possession against the landlord during tenancy, therefore, do not apply to the tenant's possession of other land of the lessor on which the tenant encroaches. So, a tenant can set up adverse possession against the landlord in respect of such lands.[1] But there is a presumption that he claims to hold such land under the same terms as those under which he holds the lands covered by the lease. Hence, 'prima facie,' in regard to lands encroached upon by a tenant, he can acquire by adverse possession only such rights as he has in respect of the lands covered by the original tenancy.[2] But he 'can' prescribe for a higher title also by openly asserting such title to the 'knowledge' of the landlord.

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ween the parties to the original contract of letting.)

S. 105—NOTE 80a

1. See Note 80.
   See also A. I. R. Commentaries on the *Limitation Act*, 2nd (1942) Edition, Arts. 142 and 144, Note 16.
2. ('43) 30 AIR 1943 Bom 148 (149): 207 Ind Cas 62 (DB), *Donkangouda* v. *Revanshidappa*. (Tenant for life—Heirs of tenant not paying rent since his death—Possession of heirs would become adverse on death of tenant for life.)
   ('26) 13 AIR 1926 Pat 241 (242, 243): 93 Ind Cas 300 (DB), *Kuldip Singh* v. *Kamakhya Narain Singh*.
   ('25) 12 AIR 1925 Pat 357 (361, 362): 86 Ind Cas 387 (DB), *Charan Mahton* v. *Kamakhya Narain Singh*. (The grant of marfatdari receipts by the landlord did not create the relationship of landlord and yearly tenant between the parties.)
   ('25) 12 AIR 1925 Sind 36 (38, 39): 79 Ind Cas 59, *Mahomed Faruq* v. *Sidik*. (Tenancy at will—Death of tenant — Tenant's heir after him continues as permissive occupant —Unequivocal assertion of title coupled with non-payment of rent for statutory period is enough to complete adverse possession.)

S. 105—NOTE 81

1. ('26) 13 AIR 1926 Cal 634 (635): 92 Ind Cas 963, *Gopal Chandra* v. *Satya Bhanu*.
   ('19) 6 AIR 1919 Cal 725 (726): 53 Ind Cas 184 *Jnanada Sundari* v. *Jilapai Bewa*.
2. ('44) 31 AIR 1944 Pat 109 (111, 112): 212 Ind Cas 273, *Baldeb Jiu Thakur* v. *Jogi Sahu*. (Tenant taking possession of land outside tenancy—Landlord cannot recover khas possession by reason of Art. 142, Limitation Act, but right to recover rent is not barred as possession is only in the character of a tenant and not adverse to landlord in the character of a landlord.)
   ('30) 17 AIR 1930 Lah 437 (437): 129 Ind Cas 889, *Allah Ditta* v. *Budha*. (He cannot get, by mere efflux of time, a title of full ownership. 35 Mad 618 followed.)
   ('18) 5 AIR 1918 Cal 639 (641): 41 Ind Cas 530 (DB), *Sarada Kripahalala* v. *Akhil*

(See also the A. I. R. Commentaries on the Limitation Act, 2nd (1942) Edn., Art. 139, Note 19.)

82. Possession under invalid lease, how far adverse. — Where a person enters under a void lease his possession is not referable to any lawful title and so, he is not precluded, on the principle discussed in Note 79 from setting up adverse possession against the grantor of the lease. But he can set up such adverse possession only in regard to the interest attempted to be created by the void lease.[1] The reason is that having entered into possession under colour of a particular transaction he cannot afterwards set up another title to the property against such transaction, although it did not operate to pass title to him. (See the A. I. R. Commentaries on the Limitation Act, 2nd (1942) Edn., Arts. 142 & 144, Note 60.)

Reference may also be made in this connexion to S. 116 of the Evidence Act. As seen in Note 19, the person entering under a void lease is in the position of a licensee. Under S. 116 of the Evidence Act he cannot set up a right to the 'ownership' of the property. But that section does not prevent him from asserting a lesser right to the property. But the principle above referred to precludes him even from doing so, except to the extent of the interest purported to be created by the void lease.

Under the above principles, a person entering under a void lease can acquire by adverse possession the interest purported to be granted by such lease.[2] Thus, if the interest attempted to be created is a permanent tenancy, the person entering into possession under such transfer can prescribe for a permanent tenancy.[3] The same principle will apply 'mutatis mutandis,' where a transfer is valid for a time and becomes invalid subsequently. Thus,

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Chandra. (If the original tenancy is of a permanent character, the tenancy with regard to the new land also will be a permanent one.)

Also see Section 108 (d), Note 3.

S. 105—NOTE 82

1. ('10) 5 Ind Cas 350 (351) (All), *Bhagwan Das* v. *Hari Ram*.
('17) 4 AIR 1917 All 102 (103): 37 I.C. 395. (Even where lessee continues in possession after the period of the invalid lease.)
2. ('28) AIR 1928 Bom 377 (378, 379): 114 I.C. 266. (Lease void as being against Bhagdari Act.)
†('23) AIR 1923 Bom 146 (147): 77 C 952 (DB). (Lease for 500 years void under Bhagdari Act—Prescription.)
('03) 27 Bom 515 (534): 5 Bom L R 274 (DB), *Fatesingji* v. *Bamanji*. (Possession may be adverse to a limited extent though rent is paid and accepted.)
('97) 21 Bom 509 (516) (DB), *Budesab* v. *Hanmanta*.
('35) 22 AIR 1935 Cal 261 (262) (DB), *Nagendra Chandra* v. *Purna Chandra*. ("Jibka" grant can be acquired by adverse possession. NOTE.—The dicta in this case that possession under a void grant can be adverse even to the full extent i. e., so as to enable ownership to be acquired by adverse possession are, it is submitted, not correct.)
('32) 19 AIR 1932 Mad 328 (332): 137 I. C. 487.
('02) 25 Mad 507 (512): 12 Mad L Jour 119 (DB), *Seshamma Shettati* v. *Chickaya Hegade*. (A person coming into possession of land under a lease which is invalid or void is really a trespasser.)
[But see ('07) 5 Cal L Jour 62 (63) (DB), *Chaitan Singh* v. *Sadhari Monim*. (NOTE. —In this case the grantee under a void lease remained in possession for more than the statutory period. During this period he paid rent which was accepted by the landlord—He was then dispossessed by the owner. He afterwards brought a suit for possession based on the ground that ne had acquired a title by prescription—It was held that there was no adverse possession as there was no hostile claim between the grantor and grantee—Both believed that the lease was valid and rent was paid and accepted—12 Cal 484 was relied on for the proposition that unless there is an assertion of a hostile claim possession cannot be adverse—At the same time it was held that the payment and acceptance of rent created a tenancy by implication and that the tenant could not be dispossessed without determining that tenancy.)]
3. ('20) AIR 1920 Oudh 147 (149): 60 I.C. 717.
('07) 17 Mad L Jour 469 (470): 3 Mad L Tim 187 (DB), *Kanuparti* v. *Kurnani*.
('94) 18 Bom 507 (512) (DB), *Vithalbowa* v. *Narayan*. (Grantee of mirasi right from manager of math.)
('23) 10 AIR 1923 Cal 130 (134): 69 Ind Cas 707 (DB). (Permanent lease by manager of religious endowment.)
†('06) 33 Cal 511 (525, 526, 527): 3 Cal LJ 306 (DB). (Permanent lease of debutter property. Reversed in 36 Cal 1003: 36 Ind App 148 (PC) on a different point.)
('32) 19 AIR 1932 Mad 328 (332): 137 I.C. 487.
(DB). (Cowl granted by a dharmakaratha of temple lands.)

where a lease is valid only for the lifetime of the grantor or during the time that he holds a certain office or occupies a certain position, the lessee's possession after the death of the grantor or after he ceases to hold the office or occupy the position will be adverse to his successors from the moment of his death or ceasing to hold the office or occupy the position in question. Such a person would also be in the position of a person who continues in possession without the lessor's assent after the determination of the tenancy.

83. Dispossession of lessee by third person — Adverse possession. — Where a stranger dispossesses a lessee from the property and enters into possession of the property, the possession of such stranger is not adverse to the lessor so long as the tenancy is in force. The reason is that till the lease is determined the lessor is not entitled to possession.[1] (See the A. I. R. Commentaries on the Limitation Act, 2nd (1942) Edn., Arts. 142 & 144, Notes 78 and 86.)

84. Acquisition of tenancy by prescription by trespasser. — A 'limited' interest in immovable property can be acquired by adverse possession in the same way in which a right of 'ownership' can be acquired. Thus, a trespasser in possession under a claim of tenancy in respect of the land can acquire a right of 'tenancy' in the land by prescription.[1] If he has been in possession claiming a 'permanent tenancy,' he will be entitled, at the end of the statutory period to a permanent tenancy by prescription.[2]

85. Estoppel of tenant.—In a suit for ejectment by a landlord against a tenant after the tenancy has been terminated by a due notice to quit, the tenant cannot set up the title of a third person and contend that the land belongs to such third person and not to the plaintiff.[1] This is on the principle of estoppel contained in S. 116, Evidence Act, which runs as follows:

"No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord had, at the beginning of the tenancy, a title to such immoveable property; and no person who came upon any immoveable property by the licence of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such licence was given."

S. 105—NOTE 83

1. ('25) 12 AIR 1925 P C 97 (98): 52 Ind App 160: (The duty if a tenant under a perpetual tenure is to protect himself against illegal encroachments by others on the lands of which he has the exclusive possession. If the fails to do so he cannot prejudice the landlord's claim for rent.)
('95) 19 Bom 138 (139) (DB), *Vinayak Janardan* v. *Mainai*.
('37) 24 AIR 1937 Mad 882 (888): I L R (1937) Mad 638. (Per Varadachariar and Stone, JJ., in the Order of Reference.)
[*See* ('22) 9 AIR 1922 Cal 348 (352): 49 Cal 257: 69 I. C. 117 (DB), *Katyani Debi* v. *Udaykumar*. (Per Woodroffe, J.—Where the lease is permanent the landlord can sue the trespasser in order to give land, of which the latter is wrongfully in possession, to his tenant.)]
[*See also* ('09) 4 Ind Cas 30 (31) (DB) (Mad.), *Krishna Nambudri* v. *Secy. of State*. (Tenant dispossessed by a third person under a decree—Landlord cannot sue third person for possession.)]

S. 105—NOTE 84

1. ('14) 1 AIR 1914 Cal 173 (174): 19 Ind Cas 853 (DB), *Moti Lal Roy* v. *Kalu Mandar*.
*('83) 7 Bom 96 (99) (DB), *Maidin Saiba* v. *Nagapa*.
('08) 35 Cal 470 (476): 7 Cal L Jour 499 (Purchaser from occupancy tenant transferring without landlord's consent.)
[See however ('12) 8 Nag L R 163 (168): 17 Ind Cas 606 (609), *Kanhayalal* v. *Dular Singh*. (While there may be adverse possession of a limited interest in land, this principle is overridden by the special provisions of the Central Provinces Tenancy Act and hence under C. P. Tenancy Act, tenancy cannot be acquired by prescription.)]
2. ('22) 9 AIR 1922 P C 292 (304): 45 Mad 586: 49 Ind App 286: 68 I. C. 530 (PC), (Permanent tenancy of temple lands.)
('83) 7 Bom 96 (99) (DB), *Maidin Saiba* v. *Nagapa*.
('22) 9 AIR 1922 Cal 185 (186): 68 Ind Cas 1003 (DB), *Ujir Ali* v. *Shadhai*. (Possession under a transfer purporting to be a transfer of a permanent tenure.)

S. 105—NOTE 85

1. ('24) 11 AIR 1924 Oudh 309 (311): 84 Ind C 532. *Shamshudin* v. *Agha Sayaid*.

106. In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Duration of certain leases in absence of written contract or local usage.

Every notice under this section must be in writing signed by or on behalf of the person giving it, and [a][either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party], or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

a. These words were *substituted* by S. 54 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929). for the words: "tendered or delivered either personally to the party who is intended to be bound by it."

Synopsis

1. Amendment of section. See Note 45.
2. Contract to the contrary.
3. Lease for a term certain—Notice.
4. Lease for life.
5. Perpetual lease.
6. Tenancy at will.
7. Lease for indefinite period.
8. Possession under agreement to grant lease for a term certain.
9. Law to the contrary.
10. Usage to the contrary.
11. Immovable property.
12. Presumption of yearly or monthly tenancy under this section.
13. Lease for agricultural or manufacturing purposes.
14. Lease for building purpose—Presumption as to. See Note 12.
15. Reservation of yearly or monthly rent—Effect.
16. Lease from year to year.
17. Lease from month to month.
18. Possession under invalid lease—Presumption under this section.
19. Notice to quit—General principles.
20. Notice to quit with an option to continue on different terms.
21. Notice required under other sections for determining lease.
22. Notice by lessee—Duty to give up possession.
23. Waiver of notice.
24. Suit for ejectment—Notice to quit.
25. Denial of lessor's title by lessee and notice to quit.
26. Other modes of determination of lease.
27. Effect of giving notice where it is not necessary.
28. Notice by lessor undertaking to pay compensation for improvements—Effect.
29. Determination of main lease by notice—Effect on sub-lease.
30. Resumption of possession by landlord without giving notice—Effect.
31. Lessee giving up possession before termination of lease—Liability for damages or rent.
32. Lessee holding over after expiry of notice to quit—Effect.
33. Notice to quit—Who can give.
34. Who can give notice to quit—Co-lessors.
35. Who can give notice to quit—Assignment by lessor.
36. Who can give notice—Miscellaneous.
37. Notice to quit—To whom to be given.
38. Notice to or by agent.
39. Period of notice.
40. Expiring with end of year or month of tenancy.
41. Year or month of tenancy.
42. Calendar for calculation of time.
43. Form of notice.
44. Mode of service.
45. Service by post.
46. Service of notice on party's pleader or solicitor.
47. Leases by Government.
48. Lease by Municipality.
49. Notice in cases not governed by this section.

1. Amendment of section.—See Note 45.

2. Contract to the contrary.—This section only applies in the absence of (*inter alia*) a "contract to the contrary".[1] A lease for a term certain, a perpetual lease, a lease for the life of the lessee, a tenancy-at-will, etc., are all leases in which there is a contract to the contrary within the meaning of the section. So also, where a lease is expressly made determinable by the lessor *without* any previous notice there is clearly a contract to the contrary under this section and no notice will be necessary to determine such a lease.[2-3] Similarly, where a lease is expressed to be determinable by notice but the notice is not of the kind required by this section there is a contract to the contrary within this section. Thus, the parties may provide for a longer[4] or shorter[5] notice than that required under the section for the determination of a lease. Similarly, a notice may be according to the contract between the parties although such notice does not expire with the end of a year or month of the tenancy.[6]

Section 106—Note 2

1. ('28) 15 AIR 1928 Mad 687 (689) : 110 Idn Cas 398 (DB), *Moosa Kutty* v. *Kovilakath Thekke.*

('24) 11 AIR 1924 Nag 220 (220) : 78 Ind Cas 445, *Saik Kasam* v. *Haji Yusuf.* (A contract for a month's notice without any specification of the time when the notice is to expire is a contract to the contrary.)

('24) 11 AIR 1924 All 726 (727) : 79 Ind Cas 106, *Mukat Singh* v. *Misra Paras Ram.*

2-3. ('06) 16 Mad L Jour 557 (558) (DB), *Suryanarayana Row* v. *Somayya.* (Tenant executing *muchilkas* binding himself thereby to surrender the lands at the end of the year at the landlord's pleasure).

('28) 15 AIR 1928 Mad 687 (689) : 110 Ind Cas 398 (DB), *Moosa Kutty* v. *Kovilakath Thekke.* (Provision that tenant should surrender the property when demanded.)

('10) 8 Ind Cas 362 (363) (DB) (Mad), *Kelu* v. *Ammad Kully.* (Do.)

('24) 11 AIR 1924 All 726 (727) : 79 Ind Cas 106, *Mukat Singh* v. *Misra Paras Ram.* (Do.)

('18) 5 AIR 1918 Cal 665 (665) : 47 Ind Cas 19 (DB), *Momindra Nath* v. *Radha Prosonno.* (Provision for resumption of possession by landlord at any time on payment of compensation.)

('25) 12 AIR 1925 Pat 256 (257) : 85 Ind Cas 77 (DB), *Ramdhani Gope* v. *C. V. Scott.* (Notwithstanding mention of term and also fixation of rent by reference to year option reserved to lessor to eject at any time—No notice necessary.)

[*See also* ('02) 5 Oudh Cas 113 (114, 115), *Govind Prasad* v. *Asmat Ara Begam.* (Provision in a lease that if for any reason the lessee had to leave the leased property without giving one month's notice to lessor he should pay one month's rent.)]

4. ('25) 12 AIR 1925 Rang 206 (206) : 86 Ind Cas 512. *F. Morgan* v. *Ahmed Moola Dawood.* (One month's notice in lease of house property.)

('19) 6 AIR 1919 Cal 54 (55) : 52 Ind Cas 180 (DB), *Manmatha Nath* v. *Peary Mohan.* (Three months' notice in lease of homestead land.)

('02) 5 Oudh Cas 113 (114, 115), *Govind Prasad* v. *Asmat Ara Begam.* (Lease of a house—Provision for one months' notice.)

(1857) 1 H & N 732 (735) : 108 R R 796 : 156 E R 1396, *Tooker* v. *Smith.* (A tenancy, subject to a condition that it may be determined by a two years' notice to quit is capable of being created.)

5. ('39) 26 AIR 1939 P C 11 (13) : ILR (1939) Kar P C 90 : 179 Ind Cas 321 (PC), *Prahladrai* v. *Commissioners, Port of Calcutta.* (Lease for agricultural or manufacturing purpose—Parties may contract that lease is to be from month to month determinable at fifteen days' notice.)

('23) 10 AIR 1923 Lah 281 (282) : 75 Ind Cas 490, *Sahib Dayal* v. *Dhanpat Rai.* (Monthly tenancy determinable at a week's notice.)

('24) 11 AIR 1924 Lah 643 (643, 644) : 75 Ind Cas 1034, *Bure Khan* v. *Ghulam Mohammad.* (Lease for eleven months determinable at a week's notice.)

[*See also* (1948) 1 All E R 260 (264) *H. G. Simonds Ltd.* v. *Heywood. Agreement of tenancy for three months and afterwards from year to year—Tenancy determinable on three months' notice at any time—Notice proviso held valid and not repugnant to grant contained in habendum of agreement.*]

[*See however* ('38) 25 AIR 1938 Cal 656 (658) : ILR (1938) 2 Cal 261 : 180 Ind Cas 93, *Baidyanath Basak* v. *Onkermull Manicklal.* (In this case a lease of vacant land provided that when it is necessary to give khas possession the lessee will give khas possession to the lessor within seven days—*Held* that this was not a contract making the lease determinable on seven days' notice by the landlord—The provision only meant that if the tenancy was determined in any of the ways mentioned in S. 111. the tenants would give khas possession within seven days of such determination: *Dixon* v. *Bradford & District Railway Servants' Coal Supply Society,* (1904) 1 K B 444 followed.)]

6. (1948) 1 Sau L R 41 (44), *Jagadishchandra Jayantilal Bhatt* v. *Metha Girdharlal Bhimji.* [Rent note contained the following provision "in case you (the landlord) desire the suit permises to be vacated they will be so vacated after the lapse of 15 days or at the most a month without actually claiming a notice:" *Held,* that even assuming that the tenant had waived a specific notice under S. 106, there was a substituted contract by which the tenant was entitled, if so desired, to a month's notice, though not in writing certainly verbally.)

Where a contract of tenancy simply provides for a notice of a certain period which is different from the period of notice under this section there will be deemed to be a contract to the contrary within the meaning of this section not only with reference to the *length* of the notice required to determine the lease but also with reference to the time when the notice is to expire, although there is no specification in the contract as to such time. Hence in such a case the notice need not expire with a year or month of the tenancy.[7]

It has been held that where after the termination of a lease, the lessee holds over with the assent of the landlord and the lease is renewed from year to year or from month to month, a covenant in the original lease making it determinable without notice will also hold good in the case of the lease formed by holding over.[8] The reason given is that except as to the period of the lease, the lease by holding over will be governed by the same terms as the original lease.

The questions as to the nature of a tenancy and as to whether it involves a contract to the contrary within the meaning of the section are purely questions of construction depending on the facts and circumstances of each case. The undermentioned are some illustrative cases.[9]

('28) 15 AIR 1928 Lah 348 (348, 349) : 106 Ind Cas 537, *Ram Nath* v. *Badri Nath.*

(1902) 1 K B 157 (158) : 71 LJKB 24 : 85 L T 614 : 50 W R (Eng) 169, *Soames* v. *Nicholson.*

('20) 7 AIR 1920 Lah 96 (97) : 56 Ind Cas 7, *Radha Kishen* v. *Rattan Lal.* (Lessee undertaking to vacate within one month of *receipt* of notice.)

7. ('24) 11 AIR 1924 Nag 220 (220) : 78 Ind Cas 445, *Saik Kasam* v. *Haji Yusuf.*

('19) 6 AIR 1919 Cal 54 (55) : 52 Ind Cas 180 (DB), *Manmatha Nath* v. *Peary Mohan.*

('28) 15 AIR 1928 Lah 348 (348, 349) : 106 Ind Cas 537, *Ram Nath* v. *Badri Nath.* (AIR 1923 Lah 659 dissented from.)

('24) 11 AIR 1924 Oudh 309 (311) : 84 Ind Cas 532, *Shamsuddin Khan* v. *Agha Sayid Fateh Shah.*

[But see ('43) 30 AIR 1943 Bom 306 (310) : ILR (1943) Bom 553 : 213 Ind Cas 48 (DB), *Utility Articles Manufacturing Co.* v. *Motilal Bombay Mills Ltd.* (A provision in a tenancy that each side will give one clear months notice to determine the tenancy does not affect the rule that the notice must expire with the expiration of the tenancy.)

('23) 10 AIR 1923 Lah 659 (659, 660) : 79 Ind Cas 957, *Chuni Lal* v. *Chuni Lal.* (Stipulation in lease for one month's notice —Notice must expire with end of month.)]

8. ('38) 25 AIR 1938 All 649 (650) : 178 Ind Cas 986, *Badal* v. *Ram Bharosa.*

('19) 6 AIR 1919 Cal 54 (55) : 52 I. C. 180 (DB), *Manmotha Nath* v. *Peary Mahan.*

(20) 7 AIR 1920 Lah 96 (97) : 56 Ind Cas 7, *Radha Kishen* v. *Rattan Lal.*

('25) 12 AIR 1925 Oudh 173 (173) : 27 Oudh Cas 224 : 81 Ind Cas 592, *Lalman* v. *Mt. Mullo.*

†('09) 12 Oudh Cas 279 (284) : 3 I. C. 873 (875) *Khuda Baksh* v. *Abid Husain.*

9. ('05) 28 Mad 391 (392, 393) (DB), *Narasimha Charri* v. *Gopala Ayyangar.* (A patta given at the end of the fasli indicating the change in the conditions of the tenure even for the existing fasli is not a sufficient notice.)

('37) 24 AIR 1937 Oudh 165 (167) : 12 Luck 516 : 164 Ind Cas 1003 (DB), *Gur Din Sah* v. *Badri.* (Lease for building purpose—Long possession at same rent—*Held,* on construction lease was permanent.)

('39) 26 AIR 1939 P C 11 (13) : ILR (1939) Kar P C 90 : 179 Ind Cas 321 (PC), *Prabladrai* v. *Commissioners, Port of Calcutta.* (Unless there is some indication to the contrary, the term 'ordinary tenant' would in Calcutta mean monthly tenant, even though there was no reference to payments of monthly rent, and such a tenancy would be terminable on 15 days' notice expiring with the end of the month of the tenancy.)

('15) 2 AIR 1915 All 251 (252) : 29 Ind Cas 437 (DB), *F. S. Old* v. *J. A. Shail.* (In the absence of evidence to the contrary a lease of a house at Mussoorie for the 'season' continues to the end of the year.)

('29) 117 Ind Cas 842 (846) (DB) (Cal), *Bejoichand Mahtab* v. *Girupada Haldar.* (The fact that a tenant for an agricultural holding has been in long possession but failed to prove permanent tenancy may give rise to an inference that he was a tenant from year to year.)

('29) 16 AIR 1929 Pat 444 (446) : 118 Ind Cas 305 (DB), *Pratab Udai Nath* v. *Jagannath Mahto.* (Fresh settlement made every year—Therefore the lease was not one from year to year.)

('17) 4 AIR 1917 Pat 46 (46) : 2 Pat L Jour 180 : 39 Ind Cas 658 (DB), *Mt. Parshan Kuer* v. *Mt. Tulsi Kuer.* (*Held* that the bemiadi patta was a lease without a term or one not for any definite period, and the mere mention of the heirs, and successors of the lessee or of the mineral rights, etc., did not make the lease a permanent one and that it was only a lease from year to year.)

('33) 20 AIR 1933 Cal 609 (609, 610) : 60 Cal 681 : 146 Ind Cas 55, *Surendra Nath* v. *Poornachandra.* (In the case of utbandi holdings, unless there is a special custom to that effect, the right to occupy the land does not enure beyond a particular season

The contract to the contrary must be a *valid* contract, see Notes 15 and 18. Further, it must form part of the transaction of lease in question. See Notes 8 and 18.

In a suit for ejectment by a landlord against a tenant on the allegation of the tenancy having been determined by a notice to quit the onus of proving that the tenancy is not determinable by notice is on the tenant.[10] See also Note 43 on section 105.

3. Lease for a term certain—Notice.—Where a definite period is fixed as the term of a lease, there would be a "contract to the contrary" within the meaning of this section. The section will not, therefore, apply to such cases.[1] In such cases, the lease will automatically come to an end by efflux of the time limited thereby. (See S. 111, clause (a).) A notice will not be necessary to determine the lease.[2] Similarly, such a lease cannot be determined before the end of the term fixed, by a notice to quit.[2a] After the expiration of the term fixed by the lease, the lessee continuing in possession, will, in the absence of an assent by the lessor or his representative in

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or a particular year and the tenancy not being a lease from year to year S. 106 does not apply.)

('18) 5 AIR 1918 Mad 453 (454) : 42 Ind Cas 268 (DB), *Gangadharan Pattar* v. *Manavikraman.* (Verumpattam is a lease which runs only for a single year unless otherwise specified—At the end of the year the landlord is at liberty either to renew the lease or let the land to another tenant—The period of twelve years presumed in the case of a kanom has no application to Verumpattam.)

('15) 2 AIR 1915 Mad 1135 (1136) : 28 Ind Cas 915 (DB), *Ramasami Chettiar* v. *Ambalagaran.* (A refusal or neglect to perform purakudi service renders the purakudi tenant liable to be evicted without notice—S. 111 of the T. P. Act has no application to the case.)

('26) 13 AIR 1926 Cal 312 (313) : 92 Ind Cas 411 (DB), *Gopal Chandra* v. *Bhutnath.* (Lease for residential purpose—*Held*, on construction that the land was to be enjoyed by the defendants from generation to generation so long as the landlord did not require it for his own purposes, but that if he so required it, he had the right to re-enter after giving notice and paying compensation in accordance with the terms of the lease.)

('24) 11 AIR 1924 Mad 771 (772) : 80 Ind Cas 139 (DB), *Kannan Kutty* v. *E. V. Velu.* (A condition in the lease that the landlord must give the value of the kuzhijurs and chamayams to the tenant on his eviction does not dispense with the necessity of notice to quit.)

10. ('36) 23 AIR 1936 Cal 351 (352) : 166 Ind Cas 811, *Golam Hossain* v. *Aiu Bakkar.*
('17) 4 AIR 1917 Cal 37 (38) : 42 Ind Cas 262 (DB), *Paran Chandra* v. *Khazez Mandal.*

Section 106—Note 3

1. ('33) 20 AIR 1933 All 756 (757, 758) : 146 Ind Cas 762 (DB), *Kundan Lal* v. *Deepchand.*

2. ('47) 1947 All W R (HC) 167 (168), *Beshambhar Nath* v. *Mt. Kailash Wati.* [*Lessee permitted by lessor to continue in possession for a definite period on expiry of a seven years' lease.*]

('25) 12 AIR 1925 Nag 48 (48) : 78 Ind Cas 446, *Dina Singh* v. *Jamal Singh.* (Where a tenant agrees to give up possession at a particular time, he is not entitled to a notice to quit under S. 106.)

('18) 5 AIR 1918 Nag 148 (148) : 14 Nag L R 129 : 44 Ind Cas 212, *Keshao* v. *Mansha.* (Notice to quit in tenancy for one year is not necessary.)

('26) 13 AIR 1926 Nag 201 (202) : 90 Ind Cas 43, *Balkrishna* v. *Raghunath.* (No notice is necessary in the case of a tenant for one year only.)

('05) 2 Cal L Jour 349 (351) (DB), *Bibi Jawahir Kumari* v. *Chatterput Singh.*

('32) 19 AIR 1932 All 314 (315) : 139 Ind Cas 828 (DB), *Md. Fazihzzaman* v. *Anwar Husain.* (Notice must be presumed as given when lease was executed.)

('33) 20 AIR 1933 All 756 (757, 758) : 146 Ind Cas 762 (DB), *Kundan Lal* v. *Deepchand.* (If notice is actually given, it cannot be treated as defective merely because it is not according to the requirements of a notice under this section.)

(1850) 15 Q B 257 (265) : 19 LJQB 438 : 15 L T (o s) 298 : 117 E R 455. *Doe d. Davenish* v. *Moffatt.*

(1828) 4 Bing 446 (447) : 6 L J (o s) C P 50 : 130 E R 839, *Doe d. Tilt* v. *Stratton.*

(1807) 103 E R 380 (381) : 8 East 358 (361), *Cobb* v. *Stokes.*

(1786) I R R 169 (170) : 99 E R 1029 : 1 Term Rep 159, *Right d. Flower* v. *Darby.* [*See also* ('44) 31 AIR 1944 Lah 1 (6) : 211 Ind Cas 145 (DB), *Suraj Bhan* v. *Hafiz Abdul.* [A lease for a fixed term expires on the expiration of the term and the landlord is automatically entitled to eject the tenants. There is no necessity for inserting a provision to that effect in the rent deed itself.]

('26) 13 AIR 1926 Cal 354 (355) : 90 Ind Cas 114 (DB), *Raj Kristo* v. *Bata Kristo.* (The lessee is bound by the terms of the contract and must give up possession after the expiry of his lease period.)].

Also see S. 111, Note 2.

2a. ('19) 6 AIR 1919 Oudh 124 (125) : 53 Ind Cas 109, *Bisheshwar* v. *Chhedi Lal.* (Lease for one year providing that the lessor might determine the lease before the end

interest, only be a *tenant by sufferance.* He can be sued in ejectment at any time without any previous notice or demand of possession.[3] (See S. 105, Note 37.) As seen in Note 25 on S. 105, a lease need not be for a period which is certain on the date of the lease but it is sufficient if the period is fixed with reference to a future event on the happening of which the lease will be determined and the period of the lease will become certain. In such a case also the lease will come to an end on the happening of the event and no notice to quit would be necessary.[3a]

Where a lease for a term certain is granted in favour of A and then another lease is granted in favour of B to commence on the expiration of A's lease, B can sue A for possession after the period of A's lease has expired. B need not give any notice to quit to A before bringing such suit.[4]

Where, however, the tenancy is renewed from year to year or month to month under S. 116 read with this section, a notice will be necessary to determine such tenancy and the tenant cannot be sued in ejectment without such notice being given.[5] (See Notes on section 116.)

4. Lease for life.—A lease for the life-time of the tenant is obviously one in which there is a "contract to the contrary" within the meaning of this section. Such a lease cannot be determined by a mere notice to quit under this section. Nor will such a notice be *necessary* for bringing a suit for ejectment against the tenant's representatives, where the lease has terminated on the death of the tenant.[1] See also Note 34 on section 105.

5. Perpetual lease.—A perpetual lease necessarily involves a contract to the contrary within the meaning of this section and is not determinable by notice under this

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of one year if he wanted the house himself or if the rent was not regularly paid—Lessee cannot determine the lease by notice.)

('14) 1 AIR 1914 Mad 301 (303) : 23 Ind Cas 572 *Ramasami* v. *Venkataramanjulu.* (Lease for 15 years with provision for six months' notice thereafter before the lessee could be asked to vacate is not determinable by notice given before expiry of 15 years.)

3. ('29) 16 AIR 1929 Pat 444 (446) : 118 Ind Cas 305 (DB), *Pratap Udai Nath* v. *Jagannath.* (The annual tenancy of private land (manjhihas) of landlord ceases on the termination of the year.)

('12) 13 Ind Cas 59 (60) (All), *Gokul Chand* v. *Shib Charan.*

('19) 6 AIR 1919 Pat 254 (256) : 53 Ind Cas 180 (DB), *Moore* v. *Makhan Singh.*

† ('10) 7 Ind Cas 8 (9) (DB) (Mad), *Nandikolla Gopalan* v. *Manyam Mahalashmi.*

† ('27) 14 AIR 1927 Bom 192 (193, 194) : 51 Bom 149 : 101 Ind Cas 35 (DB), *Magan Lal* v. *Bhudar.*

† ('30) 17 AIR 1930 Lah 386 (388) : 120 Ind Cas 166 (DB), *Asa Ram* v. *Kishan Chand.*

('40) 27 AIR 1940 Lah 410 (412) : 191 Ind Cas 289 (DB), *Banwari Lal* v. *Mt. Hussaini.*

[*See also* ('40) 27 AIR 1940 Oudh 401 (402) : 16 Luck 44 : 189 Ind Cas 488 (DB), *Bansidhar* v. *Ramcharan.* (Tenant continuing in possession after expiry of period fixed in invalid lease without landlord's consent—Notice to quit not necessary prior to ejectment.)

('25) AIR 1925 Nag 48 (48) : 78 Ind Cas 446, *Dina Singh* v. *Jamal Singh.* (Tenancy by sufferance—Absence of assent as well as dissent is necessary.)]

3a. (1786) 1 R R 169 (170) : 1 Term Rep 159 : 99 E R 1029, *Right d. Flower* v. *Derby.*

(1816) 171 E R 439 (440) : 1 Stark 181 (182) : 4 Camp 373, *Doe d. Waithman* v. *Miles.* (A house was to be used and occupied by the lessees during the partnership between them—*Held* that the tenancy came to an end on the dissolution of the partnership and no notice to quit was necessary.)

(1805) 6 East 530 (535,536) : 102 E R 1390, *doe d. Bromfield* v. *Smith.* (Lease to endure only for the joint lives of *A* and *B*—Lease held determined on the death of either of them without a notice to quit.)

Also see S. 105, Note 37 and S. 116, Note 13.

4. ('32) 19 AIR 1932 All 314 (315) : 139 Ind Cas 828 (DB), *Md. Fazihzzaman* v. *Anuwar Husain.*

('31) 18 AIR 1931 All 649 (650, 651) : 136 Ind Cas 273 (DB), *Bishen Sarup* v. *Abdul Samad.*

5. *See* ('17) 4 AIR 1917 Mad 141 (142) : 32 Ind Cas 709 (DB), *Mt. Bevi Umma* v. *Shammu Menon.* (In this case the lease stipulated for a year certain and provided for yearly payments in case the lessee continued to hold on—*Held* on the expiry of the first year of tenancy the defendant was continuing as a tenant from year to year under the provision to hold on—Notice to quit was necessary for ejectment.)

Section 106—Note 4

1. ('94) 18 Bom 256 (259) (DB), *Krishnaji Ramchandra* v. *Antaji Pandurang.*

('08) 7 Cal L Jour 90 (95) (DB), *Syed Mahammad Khan* v. *Maharaja Nam Narain Singh Bahadur.*

section.[1] But a perpetual lease cannot be created except by a registered instrument. Where a person alleges a perpetual lease for building purposes but there is no registered instrument it has been held that the oral agreement accompanied by delivery of possession operates only to create a month to month tenancy under this section.[2]

Where a tenancy is established, the onus of proving that it is a perpetual tenancy is on the tenant. See S. 105, Note 43.

6. Tenancy at will.—Where the agreement between the parties is to the effect that the tenancy should be determinable by either party *at any time*, there is clearly a "contract to the contrary" within the meaning of this section. Hence, the provisions of this section will not apply to such leases. The tenancy in such cases will be what is known as a tenancy at will under the law. (See S. 105, Note 32.)

But a tenancy at will must be established by *positive* proof of a contract. Such a tenancy cannot be implied merely because the intention of the parties as to the duration of a lease cannot be definitely ascertained.[1] In such cases, there would be no contract to the contrary within the meaning of this section and the presumption of yearly or monthly tenancy under the section will apply.

But the agreement making a lease one at the will of the parties may be express or implied. Such agreement may be implied from words used as well as from the conduct of the parties and other circumstances. So the question, whether a lease is a tenancy at will, depends on the facts and circumstances of each case.

Where it was provided in a lease that the tenant would pay the monthly rent regularly and that in case of default for three months he would vacate the property, it was held that as soon as rent for three months fell into arrears the tenancy was reduced to one at will and that from that date the tenant could be ejected without any notice to quit.[1a]

Though ordinarily a tenancy at will is not a transferable interest, it may be transferable by special custom in any particular place. Hence, notwithstanding such transferability, a lease may be only a tenancy at will.[2]

Where a lessee enters into possession under a lease which requires registration but is not registered, the circumstances of a case may give rise, by implication, to a tenancy at will.[3] But it would be wrong to suppose that wherever a tenant enters under an invalid lease, there would *ipso facto* arise a tenancy at will. If a tenancy is implied from the circumstances in such cases, the *prima facie* presumption under this section would be in favour of its being a yearly or monthly tenancy and not a tenancy at will. Such a tenancy can arise only by positive proof of a contract and not by mere *presumption of law*.

A tenancy at will may go on for any length of time indefinitely. Hence, the mere fact that a tenancy has continued for a very long time is not a conclusive proof that it is not a tenancy at will.[4]

Section 106—Note 5

1. ('86) 9 Mad 307 (319) : 13 Ind App 32 (PC), *Vizianagaram Maharajah* v. *Suryanarayana.*
2. ('44) 31 AIR 1944 Pat 30 (31, 33) : 22 Pat 554 (DB), *Darbari Lal Mudi* v. *Ranceganj Coal Association, Ltd.*

Section 106—Note 6

1. But see ('40) 27 AIR 1940 Oudh 401 (403) 16 Luck 44 : 189 Ind Cas 488 (DB), *Bansidhar* v. *Ram Charan.* (A tenancy at will arises by implication of law in cases of permissive occupation when a person is in possession of premises with the consent of the owner ; or it may arise expressly by agreement to let for an indefinite period for a compensation accruing day to day so long as both parties please. NOTE.—It is submitted that the view that a tenancy at will can arise by implication of law is against the provisions of this section.)

1a. ('38) 25 AIR 1938 Nag 506 (509) : ILR (1940) Nag 269 : 182 Ind Cas 581 (DB), *Abdul Razak* v. *Nandlal Sheolal.*

2. ('80) 6 Cal L R 117 (118) (DB), *Shama Sunduri* v. *Nobin Chunder.*

3. ('46) 33 AIR 1946 Oudh 144 (145) : 21 Luck 292 : 222 Ind Cas 630 *Gur Prasad* v. *Hansraj.* [No notice is necessary to determine tenancy—demand for possession is sufficient.]

('36) 23 AIR 1936 Oudh 102 (105) : 159 Ind Cas 316 (DB), *Janki* v. *Kanhaiyalal.* (Mere demand for possession is sufficient —Notice not necessary.)

4. ('68) 10 Suth W R 477 (478) (DB), *Sheo Dayal* v. *Mohabeer Pershad.*

A tenancy at will can be determined by a notice to quit.[4a] But such a notice will not be *necessary* for the purpose.[5] A mere demand for possession will be sufficient to put an end to the tenancy.[6] Even where a notice is given, it need not comply with the requirements of this section. Such a notice need not be for the period prescribed by this section nor need it expire with the end of a year or month of the tenancy. A reasonable notice will be quite sufficient to determine the tenancy.[7]

But unless the lease is determined in some way, the lessee cannot be sued in ejectment.[8]

A tenancy at will is ordinarily determined by the death of the lessor,[9] or lessee.[10]

7. Lease for indefinite period.—Reference has been made in Note 26 on S. 105 to the rule of construction according to which a lease for an indefinite period would be construed as a lease for the life-time of the lessee. Hence, where this rule applies, there would be a "contract to the contrary" within the meaning of this section, although the lease is not for any definite period and the parties have not fixed any limit of time absolutely or relatively in regard to the lease.[1]

See also Note 72 on section 105.

8. Possession under agreement to grant lease for a term certain.—In the undermentioned case,[1] A agreed to take a lease of lands for a term of ten years and entered into possession of the lands. He paid rent as arranged but no lease was executed in his favour. It was held that this section did not apply to such a case as the agreement to grant a lease for ten years amounted to a "contract to the contrary" within the meaning of this section. It is submitted with respect that this view is not correct. The "contract to the contrary" referred to in the section is a contract forming *part* of the transaction of lease. In the above case, the tenancy formed by implication from payment and acceptance of rent is independent of the agreement to grant a lease for ten years and is not affected by such agreement.

4a. ('75) 24 Suth W R 461 (461) (DB), *Abdool Kureem* v. *Omer Chand.*

('28) 15 AIR 1928 Cal 279 (280) (DB), *Bishum Chandra* v. *Behari Lal.*

5. ('25) 12 AIR 1925 Pat 256 (258) : 85 Ind Cas 77 (DB), *Ramdhani Gope* v. *C. V. Scott.*

('33) 20 AIR 1933 Pat 561 (562) : 145 Ind Cas 567 (DB), *Ramkrishun Pande* v. *Bibi Sohila.*

('40) 27 AIR 1940 Oudh 401 (403) : 16 Luck 44 : 189 Ind Cas 488 (DB), *Bansidhar* v. *Ram Charan.*

[*See also* ('42) 29 AIR 1942 Pesh 74 (75) : 202 Ind Cas 627 (DB) *Abdul Ghafur* v. *Jetamal.* (A tenant at will can be evicted at any time.)]

6. ('46) 33 AIR 1946 Oudh 144 (145) : 21 Luck 292 : 222 Ind Cas 630 *Gur Prasad* v. *Hansraj.*

('36) 23 AIR 1936 Oudh 102 (105) : 159 Ind Cas 316 (DB), *Janki* v. *Kanhaiyalal.*

('35) 62 Cal L Jour 201 (204) (DB), *Jamiruddin Saodagar* v. *Hazi Mal Gani.*

('78) 2 Mad 346 (351) (DB), *Abdulla Rawutan* v. *Subbarayyar.*

Also see S. 105 Note 32 and S. 111 Note 24.

7. ('05) 2 Cal L Jour 343 (349) (DB), *Jawahir Kumari* v. *Chatterput Singh.* (Five month's notice held reasonable.)

('18) 5 AIR 1918 Cal 355 (356) : 39 Ind Cas 795 (DB), *Dhuki Ram* v. *Matabi.* (What is a reasonable notice is a question of fact.)

(1847) 16 L J Q B 269 (270) : 10 Q B 130, *Doe d. Jacobs* v. *Phillips.*

8. (1847) 16 L J Q B 269 (270) : 10 Q B 130, *Doe d. Jacobs* v. *Phillips.*

[*But see* ('26) 13 AIR 1926 Lah 129 (130) : 89 Ind Cas 869, *Kaka* v. *Ram Saran.* (Defendant retaining possession of the property for a considerable period after the institution of the suit—Suit cannot be dismissed on the ground that there was no previous notice to quit. NOTE.—Submitted that the view is not correct.)]

9. (1900) 10 Mad L Jour 201 (202) (DB), *Chemminian Pockan* v. *Udayavarma Valia Rajah.*

10. ('38) 25 AIR 1938 Nag 506 (509) : 1LR (1940) Nag 269 : 182 Ind Cas 581 (DB), *Abdul Razak* v. *Nandlal Sheolal.*

Also see Section 111, Note 24.

Section 106—Note 7

1. ('39) 26 AIR 1939 Cal 423 (424, 425) : 184 Ind Cas 216 (DB). *Mahomed Azizal* v. *Raziuddin Mohd, Idris.*

('26) 13 AIR 1926 Cal 379 (379) . 89 Ind Cas 298 (DB), *Biswambhar Das* v. *Amiruddin Mondal.* (Lease for indefinite period —Lessor serving notice to quit and after lessee's refusal suing for ejectment—*Held,* lessee had lease for life and therefore lessor was not entitled to eject him.)

Section 106—Note 8

1. ('5) 2 Cal L Jour 343 (346) (DB), *Jawahir Kumari* v. *Chatterput Singh.*

9. Law to the contrary.—Where the right of a landlord to eject his tenant after determining the tenancy under the general law is interrupted by a temporary enactment, the right is revived on such enactment ceasing to be in force.[1]

10. Usage to the contrary.—The presumption as to the duration of a tenancy and its mode of determinability under this section will not apply to cases, where there is a usage to the contrary.[1] Thus, it has been held that according to local custom a month's notice to quit instead of 15 days notice as required by this section will probably be necessary to determine a tenancy of buildings in the city of Bombay.[2] But in the city of Calcutta there would seem to be no special custom extending the fifteen days' notice provided for by this section for monthly tenancies of buildings.[3] It has been held by the Sind Judicial Commissioner's Court that, where local custom requires a monthly tenancy to be determined by a month's notice, it need not be served in the manner prescribed by this section.[4] There being a "usage" to the contrary in such a case, the provisions of this section do not apply.

11. Immovable property.—A jalkar or right of fishery is "immovable property" within the meaning of this section.[1]

See also Notes on section 3.

12. Presumption of yearly or monthly tenancy under this section.—Under this section, in the absence of a contract, local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes should be deemed to be one from year to year and a lease for any other purpose should be deemed to be one from month to month. Hence, where there is no satisfactory evidence as to the period for which a lease has been granted, it will be deemed to be one from year to year[1] or one from month to month[2] according to the purpose of the lease, unless there is any local law or usage to the contrary.

In thus creating a presumption of yearly tenancy in regard to agricultural leases the section only gives effect to a principle generally recognised in India.[3]

Section 106—Note 9

1. ('28) 15 AIR 1928 Cal 436 (437) : 110 Ind Cas 715 (DB), *Suresh Chandra* v. *Kanti Chandra.* (Calcutta Rent Act, III of 1920—Case relating to—Act expiring during pendency of appeal.)

Section 106—Note 10

1. ('78) 3 Cal 696 (699) : 1 Cal L Rep 577 (DB), *Prosunno Comaree Debed* v. *Sheikh Rutton Bebary.*
2. ('25) 12 AIR 1925 Bom 167 (167) : 94 Ind Cas 631, *Mahomedally* v. *Haji Abdulla.*
3. ('35) 39 Cal W N 1069 (1071), *Profulla Chandra Mullick* v. *Nanda Lal Jhamor.* (12 Beng L R 263, explained.)

[*See also* ('74) 12 Beng L R 263 (265) *Nocoordass Mullick* v. *Jeuraj Baboo.* (Tenancy in Calcutta is presumed to be monthly terminable by a month's notice.)]

4. ('27) 14 AIR 1927 Sind 24 (25) : 97 Ind Cas 577, *Haroon Haji Hamid* v. *Meherali Din Mahomed.*

Section 106—Note 11

1. ('93) 20 Cal 446 (448) (DB), *Ram Gopal Biswas* v. *Nurunnuddin.*

Section 106—Note 12

1. ('43) 30 AIR 1943 Mad 311 (312) : 209 Ind Cas 561, *Thirumalareddi Inna Reddi* v. *Gade Gopi Reddi.*

('20) 7 AIR 1920 Nag 62 (62) : 57 Ind Cas 311, *Mangal* v. *Sukhlal.* (Waste land —Money spent for cultivation—No presumption of permanent tenancy.)

('21) 8 AIR 1921 Bom 224 (224) : 45 Bom 350 : 59 Ind Cas 751 (DB), *Manekial* v. *Bai Amba.*

[*See also* ('29) 117 Ind Cas 842 (846) (DB) (Cal), *Bejoychand Mahtab* v. *Gurupada Haldar.* (The fact that the tenant had been in long possession may give rise to an inference that he was a tenant from year to year.)]

2. ('05) 32 Cal 243 (246) : 8 Cal W N 904 (DB), *Jyotish Chandra* v. *Ramanath.* (Where it was agreed that instead of paying rent a lessee was to give his services as a family doctor to the lessor, the lease was a lease from month to month terminable by fifteen days' notice, expiring with the end of month of the tenancy.)

('26) 13 AIR 1926 Nag 147 (148) : 89 Ind Cas 1019, *Baliram* v. *Sadaram.*

('37) 24 AIR 1937 Nag 321 (321) : ILR (1937) Nag 406 : 172 Ind Cas 543, *Rajib Husain* v. *Nawab Yanuskhan.*

('06) 10 Cal W N 841 (844) (DB), *Rakhal Chandra Tewary* v. *Secretary of State for India.*

('40) 27 AIR 1940 Cal 89 (91) : ILR (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwardi Bepari* v. *Jamini Lal.*

[*See also* ('18) 5 AIR 1918 Mad 419 (419) : 43 Ind Cas 643 (SB). *Thavasi Ammal* v. *Salai Ammal.* (Tenant alleging permanent tenancy—Burden of proof is on tenant—In absence of proof, tenancy must be deemed

In the cases cited below,[4] a lease of shops in the Punjab, where this Act is not in force, was held to be one from month to month on the analogy of this section.

Under this section, a lease which is not for agricultural or manufacturing purposes must be presumed to be one from month to month. This presumption will apply even to a *building* lease.[5] See also S. 105, Note 26.

13. Lease for agricultural or manufacturing purposes.—This section provides that in the absence of a contract, local law or usage to the contrary, a lease for agricultural or manufacturing purposes shall be deemed to be one from year to year. This provision has to be read with S. 117, under which the provisions of this chapter will not apply to leases for agricultural purposes, except in so far as they may be made specially applicable by a notification of the Provincial Government. The result is that in the case of agricultural leases, the persumption of yearly tenancy under this section will apply only if the section has been made applicable to such leases by special notification above mentioned.[1] The principle of the section may be applied to such leases.[1a] See also S. 105, Note 1. As to when a lease can be regarded as being for agricultural purposes, see S. 105, Note 1 and S. 117, and the undermentioned cases.[2]

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to be a monthly one and determinable by notice.)

('97) 24 Cal 440 (446) : 1 Cal W N 321, *Kally Dass Ahiri* v. *Monmohini Dassee.* (Ordinary inference as to a lease of buildings in Calcutta at a monthly rent would appear to be that the tenancy is from month to month.)]

3. ('23) 10 AIR 1923 Lah 659 (659, 660) : 79 Ind Cas 957, *Chuni Lal* v. *Chuni Lal.*
('90) 13 Mad 60 (62) (DB), *Appa Rau* v. *Subbanna.*
('78) 3 Cal 696 (699) : 1 Cal L R 577 (DB), *Prosunno Coomaree Debea* v. *Sheikh Rutton Bepari.*
('91) 4 C P L R 47 (47), *Jadoonath Jamadar* v. *Palhadi.*
('91) 4 C P L R 55 (55), *Kasiba* v. *Vithoba.*
('21) 62 Ind Cas 390 (391) (DB) (Mad), *Ittinan* v. *Govinda Nambudui.*
(10) Ind Cas 701 (701) (DB) (Mad), *Gandrapu Sinayya* v. *Koppineni Venkatratnam.*
('96) 20 Bom 78 (82) : 1894 Bom P J 399 (DB), *Sonshet Antushet* v. *Vishnu Babaji.*
('70) 7 Bom H C R (A C) 111 (113, 114) (DB), *Endar Lala* v. *Lallu Hari.*
('68-69) 5 Bom H C R (A C) 179 (179, 180) (DB), *Bai Ganga* v. *Dullabh Parag.*
('77) 1877 Bom P J 182 (DB), *Govind* v. *Narayan.*
[*See however* (1900) 23 Mad 318 (327, 328) (DB), *Cheekati Zamindar* v. *Ranasooru Dhora.* (The general presumption does not apply to agricultural leases in zamindari areas.)]

4. ('13) 19 Ind Cas 493 (495) (DB) (Lah), *Jamasjee Boga* v. *Duni Chand.*
('98) 1898 Pun Re No. 33, p. 113 (114) (DB), *Ganga Singh* v. *Mt. Shib Devi.*

5. ('41) 28 AIR 1941 All 399 (399, 400) : 197 Ind Cas 276, *Bajrang Sahai* v. *Mr. Mulia.*
†('09) 1 Ind Cas 66 (69) (DB) (Cal), *Mohan Chandra* v. *Anil Bandhu.* (Correctness of 23 Suth W R 399 doubted.)
('38) 25 AIR 1938 All 42 (43) : ILR (1938) All 53 : 173 Ind Cas 153 (DB), *Nand Ram* v. *Saraj Hussain.* (Burden to rebut presumption lies on lessee.)
('19) 6 AIR 1919 Cal 400 (400) : 51 Ind Cas 44, *Biseshwar Roy* v. *Pitambar Nath.* (Mere fact that rent is payable annually does not make lease a yearly one. See Note 15.)
('39) 26 AIR 1939 Pat 296 (303) : 182 Ind Cas 618, *Ram Lal Sahu* v. *Bibi Zohra.*
('39) 26 AIR 1939 Mad 247 (249) : 183 Ind Cas 609, *Pandarasannadhi* v. *Anantha-krishnaswami.*
[*See however* ('36) 23 AIR 1936 All 385 (385, 386) : 160 Ind Cas 866 (DB), *Kanhiya Lal* v. *Abdullah.* (The presumption of law is that where a permanent building has been erected by person on land which has been given to him for purposes of erecting a building he has a right to remain in possession of the building as long as the building stands—It is not for him to prove specifically the term on which he was allowed to erect the building.]

NOTE.—See cases under Note 47 in which a building lease by the Government for building purposes was presumed to be one from year to year on the analogy of English Common law.

Section 106—Note 13

1. ('19) 6 AIR 1919 Pat 254 (256) : 53 Ind Cas 180 (DB), *Moore* v. *Makhas Singh.*
1a. ('49) 36 AIR 1949 Mad 127 (128) (DB), *Narayanan Nair* v. *Kunban Mannal diar.* [*Demand for possession is not notice to quit — Tenant's willingness to surrender holding on certain payment by landlord — Offer not accepted by landlord — Tenant's right to have notice to quit not affected.*]
('49) 36 AIR 1949 Mad 148 (151) (DB), *Venugopala* v. *Thirunavukkarasu.*
('48) 35 AIR 1949 Mad 275 (279) : ILR (1948) Mad 757 (FB), *Brahmayya* v. *Sunderamma.*

2. ('18) 5 AIR 1918 Nag 210 (211) : 48 Ind Cas 354, *Banmali* v. *Nihal Singh.* (A lease of a village or of a share in a village for the purpose of bringing it under cultivation is a lease for agricultural purposes.)
('09) 2 Ind Cas 993 (993) (Cal), *Sheikh*

The question whether a lease is for a manufacturing purpose, is one of *fact*.[3]

Where a lease is for a manufacturing purpose but the landlord gives only a notice of *one* month to terminate the lease and the tenant in his reply to that notice admits that he is a *monthly* tenant, this does not estop him from contending in a subsequent suit for ejectment against him, that the notice is not sufficient and that he is entitled to six months' notice.[4]

14. Lease for building purpose—Presumption as to.—See Note 12.

15. **Reservation of yearly or monthly rent—Effect.**—The reservation of a yearly rent would *prima facie* imply that a lease is not one from month to month but one from year to year.[1] Hence, where a lease is not for an agricultural or manufacturing purpose but a yearly rent is reserved under the lease, there would *prima facie* be a contract to the contrary within the meaning of this section, preventing the application of the presumption of monthly tenancy to such a lease. But a lease from year to year would require registration under S. 107. Hence, in such a case, if the lease is made by an oral agreement and delivery of possession and not by a registered deed there would be no lease from *year to year* notwithstanding the above implication. In other words, there would be no *valid* "contract to the contrary" in such a case within the meaning of this section. Hence, in such a case, the lease can be presumed to be one from month to month under this section notwithstanding the reservation of a yearly rent.[2] It has been held in the undermentioned case[2a] that in the circumstances described

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Abdul v. *Chabil Jan.* (Lease of homestead land is not agricultural.)

('35) 22 AIR 1935 Oudh 90 (92) : 10 Luck 490 : 153 Ind Cas 609, *Narain Singh* v. *Jagat Jit.* (A lease was given for cutting down timber in forest land and subsequently the same land was given to another for cultivation at an annual rent but no period was fixed—*Held,* it was lease for agricultural purposes.)

('04) 31 Cal 174 (176) : 9 Cal W N 87 (DB), *Surendra* v. *Harimohan.* (Though the cultivation of indigo is certainly an agricultural purpose, the manufacture of indigo cannot be said to be agricultural purpose.)

('21) 8 AIR 1921 Cal 379 (380) : 66 Ind Cas 61 (DB), *Sasibala Debi* v. *Ambala Debi.* (The fact that a portion of a holding used for residential purposes is planted with fruit bearing trees does not alter the character of the holding.)

('26) 13 AIR 1926 Cal 312 (313) : 92 Ind Cas 411 (DB), *Gopal* v. *Bhutnath.* (Mere fact that there is a right to plant fruit trees or pluck the fruits of trees would not by itself convert lease for residential purpose into horticultural lease.)

('26) 13 AIR 1926 Cal 373 (374) : 90 Ind Cas 805 (DB), *Purusottam* v. *Panchanan.* (Where the land was admittedly taken by defendants not for the purpose of a homestead from which the defendants were to cultivate their Jotes but was taken for the purpose of a shop and continued to be used for that purpose, held, the case was governed by the provisions of this Act.)

('36) 164 Ind Cas 446 (447) (Cal), *Rajani Sutradhar* v. *Baikuntha Chandra.* (When the letting of the land is for non-agricultural purposes, a subsequent user for agricultural purposes would not affect the incidents of the tenancy.)

('33) 20 AIR 1933 Cal 643 (644) : 146 Ind Cas 540, *Banowari Lal* v. *Gopal Chandra.* (Parent holding may be agricultural and sub-lease may be residential.)

('22) 9 AIR 1922 Cal 201 (202) : 70 Ind Cas 166 (DB), *Harendra Kumar* v. *Hara Kishore.* (Transfer of agricultural lease—Fresh settlement in favour of transferee for non-agricultural purpose—T. P. Act applies.)

3. ('46) 33 AIR 1946 Cal 317 (318) : ILR (1946) 1 Cal 537 : 227 Ind Cas 458 (DB), *Joyanti Hosiery Mills* v. *Upendra Chandra.* [*Hosiery Manufacture — Lessee carrying on knitting and cutting operations on leased premises though yarn from raw material was produced on another premises—Lease held to be for manufacturing purposes.*]
('23) 10 AIR 1923 Rang 13 (15) : 70 Ind Cas 834 (DB), *The Punjab Motor Company* v. *Sheikh Juman.* (Failure by tenant defendant to plead manufacturing purpose will amount to admission that lease is not for such a purpose.)

4. ('24) 11 AIR 1924 Bom 115 (116) : 48 Bom 38 : 82 Ind Cas 791, *William Jacks & Co.* v. *Joosab Md.*

Section 106—Note 15

1. ('43) 30 AIR 1943 Cal 474 (474) : ILR (1943) 1 Cal 34 : 209 Ind Cas 279 (DB), *Adinath Bhattacharjee* v. *Krishna Chandra.*
('13) 19 Ind Cas 721 (722, 724) (DB) (Mad), *Sevathamuthu Asari* v. *Reverend J. N. K. Masquite.* (Pre-T. P. Act lease.)
('32) 19 AIR 1932 Cal 198 (202) : 136 Ind Cas 889 (DB), *Debendra Nath* v. *Pashupati Nath.* (Pre-T. P. Act lease—A monthly tenancy at a yearly rent is an anomaly and difficult to infer unless there is some special reason for doing so.)
('19) 6 AIR 1919 Cal 529 (531) : 51 Ind Cas 415 (DB), *Shamsoonessa* v. *Satya Sebak.* (Reservation of yearly rent payable by monthly instalments.)

above there would be a valid lease for the first year and if after expiry of the first year the lessor accepts rent from the lessee and assents to his continuing in possession the lease would be renewed from month to month terminable by fifteen days' notice.

But apart from the above, the reservation of a yearly rent will not *conclusively* show in every case that the lease is one from year to year and a lease may be held not to be such a lease notwithstanding the reservation of such rent.[3]

The expression "ordinary tenant" used in a lease-deed with reference to house property in Calcutta *prima facie* indicates a monthly tenancy although there is no reference to payment of *monthly rent*.[4]

16. Lease from year to year. —The characteristics of such a lease have been discussed in Note 31 on S. 105. As pointed out in that Note, such a lease is intended to go on indefinitely, till it is determined by either party by a proper notice at the end of any year of the tenancy.[1] There is no other limit of time for such a lease and it may go on even for a century or more.[2] The lease is a single lease for the whole period till it is terminated. Although liable to be determined at the end of any year by a valid notice, it does not *ipso facto* come to an end at the end of every year.[3]

A periodic lease like a yearly tenancy is not determined by the death of the tenant. His legal representatives cannot be evicted from the land without a proper notice to quit.[4]

('26) 13 AIR 1926 Cal 558 (558) : 53 Cal 95 : 94 Ind Cas 684 (DB), *Chandi Charan Mitra* v. *Ashutosh Lahiri.*

Also see Section 105, Note 26.

2. *('06) 11 Cal W N 1124 (1126) (DB), *Debendra Nath Bhowmik* v. *Syama Prosanna Bhowmik.*

†('16) 3 AIR 1916 Cal 358 (359) : 33 Ind Cas 899 (DB), *Sheikh Akloo* v. *Sheikh Emanon.*

('20) 7 AIR 1920 Cal 858 (858) : 59 Ind Cas 788 (DB), *Sari Debi* v. *Sailabala Dasi.*

('19) 6 AIR 1919 Cal 529 (531) : 51 Ind Cas 415 (DB), *Shamsoonessa* v. *Satya Schak.*

('19) 6 AIR 1919 Cal 65 (66) : 50 Ind Cas 918 (DB), *Mohendra Nath Mozumdar* v. *Narendra Narain Roy.*

('19) 6 AIR 1919 Cal 212 (213) : 49 Ind Cas 974, *Ram Prosad* v. *Debi Prosad.*

('18) 5 AIR 1918 Cal 906 (907) : 44 Cal 214 : 37 Ind Cas 956 (DB), *Sarat Chandra* v. *Jadab Chandra.*

('21) 8 AIR 1921 Pat 307 (308) : 61 Ind Cas 976 (DB), *Sankar Ram* v. *Tulsi Bhagat.* [*See also* ('32) 19 AIR 1932 Cal 198 (201, 202) : 136 Ind Cas 889 (DB), *Debendra Nath* v. *Pashupati Nath.*)

2a. ('43) 30 AIR 1943 Cal 474 (474) : ILR (1943) 1 Cal 34 : 209 Ind Cas 279 (DB), *Adinath Bhattacharjee* v. *Krishna Chandra.*

3. ('41) 28 AIR 1941 Pat 488 (490) : 194 Ind Cas 300 (DB), *Chinti Kaharin* v. *Kripa Shankar.* (A tenancy may well be a monthly tenancy though the rent may be mentioned as so much per year.)

('20) 7 AIR 1920 Cal 858 (858) : 59 Ind Cas 788 (DB), *Sari Debi* v. *Saila Bala Dasi.*

('20) 7 AIR 1920 Cal 361 (361) : 58 Ind Cas 835 (DB), *Gaya Nath Ojha* v. *Anukul Chandra Ojha.* (AIR 1916 Cal 358 : 44 Cal 403 and AIR 1915 Cal 313, followed.)

('19) 6 AIR 1919 Cal 400 (400) : 51 Ind Cas 44, *Biseswar* v. *Pitamber.*

('25) 12 AIR 1925 Pat 256 (257) : 85 Ind Cas 77 (DB), *Ramdhani Gope* v. *C. V. Scott.* (Lease in this case held to be a tenancy at will.)

Also see Section 107, Note 4.

4. ('39) 26 AIR 1939 PC 11 (13) : ILR (1939 Kar PC 90 : 179 Ind Cas 321 (PC), *Prahladrai Chooreewalla* v. *Commissioners for the Port of Calcutta.*

Section 106—Note 16

1. ('49) 36 AIR 1949 Pat 265 (267) (DB), *Rama Bahadur* v. *Harkhu Singh.* [Such a lease is one of uncertain duration which does not purport to be for any definite period as the interest of the lessee does not terminate at the end of the period. A tenant from year to year has an interest for one year certain with a growing interest during every year thereafter springing out of the original contract and as parcel of it.]

('70-71) 6 Mad H C R 164 (171) (DB), *Chockalinga Pillai* v. *Vythealinga Pandara.*

('04) 8 Cal W N 139 (140), *Idulgazi Doctor* v. *Chandra Kali.*

('14) 1 AIR 1914 Bom 152 (153) : 38 Bom 240 : 23 Ind Cas 786 (DB), *Sitaram* v. *Sadhu.*

2. ('89) 1889 Bom P J 321 (DB), *Gangadhar* v. *Mahadu.*

('85) 9 Bom 419 (422) (DB), *Gangabai* v. *Kalapa Dari Mukrya.*

3. ('35) 62 Cal L Jour 201 (204) (DB), *Jamiruddin Sadagar* v. *Haji Mal Gani.*

(1870) 13 Suth W R 190 (190) (DB), *Malooddee Noshyo* v. *Bullubee Kant Dhur.* [*See* ('29) 16 AIR 1929 Pat 444 (446) : 118 Ind Cas 305 (DB) *Pratap Udai Nath* v. *Jagannath.* (Fresh settlement made annually—This shows that lease terminates each year—No year to year lease.)]

Also see S. 107, Note 4 and S. 111 Note 2.

4. ('89) 1889 Bom P J 79 (DB), *Tavnapa* v. *Kalapa.*

17. **Lease from month to month.**—A monthly tenancy is one single tenancy for an unstated period.[1a] A joint monthly lease is liable to partition among the co-lessees.[1] A monthly tenancy under this section is a heritable interest and is not determined by the death of the tenant.[2]

For a fuller discussion of the features of such leases, see section 105, Note 31.

18. **Possession under invalid lease—Presumption under this section.**—Where a lease for a term of years or in perpetuity is granted but is invalid and the lessee enters into possession under such a lease, a tenancy may arise by implication from the payment of rent by the tenant and its acceptance by the landlord. The presumption of a yearly or monthly tenancy under this section may apply to such leases.[1] The invalid lease would not constitute a "contract to the contrary" in such cases,[2] for two reasons: (1) The section contemplates a *valid* contract to the contrary. (See Note 15.) (2) The contract would not form part of the lease in question. (See Note 8.) But the invalid lease *itself* cannot be treated as a yearly or monthly tenancy under this section.[3] The reason is that the section cannot convert an invalid lease into a valid one.

See also section 105, Notes 8 and 19 and section 107, Note 8.

19. **Notice to quit—General principles.**—The section provides that in cases coming under it the lease can be determined by either the lessor or the lessee by notice. The principles laid down in English decisions as to what would be a valid notice to quit are, it has been authoritatively held, equally applicable to cases arising in India.[1] According to these principles, a notice to quit must be a clear and unambiguous intimation to the lessor or lessee, as the case may be, of the intention of the party giving the notice that the lease is to terminate at a certain time. No particular form is necessary

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Section 106—Note 17

1a. ('48) 35 AIR 1948 Bom 336 (337) : ILR (1948) Bom 342 (DB), *Collector & Supdt. of stamps, Bombay* v. *Laxmibai.*

('46) 50 Cal W. N. 461 (464) *Usharani Debi* v. *the Research Industries Ltd.*

('45) 32 AIR 1945 Pat 385 (385) : 24 Pat 449 (DB), *Firm Ganesh Das Ram Gopal* v. *Jamuna Das.*

[A letting to a montly tenant is not a letting which expires at the end of the first month; or at the end of each succeeding month; nor is there a re-letting at the commencement of each month of tenancy. It is a letting for a period of time which is determinable by due notice.]

1. ('29) 16 AIR 1929 Cal 710 (713) : 57 Cal 715 : 126 Ind Cas 121 (DB), *Rajani Mohan* v. *Sambhu Nath.*

2. ('40) 27 AIR 1940 Cal 89 (91) : ILR (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali* v. *Jamini Lal Roy.*

('02) 5 Oudh Cas 113 (114, 115), *Govind Prasad* v. *Asmat Ara Bengam.*

Also see Section 105, Note 72.

Section 106—Note 18

1. ('49) 36 AIR 1940 Nag. 265 (269) ILR (1948) Nag 978, *Karimullakhan* v. *Bhanu-Pratapsingh.* [Perpetual lease for agricultural purposes—No registered instrument—Tenancy is from year to year.]

('49) 36 AIR 1949 Pat. 265 (267) (DB), *Rama Bahadur* v. *Harkhu Singh.*

('47) 34 AIR 1947 Cal 351 (352), *Ram Mohan* v. *Lalit Chandra Sen Gupta.* [Oral contract for lease of residential quarters—Tenant to occupy premises at least for 1 year and thereafter tenancy to be terminated on one month's notice—Lease held for term exceeding one year and therefore invalid for want of registered deed—Lease should be deemed to be from month to month under S. 106.]

('19) 6 AIR 1919 Mad 1186 (1187) : 43 Ind Cas 210 (DB), *Manickam Pillai* v. *Ratnasami Nadar.* (Lease not for agricultural or manufacturing purpose—Presumed to be monthly tenancy.)

('28) 15 AIR 1928 All 617 (619) : 51 All 285 : 116 Ind Cas 491 (DB), *Basdeo Narain* v. *Mohd. Yusuf.*

2. *See* ('36) 23 AIR 1936 Oudh 102 (105) : 159 Ind Cas 316 (DB), *Janki* v. *Kanhaiya Lal.* (Lessee under unregistered lease which is compulsorily registrable is mere tenant at will—Notice under S. 106 not necessary. NOTE.—This can only mean that such lessee cannot be anything *more* than tenant at will—For a discussion of the principles applicable. see S. 105 Note 19.)
[*But see* ('16) 3 AIR 1916 Low Bur 34 ('34) : 8 Low Bur Rul 351 : 32 Ind Cas 692, *Pazundaung Bazar Co.* v. *T. Gwan Chwan.* (Submitted wrong.)]

3. ('29) 16 AIR 1929 All 387 (387) : 119 Ind Cas 436, *Banwari Barbi* v. *Ram Ratan.* (Perpetual lease from a person beyond his power cannot be construed as an ordinary lease from year to year entitling the lessee to possession.)

Section 106—Note 19

1. *('18) 5 AIR 1918 PC 102 (107) : 46 Cal 458 : 45 Ind App 222 : 48 Ind Cas 277 (PC), *Haribar Benerji* v. *Ram Shasi Roy.*

but there must be no uncertainty or ambiguity in the notice on the above point.[2] But a notice need not be clear and unambiguous in its *expressed* terms. It is sufficient if the notice is such that it can be *rendered* clear and unambiguous by the application of the maxim *id certum est quod certum reddi potest* (that is certain which can be made certain).[3] Further, a notice to quit ought not to be construed with a view to find fault with it but with a view to its validity.[4] The validity of a notice to quit ought not to turn on the splitting of a straw.[5]

In *Haribar Banerji* v. *Ramshashi Roy*[6] their Lordships of the Privy Council laid down the following as the principles deducible from English authorities on the subject : Notice to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law. The test of their sufficient is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with all those facts and circumtsances. Further, notices to quit are to be construed not with a desire to find faults in them which would render them defective but to be construed *ut res magis valeat, quam pereat* (that an act may avail rather than perish).

But the above principles are only applicable to notices containing errors honestly but inadvertently made. The principles would be entirely inapplicable to inaccuracies deliberately inserted for fraudulent purposes.[6a]

Whether a particular notice is valid according to the above principles depends on the terms of the notice in each case and the facts and circumstances of that case. The undermentioned are illustrative cases.[7]

('29) 16 AIR 1929 Pat 444 (448) : 118 Ind Cas 305 (DB), *Pratap Udai Nath* v. *Jagannath.*

('85) 11 Cal 533 (538) (DB), *Mohamaya Goopta* v. *Nil Modab Rai.*

2. ('85) 7 All 899 (902, 904) : 1885 All W N 288 (FB), *Bradley* v. *Atkinson.* (Notice must make it clear that after the date mentioned the tenant would be a trespasser.)

(1889) 61 L T 729 (730) : 54 J P 311, *Gardner* v. *Ingram.*

(1925) 1 K B 14 (21, 22), *Phipps and Co., Ltd.* v. *Rogers.*

(1879) 40 L T 771 (772) : 48 L J Q B 681 : 4 Ex D 201 : 27 W R (Eng) 928, *Ahearn* v. *Bellman.*

('85) 11 Cal 533 (538) (DB), *Mohamaya Goopta* v. *Nil Madab Rai.*

3. (1925) 1 K B 14 (20), *Phipps & Co., Ltd.* v. *Rogers.*

4. ('43) 30 AIR 1943 Bom 306 (307) : ILR (1943) Bom 553 : 213 Ind Cas 48 (DB), *Utility Articles Manufacturing Co.* v. *Motilal Bofbay Mills Ltd.*

('31) 18 AIR 1931 Mad 352 (353, 354) : 131 Ind Cas 621, *Ganaprakasam* v. *Vaz.* (Where a notice is sufficiently clear though not drawn with strict accuracy it should be given a rational interpretation and held as sufficient.)

('18) 5 AIR 1918 P C 102 (106, 107) : 46 Cal 458 : 45 Ind App 222 : 48 Ind Cas 277 (PC), *Haribar Banerji* v. *Ramshasi Roy.*

('33) 20 AIR 1933 Cal 260 (262) : 141 Ind Cas 833 (DB), *Secy. of State* v. *Madhu Sudan.*

[*But see* (1924) 2 K B 149 (152) : 93 L J K B 800 : 131 L T 568, *Precious* v. *Reedie.* (A notice to quit is to be strictly construed and cannot be afterwards amended by the party who serves it.)]

5. (1895) 1 Q B 378 (383) : 64 L J Q B 200 : 72 L T 62 : 43 W R (Eng) 228, *Sidebotham* v. *Holland.*

('38) 68 Cal L Jour 411 (412), *Sudhansu Badini Debi* v. *Narayan Chandra Panda.*

('31) 18 AIR 1931 Mad 352 (353, 354) : 131 Ind Cas 621, *Ganaprakasam* v. *Vaz.*

6. ('18) 5 AIR 1918 P C 102 (106, 107, 110) : 46 Cal 458 : 45 Ind App 222 : 48 Ind Cas 277 (PC).

[*See also* ('43) 30 AIR 1943 Bom 306 (307) : ILR (1943) Bom 553 : 213 Ind Cas 48 (DB), *Utility Articles Manufacturing Co.* v. *Motilal Bombay Mills Ltd.*]

6a. ('18) 5 AIR 1918 P C 102 (106) : 46 Cal 458 : 45 Ind App 222 : 48 Ind Cas 277 (PC), *Haribar Banerji* v. *Ramshahi Roy.*

7. ('49) 36 AIR 1949 All 173 (174), *Ganga Prasad* v. *Premkumar Kohli.* [*Notice requiring defendant to vacate on 15th May 1944 or on such date as r' your then current month of tenancy will and*"—*Tenancy commencing from 1st of every month*—*Notice held proper.*]

(1948) 1 All E R 177 (183), *Addis* v. *Burrows.* [Lease for fixed period of 18 months in the first instance and thereafter a lease from year to year—Notice to quit "at the expiration of tenancy which will expire next after the end of one half year from the service of notice"—Notice held sanctioned by long usage.]

(1846) 3 C B 215 (228) : 15 L J C P 263 : 136 E R 86 : 7 L T (O S) 208, *Doe d. Bailey* v. *Easter.* (Notice held valid, although it did not state to whom the possession was to be delivered up.)

(1817) 6 M & S 40 (41) : 105 E R 1157, *Doe d. Brooks* v. *Fairclough.* (Notice held

A notice to quit which contains a clear intimation of the intention to terminate the lease by a certain time is not invalid merely because it visualises the possibility of the relationship of landlord and tenant continuing (or being resumed) in

invalid, as the statement regarding the persons to whom the possession was to be delivered up was uncertain in its intent.) (1840) 12 Ad & El 743 (744) : 4 Per & Daf 323 : I Arn & H 39 : 113 E R 995, *Doe d. Armstrong* v. *Wilkinson.* (A mere misdescription of property in a notice to quit is not fatal provided tenant is not misled thereby—Property situated in parish *H* wrongly described as situated in parish *D* —Notice held valid.)

(1839) 50 R R 832 (840, 841) : 9 L J C P 201 : 132 E R 1267, *Muskett* v. *Hill.* (Notice that if lessee failed to keep six miners at work the lessor would re-enter after expiration of a month is bad.)

(1836) 5 L J K B 116 (116, 117) : 111 E R 1198, *Doe d. Williams* v. *Smith.* (Tenant entering in May to pay rent to the 2nd of February and then from year to year—Notice given in October 1833 to quit "at the expiration of half a year from the delivery of the notice, or at such other time as your present year's holding shall expire after the expiration of half a year from the delivery of the notice" Held, the notice was sufficient to determine the tenancy in February 1835).

(1811) 11 R R 807 (808) : 2 Camp 591 : 170 E R 1262, *Earrance* v. *Ikinton.* (A notice by a tenant that he would quit the premises as soon as he gets another situation is bad as it only amounts to this, that he would quit when he found it convenient.)

(1802) 4 Esp. 185 (185) : 170 E R 685 (685), *Doe d. Cox* v. *Roe.* (Tenant holding premises called *B*—Landlord giving notice "to quit the premises which you hold of me, commonly called as *W*"—*Held,* as there was no house of the sign of *W* in the parish and as the tenant did not hold any other premises of the landlord the tenant was not misled by the misdescription of the premises and the notice therefore was good.)

(1915) 113 L T 694 (695) : (1915) 1 K B 830 : 84 L J K B 823, *May* v. *Borup.* (Notice to quit at earliest possible moment means a notice to terminate the tenancy at the next date when the tenancy could be determined under the agreement and is not invalid as uncertain.)

(1900) 1 Q B 23 (26) : 69 L J Q B 17 : 81 L T 453 : 48 W R (Eng) 73, *Wride* v. *Dyer.* (Tenant held premises on a yearly tenancy from Lady Day to Lady Day. On 24th March 1898, her landlord gave her nitice to quit and deliver up the premises "on 24th June 1898, or at the end of your current year's tenancy"—*Held* that the notice must be construed in accordance with the intention of the landlord, and that since it was impossible to suppose that it was intended to be a notice to quit on 25th March 1898, when the current year's tenancy expired it must be taken to be a good notice to quit on 25th March 1899.)

(1889) 61 L T 729 (730) : 54 J P 311, *Gardner* v. *Ingram.* (A notice to quit given by lessee ran as follows :—I intend to surrender to you the tenancy on or before the 29th September—*Held,* the notice was bad. The words in this case mean that the tenant intends to enter into negotiations as to something which cannot be done without the landlord's consent, that he will surrender the lease to the landlord if he will accept it. That is no notice to quit.)

('43) 30 AIR 1943 Bom 306 (307, 309) : ILR (1943) Bom 553 : 213 Ind Cas 48 (DB), *Utility Articles Manufacturing Co.* v. *Motilal Bombay Mills, Ltd.* (Notice to quit—Words by counsel in notice "we are instructed to determine the tenancy" held determined tenancy.)

('21) 8 AIR 1921 Pat 307 (308) : 61 Ind Cas 976 (DB), *Sanker Ram* v. *Tulshi Bhagat.* (Lease of a house for dwelling purposes—Notice served on 7th Asarh to vacate the house at the end of the month of Asarh 1324 F. N. or such date of the month on which the defendants thought their monthly tenancy ended—Defendants' contention was that the notice was illegal and uncertain—*Held* that the notice gave more than 15 days' time to quit and further gave the defendants an option to quit on a later date in case the defendants thought that their monthly tenancy ended on such date—The notice was not uncertain for the date for vacating the house had been clearly given. It was only to avoid any doubt or dispute that an option of the nature set forth in the notice was given to defendants.)

('34) 21 AIR 1934 All 787 (788, 789) : 152 Ind Cas 180 (DB), *Tika Ram* v. *Daoji Maharaj.* (A notice was given on 9th November 1927, to the lessee stating that he should vacate the land on 13th May 1927. It appeared that '1927' in the notice was a mistake for '1928' and the party were not misled on that account—*Held* that this was merely a case of an accidental slip and the notice was valid.)

('97) 25 Cal 36 (38) : 2 Cal W N 106 (DB), *Shama Charan Mitter* v. *Wooma Churn Halder.* (A notice to quit which directs the tenant to vacate a certain quantity of land under his landlord is not bad in law, merely because it includes some land which the tenant is found not to hold under the landlord. Considering that the error is only small and considering that the defendant never took any objection that he was misled by rerson of this defect, it was not sufficient to vitiate the notice.)

('37) 24 AIR 1937 Cal 331 (333) : 173 Ind Cas 885 (DB), *Sashi Mohan* v. *Lakshimi Narayanjee.* (Where notice to quit was given by the shebait on the footing as if the idols were the sole owners of the premises and it directed that the tenants should vacate the entire premises, while it was found that the idols had only an undivided

certain contingencies by *mutual agreement* between the parties. The cases noted below[8] fall under this principle.

It will be noted in this connection that once a notice is given, the party giving it cannot himself retract it. The consent of the other side is necessary for waiver of notice : See S. 113. A notice is not bad merely because it refers to the possibility of such waiver. Such reference does not affect the finality of the notice.

A tenancy can be determined only as a whole or not at all. It cannot be determined piecemeal.[9] Hence, a notice to quit with reference to a portion of the holding is bad.[10]

It is open to the Court, notwithstanding certain features in a notice which may suggest that it is an attempt to terminate the tenancy partially, to hold, on the construction of the notice in the light of all the facts and circumstances of the case, that the notice is not of this kind and is valid.[11]

A notice is not invalid merely because the landlord treats the person to whom the notice is given as a trespasser and not as a tenant.[12]

Where a notice to quit is invalid or insufficient for any reason, it will not have the effect of determining the lease.[13] But where an invalid notice is accepted

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share in the premises — *Held* that if the notice was sufficient with regard to the whole of the premises it was sufficient with regard to a portion of it, even if the property from which ejectment was sought might have been an undivided portion of the said premises.)

('18) 5 AIR 1918 P C 102 (110) : 46 Cal 458 : 45 Ind App 222 : 48 Ind Cas 277 (PC), *Haribar Banarji* v. *Ramshasi Roy.* (In this case, notwithstanding apparent confusion in description of demised land in the notice, the notice was held to be good.)

('39) 26 AIR 1939 Cal 291 (292) : 182 Ind Cas 8 (DB), *Girdhari Lal* v. *Purnendu Narayan.* (Inaccurate description of the land is not necessarily material defect.)

('25) 12 AIR 1925 All 199 (200) : 78 Ind Cas 651, *Bhagwana* v. *Shib Samentri Prasad.* (Where the notice given by the manager of a temple property was given by him in his capacity as manager but the heading of the notice did not show the fact and the notice was not signed by the manager but by his general attorney—*Held,* the notice was nevertheless quite valid.)

('05) 28 Mad 391 (392, 393) (DB), *Narasimha Chari* v. *Gopala Iyengar.* (Patta given at the end of the fasli indicating the change in the conditions of the tenure even for the existing fasli is not sufficient notice.)

8. ('1915) 113 L T 694 (696) : (1915) 1 K B 830 : 84 L J K B 823 *May* v. *Borup.* (Notice to quit given by tenant—Statement that in a certain event the notice will be cancelled—The reservation does not invalidate the notice—It only informs the landlord of the hopes and fears of the tenants —The tenants cannot cancel the notice after giving it—Their statement that they will do so is not to be taken as attaching a condition to the notice—They could only enter into negotiations with the landlord.)

(1918) 2 K B 805 (806) : 87 L J Ch 1122, *Norfolk County Council* v. *Child.* (Notice to quit—Covering letter stating that the notice is given to terminate the lease on the date given therein unless the lessor sees sufficient reason to change his opinion— In the previous year notice had been given but this notice was withdrawn at the request of the tenant, whose rent was in arrear, on his paying off the arrears—*Held* that the notice was not conditional or reserving a right to lessor—Taken in the light of what happened in the previous year it only means that the notice will not be withdrawn as in the previous year unless he sees sufficient reason in the meanwhile to change his opinion.)

9. ('21) 33 Cal L Jour 518 (518, 519) (DB), *Durga Churan* v. *Pandub.*

('21) 64 Ind Cas 550 (550) (DB) (Cal), *Ram Kanie Mandal* v. *Ganesh Chunder Sen.*

('21) 33 Cal L Jour 516 (517) (DB), *Bhimram* v. *Hura Soondery.*

10. ('21) 64 Ind Cas 551 (551) (DB) (Cal), *Atal Chundal* v. *Kedarnath Mukerji.*

('39) 26 AIR 1939 Cab 291 (292) : 182 Ind Cas 8 (DB), *Giridhari Lal* v. *Purnendu Narayan.*

('29) 16 AIR 1929 Cal 651 (654) : 57 Cal 10 : 120 I. C. 455 (DB), *Bodardoja* v. *Ajijuddin Sirkar.*

(1811) 12 R R 509 (512) : 14 East 245 : 104 E R 595, *Doe d. Rodd* v. *Archer.*

(1811) 3 Camp 71 (73) : 170 E R 1309, *Doe d. Morgan* v. *Church.* (Joint demise of land and titles at joint rent—Notice to quit only referred to land—*Held* that the notice was still valid because tenancy as to land cannot be determined without at the same time determining it as to tithes and the parties must have understood the notice as applying to both.)

11. ('18) 5 AIR 1918 P C 102 (110) : 46 Cal 458 : 45 Ind App 222 : 48 Ind Cas 277 (PC), *Haribar Banarji* v. *Ramshasi Roy.*

12. ('33) 20 AIR 1933 Cal 260 (262) : 141 Ind Cas 833 (DB), *Secy. of State* v. *Madhu Sudan.*

('08) 7 Cal L Jour 107 (109) (DB), *Ram Charan Naskar* v. *Hari Charan.*

13. ('21) 8 AIR 1921 Pat 334 (335) : 62 Ind Cas 421, *Farzand Ali* v. *Motilal.*

('91) 15 Bom 415*n* (415*n*) : (1880) Bom

and acted upon by the party to whom it is given, the tenancy would be determined.[14] There would be an implied surrender in such a case. But where a lease is really determinable only by six months' notice under this section but the lessor gives only a month's notice, the mere fact that the lessee in his reply notice erroneously admits that he is a monthly tenant will not estop him from contending that the notice was insufficient. The reason is that the lessor is not in any way misled by such a statement.[15]

A notice to quit is necessary under this section before a suit for ejectment can be brought only where the defendant is a *tenant* of the plaintiff.[16] Nor will such a notice to quit give a cause of action for a suit for ejectment against a person where the relationship of landlord and tenant between the parties has been created not by a *lease* but by a decision of Court.[17]

See also Note 20.

20. **Notice to quit with an option to continue on different terms.**—A notice must be absolute and unconditional in its terms.[1] Otherwise, it would not amount to a clear and unambiguous intimation of an intention to terminate the lease on a certain date. Thus, a notice giving the lessee an *option either* to vacate the property by a certain date *or* to pay enhanced rent from such date will be bad.[2] On this principle, it has been held that a notice which merely informs the lessee that if he wants to keep the premises after a certain date, he will have to pay enhanced rent at a certain rate is bad.[3] The reason is that such a notice virtually amounts only to giving the lessee an option either to vacate the property by a certain date or to pay enhanced rent.

But, where a notice clearly expresses an intention to terminate a lease by a certain date, the mere fact that it is coupled with an intimation that if the lessee continued in possession after such date he would be liable for enhanced rent does not make the notice bad.[4] The reason is that such a clause in a notice to quit only amounts

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P J 10 (DB), *Ramchandra Appaji* v. *Daulatji.*

('10) 6 Nag L R 17 (18) : 5 Ind Cas 699 (700), *Udebhan* v. *Jagannath.*

14. ('25) 12 AIR 1925 Rang 206 (206) : 86 Ind Cas 511, *F. Morgan* v. *Ahmed Moola.*

(1811) 2 Camp 559 (560) : 170 E R 1251, *Doe d. Baker* v. *Wombwell.* (Tenant making no objection to notice but giving a promise that he would leave the premises as soon as he could fit himself—*Held* that the tenancy had determined.)

(1806) 9 R R 810 (810) : 6 Esp 70, *Doe* v. *Spiller.* (Lease granted to one *T*—Notice to quit directed to one *S*—*T* accepting notice—No other tenant of name *S*—*Held,* as *T* did not repudiate notice he should be held bound by it.)

15. ('24) 11 AIR 1924 Bom 115 (115) : 48 Bom 38 : 82 Ind Cas 791, *William Jacks and Co.* v. *Jaosah Mahomad.*

16. ('39) 26 AIR 1939 Pat 167 (168) : 178 I. C. 362, *Shiba Prasad* v. *Chamru Pasi.*

17. †('42) 29 AIR 1942 Cal 406 (407) : 201 I. C. 443, *Sazawar Khan* v. *Satyendralal.*

Section 106—Note 20

1. (1889) 61 L T 729 (730) : 54 J P 311, *Gardner* v. *Ingram.*

(1922) 1 Ch 36 (40) : 91 L J Ch 195 : 125 L T 722, *Freeman* v. *Evans and Fletcher and Co.*

2. (1922) 1 Ch 36 (40) : 91 L J Ch 195 : 125 L T 722, *Freeman* v. *Evans and Fletcher and Co.*

('85) 11 Cal 533 (537, 538) (DB), *Mohamaya Goopta* v. *Nilmadab Rai.*

[*See also* ('85) 7 All 899 (902, 903, 904) : 1885 All W N 288 (FB), *Bradley* v. *Atkinson.* (Notice informing lessee that if he did not vacate by the given date a suit will be filed against him for ejectment as well as enhanced rent—*Held,* notice is bad.)]

3. ('12) 15 Ind Cas 906 (906, 907) (DB) (Cal), *Shakhi Chand* v. *Ram Chandra.*

4. †(1879) 4 Ex D 201 (207) : 48 L J Q B 681 : 40 L T 711 : 27 W R (Eng) 928, *Ahearn* v. *Bellman.* (Notice to quit on a certain day given — Notice contained the following clause "and I further give you notice that should you retain possession of the premises after the day before mentioned the annual rental of the premises now held by you from me will be increased and made payable in advance"—*Held,* by Bramwell, L. J. and Cotton, L. J. (Brett, L. J., dissenting) that the notice to quit being otherwise sufficient it was not rendered invalid by the additional clause—Notices with an option may be good.)

('21) 8 AIR 1921 Pat 334 (335) : 62 Ind Cas 421, *Farzand Ali* v. *Motilal.*

('04) 1904 Pun Re No. 5 p. 27 (29) : 1904 Pun L R No. 42 (DB), *Pirbhu* v. *Ramchand.* (Notice does not become bad and insufficient merely because it also contains an offer to the tenant to remain on land on fresh terms from a given date, if the tenant accepts that offer.)

('21) 8 AIR 1921 All 194 (194, 195) : 43 All 330 : 60 Ind Cas 842 (DB), *Shankar Lal* v. *Baburam.*

('19) 6 AIR 1919 Lah 304 (305) : 1919 Pun Re No. 34 : 51 Ind Cas 121, *Muharram Ali* v. *Bansi Lal.*

to an offer of a new tenancy on a higher rent and does not affect the intention to terminate the present lease on the given date. Sometimes, a notice which is expressed as giving an option to the lessee to vacate the property by a certain date or pay enhanced rent thereafter has been treated on construction as a definite notice to quit on such date coupled with an offer of a new tenancy at an enhanced rent from such date.[4a]

Where a notice to quit clearly conveys the intention to terminate the lease by a certain date, the mere fact that the notice provides for its abandonment in case the other party agrees to an enhancement or reduction of the rent, does not affect the validity of the notice.[5] The reason is that such a provision relates only to the *waiver* of the notice by *mutual consent*. The law allows waiver of a notice to quit by the person who has given the notice with the consent of the other party. (See S. 113.) A mere provision, in a notice, for such waiver by mutual agreement between the parties will not affect the validity of the notice. (See Note 19.)

A notice to quit is not bad, merely because it provides that if the tenant fails to vacate the property by the date fixed in the notice, he will be liable for damages at a certain rate.[6] In such a case there is merely an intimation to the tenant as to the consequences that would follow from his non-compliance with the notice to quit. The clearness of the requisition for quitting the property by a certain date is not affected.

21. Notice required under other sections for determining lease.—The requirements prescribed by this section with regard to a notice apply only to a notice given under this section for determining a lease. Such requirements do not apply to notices issued under other sections of the Act. For instance, a notice under S. 108, cl. (e) expressing the lessee's intention of avoiding a lease on account of the destruction of the property, which is the subject-matter of the lease, need not comply with the requirements prescribed by this section.[1] So also, the notice under S. 111, clause (g) given by the lessor of his transferee determining a lease on forfeiture being incurred need not comply with the requirements laid down in this section.[2]

4a. ('24) 11 AIR 1924 Lah 643 (643, 644) : 75 Ind Cas 1034, *Rure Khan* v. *Ghulam Mohammad.* (Notice to leave the house within a week or to pay double rent from the expiry of that week and stating that if defendant did not vacate the house it would be assumed that he was prepared to pay double rent.)

('34) 21 AIR 1934 All 115 (116, 117) : 153 Ind Cas 432, *Madan Mohan* v. *Bohra Ramlal.* (Notice giving lessee alternative of vacating on or before a certain date or, if he continued in possession therefter, of paying enhanced rent—Lessee not vacating —Held, he had thereby agreed to hold over and to have accepted the proposal as to enhanced rent.)

5. ('35) 22 AIR 1935 Bom 247 (251) : 156 Ind Cas 1020 (DB), *Vaman Vithal* v. *Khanderao Ramrao.*

('43) 47 Cal W N 207 (212, 213) (DB), *Dhaniram* v. *Bholanath.* (Landlord's notice to quit addressed to monthly tenant requesting him to enter into a fresh engagement on new terms by the last date of the month of the tenancy at the latest and stating that failing that, the tenancy would be determined from the next day of such last date.)

('09) 2 Ind Cas 548 (548) (Cal) (DB), *Ganga Das* v. *Ananda Chandra.* (Where a landlord wrote to the tenant asking him to come to an agreement with him to pay increased rent, and concluded by saying "otherwise, I shall take steps to eject you and hence you consider this as 15 days' notice expiring with the end of this month"—*Held* that this was a good notice to quit.)

('96) 22 Bom 241 (243) (DB), *Kikabhai Gandabhai* v. *Kalu Ghela.* (Tenants were by the notice given to them by landlord allowed two days to make a fresh agreement with him failing which the notice to them to quit at the end of the year became an absolute notice.)

('13) 19 Ind Cas 758 (759) (All), *Jugle* v. *Har Narain Singh.* (A landlord gave a notice to his tenant that he must within fifteen days either execute an agreement binding himself to pay enhanced rent or he must vacate the house—*Held* that the notice was valid.)

(1895) 1 Q B 231 (235), *Bury* v. *Thompson.* (Notice by lessee that the rent is too high and that he will not be able to continue unless reduction is made is good—Confirmed on appeal in *Bury* v. *Thompson* (1895) 1 Q B 696.)

(75) 23 Suth W R 440 (441) (DB), *Hem Chunder* v. *Radha Persohad.* (It is sufficient if the landlord asks for a higher rate of rent and gives the ryot notice to quit if he declines to pay it.)

6. ('08) 12 Cal W N 1059 (1063), *Adolphe Stranger* v. *Emma Price.*

('25) 12 AIR 1925 All 199 (199) : 78 Ind Cas 651, *Bhagwana* v. *Shib Sametri Prasad.*

Section 106—Note 21

1. ('16) 3 AIR 1916 Cal 707 (707) : 31 Ind Cas 697 (DB), *Damoda Coal Co., Ltd.* v. *Hurmook Marwari.*

2. ('22) 9 AIR 1922 Mad 349 (349) 66 Ind Cas 48 (DB), *Manna Vikraman* v. *Noor Mohomed.* (A notice by a landlord

22. **Notice by lessee—Duty to give up possession.**—Under this section, a lease is determinable even by the lessee by a simple notice given in accordance with the provisions of this section. It is not necessary for the purpose of determining the lease that the lessee must give up possession of the property. Although, under S. 108, cl. (q) the lessee is bound to put the lessor into possession of the property on the determination of the lease, a failure to do so will only entitle the lessor to damages and will not make the determination of the lease by notice by the lessee ineffective or incomplete.[1]

23. **Waiver of notice.**—As to waiver of notice by the person giving it, see section 113 and Notes thereon. See also the undermentioned cases.[1]

See also Note 25 as to *forfeiture* of right to notice.

As to waiver of *defect* in notice, by the person to whom the notice is given, see Note 19.

24. **Suit for ejectment—Notice to quit.**—Where the defendant in a suit for ejectment has been a *tenant* under the plaintiff, a decree for ejectment cannot be passed against him, unless it is established that the tenancy has been lawfully determined.[1] A notice to quit is one of the modes of determining a lease, although such a mode of determination does not apply to *every* case. Where a lease is determinable by a notice to quit and has not been determined in any other manner according to law, ejectment cannot be decreed against a tenant, unless a sufficient and valid notice to quit has been served upon him.[1] Such a notice is a *pre-requisite* of the suit. In other

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to his tenant, unequivocally expressing the intention to determine the lease on the ground of forfeiture, is a sufficient compliance with S. 111 though inadequate under S. 106 of the Act.)

Section 106—Note 22

1. ('96) 22 Bom 348 (353, 354) (DB), *Baliramgiri* v. *Vasudev.*
[*But see* ('10) 1910 Pun Re No. 94 : 8 Ind Cas 355 (355), *Niadar Mal* v. *Lewin.* (Submitted not correct.)]

Section 106—Note 23

1. ('41) 28 AIR 1941 Pat 495 (497) : 194 Ind Cas 459, *Chagganlal Marwari* v. *Indra Keot.* (Landlord accepting rent from tenant for period after expiry of notice—In order to succeed in an ejectment suit landlord must show that another proper notice to quit had been duly served on the tenant.)
('35) 22 AIR 1935 Bom 247 (251) : 156 Ind Cas 1020 (DB), *Vaman Vithal* v. *Khanderao.* (Lessor giving another notice to quit after expiry of first notice—This is a waiver of first notice.)
('23) 10 AIR 1923 Nag 129 (130) : 68 Ind Cas 178, *Yeswant* v. *Shiwappa.* (Merely allowing tenant to continue in possession after expiry of notice to quit—No waiver.)
('17) 4 AIR 1917 Pat 469 (470) : 2 Pat L Jour 595 : 42 Ind Cas 655 (DB), *Wali Ahmad* v. *Mt. Hussaini.* (Giving notice and then claiming arrears of rent up to institution of suit is not waiver of notice.)
('21) 8 AIR 1921 Cal 126 (127) : 63 Ind Cas 191 (DB), *Ratneswar Das* v. *Kamal Deb Adhikar.* (Acceptance of rent for period before expiry of notice is not waiver.)
('05) 29 Bom 580 (613) : 7 Bom L R 27 (DB), *Municipal Corporation* v. *Secretary of State.* (Acceptance of rent for period after expiry of noitce is waiver.)
(1811) 3 Camp 115 (118) : 13 R R 768 (769) : 170 E R 1324, *Doe d. Digby* v. *Steel.* (After expiration of first notice landlord giving tenant a fresh notice that unless he quits in fourteen days he will be required to pay double value—*Held,* second notice was not intended as waiver of the first, having for its object merely the recovery of double value.)

Section 106—Note 24

1. ('21) 62 Ind Cas 390 (391) (DB) (Mad), *Ittinan* v. *Govindan Nambudri.*
('03) 13 Mad L Jour 475 (476) (DB), *Nagasamy Aiyar* v. *Perumal Aiyar.*
('17) 4 AIR 1927 Cal 426 (426) : 34 Ind Cas 516 (DB), *Umesh Chandra* v. *Kala Chand.*
1a. ('76) 25 Suth W R 56 (56) (DB), *Narain Mundul* v. *Bookto Mahato.*
('70) 13 Suth W R 267 (268) (DB), *Bunwari Lal* v. *Mohima Chunder.*
('11) 9 Ind Cas 19 (20) (DB) (Cal), *Mozaffar Ali* v. *Darogha Gope.*
('95) 1895 Bom P J 321 (DB), *Annaji* v. *Balkrishna.*
('78) 2 Mad 346 (349) (DB), *Abdulla* v. *Subbarayyar.*
('78) 1 Mad 333 (335) (DB), *Saminada Pillia* v. *Subba Reddiyar.*
('94) 18 Bom 110 (114) (DB), *Dodhu* v. *Madhavrao.*
('76) 25 Suth W R 104 (104), *Kalee Dass* v. *Nistarinee Bewa.*
[*See also* ('39) 26 AIR 1939 Pat 428 (430) : 185 Ind Cas 284, *Jadunandan Das* v. *Mt. Maho.* (Where the lessee is allowed to construct a building on the land leased and the lease is a lease from month to month the lessor should give the lessee notice to quit before asking him to demolish the structure.)
('26) 13 AIR 1926 Nag 201 (202) : 90 Ind Cas 43, *Balkrishna* v. *Raghunath.* (Case under Berar Land Revenue Code, S. 79.)]

words, the determination of the lease by such notice must have become complete by the expiration of a valid notice to quit *before* the institution at the suit. Where this is not the case, the suit itself cannot be treated as a notice to quit. Nor can the Court, in such a case pass a decree for ejectment against the tenant fixing a certain time within which he must vacate the property.[2] The contrary view taken in the undermentioned cases[3] is, it is submitted, not correct.

But the above principle does not apply to a trespasser who can, therefore, be ejected without any previous notice.[4] (See also section 105, Note 37.)

Where a tenancy is established, the onus of proving, in a suit for ejectment, that the tenancy has been determined by a notice to quit or otherwise is on the plaintiff.[5] But it has been held in the undermentioned case[6] that, where it is proved that a notice to quit was *served* on the defendant the onus is on him to prove that it was invalid.

A plea as to the *absence* of a notice to quit is one which goes to the root of the plaintiff's case and as such can be raised even in second appeal for the first time.[7]

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2. ('35) 62 Cal L Jour 201 (204, 205) (DB), *Jamiruddin Soodagar* v. *Hazi Mal Gani.*
('10) 5 Ind Cas 336 (337) (All), *Chatter Singh* v. *Ishri Prashad.*
('90) 1890 All W N 175 (176) (DB), *Harbansi* v. *Bholai.*
('94) 18 Bom 107 (108) : 1893 Bom P J 44 (DB), *Abu Bekar* v. *Venkataramana.*
('81) 1881 Bom P J 180 (DB), *Yadneshwar* v. *Rama.*
('01) 29 Cal 203 (206) : 6 Cal W N 69 (DB), *Hemangini* v. *Sri Gobinda.*
('07) 34 Cal 57 (63) : 5 Cal L Jour 181 (DB), *Deo Nandan Pershad* v. *Maghu Mahton.* (This appears to be based upon the principle that ejectment can be brought only for an unlawful or tortious detention.)
('80) 5 Cal L Rep 231 (235, 237) (DB), *Jubraj Roy* v. *Mackenzie.*
('79) 4 Cal 339 (341) (DB), *Ram Rotton* v. *Netro Kally.*
†('77) 2 Cal 146 (149) : 25 Suth W R 329 (FB), *Rajendranath* v. *Bassider Ruhman.*
('02) 6 Cal W N 199 (201) (DB), *Nahin Majhi* v. *Raj Kumar Gouri Lal.*
('67) 8 Suth W R 385 (386) (DB), *C. J. Phillips* v. *Nund Coomar.*
('69) 11 Suth W R 231 (231) (DB), *Fitz Patrik* v. *George Wallace.*
('96) 6 Mad L Jour 59 (61) (DB), *Vengu Padiyachi* v. *Ragava Chetty.*
('10) 6 Nag L R 17 (20) : 5 Ind Cas 699 (701), *Udebhan* v. *Jagannath.*

3. ('75) 23 Suth W R 440 (441) (DB), *Hem Chunder* v. *Radha Pershad.*
('95) 23 Cal 200 (201) (DB), *Kamlal* v. *Dinanath.*
('73) 20 Suth W R 401 (402) (DB), *Mohomed Rasid Khan* v. *Jadoo Mirdha.*
('23) 10 AIR 1923 Pat 340 (341) : 71 Ind Cas 1022 (DB), *Stonewigg* v. *Kameshwar Narayan.*

4. ('34) 21 AIR 1934 Cal 134 (134) : 149 Ind Cas 678, *Sitabuddin* v. *Behari Lal.*
('07) 34 Cal 57 (61) : 5 Cal L Jour 181 (DB), *Deo Nandan Pershad* v. *Meghu Mathon.*
[*See* ('11) 9 Ind Cas 19 (20) (DB) (Cal), *Mozaffar Ali* v. *Darogha Gope.* (If neither party in an ejectment suit admits or sets up a tenancy, then notice to quit would not be required.)]
[*See also* ('34) 21 AIR 1934 Rang 291 (292) : 151 Ind Cas 971, *Ma Gui* v. *Maung Tet.* (No lease as defined under S. 105—No notice under S. 106 is necessary for ejectment.)]

5. ('42) 29 AIR 1942 Cal 341 (341) : 200 Ind Cas 660 (DB), *Mozam Sbaikh* v. *Annada Prasad.*
*('19) 6 AIR 1919 Mad 1135 (1136, 1137) : 43 Ind Cas 977, *Chandrasekharaswami* v. *Nainar Ammal.* (Principles affecting the onus of proof and presumptions arising in ejectment suits discussed.)
('15) 2 AIR 1915 All 251 (252) : 29 Ind Cas 437 (DB), *F. S. Old* v. *J. A. Shail.*
('10) 5 Ind Cas 336 (337) (All), *Chatter Singh* v. *Ishri Prashad.*
('02) 26 Bom 360 (362) : 4 Bom L R 58 (DB), *Ganoo* v. *Shri Dev Sidheswar.* (Defendant in his written statement not denying the receipt of the notice but disputing its legality—The burden is on plaintiff to show that the notice was proper.)
('91) 15 Bom 414*n* (415*n*) : (1880) Bom P J 122 (DB), *Haji Sayyad* v. *Venkta.*
('76) 25 Suth W R 56 (56) (DB), *Narain Mundul* v. *Bhookto Mohato.*
('78) 2 Mad 346 (349, 350) (DB), *Abaulla* v. *Pakkeri.*
('43) 30 AIR 1943 Mad 311 (312) : 209 Ind Cas 561, *Thirumalareddi Inna Reddi* v. *Gade Gopireddi.*
('28) 112 Ind Cas 257 (258) (DB) (Mad), *Kadiyam Rayudu* v. *Kamarsu Veeraju.*

6. ('28) 15 AIR 1928 Cal 436 (438) : 110 Ind Cas 715 (DB), *Suresh Chandra* v. *Kanti Chandra.*

7. ('10) 5 Ind Cas 336 (337) (All), *Chatter Singh* v. *Ishri Prashad.*
('94) 18 Bom 256 (259) (DB), *Krishnaji* v. *Antaji.*
('94) 18 Bom 110 (113) (DB), *Dodhu* v. *Madhavarao.*
('78) 2 Mad 346 (350) (DB), *Abdulla* v. *Subbarayyar.*
('93) 1893 Bom P J 292 (DB), *Krishna* v. *Ladu.*
Also see S. 111 Note 23.

As already seen, it is a matter in regard to which the onus of proof is on the plaintiff. In fact, such a notice to quit is an essential part of the plaintiff's *cause of action*. But a plea as to the *invalidity* of a notice cannot be allowed to be raised for the first time in second appeal.[8] This, as already seen, is a matter in regard to which the onus of proof is on the tenant.

In a suit for ejectment against a tenant, the plea of want of notice may be taken as an alternative to a plea of permanent tenancy.[9]

Where, in defence to a suit for ejectment against a tenant after a notice to quit, the tenant sets up a permanent tenancy or any other tenancy, which is not determinable by notice by the lessor, the onus of proving such a tenancy is on the tenant. (See section 105, Note 43.)

Even after a lease has been determined, a lessee cannot be ejected by the lessor by force. The lessee can only be evicted in due course of law.[10] (See also section 105, Note 37.)

25. Denial of lessor's title by lessee and notice to quit.—Under S. 111, clause (g) a denial of the lessor's title by the lessee will make the lease liable to forfeiture at the option of the lessor. In other words, the denial will not *ipso facto* determine the lease. It is such denial coupled with the exercise of option by the lessor in the prescribed manner that will cause the determination of the lease. This principle applies also to a tenancy from month to month or from year to year under this section.

But in the case of a lease from year to year the disclaimer of title by the lessee will, according to the English law, made the lessee liable to ejectment without notice on another principle. This principle has been expressed as follows :[1]

> "The holding being from year to year subject to the mutual will of landlord and tenant to determine it on giving the usual six months' notice, evidence of a disclaimer is evidence of an election to put an end to the tenancy and supersede the necessity for such a notice. Hence verbal or written denials of a tenancy have rendered notice to quit unnecessary, but it does not appear that they have effected a forfeiture of the term."

The above principle has also been followed in a series of decisions in India,[2] although

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[*See however* ('95) 1895 Bom P J 165 (DB), *Vyankaji* v. *Bala.* (Objection taken in appeal—Plaintiff should be given an opportunity for proving that as defendant had disclaimed his title, a notice to quit was not necessary.)

('33) 20 AIR 1933 Lah 377 (378) : 145 Ind Cas 992, *Karam Chand* v. *Amar Nath.* (Suit by landlord to eject a tenant decreed in the lower appellate Court—The tenant appealed from the judgment on the ground that he was not given a month's notice as stipulated in the lease-deed. The case was pending for over two years—*Held* that under the above circumstances, the tenant can have no grievance on the ground of lack of notice and that the High Court will not interfere in second appeal on the technical ground of want of notice. AIR 1926 Lah 129, relied on.)]

8. ('17) 4 AIR 1917 Pat 469 (470) : 2 Pat L jour 595 : 42 Ind Cas 655 (DB), *Wali Ahmad* v. *Mt. Hussaini Begum.*
('21) 62 Ind Cas 390 (391) (DB) (Mad), *Ittinan* v. *Govindan Nambudri.*
('10) 8 Ind Cas 132 (132) (DB), (Mad), *Musili*, v. *Nafuraja Chettiar.*
('24) 11 AIR 1924 Mad 904 (904, 905) : 82 Ind Cas 956, *Raman Menon* v. *Collector of Malabar.* (Ordinarily, the plea should not be allowed—It is open to the Court to allow it but it is not bound to do so.)

[*See also* (10) 5 Ind 813 (814) (DB), (Mad), *Pennusami* v. *Pasupathi.* (Where in a suit to eject notice was pleaded in the plaint and sufficiency of notice was denied in the written statement, but no issue was raised, the contention as to notice must be treated as abandoned by the defendant.)]

9. ('86) 10 Bom 669 (672) (DB), *Purshotam* v. *Dattatraya.*

10. ('29) 16 AIR 1929 Oudh 529 (534) : 4 Luck 649 : 118 Ind Cas 841 (DB), *Ambika Prasad* v. *Beni Madho.*

Section 106—Note 25

1. *('19) 6 AIR 1919 P C 1 (4) : 42 Mad 589 : 46 Ind App 109 : 50 Ind Cas 631 (PC), *Maharaja of Jeypore* v. *Rukmani.* (Quoting Platt on *Leases.*)

2. †('10) 5 Ind Cas 924 (924) (DB) (Mad), *Thariyakath Kathijakutti* v. *Ithikamparambil.*
('85) 9 Bom 527 (529) (DB), *Gopalrao Ganesh* v. *Kishor Kalidas.*
(1900) 24 Bom (426) (433, 434) : 2 Bom LR 228 (DB), *Mahipat* v. *Lakshman.*
('10) 6 Ind Cas 600 (600) (DB) (Mad), *Murugesa Mudalay* v. *Subraya Gramany.*
('33) 20 AIR 1933 Lah 377 (378) : 145 Ind Cas 992, *Karam Chand* v. *Amar Nuth.*
('11) 1911 Pun Re No. 76 : 13 Ind Cas 323 (323, 324), *Zia-ud-din* v. *Gobind Ram.* (Even if a notice is expressly required by the terms of the lease.)

there are also some decisions, which do not refer to this distinction between a lease from year to year and other leases.[3]

There is a conflict of decisions whether the denial of title by the defendant in the suit for ejectment itself will be sufficient for the purpose of obviating the necessity of a notice to quit on the above principle.[4] There is also a conflict of decisions as to whether the assertion of a permanent tenancy by a tenant who is not entitled to such a right will amount to a denial of title for the above purpose.[5]

Under S. III (g) as amended by Act XX of, 1929 the option of the lessor to forfeit a lease is to be exercised by issuing a written notice to the lessee. This notice need not comply with the provisions of this section.

26. Other modes of determination of lease.—A notice to quit is not the only mode of determining a lease even in cases such as those under this section, in which a notice to quit would be *sufficient* for the purpose. (See section III.) Where a lease has been *determined* according to the law without any notice to quit, such a

('12) 15 Ind Cas 584 (586) (Mad), *In re Armugam Pillai.*

†('95) 17 All 45 (47) : 1894 All W N 196 (DB), *Haidri Begam* v. *Nathu.*

('36) 23 AIR 1936 Oudh 102 (105) : 159 Ind Cas 316 (DB), *Janki* v. *Kanhaiyalal.*

('26) 13 AIR 1926 Mad 143 (144) : 91 Ind Cas 316, *Kalliani Amma* v. *Cochin Sircar.*

('28) 112 Ind Cas 257 (260) (DB) (Mad), *Kadiyam Rayadu* v. *Kamarsu Veeraraju.*

('27) 14 AIR 1927 Sind 248 (250) : 104 Ind Cas 412 (DB), *Mulibai* v. *Vassibai.*

†('94) 17 Mad 218 (219) : 3 Mad L Jour 287 (DB), *Unhamma Devi* v. *Vaikunta Hegade.*

('12) 15 Ind Cas 52 (52) (DB) (Mad), *Maniyam Pattar* v. *Lakshmana Nattama.* (Payment of rent by a lessee to the lessor's assignee, who took the property on usufructuary mortgage from the lessor, and attornment to him do not amount to the denial of the title of a purchaser of the property at Court sale held after the date of the said assignment so as to dispense with the necessity of giving notice to quit, prior to an action in ejectment by the said purchaser, to the lessee.)

[*See however* (22) 9 AIR 1922 Mad 514 (516), *Saravana Perumal Pillai* v. *Subbayyan Pillai.* (The mere assertion of a claim of permanent occupancy right does not deprive the tenant of his right to a notice to quity by the landlord. A notice to quit given a long time before the suit and not acted upon does not relieve the landlord from his obligation to give a fresh notice to quit before ejectment.)]

Also see S. 111, Note 14.

3. ('02) 12 Mad L Jour 194 (196) (DB), *Muthusami Pillai* v. *Srinivasier.*

('06) 33 Cal 339 (341, 342) : 3 Cal L Jour 274 (DB), *Anandamoyi* v. *Lakshi Chandra.*

4. *Cases holding that denial of title in suit itself is enough.*

('92) 17 Bom 631 (636) : 1892 Bom P J 294 (DB), *Lalu Gagal* v. *Bai Motan.*

('94) 18 Bom 256 (259) (DB), *Krishaji Ramchandra* v. *Antaji Pandurang.*

('88) 12 Bom 678 (682) (DB), *Agarchand Gumanchand* v. *Rakhama Hanmant.*

('07) 17 Mad L Jour 287 (287) (DB), *Kizhakimyakath Abdulla* v. *Mohideen Kutty.*

†('10) 5 Ind Cas 924 (924) (DB) (Mad), *Mayan Thariyakath Kathijakuth* v. *Ithikamparambil Kuthussa.*

('83) 8 Bom 228 (230) : 1883 Bom F J 360 (DB), *Baba* v. *Vishavanath Joshi.*

†('91) 1 Mad L Jour 218 (220) (DB), *Chidambaram Pillai* v. *Sabapathi Pillai.*

[See also (05) 1 Cal L Jour (117) (DB), *Sujjad Ahmad chowdhary* v. *Gunga Charan* (Defendant cannot be allowed to set up an entirely new case of a lease from year to year.)].

Cases holding that denial of title in the suit itself is not sufficient.

('98) 1898 Bom P J 206 (206, 207) (DB), *Pemraj* v. *Balchand.*

('96) 1896 Bom P J 451 (452, 453) (DB), *Ramchandra* v. *Kashinath.*

†('94) 17 Mad 218 (220) : 3 Mad L Jour 287 (DB), *Unhamma* v. *Vaikuntha.*

†('10) 5 Ind Cas 336 (337) (All), *Chatter Singh* v. *Ishri Prasad.*

('89) 12 Mad 353 (355) (DB), *Subba* v. *Nagappa.*

('08) 31 Mad 261 (263) : 18 Mad L Jour 153 (DB), *Peria Karuppan* v. *Subramania Chetty.*

('94) 17 All 45 (47) : 1894 All W N 196 (DB), *Haidri Begam* v. *Nathu.*

†('91) 15 Bom 407 (412, 414) (DB), *Vithu* v. *Dhondi.* (8 Bom 228 dissented from.)

5. *Cases holding that such claim will amount to a disclaimer of title.*

†('83) 8 Bom 228 (230) : 1883 Bom P J 360 (DB), *Baba* v. *Vishvanath Joshi.*

(1900) 24 Bom 426 (434) : 2 Bom LR 228 (229, 233, 234) (DB), *Mahipat Rane* v. *Lakshman.*

Cases holding that such claim will not amount to a disclaimer of title.

('93) 1893 Bom P J 292 (294) (DB), *Krishna* v. *Ladu.*

†('03) 27 Bom 515 (550) : 5 Bom L R 274 (DB), *Fateshinghji* v. *Bamanji.*

('96) 6 Mad L Jour 59 (61) (DB), *Vengu Padiyachi* v. *Ragava Chetty.*

('93) 3 Mad L Jour 222 (223) (DB), *Pranambal Achee* v. *Palaniappa..*

('94) 17 Mad 218 (220) : 3 Mad L Jour 287 (DB), *Unhamma* v. *Vaikuntha.*

('03) 27 Mad 23 (24) (DB), *Chinna Narayudu* v. *Harischendana Deo.*

notice is not necessary before a suit for ejectment against the tenant.[1] The reason is that after a lease has been determined in some manner recognised by the law, the tenant or his representative in interest would be merely in the position of a trespasser and can be ejected from the property without any previous notice to quit. (See S. 105, Note 37 and S. 116, Note 13.)

Similarly, where a lease is *voidable* under the law and has been avoided according to the law, the position is the same as if the lease has been lawfully *determined* and the quondam lessee can be ejected without any previous notice to quit.[2]

But a lease cannot be determined except in some way recognised by the law. Thus, a lease of joint land is not *ipso facto* determined by partition among the co-owners and the allotment of the leased land to one of them, so as to dispense with the necessity of a notice to quit before a suit for ejectment by him against the tenant.[3] Where the monthly tenant of a house is obliged to vacate the house under an order from the Plague Authority acting under statutory powers, the tenant is not thereby absolved from liability to give the usual notice to quit, if he desires to put an end to the tenancy.[4]

27. Effect of giving notice where it is not necessary.—Where a notice to quit is given by the landlord although such notice is not necessary for evicting a person from certain immovable property, no tenancy is created merely by reason of such notice.[1]

28. Notice by lessor undertaking to pay compensation for improvements —Effect.—It has been held that where a lessor in his notice to quit has undertaken to pay compensation to the tenant for the improvements effected by him before compelling him to vacate the property the lessor cannot enforce his right to possession, unless he has paid or tendered such compensation, although there may be no provision for it in the lease.[1]

29. Determination of main lease by notice—Effect on sub-lease.—The determination of a lease by a valid notice by the lessor will automatically put an end to any *sub-lease* granted by the lessee.[1]

30. Resumption of possession by landlord without giving notice—Effect. —Where a tenure was resumable by the grantor thereof after notice but the latter took possession of the land without giving notice and the grantee acquiesced in such resump-

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Section 106—Note 26

1. ('09) 2 Ind Cas 993 (994) (Cal), *Sheikh Abdul* v. *Chabil Jan Bibi.*
('21) 8 AIR 1921 Cal 574 (575) : 64 Ind Cas 824 (DB), *Guruprosanna* v. *Madusudhan.*
('77) 1877 Bom P J 177 (DB), *Suleman Abraham* v. *Asmad Isap.* (Forfeiture of lease by breach of condition.)
†('20) 7 AIR 1920 Pat 803 (804) : 59 Ind Cas 893 *Wazir Nonian* v. *Ram Prasad.* (Lease of a service tenure expires when the service ceases.)
('13) 20 Ind 11 (13) (All), *Shyam Lal* v. *Bachohu Lal.* (Sub-lease is detremined on surrender of main lease.)
('06) 5 Cal L Jour 53 (55) (DB), *Mrittunjoy Roy Chowdhury* v. *Kenatullah Norya.* (On determiantion of main lease sub-lease also are determined.)
[*See also* ('13) 19 Ind Cas 824 (824, 825) (SB) (Mad), *Sivatha Muthu* v. *Revd. Mesquita.* (Forfeiture of lease by breach of condition against disobeying lessor's orders regarding the holding.)]
2. ('09) 36 Cal 675, (651) : 1 Ind Cas 626 (631) : (DB), *Mathewson* v. *Shriram Kanai Sing* (Avoidance of lease obtained by fraud —Such lease is not void but only voidable.)
3. ('82) 6 Bom 70 (72) (DB), *Pandurang* v. *Yedneshwar.*
('81) 6 Bom 67 (69) : 1881 Bom P J 178 (DB), *Narayan Bhivarao* v. *Kashi.*
4. ('99) 1 Bom L R 739 (741, 742) (DB), *Mohomdally Moola* v. *John Campbell.*

Section 106—Note 27

1. ('03) 30 Cal 883 (1900), *Narsing Dayal* life dying—Heirs continuing in possession *Sahu* v. *Ram Narain Singh.* (Lessee for Landlord giving notice to quit does not thereby disentitle himself to mesne profits.)
†('17) 4 AIR 1917 Cal 219 (220), 221) : 37 Ind Cas 201 (DB), *Paramananda Singh* v. *Syjon Singh.* (Lessee holding over after expiry of lease—Lessor not assenting—Notice to quit given—This does not create tenancy.)

Section 106—Note 28

. ('36) 23 AIR 1936 Cal 581 (581, 582) : 167 Ind Cas 281, *Shambu Chandra Haldar* v. *Kanai Lal Goswami.*

Section 106—Note 29

1. ('97) 21 Bom 311 (313) (DB), *Timmappa Kuppaya* v. *Rama Venkanna.*
('32) 19 AIR 1932 Cal 241 (242) : 59 Cal 739 : 137 Ind Cas 139 (DB), *Yusuf Shaikh* v. *Jyotish Chandra.*

Also set S. 111 Note 1 and S. 115 Note 1.

tion and did not raise any objection on the ground of want of notice, it was held that he could not afterwards contend that the resumption was unlawful for want of notice.[1] It is conceived that in such cases the principle of implied surrender will apply. (See S. 111, Note 10.)

31. Lessee giving up possession before termination of lease—Liability for damages or rent.—Where a tenant gives notice determining a lease but such notice is invalid the lease will continue in force notwithstanding such notice. If, however, the tenant gives up possession and the landlord re-enters on the premises, there will be an *implied surrender* of the lease. (See S. 111, Note 10.) The lessee will not be liable for *rent* after such surrender. But he will be liable for *damages* for premature determination of the lease in breach of the contract of tenancy.[1]

Although a lessee may actually vacate the property before the expiry of the notice given by him to terminate the lease, he will be liable for rent till the last day of the notice.[2]

Where the lessee of a house under a monthly tenancy is obliged to vacate the house under the orders of the Plague Authority, he is not thereby absolved from the duty of giving notice to quit for the usual period if he wishes to terminate the lease, or from the liability to pay rent till the lease is so determined.[3]

32. Lessee holding over after expiry of notice to quit—Effect.—Where a lessee continues to be in possession of the property after the lease has been determined by a valid notice, he will not be liable for *rent*.[1] The reason is that in such a case, there will not be any relationship of landlord and tenant between the parties after the expiry of the notice. He will not also be liable for damages for *use and occupation*. (See section 105, Note 70.) But the lessee will be liable for mesne profits. He will also be liable for *damages* for breach of the duty under S. 108, clause (q) of putting the lessor into possession of the property. The amount awardable as damages is within the discretion of the Court to be exercised according to the circumstances of the case.[2] But, where the notice to quit is *invalid*, it will not have the effect of determining the lease and the lessee will be liable for *rent* even after the expiry of the notice.

Liability for enhanced rent.

Section 106—Note 30

1. ('03) 13 Mad L Jour 209 (210) (DB), *Venkata Narasimha* v. *Sobhanadri.*

('14) 1 AIR 1914 Bom 152 (153) : 38 Bom 240 : 23 Ind Cas 786 (DB), *Sitaram* v. *Sadhu.*

Section 106—Note 31

1 †('23) 10 AIR 1923 Cal 524 (527) : 72 Ind Cas 98 (DB), *Bijoi Chandra* v. *Howrah Amta Light Ry. Co., Ltd.*

('23) 10 AIR 1923 Cal 63 (65) : 49 Cal 345 : 68 Ind Cas 993 (DB), *Jogendra Krishna* v. *Kurpal Harshi and Co.*

† (1910) 1 K B 622 (626) : 79 L J K B 389 : 102 L T 187, *Gray* v. *Owen.*

2. ('68) 9 Suth W R 213 (214) (DB), *Ruff* v. *Stokoe.*

3. ('99) 1 Bom L R 739 (741, 742) (DB), *Mahomadally* v. *Campbell.*

Section 106—Note 32

1. ('14) 1 AIR 1914 All 1 (2) : 22 Ind Cas 7, *Munnalal* v. *Buchchu Lal.*

2. ('24) 11 AIR 1924 Lah 643 (643, 644) : 75 Ind Cas 1034, *Rure Khan* v. *Ghulam Muhammad.* (Double rent may be awarded as compensation.)

[See ('98) 22 Bom 348 (354) (DB), *Beairamgiri* v. *Vasudeo.* (Notice by lessee determines lease though possession not given up —Lessee liable for damages for failure to give back possession.)

('28) 15 AIR 1928 Lah 554 (555) : 9 Lah 576 : 109 Ind Cas 90 (DB), *Mul Raj* v. *Indar Singh.* (The whole circumstances of the tenancy and the suffciency in point of time of the notice vacate the land may properly be taken into consideration. 1904 Pun Re No. 5 relied on.)

('21) 8 AIR 1921 Pat 341 (341) : 60 Ind Cas 72 (DB), *Bisseswar Lal* v. *Rup Kishore.* (Quantum of damages depends upon the rent which the plaintiff could have got from another tenant.)

('23) 10 AIR 1923 Lah 281 (282) : 75 Ind Cas 490, *Shib Dayal* v. *Dhampat Rai.* (Lease providing for payment of enhanced rent if lessee fails to vacate on notice—Enhanced rent for one month awarded as damages.)

('28) 15 AIR 1928 Cal 436 (438) : 110 Ind Cas 715 (DB), *Suresh Chandra* v. *Kanti Chandra.* (It is open to the Court to assess damages at a rate which it thinks to be fair.)]

Where a notice to quit given by a lessor to the lessee is coupled with a demand of rent at a higher rate if the lessee should continue in possession after the date fixed in the notice, the question arises whether and in what cases the lessee will be liable for rent at the enhanced rate if he continues in possession. Such cases may be broadly divided into two classes :

(1) Those in which the notice to quit is valid and terminates the tenancy on the date mentioned therein.

(2) Those in which the notice is not valid.

In the *first* class, the demand of rent at higher rate is virtually an offer of a fresh tenancy on new terms. In such cases, the question will be whether the tenant has accepted the offer of such new tenancy. If he has done so, he will be liable for the enhanced *rent*. But, if he has not accepted the offer, he will not be liable for the enhanced *rent*.[3] But he will be liable for mesne profits and damages on the principles mentioned above.[4]

Does the continuation in possession after the date fixed in the notice to quit amount by itself, to an acceptance by the tenant of the offer of a new tenancy on different terms in such cases ? There is a conflict of decisions on this question. One view is that a new tenancy is not created *ipso facto* by the continuation of the tenant in possession in such cases.[5] The opposite view has been taken in the undermentioned cases.[6]

In the *second* class, the lease will continue to be in force even after the date fixed in the notice and there will be no question of the offer of any *fresh* tenancy on new terms. In such cases the question will be whether there is a valid contract for the *variation* of rent. According to the Oudh Chief Court[7] even if the notice to quit is invalid, the continuance in possession of the tenant after the date fixed in the lease without protesting against the proposal to enhance rent will amount to a binding agreement to pay such enhanced rent. This view is not accepted by the Patna and Nagpur High Courts.[8] It is submitted that the Oudh view is not correct.

3. ('37) 24 AIR 1937 All 36 (38) : 166 Ind Cas 897 (DB), *A. P. Bagchi* v. *Mrs. F. Morgan.*

('33) 20 AIR 1933 Oudh 465 (466) : 9 Luck 112 : 145 Ind Cas 647 (DB), *Mahomed Noor* v. *Ashig Beg.* (Tenant protesting against enhancement of rent—He is not liable for enhanced rent.)

4. ('24) 11 AIR 1924 Lah 643 (643, 644) : 75 Ind Cas 1034, *Rure Khan* v. *Ghulam Muhammad.* (Double rent standard allowed as measure of compensation.)

5. (1900-02) 1 Low Bur Rul 82 (83), *Maung Po yin* v. *Mamoojee Moosaji,* (Tenant not liable for enhanced rent but for mesne profits and damages.)

('04) 1904 Pun Re No. 5, P. 27 (30) : 1904 Pun L R No. 87 (DB), *Pirbhu Dayal* v. *Ramchand.* (It will depend upon the facts disclosed in each case, whether the tenant is to be presumed to have accepted the terms offered.)

†('21) 8 AIR 1921 All 194 (194, 195) : 43 All 330 : 60 Ind Cas 842 (DB), *Sham Das* v. *Bahadur Singh.* (In absence of anything to show acceptance of the new terms, tenant can be sued in ejectment.)

6. ('34) 21 AIR 1934 All 115 (116, 117) : 153 Ind Cas 432, *Madan Mohan* v. *Bobra Ram Lal.*

('25) 12 AIR 1925 Oudh 189 (190) : 28 Oudh Cas 77 : 82 Ind Cas 585, *S. Burge* v. *Md. Inamullah Khan.*

†('33) 20 AIR 1933 Oudh 463 (465) : 9 Luck 112 : 145 Ind Cas 647 (DB), *Mohammad Noor* v. *Ashiq Beg.*

('40) 27 AIR 1940 Nag 140 (141) : 189 Ind Cas 895, *Nandlal* v. *Anant Govind.*

(1828) 3 Car & P 432 (433) : 33 R R 683 : 172 E R 489, *Roberts* v. *Hayward.*

[*See also* ('11) 11 Ind Cas 270 (272, 273) (DB) (All), *Scott* v. *Jotis Sarup.* (In this case there was a contract, after the notice to quit, under which the lessee agreed to vacate by a certain date—He failed to do so—*Held,* he was liable for breach of contract and the amount mentioned in the notice to quit might be awarded as damages.)]

7. †('33) 20 AIR 1933 Oudh 465 (465) : 9 Luck 112 : 145 Ind Cas 647 (DB), *Mohammad Noor* v. *Ashiq Beg.* (Principle applies to the converse case of a tenant proposing a reduction of rent.

('26) 13 AIR 1926 Oudh 79 (80) : 89 Ind Cas 578, *Baboo Lal* v. *Mirza Md. Askari.*

8†('221) 8 AIR 1921 Pat 334 (335) : 62 Ind Cas 421, *Farzand Ali* v. *Motilal Choudhry.*

('40) 27 AIR 1940 Nag 140 (141) : 189 Ind Cas 895, *Nandlal* v. *Anant Govind.*

Scction 106—Note 33

1. ('19) 6 AIR 1919 Mad 1186 (1187) : 43 Ind Cas 210 (DB), *Manikkam Pillai* v. *Rathnasami Nadar.*

('19) 6 AIR 1919 Lah 31 (31, 32) : 1 Lah 241 : 53 Ind Cas 865, *Parbhu Ram* v. *Tekchand.*

33. Notice to quit—Who can give.—Under this section a lease can be determined by a notice to quit either by the lessor or the lessee. The expression "lessor" will include any person who would be entitled to the possession of the property on the termination of the lease.[1] (See also Note 35.) Similarly, the term "lessee" will include any person in whom the leasehold interest is vested for the time being.

34. Who can give notice to quit—Co-lessors.—In the case of co-lessors, who are joint tenants, the rule under the English law is that any one of them can put an end to the tenancy by giving a notice to quit.[1] This principle was also applied in the undermentioned decision in India.[2] The English view is based on the theory that a tenant holds the premises only so long as he and the cosharer landlords *all* agree.[3] But according to the general view in India, a lease cannot be determined by notice by one or some of the co-lessors alone. This view is based on the theory that the relationship created by contract with several joint landlords continues, until there exists a new and complete volition to change it.[4] One co-lessor cannot give a notice to quit even as to his own share in the property.[5] On the above principles, even where a tenant has incurred the liability to have his lease forfeited under S. 111, the lease cannot be determined, except where all the co-lessors concur in doing so.[6]

But, where one cosharer landlord has been acting as *manager* on behalf of all the cosharers, he can give a valid notice to quit on behalf of all.[7] This is on the

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Section 106—Note 34

1†('17) 4 AIR 1917 Cal 621 (624) : 34 Ind Cas 221 (SB), *Cassim Ahmed* v. *Eusuf Haji*. (See the English authorities cited in this decision.)
('08) 35 Cal 807 (811) : 7 Cal L Jour 483 (DB), *Gopal Ram* v. *Dhakeshwar Pershad*.
('11) 9 Ind Cas 110 (113) (DB) (Cal), *Surendra Nath* v. *Krishna Sakhi*.
(1842) 66 R R 867 (869) : Car & M 280, *Alford* v. *Vickery*.
(1830) 1 B & Ad. 135 (141, 142) : 8 L J (O S) KB 369 : 109 ER 738, *Doe d. Ashn* v. *Summerset*.
[See however (1871) 5 H L 134 (146) : 20 W R (Eng) 150, *Liddy* v. *Kennedy*. (Notice must be by all the persons who have acquired an interest in the reversion.)]
2. (87) 11 Bom 644 (647, 648), *Ebrahim Pir Mahomad* v. *Cursetji. Sorabgi* (Suit on the original side of the High Court parties to which were a Hindu, a Mahomedan and a Parsi.)
[*See also* ('05) 29 Mad 29 (34) (DB), *Appa Rao* v. *Prattipati Ramayya*. (Subrahmania Ayyar, Offg. C. J.—A tenant in common may have ejectment to the extent of his interest on proper notice to quit—See *Cutting* v. *Derby*, (1776) 2 W Bl 1077 and *Doe d. David Whayman* v. *Chaplin*, 3 Taunton 119 (120.))]
3. ('17) 4 AIR 1917 Cal 621 (624) : 34 Ind Cas 221 (SB), *Cassim Ahmed* v. *Eusuf Haji*.
4. *('08) 35 Cal 807 (811) : 7 Cal L Jour 483 (DB), *Gopal Ram* v. *Dhakeshwar Pershad*.
†('81) 7 Cal 414 (417, 418) : 9 Cal L Rep 76 (DB), *Radha Proshad* v. *Esuf*.
('35) 22 AIR 1935 Bom 262 (263) : 156 Ind Cas 898, *Vagha* v. *Manilal*. (Suit to recover rent on a new basis of calculation.)
('88) 15 Cal 40 (46, 47) (DB), *Harendra Narain* v. *Moran*.
('11) 9 Ind Cas 110 (113) (DB) (Cal), *Surendra Nath* v. *Krishna Sakhi*.
('10) 5 Ind Cas 277 (277) (Cal), *Thakur Ram* v. *Shakroo Mian*.
('71) 16 Suth W R 138 (139) (DB), *Alum Manjee* v. *Ashad Ali*.
('35) 22 AIR 1935 Cal 577 (577) : 157 Ind Cas 1115, *Panchu Charan* v. *Benode Behari*.
†('79) 3 Bom 23 (24, 25) (DB), *Balaji* v. *Gopal*.
('07) 7 Cal L Jour 251 (260, 261) (DB), *Tapurah Hossein* v. *Gopi Narayan*.
†('05) 29 Mad 29 (32, 33, 34) (DB), *Appa Rao* v. *Prattipati Ramayya*.
('20) 7 AIR 1920 Cal 513 (514) : 57 Ind Cas 895, *Prianath Naik* v. *Promatha Nath*.
('75) 12 Bom H C R (A C) 85 (87) (DB), *Krishnarav v. Govind*.
Also see S. 111, Note 26.
[See however ('16) 3 AIR 1916 Cal 906 (907) : 34 Ind Cas 56 (DB), *Karamat Ali* v. *Hanuman Das*. (Co-owner sending the notice, not on his own behalf but only as being in charge of sending notices on behalf of others and also verbally asking the tenant to vacate the property—*Held*. notice sufficient.)]
5. ('04) 31 Cal 786 (790) : 8 Cal W N 325 (DB), *Gholam Mohiuddin* v. *Khairan*.
†('20) 7 AIR 1920 Cal 513 (515) : 57 Ind Cas 895, *Prianath Naik* v. *Promatha Nath*.
6. ('81) 7 Cal 470 (473) : 9 Cal L R 26c (DB), *Reasut Hossein* v. *Charwar Singh*.
('08) 35 Cal 807 (811) : 7 Cal L Jour 483 (DB), *Gopal Ram* v. *Dhakeswar Pershad*.
7. ('35) 22 AIR 1935 Bom 219 (222) (DB), *Devji Arjan* v. *Bhoja Vaija*.
(1828) 6 L J (O S) K B 345 (345) : 2 Man & Ry (KB) 433 *Doe d. Elliott* v. *Hulme*.
[*But see* ('75) 12 Bom H C R (AC) 85 (87) (DB), *Krishnarav* v. *Govind*. (Where a suit was brought by one of two cosharers to recover land from a tenant, not only in the absence of, but against the express desire of, the other cosharer, held that the suit was not maintainable, and that the plaintiff could only sue jointly with his cosharer though

principle of agency. (See Note 38.) Similarly, in the case of a lease of property belonging to a Hindu joint family a notice to quit by the manager of the family is enough.[8]

Where the tenant has dealt with one co-owner as the sole owner and sole landlord and by so doing is estopped from denying his title, such co-owner can give him notice to quit and sue him in ejectment.[9]

Where a person in co-owner with others with regard to one property and a sole owner of another property and both properties are separately let to the same tenant, such co-owner can give a notice to quit with regard to the separate property.[10]

The principle that the concurrence of all cosharers is necessary for a suit for ejectment by determining a tenancy does not apply to a suit for ejectment against a trespasser.[11] Similarly, suit for ejectment can be brought against a tenant by sufferance (i. e., a tenant who holds over after the determination of his tenancy without the assent of the landlord) by one of the cosharer landlords alone.[12] The reason is that such a tenant is no better than a trespasser in the eye of the law. (See S. 105, Note 37.)

Where a notice to quit is given by all the cosharer landlords, the tenancy will be determined on the expiration of the notice. Hence, after such expiration the tenant will be only a tenant by sufferance and a suit for ejectment can be brought against him by one or some of the cosharers alone.[13]

It has been held that, except where there is a special provision of law to the contrary, one co-owner cannot sue in respect of the common property in *his own name* on behalf of all.[14]

One cosharer landlord cannot sue for his own share of the rent, unless there is an agreement for the payment of rent separately to such landlord.[15] One cosharer alone cannot enhance the rent of the holding or sue for enhancement of such rent,[16] except where the rent has been paid separately to the cosharer landlord.[17]

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the plaintiff was sole manager of the joint estate.)]

8. *See* ('19) 6 AIR 1919 Lah 304 (305) : 1919 Pun Re No. 34 : 51 Ind Cas 121, *Muharram Ali* v. *Bandsi Lal.*

9. †('07) 7 Cal L Jour 257 (260, 261) (DB), *Tapurah Hossein* v. *Gopi Narayan.*
('05) 29 Mad 29 (35) (DB), *Appa Rao* v. *Prattipati Ramayya.*
[*See also* ('19) 6 AIR 1919 Lah 304 (305) : 1919 Pun Re No. 34 : 51 Ind Cas 121, *Muharram Ali* v. *Bansi Lal.* (Property belonging to *A, a Hindu,* leased by *B. A's* son —B is sole lessor and he can give notice.)]

10. ('35) 22 AIR 1935 Cal 577 (578) : 157 Ind Cas 1115, *Panchu Charan* v. *Benode Behari.*

11. ('20) 7 AIR 1920 Cal 513 (515) : 57 Ind Cas 895, *Brianath Naik* v *Promatha Nath.*
†('81) 7 Cal 414 (417, 418) : 9 Cal L R 76 (DB), *Radha Proshad* v. *Esuf.*
('88) 15 Cal 40 (46, 47) (DB), *Harendra* v. *Moran.*
('11) 9 Ind Cas 110 (113) (DB) (Cal), *Surendranath* v. *Krishna Sakhi.*

12. †('27) 14 AIR 1927 Bom 192 (194) : 51 Bom 149 : 101 I. C. 35 (DB), *Maganlal* v. *Bhudar Purshottam* (The reason of the rule which requires one fresh and common volition of co-owners to put an end to that which commenced under their common volition does not apply to a case where what commenced under a common volition has come to an end and where the person concerned requires a fresh common volition to continue in possession.)
('08) 35 Cal 807 (811) : 7 Cal L Jour 483 (DB), *Gopal Ram* v. *Dhakeswar Pershad.*
[*But see* ('10) 5 Ind Cas 277 (277) (DB) (Cal), *Thakur Ram* v. *Shakroo Mian.* (Submitted wrong.)]

13. ('34) 21 AIR 1934 Cal 127 (128) : 149 Ind Cas 559 (DB), *Jarman Gomez* v. *Ram Kumar.* (Other cosharers made *pro forma* defendants.)
('86) 13 Cal 75 (78) (DB), *Dwarka Nath* v. *Kali Chunder.* (Suit brought by all—Withdrawal by one—This will not prevent the remaining plaintiffs from obtaining a decree for possession of their shares of the land.)

14. †('07) 7 Cal L Jour 257 (260, 261) (DB), *Tapurah Hossein* v. *Gopi Narayan.*
('96) 21 Bom 154 (158, 159) (DB), *Balkrishna* v. *Moro.*

15. ('79) 4 Cal 96 (101, 102) : 2 Cal L R 370 (FB), *Guni Mahomed* v. *Moran.*
('81) 7 Cal 150 (152) : 8 Cal L R 445 (DB), *Jadoo Shat* v. *Kadumbinee.*

16. ('79) 3 Bom 23 (24, 25) (DB), *Balaji* v. *Gopal.*
†('35) 22 AIR 1935 Bom 262 (263) : 156 Ind Cas 898, *Vagha* v. *Manilal.*
†('79) 4 Cal 96 (102, 103) : 2 Cal L R 370 (FB), *Guni Mahomed* v. *Moran.* (One cosharer cannot enhance the rent of his share, such enhancement being inconsistent with the continuance of the lease of the entire tenure)

17. ('83) 9 Cal 864 (865) (DB), *Bidhu Bhushun* v. *Komaraddi.*

Joint Receivers.

A notice to quit given by one of two joint Receivers is not valid. The reason is that the object of the Court in appointing two joint Receivers is that the estate may have the benefit of the opinion of both as regards its management. Hence, one of the Receivers cannot delegate his duties to the other.[18]

Co-trustees of religious or charitable endowment.

A notice to quit by one only of two Urlans of a Malabar Devaswom is invalid.[19]

35. Who can give notice to quit—Assignment by lessor.—As seen in Note 33, the term "lessor" in this section includes any person who would be entitled to the possession of the property on the termination of the lease. Hence a subsequent lessee of the property for a term of years can give a notice to quit under this section.[1] (See S. 109.) A notice to quit must be given by all persons who have acquired an interest in the reversion.[2]

Where the lessor has assigned his interest in the property to another, the latter can give notice to quit, even though a notice of the assignment has not been given to the lessee.[3] Where the lessor gives notice to quit and then assigns his interest to another the assignee can take advantage of the notice.[3a] After the landlord has assigned the reversion to another, he cannot issue a notice to quit under this section.[4] But, where under the terms of the assignment the landlord has undertaken to recover possession from the tenant and hand over the property to the transferee, a notice to quit by the assignor even after the assignment will be valid and effective.[5] The reason is that in such a case the right to the reversion must be deemed to be vested in the assignor for the limited purpose of recovering possession from the tenant. Where a person entered into a contract to purchase the lessor's interest but before the purchase was completed gave notice to quit to the tenant who acting upon the notice vacated the premises, it was held that the purchaser was estopped from disputing the validity of the notice on the ground that he had no power to determine the tenancy on the date when the notice to quit was given.[6]

36. Who can give notice—Miscellaneous.—A Receiver appointed by the Court can, if so authorised by the order of appointment, issue a notice to quit against a tenant of the property of which he has been appointed Receiver.[1] As to the power of joint Receivers, see Note 34.

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18. ('17) 4 AIR 1917 Cal 621 (623, 624) : 34 Ind Cas 221 (SB), *Cassim Ahmed* v. *Eusuf Haji.*

19. ('24) 11 AIR 1924 Mad 771 (772) : 80 I. C. 139 (DB), *Kannan Kutty* v. *Velu.*

[*See however* ('13) 18 Ind Cas 77 (78, 79) (DB) (Mad), *Raja Ram* v. *Ram Roy.* (Legal arrangement between co-trustees of a chatram under which they were in management of separate properties—Notice by one with regard to property under his separate management is valid.)]

Section 106—Note 35

1. †('19) 6 AIR 1919 Mad 1186 (1187) : 43 Ind Cas 210 (DB), *Manikkah* v. *Rathnasami.*

('19) 6 AIR 1919 Lah 31 (32) : 1 Lah 241 : 53 Ind Cas 865, *Parbhu Ram* v. *Tek Chand.*

(1903) 90 L T 89 (90), *Wordsley Brewery Co.* v. *Halford.* (Grant of lease passes the reversion and not merely the attornment.)

[*See also* ('08) 12 Cal W N 1059 (1063), *Adolpha Shrager* v. *Emma Price.* (*Interesse termini* gives an immediate right of entry to the owner thereof and entitles him to give a notice to quit.)

('09) 1 Ind Cas 66 (67) (DB) (Cal), *Chandra Sarkar* v. *Anil Bandhu.* (Subsequent lessee can give notice to quit to a prior tenant at will.)]

2. (1871) L R 5 H L 134 (146) : 20 W R (Eng) 150, *Liddy* v. *Kennedy.* (Lessor executing a deed by which he constituted himself and his brother tenants in common with regard to the leased property—Both must join in giving the notice.)

3. ('19) 6 AIR 1919 Lah 31 (32) : 1 Lah 241 : 53 Ind Cas 865, *Parbhu Ram* v. *Tek Chand.*

3a. (1842) 61 R R 339 (349) : 3 Q B 627 : 11 L J Q B 321 : 114 E R 647, *Doe d. Egremont* v. *Forwood.*

4. (1903) 90 L T 89 (90), *Wordsley Brewery Co.* v. *Halford.* (Landlord granting subsequent lease—Only subsequent lessee, and not landlord, can give notice to quit.)

5. ('24) 11 AIR 1924 Mad 904 (905) : 82 Ind Cas 956, *Raman Menon* v. *Collector of Madras.*

6. (1933) 102 L J Ch 133 (140) : 149 L T 101 : 1 Ch 480, *Farrow* v. *Orttawell.*

Section 106—Note 36

1. ('91) 18 Cal 477 (480) (DB), *Huri Das* v. *Macgregor.*

A *cestui que trust* cannot give a notice to quit in regard to trust property. It is only the trustee or his agent that can do so. A *cestui que trust* is not the agent of the trustee.[2]

The trustee of a religious society can give notice to quit to a tenant of property belonging to the society.[3] As to the power of joint trustees, see Note 34.

37. **Notice to quit—To whom to be given.**—Where a notice to quit is given by the lessor, it is to be given to the lessee or to the person in whom the leasehold interest may be vested. Where the notice is given by the lessee, it is to be given to the lessor or to any other person who may be entitled to the immediate reversion in the demised property.

Co-lessees.

Where the leasehold interest is not vested in a single person but in joint tenants the notice to quit must be given to all the joint tenants.[1] But proof of service of such notice on one joint tenant will be *prima facie* evidence of such notice having reached all the joint tenants.[2] But this presumption will only arise where a notice to quit has been prepared, addressed and sent to all the joint tenants. Where no notice was addressed to one of the joint tenants at all, the presumption cannot arise. In such a case the mere service of notice on the other joint tenants will not be sufficient to determine the lease.[3]

Where the joint tenants constitute members of a joint Hindu family living together in the same house, the service on one of them, at their residence, of a notice addressed to all of them is enough.[4] In such a case, it is not necessary that separate copies of the notice must be served.[5]

Where a lease has been granted to one member of a joint Hindu family, the lease can be determined by a notice to quit issued to such member alone and it is not necessary to serve a notice on all the members of the family.[6]

Lessee's heirs.

Where a lessee dies leaving a number of heirs, all the heirs must be served with a notice to quit if the lease is to be determined.[7] Where there are several co-lessees, one of whom dies, a notice to quit to the survivors alone is not enough. A notice to quit must be served on the heirs of the deceased also. Otherwise the notice will not be sufficient to determine the lease.[8]

Where a sole tenant dies leaving several heirs *separate* notices to quit served on all of them are enough to determine the lease. It is not necessary that there must be a *single* notice to all of them.[9]

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2. (1912) 2 Ch 504 (511) : 81 L J Ch 710 : 107 L T 120, *Stait* v. *Fenner.*
3. ('04) 8 Cal W N 918 (922) (DB), *Parmanand Karan* v. *Baptist Mission Society.*

Section 106—Note 37

1. †('18) 5 AIR 1918 P C 102 (110, 111) : 46 Cal 458 : 45 Ind App 222 : 48 Ind Cas 277 (PC), *Haribar Banerji* v. *Ramshashi.*
('25) 12 AIR 1925 Cal 752 (753, 754) : 87 Ind Cas 708 (DB), *Bejoy* v. *Kali.*
[*But see* ('06) 30 Bom 137 (146) : 7 Bom L R 735 (DB), *Secy. of State* v. *Wamanrao.* (Joint occupation by three executors of the premises of deceased tenant—Notice to quit served only on one of them is enough.)]
2. ('45) 32 AIR 1945 Nag 255 (257) ; ILR (1945) Nag 629 : (DB), *Mohanlal* v. *Governor-General in Council.* [Joint tenants—Noticee to quit addresseed to all and served on one others are bound by it.
*('18) 5 AIR 1918 P C 102 (110, 112) : 46 Cal 458 : 45 Ind App 222 : 48 Ind Cas 277 (PC), *Haribar Banerji* v. *Ramshashi.*
('29) 16 AIR 1929 Cal 651 (653) : 57 Cal 10 : 120 Ind Cas 455 (DB), *Bodardoja* v. *Ajijudin.*
('35) 22 AIR 1935 Bom 247 (251) : 156 Ind Cas 1020 (DB), *Vaman* v. *Khanderao.*
(1806) 7 East 551 (553) : 8 R R 670 : 3 Smith 517 : 103 E R 213, *Doe d. Bradford* v. *Watkins.*
3. ('25) 12 AIR 1925 Cal 752 (753, 754) : 77 Ind Cas 708 (DB), *Bejoy* v. *Kali.*
4. (1900) 4 Cal W N 572 (573) (DB), *Rajoni Bibi* v. *Hafisonnissa Bibi.*
5. (1900) 4 Cal W N 572 (574) (DB), *Rajoni Bibi* v. *Hafisonnissa Bibi.*
6. ('97) 1897 Bom P J 188 (188) (DB), *Vishwanath* v. *Venkata Charya.*
7. ('40) 27 AIR 1940 Cal 89 (91) : ILR (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali* v. *Jamini Lal Roy.*
8. ('40) 27 AIR 1940 Cal 89 (91) : ILR (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali* v. *Jamini Lal Roy.*
9. ('02) 6 Cal W N 134 (137, 138) (DB), *Ismail Khan Mahomed* v. *Kali Krishna.*

Lessee's assignee.

The assignee of a lease is entitled to a notice under this section.[10] But a sub-lessee is not entitled to any notice before he can be ejected by the superior lessor. The reason is that there is no privity between the two.[11] For the same reason as long as the original lease continues the lessor cannot determine the sub-lease by giving a notice to quit to the sub-lessee.[12] An assignee of a lease, on the other hand, stands in the shoes of the assignor, i.e., the original lessee and there is privity between such assignee and the lessor. Where a tenancy is purchased by one person benami in the name of another, a notice to the real purchaser is enough to determine the lease. A notice to the benamidar is not necessary.[13]

38. Notice to or by agent.—This section is subject to the general law of agency. Hence a notice to quit can be given by[1] or to[1a] a duly authorised agent so as to bind the principal. It is conceived, however, that when a notice is given by some person other than the lessor or lessee himself, the circumstances must show that the party to whom the notice is given knows that the person giving the notice is the agent of the other party. Otherwise, the notice will lack the essential quality of a notice to quit, namely, the quality of informing the person, to whom the notice is given, that the *other party* to the lease intends to terminate the lease by a certain date. But it has been held in England that where a notice is given by a general agent, his authority need not appear on the face of the notice.[2] This is perhaps because in such a case the party served with notice may be presumed to have notice of the authority of the person who actually gives the notice. A receiver is an office of the camp and as such cannot serve a notice to quit on the lessee. Where, however, he is sues the notice with the consent of the lessor he acts as the agent of the lessor and hence in such a case the notice is valid.[2a]

Where an unauthorised person gives a notice to quit on behalf of another, the notice will be invalid. It cannot be ratified by the person on whose behalf it purports to be given.[3] This is expressly provided for under the Contract Act : see S. 200 of that Act and illustration (b) to that section.

An authority to give a notice to quit need not be in writing.[4] The authority to sue in ejectment includes an authority to give a notice to quit.[5]

The provision in the second paragraph of the section that a notice to quit must be signed by or on behalf of the person giving the notice only refers to the *signature* to the notice. The provision does not refer to the *giving* of the notice, i. e., the *decision* to give the notice. The agent's authority under the general law relates to the *decision* to give notice.

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10. ('07) 5 Cal L Jour 205 (207) (DB), *Habul* v. *Kashimani Debi.*

(1826) 30 R R 244 (245) : 6 B & C 41 : 9 Dow & Ry K B 30 : 108 E R 368, *Doe d. Morris* v. *Williams.* (Notice on assignee of original tenant held valid.)

11. ('97) 1897 Bom P J 188 (188) (DB), *Vishwanath* v. *Venkata Charya.*

12. (1811) 12 R R 507 (508) : 104 E R 590 : 14 East 234, *Pleasant d. Hayton* v. *Benson.*

13. ('26) 13 AIR 1926 Cal 634 (637) : 92 Ind Cas 963, *Gopal* v. *Satya.*

Section 106—Note 38

1. ('35) 22 AIR 1935 Cal 577 (578) : 157 Ind Cas 1115, *Panchu* v. *Benode.*

(1847) 11 Q B 127 (129) : 75 R R 304 : 10 L T (os) 184 : 116 E R 423, *Doe d. Birmingham Canal Co.* v. *Bold.* (Notice given by an authorised secretary of a corporation is valid.)

1a. (1850) 84 R R 436 (443) : 20 L J C P 26 : 138 E R 11, *Doe d. Prior* v. *Ongley.*

2. (1868) 3 Q B 567 (572), *Jones* v. *Phipps.*

2a. ('47) 34 AIR 1947 L H 388 (400) (DB), *Vinod Sagar* v. *Vishmabhat.*

3. ('17) 4 AIR 1917 Cal 621 (624) : 34 Ind Cas 221 (SB), *Cassim* v. *Eusuf.*

(1830) 10 B & C 626 (632, 633) : 34 R R 522 : 8 L J K B 297 : 109 E R 583, *Doe d. Mann* v. *Walters.* (Agent giving notice must have authority to give it at least at the time when it begins to operate—Subsequent recognition of authority will not make the notice good.)

4. ('29) 16 AIR 1929 Cal 651 (652, 653) : 57 Cal 10 : 120 I. C. 455 (DB), *Bodardoja* v. *Ajijuddin.*

5. ('29) 16 AIR 1929 Cal 651 (653) : 57 Cal 10 : 120 Ind Cas 455 (DB), *Bodardoja* v. *Ajijuddin.*

As regards the authority of an agent to *receive* a notice, the section proivdes that a notice must be sent by post or served personally on the party to be bound by the notice. If the notice is to be served on any other person so as to bind the person for whom the notice is meant, the service must be on one of his family or servants at his residence. This provision does not mean that a notice cannot be directed to an *agent* of the other party to the lease who does not reside with him. The provision only means that in serving a notice on the agent or the principal, the procedure laid down in the section must be followed.

Under the general law, a notice served on an agent who is duly authorised to receive it will bind the principal, although such notice may not actually reach or be brought to the knowledge of the principal.[6] Under S. 229 of the Contract Act, a notice given to an agent in the course of the business transacted by him for the principal shall, as between the principal and third parties, have the same legal consequence as if it had been given to the principal. This provision applies also to notices to quit.[7]

As regards the authority to take delivery of a notice quit sent by post or to *sign* the postal acknowledgment form for such notice sent by registered post, see Note 45.

39. **Period of notice.**—This section requires a notice of six months in the case of a yearly tenancy and a notice of fifteen days in the case of a monthly tenancy. The parties to a lease may provide for a shorter or longer notice than this by special contract, in which case, the provisions of this section will not apply. But in any case, if the period of the notice is shorter than that prescribed (by this section or contract, as the case may be) such notice will not be sufficient to terminate the lease.[1] But the notice may be for a longer period than required.[2]

Where a notice falls short of the requisite period, the mere fact that the tenant is actually allowed to hold the property for the full length of the period for which notice ought to have been given and a suit for ejectment against him is brought only afterwards, will not cure the defect in the notice so as to make it effectual for the purpose of terminating the tenancy.[3] But where the party to whom a notice is given accepts it and acts upon it, the fact that it is not of the requisite length will not matter.[4] In such a case, the lease will be terminated on the principle of surrender. (See section 111.)

To terminate a tenancy under this section the notice must be of fifteen *clear* days or six *clear* months according as the tenancy may be a monthly or a yearly one.[5]

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6. ('18) 5 AIR 1918 PC 102 (110, 111, 112) : 46 Cal 458 : 45 Ind App 222 : 48 Ind Cas 277 (PC), *Harihar Banerji* v. *Ramsashi Roy.*
('27) 14 AIR 1927 Sind 24 (25) : 97 Ind Cas 577, *Horoon* v. *Meharali.*
7. ('27) 14 AIR 1927 Sind 24 (25) : 97 Ind Cas 577, *Haroon* v. *Meharali.*

Section 106—Note 39

1. ('93) 3 Mad L Jour 222 (223) (DB), *Pranambal Achee* v. *Palaniapa Mudaliar.*
('29) 16 AIR 1929 Nag 332 (333) : 124 Ind Cas 256, *Mulchand Balbhaddar* v. *Municipal Committee, Gondia.*
('25) 12 AIR 1925 Rang 206 (206) : 86 Ind Cas 512, *F. Morgan* v. *Ahmed Moola.*
('21) 8 AIR 1921 Pat 334 (335) : 62 Ind Cas 421, *Farzand Ali* v. *Motilal.*
('08) 12 Cal W N 724 (725) (DB), *Bhola Nath* v. *Durga Prosad.*
2. ('45) 32 AIR 1945 Pat 385 (385) : 24 Pat 449 (DB), *Firm Ganesh Das Ram Gopal* v. *Jamuna Das.* [Notice served on the 7th of a month expiring on 31st of the month is a valid notice.]
†('33) 20 AIR 1933 Cal 260 (262) : 141 Ind Cas 833 (DB), *Secy. of State* v. *Madhu Sudan.*
('32) 19 AIR 1932 PC 279 (280) : 59 Ind App 414 : 141 Ind Cas 514 (PC), *Benoy Krishna Das* v. *Salsiccioni.*
('20) 7 AIR 1920 Cal 361 (361) : 58 Ind Cas 835 (DB), *Gaya Nath* v. *Anukul Chandra.*
†('37) 24 AIR 1937 All 36 (39) : 166 Ind Cas 897 (DB), *A. P. Bagchi* v. *Mrs. F. Morgan.*
(1894) 7 CPLR 150 (151), *Upasia* v. *Jago.*
3. ('49) 36 AIR 1949 PC 90 (95) (PC), *Gooderham* N *Worts* v. *C. B. Corporation.* [Tenant under year to year tenancy terminable by six months notice at 15th May in any year—On 26-1-1938 tenant giving notice to terminate tenancy as from 15th May, 1938—Notice held was ineffectual to terminate tenancy either at 15-5-1938 or 15-5-1939.]
('91) 15 Bom 407 (411) (DB), *Vithu* v. *Dhondi.*
4. ('25) 12 AIR 1925 Rang 206 (206) : 86 Ind Cas 512, *F. Morgan* v. *Ahmed Moolla.*
5. (1900) 28 Cal 118 (122) : 4 Cal W N 790 (DB), *Subodini* v. *Durga Charan.*

This means that the period from the service of the notice to the time when the lease is expressed therein as terminated must not be less than fifteen days or six months as the case may be. This would require the exclusion of the day on which the notice is served but not of the day on which the tenancy is purported to be terminated.[6] The reason is that the tenant would be entitled under the notice to hold on till the midnight of such day.

Where a notice for six months in the case of a yearly tenancy and a notice of fifteen days in the case of a monthly tenancy is given it will not be bad simply because it does not appear *on the face* to be a six month's or fifteen day's notice as the case may be.[7]

Where a notice is prescribed by the contract of lease itself and consequently this section does not apply but the contract does not specify the length of the notice, it has been held that the period for which notice is to be given must be determined according to the principles of English law and that at lease a notice of six months must be given in the case of a tenancy from year to year.[8]

40. Expiring with end of year or month of tenancy.—A notice under this section must expire with the end of a year or month of the tenancy as the case may be. This means that the time at which the notice says that the tenancy is to terminate must coincide with the time at which a year or month of the tenancy (as the case may be) expires. Thus, where under a monthly tenancy the usual calendar month according to the British calendar is intended to be the month of the tenancy, a notice under this section must be for terminating the tenancy at the *end* of a calendar month. A notice which does not expire with the end of a year or month of the tenancy (as the case may be) will be invalid under this section.[1] Thus, a notice terminating the tenancy *before* the end of the current year or month of the tenancy, in which such notice is given, will be bad.[2]

Where a notice to quit under this section does not expire with the end of a month or year of the tenancy as required by this section, the mere fact that the notice is for a longer period than is required under this section[3] or that it expires *after the end*

6. ('15) 2 AIR 1915 Cal 313 (315) : 26 Ind Cas 962 (DB), *Gobinda Chandra* v. *Dwarka Nath.*
('08) 12 Cal W N 1059 (1064), *Adolphe Shrager* v. *Emma Price.*
7. (1847) 175 E R 145 (145) : 2 Car & Kir 351, *Doe d. Gorst* v. *Timothy.*
8. ('19) 6 AIR 1919 Pat 108 (111) : 50 Ind Cas 8 (DB), *Ganga Singh* v. *Chairman Dist. Board, Patna.*

Section 106—Note 40

1. ('49) 36 AIR 1949 All 173 (174), *Ganga Prasad* v. *Premkumar Kohli.* [Notice requiring defendant to vacate on 18th May 1944 or on such date as "your then current month of tenancy will end"—Tenancy commencing from 1st of every month —Notice held proper.]
('46) 50 Cal W N 461 (464), *Usharani Debi* v. *The Research Industries Ltd.* [If a monthly tenancy commences on the first of a month, the day upon which that tenancy can properly be determined is the last day of a subsequent month, and not the first day of each succeeding month.]
('45) 32 AIR 1945 Pat 385 (385) : 24 Pat 449 (DB), *Firm Ganesh Das Ram Gopal* v. *Jamuna Das.* [Where, a tenancy has commenced on the first of a month, the notice must expire with the last day of a month.]
('44) 31 AIR 1944 Cal 84 (86) : 211 Ind Cas 503 (DB), *Calcutta Landing and Shipping Co., Ltd.* v. *Victor Oil Co., Ltd.* (Month to month tenancy—Lessee taking possession on 1st June—Notice to quit to end on expiry of 1st December 1940—*Held,* notice was bad—It should have ended with a calendar month.)
* ('85) 7 All 899 (902, 903, 904) : (1885) All W N 288 (FB), *Bradley* v. *Atkinson.* (On appeal from 7 All 596.)
('26) 93 Ind Cas 643 (644) (DB) (Cal), *Khosal Chandra* v. *Brindarani.*
('96) 1896 All W N 51 (51), *Sahtawan* v. *Mohan Singh.* (7 All 899 (FB) followed.)
('98) 2 Cal W N 383 (384) (DB), *Shaik Sona Ullah* v. *Troylukho Nath.*
('28) 15 AIR 1928 Cal 392 (395) : 55 Cal 435 : 110 Ind Cas 368 (DB), *Dinanath Kundu* v. *Janki Nath.*
See ('45) 32 AIR 1945 Pat 463 (464) : 24 Pat 454 (DB), *Firm Matrumall Satnaram* v. *Mt. Rami.* [Where the tenancy was a monthly tenancy according to the sambat year and the plaintiff in his notice made it clear to the defendant that he was to vacate the premises immediately on the expiry of the month of *Baisakh* ; *Held,* that the notice complied with the provisions of S. 106 and was a valid notice.]
2. ('10) 6 Nag L R 17 (18, 19) : 5 Ind Cas 699 (700), *Udebhan* v. *Jagannath.*
(1891) 4 C P L R 32 (32), *Harlal Onkar* v. *Narain Das.*
3. ('44) 31 AIR 1944 Cal 84 (85, 87) : 211 Ind Cas 503 (DB), *Calcutta Landing and Shipping Co., Ltd.* v. *Victor Oil Co., Ltd.* (Notice expiring with end of first

of the current year or month of the tenancy will not validate the notice. Similarly, where a notice under this section does not expire with the end of a year or month of the tenancy, the mere fact that the tenant is allowed to hold on till the end of such a period and the suit for ejectment is brought against him only afterwards cannot cure the defect in the notice so as to make it effective for the purpose of terminating the tenancy.[4]

The question whether a notice to quit expires with the end of a year or month of the tenancy is one of construction of the notice in each case. In construing a notice for this purpose, the principles mentioned in Note 19 must be remembered. Under those principles the validity of a notice must not be made to depend on the "splitting of a straw" as it is put. If a notice, on a fair and rational construction, clearly expresses the intention to terminate the lease at the end of a year or month of the tenancy, it must not be held to be invalid merely because on a hypercritical examination of it there may be some reason for saying that it is not accurate.

On this principle, it is immaterial whether a notice is to quit on the last day of a month or year of the tenancy[5] or on the next day after that.[6]

Similarly, a notice requiring a yearly tenant to vacate before the expiry of the last day of the year is good, as there is no appreciable interval between the expiry of the notice and the end of a year of the tenancy.[7]

A notice to quit by the last day of a year or month of the tenancy is valid.[8] Such a notice intends to keep the lease in force till the midnight of the day mentioned.

Under the English law also, a *periodic* tenancy, such as those referred to under this section, can only be terminated by a notice expiring with the *end* of a current period of the tenancy and not at any other time.[9]

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day of next calendar month instead of with last day of month is bad.)

('20) 7 AIR 1920 All 104 (105) : 57 Ind Cas 593 (DB), *Ceoti Bibi* v. *Jagannath.*

('34) 21 AIR 1934 Cal 837 (837) : 153 Ind Cas 673, *Susil Chunder* v. *Birendrajit.*

('96) 1896 All W N 51 (51), *Sahtawan* v. *Mohan Singh.*

('98) 1898 Bom P J 206 (206, 207) (DB), *Pemraj* v. *Balchand.*

†('23) 10 AIR 1923 Cal 524 (527) : 72 Ind Cas 98 (DB), *Bijoi Chandra Singh* v. *Howrah Amta Light Railway Co., Ltd.*

('85) 7 All 899 (902, 904) : 1885 All W N 288 (FB), *Bradley* v. *Atkinson.*

4. ('85) 7 All 899 (902, 904) : 1885 All W N 288 (FB), *Bradley* v. *Atkinson.*

5. ('37) 24 AIR 1937 All 36 (38) : 166 Ind Cas 897 (DB), *A. P. Bagchi* v. *Mrs. F. Morgan.*

('32) 19 AIR 1932 P C 279 (280) : 60 Cal 389 : 59 Ind App 414 : 141 I. C. 514 (PC), *Benoy Krishna Das* v. *Salsiccioni.*

('25) 12 AIR 1925 Bom 167 (168) : 94 Ind Cas 631, *Mahomedally* v. *Haji Abdulla.*

('08) 12 Cal W N 1059 (1064), *Adolphe Shrager* v. *Emma Price.*

6. †('31) 18 AIR 1931 Mad 352 (354) : 131 Ind Cas 621, *Gnanaprakasam* v. *Vaz.*

('38) 68 Cal L Jour 411 (412), *Sudhansu Badini* v. *Narayan Chandra.*

('43) 47 Cal W N 207 (213), *Dhaniram Agarwalla* v. *Bholanath.*

('49) 36 AIR 1949 Ajmer 38 (40), *Sundar Singh* v. *Arjun Singh.* [A notice calling upon the tenant to vacate by the day following the day when the tenancy expired, is defective. A. I. R. 1931 Mad. 352, Dist.]

7. (1900) 27 Cal 570 (577, 578) : 4 Cal W N 210 (DB), *Ismail Khan Mahomed* v. *Jaigun Bibi.*

[*See also* (1946) 1 All E. L. R. 133 : 115 L J K B 113 : (1946) K B 215, *Dagger* v. *Shepherd.* [Notice to quit on or before fixed date.]]

('44) 31 AIR 1944 Bom 181 (184) : ILR (1944) Bom 361 (DB), *Ismail Dada* v. *Zuleikhabai.* (Monthly tenancy—Notice to quit "on or before" the date on which tenancy expires is good.)]

8. ('37) 24 AIR 1937 Nag 139 (140) : ILR (1937) Nag 214 : 170 Ind Cas 790, *Sheikh Nuroo* v. *meghraj Ramkaran.*

[*See also* ('47) 34 AIR 1947 Cal 244 (25) 227 Ind Cas 202 *Sabitri Sundari* v. *Jalekha Bai.* [*Month to month tenancy—Notice to quit—Notice requiring tenant to vacate as last day of month came to end hold valid.*] 8 AIR 1921 All 194 (194) : 43 All 330 : 60 Ind Cas 842 (DB). *Shankar lal* v. *Babu Ram.*

9. (1924) 1 K B 117 (125) : 93 L J K B 107 : 130 L T 26, *Queen's Club Gardens Estates, Ltd.* v. *Bignell.*

(1924) 2 K B 149 (152) : 93 L J (K B) 800 : 131 L T 568, *Precious* v. *Reedie.*

(1838) 4 M & W 198 (202, 203) : 150 E R 1401 : 7 L J Ex 312, *Goode* v. *Howells.* (Notice being intended to operate immediately cannot in law have any operation at all.)

(1809) 11 East 312 (315) : 103 E R 1024, *Doe d. Spicer* v. *Lea.* (Tenant's year ending at New Michaelmas—Notice to quit at Old Michaelmas, though given half a year before New Michaelmas, was bad, for the notice must be to quit at the end of the tenant's year.)

It must be noted that a notice may be valid under this section, although the period of notice is *longer* than is required under this section. (See Note 39.) Hence, where a notice expires with the end of a year or month of the tenancy, it is not invalidated by the fact that the period between the service of the notice and the end of such month or year exceeds fifteen days or six months. In other words, the provision in the section that a tenancy mentioned therein is terminable by a notice of fifteen days or six months expiring with the end of a month or year of the tenancy does not mean that *exactly* a period of fifteen days or six months (and not a day more) must elapse between the service of the notice and the end of a month or year of the tenancy. It only means that the notice must be for terminating the tenancy *at the end* of such a month or year and not at any other time, and that the notice must be served *at least* fifteen days or six months before the end of such period. Thus, suppose in the case of a tenancy from month to month, a month of tenancy is the usual calendar month according to the British calendar. Suppose, in such a case a notice is given on the 5th of a month terminating the tenancy at the end of the month. The notice will not be invalid merely because the notice is given more than fifteen days before the end of the month.

41. Year or month of tenancy.—A year or month of the tenancy at the end of which a notice under this section is required to expire is not the *calendar year* or month in which the notice is given. The year or month referred to is the year or month calculated with reference to the *commencement* of the tenancy.[1]

It has been held that S. 110 does not apply to periodic leases and thereafter where a month to month tenancy is expressed to commence on a certain day that day need not be excluded in computing the period of the month of the tenancy.[2] (See also S. 110, Note 1.) Where it is uncertain from what day of the month, a tenancy from month to month began, it may be presumed that it began from the 1st day of a calendar month.[3]

Though in the case of a monthly tenancy the lease-deed may be executed and the tenant may enter into possession in the middle of a calendar month, the parties may agree that the period of the tenancy should only run from the beginning of such month, i.e., from the 1st day of the month. In such cases, a month of the tenancy would coincide with the *calendar* month. Such an agreement may be express or implied. It may be implied from the date fixed for the payment of rent.[4]

(1786) 1 R R 169 (170) : 1 T R 159 : 99 E R 1029, *Right d. Flower* v. *Darby and Bristow.*

[*But see* (1922) 2 K B 95 (103, 107) : 91 L J K B 643 : 127 L T 337, *Simmons* v. *Crossley.* (Not followed in (1924) 2 K B 149.)]

(1806) 9 R R 800 (800) : 6 Esp 10 : 170 E R 814 *Doe d. Halcomb* v. *Johnson.* (The notice to quit must correspond with the commencement of the term.)

('1894) 7 C P L R 150 (151), *Upasia* v. *Jago.*

('13) 19 Ind Cas 758 (759) (All), *Jugla* v. *Har Narain Singh.*

Section 106—Note 41

1. ('44) 31 AIR 1944 Cal 84 (85, 87) 211 Ind Cas 503 (DB), *Calcutta Landing and Shipping Co., Ltd.* v. *Victor Oil Co., Ltd.* (Lease from month to month arising by implication of law under S. 106—Tenant entering into possession on 1st day of a calendar month—Notice to quit should end with a calendar month—Notice ending with the expiry of the 1st day of the next calendar month is bad.)

2. ('43) 30 AIR 1943 Bom 306 (309, 310) : I L R (1943) Bom 553 : 213 Ind Cas 48 (DB), *Utility Articles Manufacturing Co.* v. *Motilal Bombay Mills, Ltd.*

3. ('37) 24 AIR 1937 All 36 (38) : 166 Ind Cas 897 (DB), *Bagchi* v. *Morgan.*

†('06) 10 Cal W N 841 (844) (DB), *Rakhal Chandra Tewary* v. *Secretary of State for India.* (Month according to Bengali calendar.)

4. ('36) 23 AIR 1936 Oudh 306 (307) : 12 Luck 241 : 162 Ind Cas 712 (DB), *Ramji*

Where a lease expires and the tenancy is renewed under S. 116 from year to year or month to month in favour of the tenant, who holds over after such expiry, the renewed tenancy will run from the termination of the original lease. Where the original lease was for a definite term of a year or years, the lease would under S. 110, last during the whole of the anniversary of the day from which it commenced. Hence, in such cases, the tenancy by holding over will commence from the next day after such anniversary, and a month of the tenancy must be determined with reference to such commencement.[5] Thus, for instance, if a lease for four years commenced from 1st June 1921, the lease would last through the whole of 1st June 1925. If the tenant held over and the tenancy was renewed from month to month under S. 116, such tenancy must be held to have commenced on the 2nd June 1925. Hence, a month of the tenancy would, in the case, be the period from the 2nd day of any calendar month during the currency of the lease, to the 1st day of the next calendar month, both days being included. In other words, so long as the lease has not been determined, the 1st day of every *calendar* month would be the last day of a month of the *tenancy*. Hence, a notice to quit on the 1st of any calendar month would be a notice expiring with the end of a month of the tenancy.

In some decisions,[6] however, the tenancy by holding over in such cases is treated as commencing on the *anniversary* of the day on which the original lease for a term had commenced. It is submitted that such decisions overlook the provisions of S. 110 and are not correct law in view of the express decision of the Privy Council in *Benoy Krishna* v. *Salsiccioni*.[7]

42. **Calendar for calculation of time.**—The terms "month" and "year" have been defined in the General Clauses Act of 1897, S. 3, clauses (33) and (59) respectively as being reckonable according to the British calendar. These definitions are made applicable to this Act by S. 4 of the General Clauses Act. Hence, the expressions year to year, month to month, six months' notice, year of tenancy, and month of tenancy, occurring in this section must be understood and interpreted according to the British calendar. But this rule will not apply where there is a contract to the contrary. Such contract may be express or implied. Thus, there may be an implied contract that a year to year lease must be reckoned according to the Bengali calendar and not according to the British calendar. In such a case, a notice of six months expiring with a year of the tenancy calculated according to the Bengali calendar will

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Lal v. *Secy. of State.* (The general practice is that when a house is occupied in the middle of a month and it is intended that tenancy should be by the calendar month, rent is paid separately for the days during which the house has been occupied prior to the first of the following calendar month.)

('07) 30 Mad 109 (111) : 16 Mad L Jour 533 (DB), *Arunachella Chettiar* v. *Ramiah Naidu.*

('02) 5 Oudh Cas 113 (114), *Govind Prasad* v. *Asmat Ara Bagam.*

[*See also* (1806) 9 R R 800 (800) : 6 Esp 10 : 170 E R 814, *Doe d. Halcomb* v. *Johnson.* (If a tenant comes in the middle of a quarter and he afterwards pays rent for that half quarter and continues then to pay from the commencement of a succeeding quarter, he is not a tenant from the time of his coming in, but from the succeeding quarter day.)]

5. *('32) 19 AIR 1932 P C 279 (280) : 60 Cal 380 : 59 Ind App 414 : 141 Ind Cas 514 (PC), *Benoy Krishna* v. *Salsiccions.*

('40) 27 AIR 1940 All 444 (445) : 191 Ind Cas 223, *Rahmatullah* v. *Md. Husain.*

('34) 21 AIR 1934 Cal 837 (837) : 153 Ind Cas 673, *Susil Chander* v. *Birendrajit.* (AIR 1932 P C 279 : 60 Cal 380 : 59 Ind App 414 (PC) followed.)

[*See also* ('31) 18 AIR 1931 Mad 352 (353, 354) : 131 Ind Cas 621, *Gnanaprakasam* v. *Vaz.* (In this case, however, it was held that there was a contract for making the month of the monthly tenancy by holding over coincide with a *calendar* month.)]

6. ('38) 25 AIR 1938 All 649 (650) : 178 Ind Cas 986, *Badal* v. *Ram Bharosa.*

('26) 93 Ind Cas 643 (644) (DB) (Cal), *Khoshal Chandra* v. *Brindarani.*

('27) 14 AIR 1927 Cal 725 (730) : 54 Cal 813 : 104 Ind Cas 484 (DB), *Bengal National Bank Ltd.* v. *Janoki Nath Roy.*

7. ('32) 19 AIR 1932 P C 279 (280) : 60 Cal 380 : 59 Ind App 414 : 141 Ind Cas 514 (PC).

be sufficient to terminate the tenancy.[1] The same principle will apply to a tenancy from month to month *mutatis mutandis*.[2]

It has been held that the expression "month" used in a business or legal document means a *calendar* month.[3]

43. **Form of notice.**—The general principle is that where there is no statutory provision for the determination of a tenancy by a *written* notice, a notice to quit may be oral.[1] But this section expressly requires a notice to quit to be in writing. The section permits such a notice to be signed either by the person who gives it or on his behalf by some other person. This means that a notice this section may be signed by a party personally or by his authorised agent.[2]

A notice to quit implies that it is addressed to the person to whom the notice is given. Where this is not the case, there would be no valid notice under this section. Thus, the mere institution by the lessor of proceedings for the possession of the leased property under S. 145 of the Criminal Procedure Code will not be a notice to quit.[3] Similarly, a mere resolution passed by a Municipal Council deciding to determine a lease granted by the municipality will not, in itself amount to a notice to quit under this section.[4]

44. **Mode of service.**—A notice under this section must be served in one or other of the four modes prescribed by the section. These are :

(1) by post ;

(2) by delivery or tender to the addressee personally ;

(3) by delivery or tender to one of his family or servants at his residence; and

(4) by affixing the notice to a conspicuous part of the demised property.

Out of the methods p to 4, the last is to be resorted to only when 2 and 3 are not practicable.[1] The sender of the notice is free to adopt any of the *other* three modes

Section 106—Note 42

1. ('16) 3 AIR 1916 Cal 576 (577) : 30 Ind Cas 887 (DB), *Behari Nath* v. *Kailas Chandra.*
2. ('44) 31 AIR 1944 Cal 84 (86) : 211 Ind Cas 503 (DB), *Calcutta Landing and Shipping Co., Ltd.* v. *Victor Oil Co., Ltd.* (Month in S. 106 means British Calendar month.)

('27) 14 AIR 1927 Cal 941 (944) : 103 Ind Cas 93 (DB), *Kesoram Poddar* v. *Bamamali Dey.*

[*See also* ('06) 10 Cal W N 841 (844) (DB), *Rakhal Chandra* v. *Secy. of State.* (Non-agricultural lease—Presumption was that it was monthly tenancy expiring with the last day of each month of Bengali year).

3. (1925) 1 K B 14 (21, 22) : 93 L J K B 1009 : 132 L T 240, *Phipps and Co.* v. *Rogers.*

Section 106—Note 43

1. ('07) 34 Cal 57 (63, 64) : 11 Cal W N 225 (229, 230) (DB), *Deo Nundan* v. *Meghu Mahton.* (Especially where the lease is verbal.)
2. ('15) 2 AIR 1915 Cal 313 (315) : 26 Ind Cas 962 (DB), *Gobindachandra* v. *Dwarka Nath.* (Notice signed by am-mukhtear—Power of attorney not produced —But defendant admitting that person signing was am-mukhtear—Notice valid.)

('25) 12 AIR 1925 All 199 (200) : 78 I. C. 651, *Bhagwana* v. *Shib Sametri Prasad.* (Notice signed by authorised agent.)

3. ('79) 4 Cal 339 (341) (DB), *Ram Rotton* v. *Netro Kally.*
4. ('28) 15 AIR 1928 All 95 (95, 96) : 107 Ind Cas 690, *Aminullah* v. *Emperor.*

Section 106—Note 44

1. *('39) 26 AIR 1939 P C 11 (13) : I L R (1939) Kar P C 90 : 179 Ind Cas 321 (PC), *Prahladrai* v. *Commissioners, Port of Calcutta.*

('23) 10 AIR 1923 Cal 682 (684) : 75 Ind Cas 105 (DB), *Kedar Nath* v. *Madhu Sudan.*

of service as he may think fit.[2] For instance, he can get the notice served by delivery or tender to a member of the addressee's family or to one of his servants at his residence though service of the notice personally on the addressee is not impracticable.[3] Similarly, a notice may always be sent by post although the other modes of service prescribed by the section are not impracticable.

But when a notice is not sent by post, the delivery or tender of the notice must be made to the addressee personally except when such delivery or tender is made at his *residence*, in which case it may be made to one of his family or servants.[3a] It follows from the above that *personal* service on the addressee can be effected at any place. But vicarious service can only be at his residence.[4]

Where a notice is desired to be served at the residence of the addressee it must be delivered or tendered to him or to one of his family or servants. In the absence of such delivery or tender, merely beating a drum and affixing the notice to the wall of the house wherein the addressee resides will not be enough.[5]

The *tender and refusal* of a notice is as good as *delivery* of the notice for the purpose of this section. This principle applies also to cases where the refusal is not by the addressee himself but by one of his family or servants at his residence.[6]

It is conceived that where a notice is delivered or tendered at the *residence* of addressee, to one of his family or servants, the service would be effective although the notice has not actually reached the addressee.

The advertisement of a notice in a newspaper will not be a valid mode of service under this section.[7]

As to whether sending a notice to a party's pleader or solicitor will be enough, see Note 46. As to the presumption arising from service of notice on one of the joint tenants, see Note 37.

It has been held in England (where there are statutory provisions prohibiting certain acts being done on Sundays that a notice to quit) by a tenant is good though given on a sunday 8.

45. Service by post.—The section as amended by Act XX of 1929 expressly recognises service by post as valid mode of service of a notice under this section. As the Special Committee point out in their Report the amendment only gives express legislative effect to what was already regarded as the law on the subject both in India and in England.[1] The principle of the matter is this. If a letter properly

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2. ('23) 10 AIR 1923 Cal 682 (684) : 75 Ind Cas 105 (DB), *Kedar Nath* v. *Madhu Sudan.*

3. (1900) 4 Cal W N 572 (573) (DB), *Rajoni Bibi* v. *Hafisonnissa Bibi.*

3a. ('23) 10 AIR 1923 Cal 682 (684) : 75 Ind Cas 105 (DB), *Kedar Nath* v. *Madhu Sudan.* (Delivery or tender to member of family or servant at residence is enough though there is no proof of *prior* tender or delivery to tenant personally.)

4. *('18) 5 AIR 1918 P C 102 (110) : 46 Cal 458 : 45 Ind App 222 : 48 Ind Cas 277 (PC), *Haribar Banerji* v. *Ram Shahi Roy.*

('12) 13 Ind Cas 59 (60) (All), *Gokul Chand* v. *Shib Charan.*

5. ('19) 6 AIR 1919 Cal 400 (401) : 51 Ind Cas 44, *Biseswar Roy* v. *Pitamber Nath.*

6. ('10) 5 Ind Cas 783 (784) (DB) (Cal), *Latifdar Rahman* v. *Forbes.*

('12) 16 Ind Cas 213 (214) (DB) (Cal), *Mohim Chandra* v. *Rup Manjari Dasi.* (Refusal by members of addresse's family.)

7. ('83) 7 Bom 474 (478) (DB), *Chandmall* v. *Bachraj.* (NOTE.—This was a case before the Act—But the law would be the same under the present section.)

8. (1867) 16 L T 157 (158), *Sangster* v. *Noy.*

Section 106—Note 45

1. ('18) 5 AIR 1918 P C 102 (110) : 46 Cal 458 : 45 Ind App 222 : 48 Ind Cas

directed, containing a notice to quit, is proved to have been put into the post office, it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post office, and was received by the person to whom it was addressed. That presumption would apply with still greater force to letters which the sender has taken the precaution to register and is not rebutted by the fact that a receipt for the letter is produced signed on behalf of the addressee by some person other than the addressee himself.[2]

In this connection, reference may also be made to the following statutory provisions :

(1) Under section 16 of the Evidence Act, when there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact. Illustration (*b*) to the section is as follows : "The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office are relevant."

(2) Under S. 114 of the Evidence Act, illustration (*f*), the Court may presume that the common course of business has been followed in particular cases. Under this principle, where it is shown that a letter was properly directed and posted, the Court may presume that it duly reached the addressee. But the presumption under S. 114 is only one of *fact*[3] and the Court may decline to draw such presumption in the circumstances of a given case. For instance, if it is shown that the usual course of the post was interrupted by disturbances, the Court may refuse to presume that the letter reached the addressee.

(3) Under S. 27 of the General Clauses Act of 1897, where any Act of the Central Legislature requires or authorises any document to be served or sent by post, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document. and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

It must be emphasised that the presumption of due service arising on general principles and from the above provisions of law, applies only in cases in which it is shown that the notice was properly *addressed*.[4] The express provision under the amended section that the notice may be sent by post only contemplates the sending by post to the *correct address*.[5]

Suppose, a notice is sent by registered post but is returned as having been refused by the addressee. This will be sufficient service of the notice for the purpose of this section,[6] as a valid *tender and refusal* of a notice have the same effect as a

277 (PC), *Hari Har* v. *Ramsashi.*

('98) 1898 Bom P J 206 (206, 207) (DB), *Pemraj* v. *Balchand.*

2. *('18) 5 AIR 1918 P C 102 (111, 112) : 46 Cal 458 : 45 Ind App 222 : 48 Ind Cas 277 (PC), *Harihar* v. *Ramsashi.*

('29) 16 AIR 1929 Cal 651 (653) : 57 Cal 10 : 120 Ind Cas 455 (DB), *Bodardoja* v. *Ajijuddin* ('36) 164 Ind Cas 44 (448) (Cal), *Rajani Suiradhar* v. *Baikun-Chandra.* (Notice sent by registered post—Postal acknowledgment received—Service held proved.)

3. ('08) 7 Cal L Jour 251 (258, 259) (DB), *Hossein* v. *Gopi.*

4. ('08) 7 Cal L Jour 251 (258, 259) (DB), *Hossein* v. *Gopi.* (There is no presumption that a letter which was posted was properly addressed.)

5. ('39) 26 AIR 1939 P C 11 (13) : ILR (1939) Kar P C 90 : 179 Ind Cas 321 (PC), *Prahladrai* v. *Commissioners, Port of Calcutta.*

6. ('20) 7 AIR 1920 All 104 (105) : 57 Ind Cas 593 (DB), *Seoti Bibi* v. *Jagannath Prasad.* (Notice to quit contained in a post card.)

delivery thereof. But there is a conflict of decisions as to whether the production in Court of the cover, in which the notice was sent, with the endorsement of the postal official to the effect that it was refused by the addressee, would be sufficient to prove tender and refusal by the addressee. The general view is that the production of such cover will be enough for the purpose.[7] But the contrary view has been taken in the decision noted below.[8]

In the undermentioned case,[9] the Bombay High Court held that where a notice sent by post is tendered to the addressee but refused by him and returned unopened to the sender, it cannot, be held to be validly served. The reason given was that one cannot assume that, because an addressee declines to accept a particular envelop, he has guessed correctly its contents. The view is against the general consensus of opinion in the matter.

Although the amendment of 1929 only gives express legislative effect to an already accepted principle, one thing must be noted. Before the amendment the provision in the section that the notice must be delivered or tendered was also applicable to addressee or to one of his family or servants at his residence was also applicable to service through the post office.[10] Under the amended section, the above provision will not apply to service of notice by post.[11] Thus, before the amendment, if a notice sent by post was delivered to a servant of the addressee at his place of *business* (not being the addressee's *residence*) the service would not have been sufficient.[12] But such delivery would be sufficient under the amended section.

At the same time, it must be noted that *mere despatch* of a notice by post would not be sufficient even under the amended section. Thus, if it is shown that a notice sent by post has not reached the addressee, there would be no effective service under this section, unless it is proved that the notice was delivered or tendered to one of his family or servants at his residence by the postman. On the question whether the notice has reached the addressee or not, the Court is entitled to draw upon the usual presumptions which the law allows as to communications sent by post. The

('98) 1898 Bom P J 206 (206, 207) (DB), *Pemraj* v. *Balchand.*

('12) 16 Ind Cas 213 (214) (DB) (Cal), *Mohim Chandra* v. *Rup Manjari.*

7. ('38) 25 AIR 1938 All 388 (389, 390) : 176 Ind Cas 393, *Bachcha Lal* v. *Lachman.*

('36) 164 Ind Cas 446 (448) (Cal), *Rajani Sutradhar* v. *Baikuntha Chandra.*

('88) 15 Cal 681 (683) (DB), *Jogendra Chunder* v. *Dwarka Nath.*

('20) 7 AIR 1920 Cal 287 (288) : 54 Ind Cas 5 (DB), *Girish* v. *Kishore.*

('02) 6 Cal W N 134 (137) (DB), *Isinail Khan* v. *Kali Krishna.*

('13) 20 Ind Cas 363 (364) (DB) (Cal), *Durga Nath* v. *Rajendra Nath.*

('71) 16 Suth W R 223 (224) (DB), *Lootf Ali* v. *Pearee Mohun.*

[*See also* ('18) 5 AIR 1918 Cal 216 (217) : 45 Ind Cas 917 (DB), *Kalamua Khadim* v. *Amir Alli.*]

8. ('15) 2 AIR 1915 Cal 313 (315, 320) : 26 Ind Cas 952 (DB), *Gobindachandra* v. *Dwarka Nath.*

[*See also* ('18) 5 AIR 1918 Nag 202 (202) : 48 Ind Cas 904, *Raja Udram* v. *Khanbeg Amirbeg.* (Where a defendant denied the receipt of notice alleged to have been sent to him through registered post it is incumbent upon the plaintiff to call upon the post peon to prove that the registered post card was tendered to him and was refused by the defendant.)]

9. ('35) 22 AIR 1935 Bom 247 (251) : 156 Ind Cas 1020 (DB), *Vaman Vithal* v. *Khanderao.*

10. ('01) 28 Cal 118 (120) : 4 Cal W N 790 (DB), *Subadini* v. *Durga Chandra Lal.*

In the following cases the service by post was held to be good as the notice was delivered or tendered as provided for by the section :

(1900) 4 Cal W N 572 (573) (DB), *Rajoni Bibi* v. *Hafisonnissa Bibi.*

('12) 16 Ind Cas 213 (214) (DB) (Cal), *Mohim Chandra* v. *Rup Manjari.*

11. ('38) 25 AIR 1938 All 388 (389, 390) : 176 Ind Cas 393, *Bachcha Lal* v. *Lachman.*

12. ('12) 13 Ind Cas 59 (60) (All), *Gokul Chand* v. *Shib Charan.*

section does not create any *new* presumption in regard to this matter. So, if a question arises whether a notice sent by post has reached the addressee or was tendered to him, the considerations that would govern the determination of the question would be the same after the amendment as before. The remarks of the Allahabad High Court in the undermentioned decision[13] which imply the contrary are, it is submitted, not correct.

From the above discussion, it will be clear that where a notice is delivered to some person other than the addressee himself the question whether it has been sent by post or otherwise is material in two ways :

(1) If the notice is sent by post the question *where* it is delivered is not material so long as it reaches the addressee in time. But if the notice is not sent by post and it is delivered to some person other than the addressee himself the service will not be valid unless, *inter alia,* the delivery is made at the *residence* of the addressee.

(2) Where a notice sent by *post* is delivered to some person other than the addressee himself, the service will not ordinarily be valid if the notice has not actually reached the addressee unless the person to whom it was delivered was duly authorised by the addressee to receive such notice. But where a notice is delivered or tendered at the *residence* of the addressee to a member of his family or to one of his servants, the service will be effective and valid although the notice does not actually reach the addressee. This rule will also apply to notices sent by post.

46. Service of notice on party's pleader or solicitor.—The service of a notice to quit on a party's pleader or solicitor will not be valid under this section, unless such pleader or solicitor is authorised as an agent to *receive* such notices on his behalf.

But in the undermentioned cases[1] the view was expressed that, if a notice is sent to party's pleader or solicitor and is sent by such pleader or solicitor to the party, this would be tantamount to a *personal* service on the party, though it is an indirect mode of service. It is submitted with respect that this view is not correct.

In the above circumstances, unless the pleader or solicitor is authorised to *receive* the notice on his client's behalf the service will not be valid, merely because the lawyer forwards the notice to the client and the notice reaches the client's hands eventually.

As regards the question of treating the notice as being served on the client *personally,* no doubt, the section does not require that the giver of the notice must serve the notice himself personally. But it is certainly contemplated that the person who delivers the notice must be the giver of the notice himself or his agent. Thus, if A wishes to give a notice to quit to B but hands over the notice to C who is not A's agent, the mere fact that C delivers it to B is not tantamount to a "delivery" of the notice to B within the meaning of the section. Hence, in such a case unless C is a member of the family of B or is his servant and the notice is delivered to C at B's *residence,* the service will not be effective under this section. Hence, the fact that a notice to quit eventually finds its way into the hands of a party after being first delivered to his lawyer will not amount to a service of the notice *personally* on the party himself as contemplated by this section.

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13. ('38) 25 AIR 1938 All 388 (389, 390) : 176 Ind Cas 393, *Bachcha Lal* v. *Lachman.*

Section 106—Note 46

1. ('27) 14 AIR 1927 Sind 24 (25) : 97 Ind Cas 577, *Haroon Haji Hamid* v. *Meherali Din Mahomed.*
('96) 22 Bom 754 (757), *Bhojobhai* v. *Hoyen Samuel.*

47. **Leases by Government.**—This section does not apply to leases of land by the Government, as the Crown Grants Act expressly excludes from the operation of this Act transfers of land and interests therein by or on behalf of the Crown. (See S. 105, Note 1.) But the English common law rule has been applied to such cases as a principle of justice, equity and good conscience. It has accordingly been held that a lease by the Government for building purposes fixing no term must be presumed to be a yearly tenancy determinable by six months' notice expiring with a year of the tenancy.[1]

A notice to quit given on behalf of the Government need not be signed by the Secretary of State for India himself. A notice signed by the Collector will be enough.[2]

48. **Lease by municipality.**—A municipality is not outside the purview of this section. A lease by a municipality will, therefore, be subject to the provisions of this section. Such a lease cannot, therefore. in the absence of a contract the contrary, be determined by a mere resolution passed by the Municipal Council and without any notice being served on the lessee in accordance with the provisions of this section.[1]

49. **Notice in cases not governed by this section.**—This section embodies a principle of general applicability. Hence even in cases in which a lease is not governed by this section, it will be regarded, in the absence of a contract, local law or usage to the contrary, as determinable by a sufficient notice given by either party to the other.[1] The lease will not be determinable without such notice.[2]

The requirements of this section as to the validity of a notice will not apply to such cases.[2a] The question of the sufficiency of notice in such cases will have to be determined according to the principles of justice, equity and good conscience. It will have to be seen in each case whether the notice given is a *reasonable* one with regard both to the length of such notice and the time at which it is to expire.[3] The question

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Section 106—Note 47

1. †('37) 24 AIR 1937 Pat 391 (395) : 170 Ind Cas 316 (DB), *Secretary of State* v. *Rajendra Prasad.* (Notice given only to original lessees and not to transferees from them is bad.)

('37) 24 AIR 1937 Pat 399 (402, 406) : 171 Ind Cas 461 (DB), *Secretary of State* v. *Sarat Chandra.* (Tenancy at will becomes one from year to year on payment of rent.)

('37) 24 AIR 1937 Pat 444 (446) : 170 Ind Cas 677 (DB), *Secretary of State* v. *Beni Prasad Sahu.* (There was no evidence as to the commencement and hence the notice ending with the end of the financial year was assumed to be valid.)

2. ('08) 8 Cal L Jour 34 (37) (DB), *Rakhal Chandra* v. *Secy. of State.* (It is also unnecessary that the notices should expressly state that they were given on behalf of the Secretary of State.)

Section 106—Note 48

1. ('28) 15 AIR 1928 All 95 (95, 96) : 107 Ind Cas 690, *Aminullah* v. *Emperor.*

Section 106—Note 49

1. See cases in foot-note (2).

2. ('33) 20 AIR 1933 Mad 165 (165, 166) : 145 Ind Cas 690, *Gurumurthi* v. *Rangiah.* (Agricultural lease—Reasonable notice by landlord is necessary to ask tenant to quit —Till such notice is given tenant remains tenant on usual agricultural terms,)

('75) 23 Suth W R 271 (271), *Betts* v. *Jamie Shaikh.* (To be reasonable, a notice must not be peremptory.)

2a. †('28) 15 AIR 1928 Lah 348 (348, 349) : 106 Ind Cas 537, *Ram Nath* v. *Badri Nath.* (This section does not apply to the Punjab.)

('25) 12 AIR 1925 Mad 346 (346) : 85 Ind Cas 339, *Jaru Poojari* v. *Sommake.* (Neither the provisions of the Transfer of Property Act nor the principles of English law in regard to a notice to quit are strictly applicable to agricultural leases in India.)

3. ('67) 7 Suth W R 152 (152) (DB), *Ram Khelawan Singh* v. *Mt. Soondra.* (Implied tenancy by holding over.)

('80) 15 Bom 415*n* (415*n*) : 1880 Bom P J 10 (DB), *Ramchandra* v. *Daulatji.* (Notice to a yearly tenant in November to quit in the following March is an insufficient notice.)

*('09) 36 Cal 927 (933) : 2 Ind Cas 656 (659) (DB), *Pertab Narain* v. *Maigh Lal.*

('09) 26 Cal 761 (764) (DB), *Digambar* v. *Jhari.*

('70) 13 Suth W R 267 (268) (DB), *Bunwari* v. *Mahima Chandra.*

('43) 75 Cal L Jour 431 (433) (DB), *Harers*

will necessarily depend on the facts and circumstances of each case.[4] Local custom will also have to be given due consideration in determining the reasonableness of a notice.[5] The provisions of this section, though not directly applicable, may be kept in view as a guide to what may be a reasonable notice.[6]

On the above principles, a six months' notice will not be indispensable in every case to determine a yearly tenancy.[7] Nor will it be necessary that the notice

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dra Nath v. *Benoyendra Nath.* (Pre-T. P. Act tenancy.)
('28) 15 AIR 1928 Pat 354 (355) : 7 Pat 496 : 110 Ind Cas 642 (DB), *Damodar Prasad* v. *Lachimi Prasad.*
('74) 21 Suth W R 268 (269) (DB), *Mt. Tetra Kooer* v. *Bhunjan Roy.*
('75) 23 Suth W R 440 (440) (DB), *Hem Chunder* v. *Radha Pershad.*
(68) 10 Suth W R 33 (35) (FB), *Bakranath* v. *Binodram.* (Notice given in the last month of a current year would not be sufficient.)
('04) 8 Cal W N 774 (778) (FB), *Sulatu Dass* v. *Jadu Nath.*
('19) 6 AIR 1919 Cal 529 (531) : 51 Ind Cas 415 (DB), *Shamsoon Nessa Bibi* v. *Satya Sebak.*
('15) 2 AIR 1915 Cal 709 (709, 710) : 16 Ind Cas 937 (DB), *Haridas* v. *Upendra Narain.*
('07) 11 Cal W N 1124 (1126) (DB), *Debendra Nath* v. *Syama Prosanna.*
('13) 20 Ind Cas 363 (364) (DB) (Cal), *Durga Nath* v. *Rajendra Nath.* (36 Cal 927 followed.)
('18) 5 AIR 1918 Nag 210 (211, 212) : 48 Ind Cas 354, *Banmali* v. *Nihal Singh.*
('33) 20 AIR 1933 Mad 165 (165, 166) : 145 Ind Cas 690, *Gurumurthi* v. *Rangiah.*
('12) 16 Ind Cas 351 (352) (DB) (Cal), *Raimala* v. *Shiba Sundari.*
('08) 31 Mad 261 (263) : 18 Mad L Jour 153 (DB), *Peria Karuvpan* v. *Sabramanian.* (15 days' notice in the middle of the cultivation season was not a sufficient notice.)
('86) 13 Cal 3 (7) (DB), *Kali Kishan* v. *Golam Ali.*
('78) 2 Mad 346 (350) : 3 Ind Jur 160 (DB), *Abdulla* v. *Subbarayar.* (What is reasonable notice is a question the answer to which must depend upon the time which should be allowed for the convenient removal and procuring of another farm, possibly, by the tenant on the one hand, and for the landlord on the other hand to procure another suitable tenant—Probably the rule in England, viz., six months, will be adopted whenever the question will be considered.)
('86) 12 Cal 93 (95) (DB), *Bidhumukhi Dabea* v. *Kefyutullah.*
[*See also* ('19) 6 AIR 1919 Cal 54 (54, 55) : 52 Ind Cas 180 (DB), *Manmatha Nath Santra* v. *Peary Mohan Mookerjee.* (Lease of home-stead land within a town for 10 year—Tenant holding over—By the general law, the lessee would be *prima facie* a monthly tenant capable of being determined on 15 days' notice—If the general law is not applicable, then the terms of the expired contract, so far they are applicable must be taken to apply to the case —As the expired lease provided for a 3 months' notice, was held entitled to 3 months' notice—Notice of 6 months expiring at the end of tenancy held not necessary.)]
4. ('29) 16 AIR 1929 Mad 617 (621) : 118 Ind Cas 279 (DB), *Kochadai Devasthanam* v. *Periakaruppa.*
5. †('69) 6 Bom H C R (A C) 31 (33), *Nanabhai Rustamji* v. *Pestanji Jamsetji.*
('73) 1873 Bom P J 66 (DB), *Shanoba* v. *Balya.*
('25) 12 AIR 1925 Mad 346 (346) : 85 Ind Cas 339, *Jaru Poojari* v. *Sommake.*
6. ('13) 20 Ind Cas 363 (364) (DB) (Cal), *Durga Nath* v. *Rajendra Nath.*
[*See also* ('33) 20 AIR 1933 Lah 134 (134) : 141 Ind Cas 513, *Rattan Sen* v. *Krishan Kaur.* (In the case of a monthly tenancy, the tenant, according to a rule recognized in the Punjab Courts, is entitled to 15 days' notice terminating with the month of the tenancy, and a notice giving the tenant one week or 11 days to vacate is invalid.)]
7. ('17) 4 AIR 1917 Low Bur 67 (68) : 242 Ind Cas 375, *Maung Po O* v. *Muniandi Servai.*
('09) 36 Cal 927 (933, 934) : 2 Ind Cas 656 (659) (DB), *Pertab Narain* v. *Maigh Lal.* (There is no fixed rule of law as to how many days' notice will be a reasonable notice in the case of leases not governed by Transfer of Property Act—But the "tendency of the law is to narrow the field of uncertainty and the growth of law in various directions points to the substitution of the fixed for the fluid, and although it cannot be said that any fixed rule has been established by the cases, they show a tendency in that direction, that is to say, as to the length of notice and the time at which the notice should expire.")
† ('86) 13 Cal 3 (7) (DB), *Kali Kishen* v. *Golam Ali.*
('86) 12 Cal 82 (89, 90) (DB), *Radha Govind* v. *Rakhal Das.* (In this case 30 days' notice was held reasonable as no evidence was given to prove that the condition of the crops on the land or the custom of the country was such that the defendant was entitled to a longer notice.)
('33) 20 AIR 1933 Mad 165 (165, 166) : 145 Ind Cas 690, *Gurumurthi* v. *Rangiah.*
('42) 75 Cal L Jour 431 (433) (DB), *Harendra Nath* v. *Benoyendra Nath.* (If a tenancy is in existence from before the Transfer of Property Act, the provisions of that Act do not apply to it, and the tenant is entitled only to a reasonable notice to quit —If on the analogy of the provisions of the Act six months' notice is deemed reasonable, a shortage of only three days will not render a notice to quit served on him unreasonable.)

must expire with a year of the tenancy.[8] But generally a notice of six months is considered reasonable in such cases.[9] This period of six months is to be calculated according to the calendar which the people generally follow in the particular locality. Thus, in regard to tenancies in the mofussil of Bengal, the six months' period must generally be calculated according to the Bengali calendar.[10] Further a notice purporting to terminate an agricultural tenancy should either ask for possession at the end of the agricultural year or at least when the crop of the year has been harvested.[10a]

A notice will not be reasonable if it requires the tenant to quit the property immediately and does not fix any time for doing so.[11] It is conceived that in such cases, the alleged notice will not be a *notice* at all to quit but simply a demand for possession.

The undermentioned are illustrative cases as to what will be a reasonable notice[12] and what will not be such notice.[13]

A *verbal* notice is quite sufficient to determine a tenancy,[14] unless there is any express provision requiring a *written* notice. See also the undermentioned case.[15]

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8. †('86) 13 Cal 3 (7) (DB), *Kali Kishen* v. *Golam Ali.*
('85) 12 Cal 93 (95) (DB), *Bidhumukhi Dabea* v. *Kefyutullah.*
('25) 12 AIR 1925 Mad 346 (347) : 85 Ind Cas 339, *Jaru Poojari* v. *Somake.*
('83) 9 Cal 48 (49) : 11 Cal L R 143 (DB), *Jugut Chunder Roy* v. *Rup Chand.* (Three months' notice expiring within 7 days of the close of the year—No crop was on the ground at the time of expiry of notice—Notice held reasonable.)
('21) 8 AIR 1921 Cal 126 (127) : 63 Ind Cas 191 (DB), *Ratneswar Das* v. *Sree Kamal Deb.*

9. ('01) 5 Cal W N 801 (804) (DB), *Durga Mohun* v. *Rakhal Chandra.*
('07) 11 Cal W N 1124 (1126) (DB), *Debendra Nath* v. *Syama Prosanna.*
('12) 14 Ind Cas 152 (152, 153) (DB) (Cal), *Baroda Prasad* v. *Parsanno Kumar.* (Yearly tenancy for building purpose.)
('95) 20 Bom 759 (761) : 1895 Bom P J 241 (DB), *Ambabai* v. *Bhau.*
('80) 1880 Bom P J 209 (DB), *Amadsang* v. *Bai Man.*

10. ('15) 30 Ind Cas 886 (887) (Cal), *Gopi Nath* v. *Abdul Gafur.*
('07) 11 Cal W N 1124 (1126) (DB), *Debendranath* v. *Syama Prosanna.*
('15) 2 AIR 1915 Cal 709 (709, 710) : 16 Ind Cas 937 (DB), *Hari Das* v. *Upendra Narain.*

10a. †('30) 17 AIR 1930 Pat 143 (144) : 123 Ind Cas 609 (DB), *Nandu Mahton* v. *Bholu Mahton.*
('28) 15 AIR 1928 Pat 354 (356) : 7 Pat 496 : 110 Ind Cas 642 (DB), *Damodar Prasad* v. *Lachimi Prasad.*
('02) 29 Cal 203 (206, 207) : 6 Cal W N 69 (DB), *Hemanginee* v. *Sriglobinda.*
('97) 24 Cal 720 (722, 723) (DB), *Kishori Mohun* v. *Nund Kumar.*
[*See also* ('13) 40 Cal 858 (861) : 19 Ind Cas 588 (589) (DB), *Guru Charan* v. *Suklal Hajam.*]

11. ('71) 16 Suth W R 185 (186) (DB), *Jumaut Ali* v. *Chutturdharee.*
†('75) 23 Suth W R 271 (272), *C. G. D. Betts* v. *Jamie Shikh.*

12. ('74) 12 Beng L R 263 (265), *Nocoordass* v. *Jewraj Baboo.* (Monthly tenancy—Notice to quit at end of month sufficient.)

13. ('78) 2 Mad 346 (350) : 3 Ind Jur 160 (DB), *Abdulla Rawtan* v. *Subbarayyar.* (Where is the case of a yearly tenancy a notice to quit was given on 25th June for immediate possession or possession at the end of the fasli, i.e. 12th July (of the same year) it was held that the notice was not reasonable.)
('08) 31 Mad 261 (263) : 18 Mad L Jour 153 (DB), *Peria Karuppan* v. *Subramanian.* (15 days' notice in the middle of the cultivation season held not sufficient.)
('80) 5 Cal L R 231 (234) (DB), *Jubraj Roy* v. *Mackenzie.* (Notice to quit within thirty days served by a landlord on his tenant, at a time when the crops are ripening, is unreasonble and insufficient.)
('79) 4 Cal 339 (341) (DB), *Ram Rotton Mundul* v. *Netro Kally Dassee.* (Ten days' notice to quit is not sufficient.)
('03) 13 Mad L Jour 137 (138) (DB), *Annammal* v. *Venkataraghavachari.* (In the case of an agricultural holding a notice to the tenant to quit in a month is not reasonable.)
('80) 15 Bom 415*n* (415*n*) : 1880 Bom P J 10 (DB), *Ram Chandra* v. *Dowlatji.* (Yearly tenancy—Notice of 3rd November 1876, requiring the tenant to give up possession in March 1877 was insufficient.)
('29) 16 AIR 1929 Nag 169 (170) : 26 Nag L R 163 : 116 Ind Cas 662, *Zingu* v. *Ramji.* (A notice demanding an agriculturist tenant from year to year to quit the land immediately or forthwith is not a proper and reasonable notice.)

14. ('75) 23 Suth W R 312 (313) (DB), *Shaikh Golam Mehdee* v. *Amjad Ali.*

15. ('29) 16 AIR 1929 Pat 630 (633) : 119 Ind Cas 551 (DB), *Jhagru Mian* v. *Raghunath Singh.* (Section 106, T. P. Act, was not applied as the lease was agricultural lease and according to Chota Nagpur Tenancy Act, which applied to the case, no notice was necessary.)

[a]**107. A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.**

Leases how made.

[b][**All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.**]

[c][**Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:**]

[d][**Provided that the [e](Provincial Government) may, [f](* * *) from time to time, by [g](notification) in the [h](Official Gazette), direct that leases of immoveable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.**]

a. As to limitation to the territorial operation of this section, see Section 1, Section 107 extends to every cantonment in British India by virtue of Section 287 of the Cantonments Act, 1924 (II of 1924).

b. This paragraph was *substituted* for the original by Section 5 of the Transfer of Property (Amendment) Act, 1904 (VI of 1904). The original paragraph ran as follows: "All other leases of immoveable property may be made either by an instrument or by oral agreement."

c. This paragraph was *inserted* by Section 55 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

d. This proviso was *added* by Section 5 of the Transfer of Property (Amendment) Act, 1904 (VI of 1904).

e. *Substituted* by A. O. for the words "Local Government".

f. The words "with the previous sanction of the Governor-General in Council" were *repealed* by A. O.

g. The following notifications have been issued under this section :—

BENGAL

Any licence to prospect for minerals for a term less than one year or any renewal of such licence for a similar term may be made by unregistered instrument.

—Calcutta Gazette, 1915, Part I, Page 2066.

BOMBAY

1. Elsewhere than in the Province of Sind, leases of immoveable property other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, may be made by unregistered instrument. —Bombay Gazette, 1910, Part I, Page 59 (as amended.)
2. In supersession of Government notification in the Revenue Department, No. 434 dated the 17th January 1910, the provision of Section 107 shall, with effect from the 1st day of December, 1913, cease to apply to leases for agricultural purposes of immoveable property in the following areas :—
   (a) The Mahim, Bassein and Salsette Talukas of the Thana District.
   (b) The Pen and Panval Talukas of the Kolaba District.

—Bombay Gazette, 1913, Part I, Page 710.

UNITED PROVINCES

Leases of houses other than leases from year to year or for any term exceeding one year or reserving a yearly rent may, when the total amount of the rents reserved thereby does not exceed Rs. 50 (fifty rupees), be made by unregistered instrument or by oral agreement without delivery of possession. — U. P. Gazette, 24-6-1905.

h. *Substituted* by A. O. for the words "Local Official Gazette."

Synopsis

1. Scope of the section.
2. Law in the Punjab.
3. Term of a lease.
4. "From year to year."
5. "For any term exceeding one year."
6. "Reserving a yearly rent."
7. Effect of non-registration.
8. Lease coming within the first paragraph created by oral agreement, if can be treated as valid lease under second paragraph.
9. Paragraph 2.
10. Paragraph 3.
11. Proviso.
12. Crown Grants Act and this section.
13. Lease embodied in a decree or order of a Court.
14. Leases and the doctrine of part performance.
15. Agreement to lease.

Topic Indicator

Agreement of lease—Possession—Part performance. See Note 14 and S. 53A, Note 17.
Agricultural leases, how created. See S. 117, Note 4.
Lease contained in several documents — Registration. See Note 7.
Leases by Government. See Note 12.
Oral agreement accompanied by delivery of possession. See Note 9.
Signed both by the lessor and the lessee. See Note 10.
Rent-note or kabuliat, whether a lease. See Note 10.

1. Scope of the section.—The section prescribes the formalities that must be adopted in order to effect a valid lease under this Act. A lease from year to year or for a term exceeding one year or reserving a yearly rent can be made only by a registered instrument. A lease for a term of one year or less than a year can be made by oral agreement accompanied by delivery of possession.

The proviso to the section empowers the Provincial Government to dispense with the formality of registration or of delivery of possession prescribed for effecting leases coming within the second paragraph of the section.[1]

The registration of a document under this section is made dependent not upon the value of the property as in S. 54 or upon the amount of rent but upon the 'period' of the lease. Thus, a document creating a lease for a term exceeding one year will require registration even though the value of the property or the amount of rent is very small: and a lease for a term of one year or less will not require even a written instrument even though the value of the property or the amount of rent may be very large.

Before the passing of this Act there was no provision requiring leases to be made in writing and all leases could be made by oral agreement accompanied by delivery of possession.[2] But if they were made in writing the document was required to be registered under the Registration Act if the lease was for a term exceeding one year or from year to year or reserving a yearly rent.[3] Now the documents creating such leases will be registrable both under this Act as well as the Registration Act.[4] Where a lease for a

SECTION 107—Note 1

1. ('36) 23 AIR 1936 Nag 174 (175) : 164 Ind Cas 557, *Mt. Nasiban* v. *Mohammad Syed.*
2. ('70) 14 Suth W R 250 (250) (DB), *Nursingh Poorkaet* v. *Bikrum Majee.* (If verbal lease was accompanied by delivery of possession it could prevail against a subsequent registered lease.)
('12) 35 Mad 95 (102) : 8 Ind Cas 668 (671, 672) (FB), *Ajam Sahib* v. *(Ananthanrayana Aiyar.* (Per Krishnaswami Ayyar, J.)
('25) 12 AIR 1925 Cal 309 (311) : 52 Cal 43 : 85 Ind Cas 103 (DB), *Abdul Hakim* v. *Elahi Baksh.* (Tests which lead to a presumption of permanent tenancy in case of lease of non-agricultural holdings stated.)
[*See also* ('11) 10 Ind Cas 489, (490) (DB) (Cal), *Akram Ali* v. *Durga Prosonna.*]
3. ('12) 39 Cal 1016 (1023) : 14 Ind Cas 540 (542) (DB), *Raimoni Dasi* v. *Mathura Mohan.* (A registered kabuliat would do if it is accepted by the lessor.)
('69) 12 Suth W R 289 (290 (DB), *Puroma Soonduree* v. *Prollad Chunder.*
('69) 11 Suth W R 16 (16) (DB), *Mt. Kaboolun* v. *Shumsheir Ali.* (Unregistered deed not admitted in evidence.)
('74) 1874 Bom P J 74 (DB), *Dhundiraj* v. *Cavasji.*
('12) 35 Mad 95 (102) : 8 Ind Cas 668 (671, 672) (FB), *Ajam Sahib* v. *Ananthanarayana Aiyer.* (Per Krishnaswami Ayyar, J.)
('94) 18 Bom 109 (110) (DB), *Parshotam Vishnu* v. *Nana Prayag.*
('80) 2 Mad 67 (73) : 6 Ind App 170 (PC), *Ramasami* v. *Collector of Madura.*
('72) 4 N W P H C R 36 (37) (DB), *Sheogholam* v. *Buddree Nath.*
[*See also* ('70) 13 Suth W R 307 (309) (DB), *Dinanath* v. *Debnath.* (Document not admitted in evidence not being registered.)
('74) 1874 Bom P J 163 (DB), *Jagoji* v. *Parashram.*
('94) 18 Bom 745 (747) (DB), *Gurunath* v. *Chenbasappa.* (Unregistered document not admitted in evidence and a suit based upon it dismissed.)
('68) 3 Agra 233 (233) (DB), *Majid Hussain* v. *Jeeawon Khewat.*
('19) 6 AIR 1919 Cal 529 (531) : 51 Ind Cas 415 (DB), *Shamsoonessa* v. *Satya Sebak.* (Lease from year to year. It was not necessarily registrable under the Registration Act of 1864—Lease in this case therefore did not require registration.)
('72) 4 N W P H C R 164 (164) (DB), *Mt. Moona* v. *Jey Mungal Singh.*
('70) 2 N W P H C R 12 (13) (DB), *Rampershad* v. *Mewa Kooer.*]
Also see S. 4, Note 6.
4. *See also* ('14) 1 AIR 1914 All 120 (121) : 36 All 176 : 22 Ind Cas 933 (DB), *Munshilal* v. *Gopi Bullabh.* (For registration, provisions of the Registration Act and present section considered and registration held necessary.)

term of one year or less is made in writing, the document creating such lease is not required to be registered under the Registration Act.[5] Before the year 1904, a valid lease for one year or less could be created under this Act, by an unregistered instrument.[6] The second paragraph of the section was substituted in 1904 for the old paragraph and since then such a lease cannot be created merely by an unregistered instrument.[7]

The amendments made by Act XX of 1929 make it clear that the section is exhaustive as regards the modes of creating a tenancy and hence, where the Act applies, no lease can be created except in one of the manners specified by this section.[8]

2. Law in the Punjab. — This Act does not apply to the Punjab. But by a notification No. 183-st, issued by the Punjab Government on 27th April 1935 under S. 1 of this Act, the present S. 107 has been made applicable to all the municipal areas in that province. The result is that in all the 'non-municipal areas,' whether before or after the above notification, in the Punjab a lease for any term can be effected by oral agreement accompanied by delivery of possession[1] though, if made in writing it may require registration under the Registration Act, 1908, that Act being applicable there.[2] In all the 'municipal areas' after 1935 a lease can be effected only in the manner prescribed by this section.[3]

3. Term of a lease. — The term of a lease is to be determined from the document of lease, where there is one, construed in the light of surrounding circumstances.[1] Where no period is specifically fixed, but there are words in the deed indicating the period in general, the period of lease for the purpose of registration must be understood to mean that period during which the lessee is entitled to continue in possession, provided he himself fulfils all the conditions stipulated in the deed.[2] Thus, if a lessee is entitled to remain in possession so long as he continues to pay the agreed rent it will be a permanent lease,[3] while, on the other hand, if lessee agrees to vacate the land whenever the lessor wants it, it will only be a tenancy at will.[4]

Where a period is fixed and there are words indicating the continuance of

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5. ('86) 8 All 198 (200) : 1886 All W N 56 (DB), *Khayali* v. *Husain Bakhsh.*
('68) 5 Bom H C R (A C) 92 (94) (DB), *Moro Vithal* v. *Tukuram Malharji.* (Lease for six months created by unregistered document.)
('86) 8 All 405 (408) : 1886 All W N 170 (DB), *Khuda Bakhsh* v. *Sheo Din.*

6. See Note 9.

7. See Note 9.

8. ('43) 30 AIR 1943 Lah 127 (128) : ILR (1943) Lah 195 : 208 Ind Cas 22 (FB), *Mohan Lal* v. *Ganda Singh.* (Kabuliyat not sufficient to create lease whatever the position before the amendment.)

SECTION 107—Note 2

1. ('33) 20 AIR 1933 Lah 61 (63) : 14 Lah 137 : 142 Ind Cas 754 (DB), *Sundar Singh* v. *Ram Saran Das.*

2. ('16) 3 AIR 1916 Lah 353 (354) : 1915 Pun Re No. 97 : 32 Ind Cas 35 (DB), *Umar Bakhsh* v. *Baldeo Singh.*
('22) 66 Ind Cas 904 (905) (Lah), *Firm Karim Baksh* v. *Natha Singh.* (A lease of a house—Unregistered document not admitted in evidence.)
[*See also* ('22) 9 AIR 1922 Lah 329 (332) : 72 Ind Cas 177 (DB), *Moti Sagar* v. *Dhanna Mal.* (Lease of a house—Unregistered lease deed not admitted to prove the terms of the lease.)]

3. ('47) 34 AIR 1947 Lah 388 (395) (DB), *Vinod Sagar* v. *Vishnubhai.*
('43) 30 AIR 1943 Lah 127 (128) : ILR (1943) Lah 195 : 208 Ind Cas 22 (FB), *Mohan Lal* v. *Ganda Singh.*
('39) 26 AIR 1939 Lah 423 (424) : ILR (1940) Lah 70 : 186 Ind Cas 426 (DB), *Taj Din* v. *Abdul Rahim.*

SECTION 107—Note 3

1. ('35) 22 AIR 1935 All 492 (493) : 154 Ind Cas 305 (DB), *Muhammad Ismail* v. *Jawahir Lal.*
('29) 118 Ind Cas 702 (703, 704) (Bom), *Pandu Mahipat* v. *Shivshankardas.*

2. ('14) 1 AIR 1914 All 120 (120, 121) : 36 All 176 : 22 Ind Cas 933 (DB), *Munshi Lal* v. *Gopi Ballabh.*

3. ('26) 13 AIR 1926 Bom 374 (374) : 95 Ind Cas 524 (DB), *Sona Bai* v. *Bai Hiragavri.*
Also see S. 105, Note 27.

4. ('32) 19 AIR 1932 Bom 493 (495) : 139 Ind Cas 258, *Narayan* v. *Shivshankerdas.*

it further, the lease is only for the period fixed and the words indicating further continuance thereof simply appertain to the future consent of the parties and cannot affect the actual fixed period or create a fresh right in favour of any party.[5] Thus, where a house was let at an annual rent of three rupees for a period of one year and the lessee declared "I shall continue to pay the annual rent every year and if I fail to pay the rent in any year, the owner of the house should be at liberty to recover the rent through Court" it was held that the lease was for one year only and that the above clause did not create any rights between the parties beyond that term.[6] See also the undermentioned cases.[7]

Where no period is fixed and there is nothing in the document or the transaction to indicate it, the period will be determined under S. 106 according to the purpose of the lease.

Where there is no document of lease, the nature of the tenancy must be determined from the surrounding circumstances and in particular from the course of dealings by the parties concerned.[8]

4. "From year to year." — A tenancy "from year to year" is a tenancy continuing so long as the parties desire to continue it and though terminable at the option of either party at the end of any year, it is not 'ipso facto' terminated at the end of every year.[1]

Where the period of lease is not specified in the deed, the provision for the annual payment of rent does not necessarily imply that the lease is from year to year. In such cases the period of lease is to be determined under S. 106 according to the purpose of the lease.[2]

Where a lease deed was executed for a year and it was provided

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5. ('86) 8 All 198 (200): 1886 All W N 56 (DB), *Khayali* v. *Husain Baksh.*

6. ('86) 8 All 198 (200): 1886 All W N 56 (DB), *Khayali* v. *Husain Bakhsh.*

7. ('77) 26 Suth W R 98 (98) (DB), *Mohunto Southo Pursad Dass* v. *Parasu Padhan.* (Lease for one year—Lessee agreeing to hold further if the lessor agrees—*Held*, lease was for one year only.)
('79) 3 Bom 21 (22) (DB), *Apu Budgavda* v. *Narhari.* (Do.)
('06) 8 Bom L R 580 (583) (DB), *Benin Menahim Yousaf* v. *John Poleologo.* (Lease for one year—Lessor agreeing to continue the lease if lessee desire—*Held*, lease was for one year only.)
('90) 17 Cal 548 (556), *A. C. Boyd* v. *A. Kreig.* (Do.)
('23) 10 AIR 1923 Cal 670 (672): 70 Ind Cas 570 (DB), *Faijuddin* v. *Asrab Ali.* (Do.)
('69) 5 Bom H C R (A C) 92 (94) (DB), *Moro Vithal* v. *Tukaram.* (It was provided in the lease deed that the lessee should continue in possession after the fixed term till the lessor asks him to vacate—Lease held only for the fixed period.)
('32) 19 AIR 1932 Sind 217 (218): 26 Sind L R 377: 140 Ind Cas 681 (DB), *Devidas* v. *Aluwalla Bros.* ((1877) 2 Ex D 355: 46 L J Ch 603, *Hand* v. *Hall*, followed.)
('39) 26 AIR 1939 Pat 296 (303): 182 Ind Cas 618, *Ram Lal Sahu* v. *Mt. Bibi Zohra.* (Lease of a house—Kabuliat not admissible being unregistered—No patta—Relationship of landlord and tenant not denied—Lease held from month to month.)
('27) 14 AIR 1927 Nag 353 (353): 102 Ind Cas 305, *Rao Saheb* v. *Umrao.* (Lease of *sir* land—Kabuliat not admissible being unregistered—No patta—Relationship of landlord and tenant admitted—Tenancy held from year to year.)

8. ('42) 29 AIR 1942 Cal 486 (487): 202 Ind Cas 545, *Dwarkadas Marwari* v. *Parbati Dassi.*

SECTION 107—Note 4

1. ('35) 62 Cal L Jour 201 (204) (DB), *Jamiruddin Saudagar* v. *Hazi Mal Gani.*
('70) 13 Suth W R 190 (190) (DB), *Malodee Noshyo* v. *Bullubee Kant.*
Also see S. 106 Note 16 and S. 111 Note 2.

2. ('21) 8 AIR 1921 Pat 307 (308): 61 Ind Cas 976 (DB), *Sanker Ram* v. *Tulsi Bhagat.*
('17) 4 AIR 1917 Pat 46 (46): 2 Pat L Jour 180: 39 I. C. 658 (DB), *Parshan Kuer* v. *Tulsi Kuer.*
('35) 22 AIR 1935 Oudh 90 (90): 10 Luck 490: 153 Ind Cas 609 (DB), *Narain Singh* v. *Jagat Jit Singh.*
('20) 7 AIR 1920 Cal 858 (858): 59 Ind Cas 788 (DB), *Sari Debi* v. *Sailabala Dasi.*
('19) 6 AIR 1919 Cal 400 (400): 51 Ind Cas 44, *Biseswar* v. *Pitamber Nath.*
('19) 6 AIR 1919 Cal 65 (66): 50 Ind Cas 918 (DB), *Mohendra Nath* v. *Nagendra Narain.*
('20) 7 AIR 1920 Cal 581 (583): 57 Ind Cas 798 (800) (DB), *Jogendra Chandra* v. *Syam Sunder.*
Also see S. 106, Note 15.

therein, "this is to remain in force until another patta is granted" it was held that the lease was not for one year only, as the said words expressed an intention to create or regulate the tenancy beyond the year and from year to year.[3]

As to the meaning of "year" see Note 5.

5. "For any term exceeding one year." — The term "year" has not been defined in this Act. It is defined in S. 3, clause (59) of the General Clauses Act, 1897, as "a year reckoned according to the British calendar." By virtue of S. 4 of that Act that definition is to be adopted in this Act also. In 'Motiram v. Seth Laxmichand[1] where a lease was for a Sambat year i.e., from Kartik Badi 12 Sambat 1976 to Kartik Badi 12 Sambat 1977 corresponding to 20th October 1919 to 7th November 1920, a period which exceeded one year according to the British calendar, and it was argued that the lease must be held to be for a term exceeding one year for the purpose of this section, Baker, J. C., observed: "I am not aware of any law by which a year calculated according to the Sambat calendar amongst Hindi speaking parties should be considered to mean a year according to the British calendar. The intention of the parties was obviously to let the house for a year only and I agree with the lower appellate Court in holding that the lease is not for a term exceeding a year." Subsequently, however, in a case[2] where the facts were exactly similar the lease was held to be for a term exceeding one year both for the purposes of the Registration Act and for the purposes of this section.

Where a tenant is entitled to hold on so long as he pays the stipulated rent or renders the stipulated service, the tenancy is for a term exceeding one year.[3] But where in a lease there is an express term that the lessee shall vacate the property in case he fails to pay the rent or 'whenever the lessor requires him to do so,' the lease is not for a term exceeding one year though a period exceeding one year is mentioned therein as a period of the lease, inasmuch as the lessor can ask the lessee to vacate even the next day and the lessee cannot insist on retaining possession till the expiry of the period fixed.[4]

A lease for the 'life' of a lessee is a lease for a term exceeding one year as it entitles him to hold for more than that period if he lives so long.[5]

Illustrations.

(1) A lease was described as a yearly lease, but no period was fixed and the lessor had the option to terminate the tenancy only if he found out a fraud or deceit on the part of the lessee. It was held that the lease was for a term exceeding one year.[6]

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3. ('81) 3 Mad 358 (359) (DB), *Venkatachellam Chetti* v. *Audian*.

SECTION 107—Note 5

1. ('24) 11 AIR 1924 Nag 216 (216) : 76 I. C. 44.
2. ('28) 15 AIR 1928 Nag 27 (28) : 23 Nag L R 152 : 105 I. C. 43, *Tribeni Prasad* v. *Ramdas*.
3. (1900) 2 Bom L R 488 (489) (DB), *Pagi Mania* v. *Lallubhai Dwarkadas*.
[*See also* 1945 AIR Nag 102 (103): ILR (1945) Nag 510 *Ganpat Balaji* v. *Kasturchand Javeri*. (A lease for unspecified period as long as the house is not sold inexecution of the decree is inadmissible is evidence in the absence of registration.)
('30) 17 AIR 1930 Sind 178 (179 : 123 Ind Cas 293, *Devidas Zaukiram* v. *Aluwalla Brothers*. (Case under Registration Act.)]
4. ('23) 10 AIR 1923 All 382 (383) : 75 Ind Cas 603, *Ghasi Ram* v. *Malomy Club*. (Period of lease fixed in the document was thirty years.)
('29) 118 Ind Cas 702 (704) (Bom), *Pandu Mahipat* v. *Shivshankardas*. (Period not fixed.)
5. ('94) 18 Bom 109 (110) (DB), *Parshotam Vishnu* v. *Nana Proyag*.
6. ('17) 4 AIR 1917 Bom 274 (275) : 41 Bom 458 : 39 Ind Cas 625 (DB), *Dhura Bhai Bhuldas* v. *Mohan Lal Maganlal*.

(2) Under the terms of a lease, the lessee was to pay eight annas a year as rent. If the rent was not paid any year or the lessee did not behave properly towards the lessor, the lease was to come to an end automatically. No period was fixed in the lease. It was held that though the lease might continue for an indefinite number of years there was no certainty that it would last beyond the term of one year, and that therefore the lease was not one for a term exceeding one year.[7]

(3) A lease deed provided: "I have taken the land from KH and am building a shop on it. I promise and give it in writing that I shall pay KH every month a rent of annas three per month. In any month in which I fail to pay the rent KH will be competent to have the shop vacated by me." It was held that as the lease contained an express condition for the payment of rent every month and as it was liable to be determined in any month in which a default might be made, it could not be called a lease from year to year or for a term exceeding one year.[8]

(4) A lease deed provided: "I have taken the house on lease on a monthly rent for my personal use. If the owner deems it necessary to have the building vacated he shall give me fifteen days' prior notice whereupon I shall vacate the premises forthwith." It was held that as there was no period fixed and as it could be determined by a fifteen days' notice it was not a lease for a term exceeding one year.[9]

(5) A lease deed provided for the payment of a monthly rent and did not specify any period. It could be terminated on non-payment of rent. But there was no clause to show that it would continue so long as the rent was paid. It was held that, in the absence of such a clause, it could not be said that it would not terminate before the end of the year, and that therefore it was not one for a term exceeding one year.[10]

See also the undermentioned case[11]

6. "Reserving a yearly rent."—The words "reserving a yearly rent" show that the lease is not limited to one year only.[1] A lease reserving a yearly rent, therefore, is one for more than a year and is really a lease from year to year.[2]

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7. ('22) 9 AIR 1922 All 54 (54) : 65 Ind Cas 836 (DB), *Kashi Nath* v. *Abdur Rahman.*
[*See also* ('84) 8 Bom 493 (494) (DB), *Jagjivandas* v. *Narayan.* (The tenancy was for one year certain and the lessee had agreed to continue to pay the rent if the landlord allowed the land to be with him—The tenancy was held to be for one year only.)
('28) 12 R D 191 (191), *Maha Narayan* v. *Jaduber Singh.* (Case under Registration Act.)
('91) 14 Mad 271 (273) (DB), *Ratnasabapati* v.*Venkatachalam.* (Where lease provides that tenancy is determinable at any moment at the option of lessor it is not compulsorily Registrable.)]
8. ('97) 1897 All W N 69 (70), *Khairat Hussain* v. *Maheshri Prasad.*
9. ('86) 1886 All W N 115 (117) (FB), *Hanso* v. *Har Narain.*
10. ('22) 9 AIR 1922 Lah 43 (43) : 2 Lah 300 : 65 Ind Cas 254 (DB), *Attra* v. *Mangal Singh.* (Letters Patent Appeal from AIR 1921 Lah 96 (1) confirming it.)
('28) 15 AIR 1928 Lah 937 (938) : 113 Ind Cas 543, *Ralia* v. *Bodh Raj.*
11. ('47) 34 AIR 1947 Cal 351 (352) *Ram Mohan* v.*Lalit Chandra Sen Gupta.* (Oral contract for lease of residential quarters—Tenant to occupy premises at least for 1 year and thereafter tenancy to be terminated on one month's notice—Lease held for term exceeding one year and therefore invalid for want or registered deed. Lease should be deemed to be from month to month under S. 106. In such a case there is no valid lease for one year—AIR 1943 Cal 474 : ILR (1943) 1 Cal 34 Dissented from.)

SECTION 107—Note 6

1. ('34) 21 AIR 1934 All 902 (902) : Ind Cas 757, *Nathu Lal* v. *Dal Chand.* (Case under Registration Act.)
2. ('43) 30 AIR 1943 Cal 474 (474) : ILR (1943) 1 Cal 34 : 209 Ind Cas 279 (DB), *Adinath Bhattacharjee* v. *Krishna Chandra.* (Oral

A lease for an indefinite period reserving a yearly rent will not cease to be one "reserving a yearly rent" merely because the rent is to be paid in two six monthly instalments.[3] On the other hand a lease which is terminable at the option of the lessor and which, therefore, can end even before the expiry of a year cannot be called a lease "reserving a yearly rent" merely because a yearly rent is mentioned in it.[4] So also a lease which is for a period of one year only cannot be called a lease reserving a yearly rent though there is a mention of an annual rent in the deed.[5]

7. Effect of non-registration. — All leases coming within the first paragraph of this section, namely, leases from year to year, or for any term exceeding one year, or reserving a yearly rent can be made 'only' by a registered instrument.[1] Where such a lease is evidenced by more documents than one, all such documents must be registered.[2] Where a lease is effected by a registered instrument, an agreement which affects the incidents of the tenure created by the lease and thus forms a part of the lease, must also be registered.[3]

An unregistered document of lease, in cases where the lease is required to be registered conveys no title and creates no rights in the lessee[4] and

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agreement accompanied by possession—Yearly rent reserved—The reservation of yearly rent raises a presumption that the lease is from year to year, in the absence of anything to the contrary.)
('96) 9 C P L R 57 (58), *Chiman Boo* v. *Hyderali*. (Case under S. 17 (d), Registration Act.)
('90) 14 Bom 319 (320) (DB), *Jivraj Gopal* v. *Atmaram*. (Case under Registration Act.)
('34) 21 AIR 1934 All 902 (902) : 152 Ind Cas 757, *Nathu Lal* v. *Dal Chand*. (Do.)

3. ('25) 12 AIR 1925 Lah 491 (492) : 6 Lah 319 : 88 Ind Cas 872 (DB), *Ata Muhammad* v. *Shankar Das*, (Case under Registration Act.)
4. ('26) 92 Ind Cas 526 (527) (Lah), *Aishan* v. *Municipal Committee*. (Case under Registration Act.)
[*See also* ('25) 12 AIR 1925 Pat 256 (257) : 85 I. C. 77 (DB), *Ramdhani Gope* v. *C. V. Scott*.]
5. ('40) 42 Pun L R 75 (76), *Kishori Lal* v. *Udhoram*. (Case under Registration Act.)
('17) 4 AIR 1917 Low Bur 133 (134) : 36 Ind Cas 378, *Aung Amin Maung* v. *R. Moniandy Servai*. (Do.)

SECTION 107—Note 7

1. ('25) 12 AIR 1925 Pat 216 (224) : 4 Pat 139 : 84 Ind Cas 586 (DB), *Ram Rachhya Singh* v. *Kamakhya Narain*.
('27) 14 AIR 1927 Sind 206 (207) : 102 Ind Cas 277 (DB), *Bhagwati Bai* v. *Bhagwandas*.
('42) 29 AIR 1942 Pat 397 (399) : 200 Ind Cas 769 (DB), *Ram Ranbijaya Prasad Singh* v. *Ramjiwan Ram*.
2. ('26) 13 AIR 1926 Bom 384 (386) : 96 Ind Cas 827 (DB), *Satyadhyantirtha Swa ni* v. *Raghunath Daji*. (Two documents evidencing a lease for a term exceeding one year—Documents require registration under S. 17 (1), Registration Act.)
[*See* ('17) 4 AIR 1917 Mad 274 (276) : 33 Ind Cas 439 (DB), *Morgun & Son* v. *N. P. Fernandez*. (Case under Rgistration Act—Letter of proposal and reply of its acceptance—Both must be registered.)]
3. ('10) 37 Cal 293 (301) : 4 Ind Cas 713 (716) (DB), *Durga Prosad Singh* v. *Rajendra Narain*. (Agreement reducing rent.)
('34) 21 AIR 1934 Lah 743 (743) : 148 Ind Cas 558, *Mohammad Din* v. *Sarada*. (Document not only varying rent but prescribing changes in terms of holding is lease compulsorily registrable—If not registered it is not admissible.)
('38) 25 AIR 1938 Cal 795 (797) : 179 I. C. 475, *Mohendra Narayan* v. *Profulla Kumar*.
('38) 25 AIR 1938 Cal 172 (175) : 174 Ind Cas 790 (DB), *Bibhuti Bhusan* v. *Maya Deby*. (Document varying amount of rent.)
('37) 24 AIR 1937 Cal 499 (500) : 173 Ind Cas 996, *Haladhar Pathak* v. *Madan Mohan*. (Agreement varying the rent requires registration if the lease is registered.)
('36) 23 AIR 1936 Cal 155 (157) : 162 Ind Cas 33, *Parbati Charan* v. *Bandeali Akon*. (Agreement increasing rent.)
('12) 39 Cal 284 (297, 298) : 12 I. C. 723 (727) (FB), *Lalit Mohan* v. *Gopali Chauk Coal Co., Ltd*. (Agreement embodying reduction of rent and also incidents of payment and consequences of default of payment.)
('29) 16 AIR 1929 Lah 291 (292) : 10 Lah 685 : 117 Ind Cas 240 (DB), *Attar Chand* v. *Chandu Lal*.
Also see S. 105, Note 11.
4. ('47) Cal L Tim 66 (70) (DB), *Braja Sunder Deb* v. *Girdhari Behera*. (Where the alleged permanent tenancy is not created by a registered instrument, the position of the tenant is no better than that of a tenant at will or of a monthly tenant whose tenancy is liable to termination on notice.)
('43) 30 AIR 1943 All 279 (280) : 208 Ind Cas 422, *Anand Sarup* v. *Taiyab Hasan*. (Written agreement to lease reserving yearly rent—Lease in pursuance of it can be created only by registered instrument—In absence of such instrument pro-

cannot be used in evidence to prove the transaction[5] or any term of the transaction[6] though it may be used for collateral purposes[7] or for the other

posed lessee in possession is mere licensee.) ('25) 12 AIR 1925 Cal 1171 (1172, 1173) : 90 I. C. 98 (DB), *Ramchandra Agarwala* v. *Syameswari Dasya*. (Under such circumstances the tenants are only tenants at will.) ('05) 27 All 462 (463) : 2 All L Jour 208 (DB), *Sikandar* v. *Bahadur*. ('20) 7 AIR 1920 Pat 803 (804) : 59 Ind Cas 893, *Wazir Nonian* v. *Ram Prasad*. (Lease for life.) ('15) 2 AIR 1915 Oudh 165 (166) : 30 Ind Cas 258, *Ram Sarup* v. *Suraj Din*. ('13) 18 Ind Cas 844 (845) (DB) (Cal), *Mati Lal* v. *Darjeeling Municipality*. ('12) 36 Bom 500 (503) : 15 Ind Cas (830, 831) (DB), *Ramchandra* v. *Tama*. ('37) 24 AIR 1937 Mad 656 (657) : 169 Ind Cas 865, *Udaya Pratapa* v. *Gourachendra Dyano*. ('16) 3 AIR 1916 Mad 517 (517) : 31 Ind Cas 604, *Govindasami Pillai* v. *Ramasami Aiyar*. ('29) 16 AIR 1929 All 831 (833) : 122 Ind Cas 671, *Baij Nath* v. *Kundanlal*. ('30) 17 AIR 1930 All 678 (680) : 130 Ind Cas 8 (DB), *Safdar Ali* v. *Ambika Prasad*. ('36) 23 AIR 1936 Nag 295 (295) : 168 Ind Cas 338, *Ramjiwan* v. *Mt. Maharani*. ('33) 20 AIR 1933 Cal 612 (613) : 145 Ind Cas 892, *Badal Chandra* v. *Debendra Nath*. ('32) 19 AIR 1932 Cal 83 (84) : 59 Cal 396 : 135 Ind Cas 725 (DB), *Haran Chandra* v. *Kaliprasanna*. ('16) 3 AIR 1916 All 219 (220) : 38 All 178 : 32 Ind Cas 346 (DB), *Basdeo Rai* v. *Dwarka Ram*.

('25) 12 AIR 1925 Cal 1225 (1226) : 89 Ind Cas 180 (DB), *Year Mamud* v. *Paomocha*. ('09) 33 Bom 610 (625) : 4 Ind Cas 804 (806) (DB), *Ardesir* v. *Sirdar Ali*. (If parties conduct themselves towards each other as landlord and tenant and money passes from one to the other on the understanding that it should be returned in certain event, this section is no bar to the recovery of such money—The right to recovery arises not upon the unregistered lease deed but upon an equity based upon the conduct of the parties and arises independently of the lease.) ('42) 29 AIR 1942 Pat 397 (399) : 200 Ind Cas 769 (DB), *Ram Ranbijaya Prasad Singh* v. *Ramjivan Ram*.

[*see also* ('16) 3 AIR 1916 Cal 108 (108) : 29 Ind Cas 806 (DB), *Behary Lal* v. *Kedar Nath*. (Decision on facts—Defendant's acts on the property were condoned on the ground that he did them as a sort of licensee.) ('22) LR 3 All (Rev) 537 (538), *Jasoda Nandan* v. *Mt. Ram Kuar*.]

5. ('26) 13 AIR 1926 Bom 384 (386) : 96 Ind Cas 827 (DB), *Satyadhyantirtha Swami* v. *Raghunath Daji*. (Where there are two clearly divisible agreements in the deeds, evidencing the transaction of lease, one of which makes the document compulsorily registrable and the other does not, that part of the document which does not require registration can be looked at. But where the deeds are one indivisible transaction, S. 49, Registration Act, applies to the whole of the deeds and are inadmissible in evidence.) ('16) 3 AIR 1916 Mad 534 (535) : 31 Ind Cas 279, *Annamalai Chetty* v. *Poosari Suppia Thevan*. ('17) 4 AIR 1917 Mad 735 (736) : 34 Ind Cas 6 (DB), *Govindasami Pillai* v. *Ramaswami Aiyar*. ('41) 28 AIR 1941 Rang 117 (117) : 194 Ind Cas 31 (DB), *U Min Sin* v. *Ko Kye*. (Suit for rent—Lessor could not claim rent on the basis of his unregisterd lease.) ('14) 1 AIR 1914 Mad 359 (360) : 23 Ind Cas 336 (DB), *Vasudeva Reddy* v. *Nalappa*. (A lessee could not prove that he had acquired certain rights under the unregistered deed.)

('41) 28 AIR 1941 Mad 602 (603) : 198 Ind Cas 606, *Nagaraja Rao* v. *Koothappan*. (Terms of letting, etc., cannot be proved by the unregistered document.)

6. ('15) 2 AIR 1915 Mad 76 (76) : 25 Ind Cas 661 (DB), *Venkata Seshayya* v. *Adam Saib*. ('21) 63 Ind Cas 90 (91) (DB) (Lah), *Niadar Mal* v. *J. Rank*. ('18) 5 AIR 1918 Nag 74 (75) : 15 Nag LR 31 : 48 Ind Cas 923, *Kalicharan* v. *Lal Indar Shah*. ('16) 3 AIR 1916 Mad 517 (517) : 31 Ind Cas 604, *Govindasami Pillai* v. *Ramasami Aiyar*. ('16) 3 AIR 1916 Mad 534 (535) : 31 Ind Cas 279, *Annamalai Chetty* v. *Poosari Suppia Thevan*.

7. ('24) 11 AIR 1924 Nag 199 (200) : 75 Ind Cas 622, *Annaji* v. *Laxman*. (Evidence of ownership.) ('31) 18 AIR 1931 Lah 501 (502) : 134 Ind Cas 289, *Kidar Nath* v. *Dungar Mal & Sons*. (Where rent is mentioned in a lease which is inadmissible in evidence on account of its being unregistered though the figure as to the rent mentioned in the lease cannot be looked at in order to establish the rent fixed, it might be looked at to establish what damages the landlord suing for arrears of rent was entitled to by way of rent.) ('25) 12 AIR 1925 Lah 500 (500) : 86 Ind Cas 733, *Asa Nand* v. *Dona Ram*. (For the purpose of proving the lessor's title and the nature and character of the lessee's possession.) ('25) 12 AIR 1925 Lah 491 (492) : 6 Lah 319 : 88 Ind Cas 872 (DB), *Ata Mohammad* v. *Shankar Das*. (Admissible to show the character of the possession held by a person.) ('31) 134 Ind Cas 1106 (1106) (Lah), *Kishori Lal* v. *Ranumal*. (To see the nature of possession.) ('21) 61 Ind Cas 328 (329) (DB) (Lah),

purposes mentioned in the proviso to S. 49 of the Registration Act, 1908.[8]

If the lessee has entered into possession the lessor cannot sue him for 'rent' on the basis of the unregistered lease deed.[9] But he can claim damages from the lessee for use and occupation of the property.[10]

See also section 105, Note 19.

8. Lease coming within the first paragraph created by oral agreement, if can be treated as valid lease under second paragraph. — The word "only"

Devi Dayal v. *Wazir Chand.* (An unregistered deed of lease for more than a year although inadmissible in evidence as a lease, or for proving title, may be admitted for proving an admission contained therein.)
('28) 108 Ind Cas 161 (161) (Lah), *Bhaga* v. *Budha.* (Can be looked at to ascertain the nature of the possession of the lessee.)
('15) 2 AIR 1915 Oudh 165 (166): 30 Ind Cas 258, *Ram Sarmp* v. *Suraj Din.* (To explain the circumstances under which the lessee got into possession.)
('30) 17 AIR 1930 Lah 915 (916) : 129 Ind Cas 30, *Jawahri Mal* v. *Jagan Nath.* (Although the figure as to rent mentioned in an unregistered lease cannot be looked into to establish the rent fixed, it may be looked at to establish what damage the landlord suing for arrears of rent is entitled to by way of rent.)
('32) 19 AIR 1932 Lah 655 (656) : 142 Ind Cas 424, *Bahawal* v. *Amrit Singh.*
('36) 23 AIR 1936 Nag 174 (176) : 164 Ind Cas 557, *Mt. Nasiban* v. *Mohammad Sayed.*
('18) 5 AIR 1918 Nag 74 (75) : 15 Nag LR 31 : 48 Ind Cas 923, *Kalicharan* v. *Lal Inder Shah.*
('26) 13 AIR 1926 Nag 255 (256) : 91 Ind Cas 1044, *Pirbax* v. *Mt. Nanhebi.*
('36) 23 AIR 1936 Nag 295 (295, 296) : 168 Ind Cas 338, *Ramjivan* v. *Mt. Maharani.* (In a suit for rent on basis of a perpetual lease, if the deed is unregisterd it is not admissible in evidence as the purpose cannot be described as collateral—The object is to establish the plaintiffs' right to recover a specific sum of money as rent by the landlord; that is, to establish the very title and terms which the law says can be effected only by a registered instrument.)
('24) 11 AIR 1924 Pat 641 (644) : 3 Pat 349 : 79 Ind Cas 26 (DB), *Janki Kuer* v. *Birj Bhikhan Ojha.*
('30) 17 AIR 1930 Pat 110 (111, 112) : 124 Ind Cas 92, *Banamali Bauli* v. *Gayaram Mahto.* (The unregistered lease may be taken in evidence not as proof of title but for the collateral purpose of explaining the present possession.)
('30) 17 AIR 1930 Pat 530 (532) : 122 Ind Cas 158 (DB), *Khodaijatul Kubra* v. *Krishna Pershad.* (The document is admissible to prove the nature of defendant's possession.)
('32) 19 AIR 1932 Pat 97 (101) : 11 Pat 98 : 136 Ind Cas 54 (DB), *Sachindra Mohan* v. *Ramjash Agarwalla.* (Where a lease created by a compromise and embodied in a decree of Court is inadmissible for want of registration, a clause in the deed creating a first charge on the demised land as security for rent due is also not admissible, though standing by itself it may not amount to a lease.)
('32) 19 AIR 1932 Sind 60 (61) : 25 Sind LR 451 : 137 Ind Cas 136 (DB), *Kodu Lal* v. *Beharilal.* (Unregistered lease is admissible to calculate compensation for use and occupation.)
[*But see* ('14) 1 AIR 1914 Mad 638 (638) : 23 Ind Cas 376 (DB), *Yuruva Venkata* v. *Madi Veeramma.* (A lease compulsorily registrable is inadmissible without registration to prove the nature of the possession—No longer good law.)
('05) 1 Nag LR 147 (149), *Narayan Bisnoi* v. *Jaswant Singh.* (Not good law.)

8. *But see* ('42) 29 AIR 1942 Oudh 231 (236) : 17 Luck 530 : 199 Ind Cas 35 (DB), *Qamar Jahan Begam* v. *Bansi Dhar.* (For purposes of S. 53A of the Act.)

9. ('36) 23 AIR 1936 Cal 628 (629) : 62 Cal 294 : 163 Ind Cas 845, *In the matter of Jambad Coal Syndicate Ltd.* (Even S. 53A cannot enable a lessor to claim rent under the unregistered deed.)

10. † ('09) 31 All 276 (278): 2 Ind Cas 211 (212) (SB), *Sheo Karan Singh* v. *Parbhu Narain Singh.*
('24) 11 AIR 1924 Oudh 97 (98) : 74 Ind Cas 582, *Ajodhya Singh* v. *Khusro Begum.*
('28) 15 AIR 1928 Oudh 479 (480) : 110 Ind Cas 875 (DB), *Raghubar Dayal* v. *Sheo Bakhsh Singh.*
('37) 24 AIR 1937 Mad 656 (657, 658) : 169 Ind Cas 865, *Udaya Pratapa* v. *Gourachendra Dyano.*
('42) 29 AIR 1942 Oudh 93 (95) : 17 Luck 205 : 196 Ind Cas 237 (DB), *Thakur* v. *Jagdambika Pratap Narain.*
('30) 17 AIR 1930 Lah 915 (916) : 129 Ind Cas 30, *Jawahri Mal* v. *Jagan Nath.*
('11) 11 Ind Cas 23 (23) (DB) (Mad), *Swaminatha Mudali* v. *Sivagami Achi.*
('25) 12 AIR 1925 All 100 (101) : 82 Ind Cas 296 (DB), *Nand Ram Singh* v. *Harisaran Das.*
('35) 22 AIR 1935 All 785 (785) : 158 Ind Cas 50, *Bakhtawar* v. *Lila Pat.*
('09) 12 Oudh Cas 140 (143) : 2 Ind Cas 920 (921) (DB), *Udit Narayan Singh* v. *Rampal Singh.* (Decree for damages for use and occupation granted on basis of possession and kabuliat.)
('06) 9 Oudh Cas 296 (299, 300) (DB), *Mt. Raj Kuar* v. *Nabi Bakhsh.*
('42) 29 AIR 1942 Oudh 408 (409) : 18 Luck 201 : 200 Ind Cas 593, *Md. Farooq* v. *Masjidi Begam.*
Also see S. 105, Notes 19, 70 and S. 108 (1) Note 12.

in the first paragraph makes it clear that leases coming within its scope cannot be created otherwise than by a registered instrument,[1] e.g., by oral agreement accompanied by delivery of possession.[2] But all other leases can, under the second paragraph of the section, be created by oral agreement accompanied by delivery of possession. The question arises whether a lease falling within the first paragraph of the section but made only by oral agreement accompanied by delivery of possession, can be treated as a valid lease of the kind referred to in the second paragraph. It has been held that it can be so treated. Thus, a lease for more than a year, by oral agreement and delivery of possession was treated as a lease for one year.[3] It has also been held that if, in such a case, after the expiry of the first year the lessor accepts rent from the lessee and assents to his continuing in possession the

SECTION 107—Note 8

1. * ('31) 18 AIR 1931 PC 79 (80) : 58 Cal 1235 : 58 Ind App 91 : 131 Ind Cas 762 (PC), *G.H.C. Ariff* v. *Jadunath.*
('09) 33 Bom 610 (624) : 4 Ind Cas 804 (806) (DB), *Ardesir* v. *Sirdar Ali.*
('42) 29 AIR 1942 Oudh 93 (95): 17 Luck 205 : 196 Ind Cas 237 (DB), *Thakur* v. *Jagdambika Pratap Narain Singh.* (Fishery rights constitute immovable property and the provisions of S. 107 exclude the possibility of an oral lease of such rights for a term exceeding one year. To be valid it must be in writing registered.)

2. ('26) 13 AIR 1926 Pat 130 (135) : 5 Pat 80 : 91 Ind Cas 169 (DB), *Midnapore Zamindari Co.* v. *Ram Kanai Singh.* (Permanent lease can only be created by registered instrument—Delivery of possession is not necessary.)
('37) 24 AIR 1937 All 36 (38) : 166 Ind Cas 897 (DB), *A. P. Bagchi* v. *Mrs. F. Morgan.* (Lease for more than one year and continuing in perpetuity requires registration—Mere possession by lessee is not enough to give him perpetual lease.)
('95) 22 Cal 752 (755) (DB), *Surendra Narain Singh* v. *Bhai Lal Thakur.* (A *hat* is a benefit arising out of land, and, therefore, within the definition of immovable property as given in S. 2, cl. (5) of the General Clauses Act, 1868. The lease of a *hat*, consequently, comes within S. 107 of the Transfer of Property Act, and can be effected only by a registered instrument.)
('36) 23 AIR 1936 Bom 246 (248) : 163 I. C. 579, *Chandulal Damodardas* v. *Keshavlal Kuberdas.*

('34) 21 AIR 1934 Mad 418 (419, 420) : 57 Mad 760 : 152 Ind Cas 538(DB), *Mopurappa* v. *Ramaswami Gramani.*
('30) 17 AIR 1930 Mad 272 (276) : 126 Ind Cas 284 (DB), *Malabar Timber Co., Ltd.* v. *Prapravan Moidoo.* (Original lease terminated by forfeiture—Subsequently parties entered into an oral contract agreeing that the old lease should continue—*Held*, this contract could not revive the old lease as a registered document was required.)
('17) 4 AIR 1917 Mad 787 (788) : 34 Ind Cas 539, (DB), *Devaraja Naicken* v. *Ammani Ammal.* (A lease for planting casuarina trees is not one for an agricultural purpose and must be in writing and registered.)
('36) 63 Cal 31 (39), *Battersby* v. *DeCruze.* (Oral lease cannot be made.)
('14) 1 AIR 1914 Mad 84 (85) : 24 Ind Cas 790 (DB), *Gopala Krishna* v. *Sukirtha Theenthara.*
('37) 24 AIR 1937 Rang 180 (181, 182) : 171 I. C. 643 (DB), *Bashir Ahmad* v. *N. H. Maatschappij.*
[*See also* ('97) 1 Cal W N 142 (143) (DB), *Sheo Charan Lal* v. *Purbhu Dayal.* (Trespasser granting lease—Real owner accepting rent from the lease—*Held*, there being no contract of lease between real owner and the lessee as required by S. 107 mere acceptance did not create relationship of landlord and tenant.)]

3. ('43) 30 AIR 1943 Cal 474 (474, 475) : ILR (1943) 1 Cal 34 : 209 Ind Cas 279 (DB), *Adinath Bhattacharjee* v. *Krishna Chandra.*
('13) 20 Ind Cas 715 (716) (DB) (Cal), *Mohammad Mossa* v. *Jagannund Singh.* (Section 107 of the Act does not prevent the creation of a verbal lease for one year by the lessor giving possession to, and accepting rent from, the lessee for that year.)
('40) 27 AIR 1940 Cal 89 (90, 91): ILR (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali Bepari* v. *Jamini Lal.*
('33) 20 AIR 1933 Pat 485 (488) : 144 Ind Cas 788, *Aziz Ahmad* v. *Alauddin Ahmad.* (Section 107 only prescribes the mode of creation of a lease. The effect of its non-compliance will be that the lease will be of no effect for the period. The statute does not say about the rights of the parties under the invalid lease. Confirmed in Letters Patent Appeal reported in AIR 1934 Pat 369.)
('41) 28 AIR 1941 Pat 244 (245) : 191 Ind Cas 686 (687), *Naim Sahib* v. *Tata Iron & Steel Co., Ltd.*
('10) 5 Ind Cas 277 (277) (Cal), *Thakur Ram* v. *Shakroo Mian.* (After first year if the lessee is allowed to hold on it is a tenancy by sufferance.)
[*See also* ('44) 31 AIR 1944 Cal 84 (85, 87) : 211 Ind Cas 503 (DB), *Calcutta Landing and Shipping Co., Ltd.* v. *Victor Oil Co., Ltd.* (Lease treated as from month to month.)
('26) 13 AIR 1926 Nag 147 (148) : 89 Ind Cas 1019, *Baliram* v. *Sadaram.* (Lease for five years not registered—*Held*, a lease from month to month.)]
[But see ('47) 34 AIR 1947 Cal 351 (352),

lease is renewed from year to year or month to month under S. 116 according to the purpose of the tenancy.[3a]

Before the year 1904 a lease for one year could be made by an unregistered instrument. Hence, where a lease for fifteen years was granted by an unregistered instrument it was held that though the lease was inoperative for the term of fifteen years it was valid for the first year under the second paragraph of the section and the lessee's possession thereafter was held to be as a tenant holding over with the consent of the lessor.[4]

9. Paragraph 2. — The preceding paragraph deals with leases "from year to year," or for a "term exceeding one year," or "reserving a yearly rent." All these expressions denote a lease for more than a year. This paragraph deals with all "other" leases, i.e., with leases for a term of 'one' year or less. A lease for one year means a lease for a term of one year 'certain.' If there is a possibility of its being undetermined at the end of one year it will not be included in this paragraph but in the preceding paragraph and will have to be made by a registered document.[1]

A lease under this paragraph for a period of one year or less can be effected only in two ways —

(1) by a registered instrument,[2] or
(2) by oral agreement accompanied by delivery of possession.[3]

The word "registered" occurring before the word "instrument" was inserted in the section only in 1904. Until that year a lease coming within this paragraph, even when effected in writing, was not required to be registered.[4] After that year, however, if a lease coming under this paragraph is effected by an instrument, the instrument must be registered.[5] As to the effect of non-registration of such a document on the transfer, see Note 7.

Number of shareholders over 2,200

As to the second mode of creating a lease referred to above, a mere oral agreement to give a lease is not enough. It must, in order to create a valid lease, be accompanied by delivery of possession.[6] "Delivery of possession"

Ram Mohan v. *Lalit Chandra Sen Gupta*—1943 Cal 474 : ILR (1943) 1 Cal 34 dissented from—In such a case under S. 106 the lease of a house would be deemed to be one from month to month—AIR 1916 Cal 358 : 44 Cal 403 Rel on.]

3a. ('44) 31 AIR 1944 Pat 30 (31, 33) : 22 Pat 554 (DB), *Darbari Lal* v. *Raneeganj Coal Association, Ltd.* (Permanent tenancy by oral grant without any registered instrument is void—Lessee entering into possession and creating permanent structures within knowledge of landlord and also continuing in possession for a long period—*Held* that no permanent tenancy could be created by estoppel without a registered instrument and that the tenancy was only month to month tenancy determinable by 15 days' notice under S. 106.)
('43) 30 AIR 1943 Cal 474 (474, 475) : ILR (1943) 1 Cal 34 : 209 Ind Cas 279 (DB), *Adinath Bhattacharjee* v. *Krishna Chandra.*

4. ('13) 18 Ind Cas 844 (846) (DB) (Cal), *Matilal* v. *Darjeeling Municipality.*

SECTION 107 — NOTE 9

1. *See* ('86) 13 Cal 113 (114) (DB), *Bhobani* v. *Shibnath.* (Case under registration Act.)

2. ('38) 1938 Oudh W N 1080 (1083), J. H. *Mathews* v. *Mirza Ismail Beg.* (Where a lease of a house for eight months is reduced to writing it is under S. 107 of the Transfer of Property Act compulsorily registrable.)
('36) 23 AIR 1936 Pat 372 (377) : 15 Pat 460 : 163 Ind Cas 501 (DB), *Kuchwar Lime & Stone Company, Ltd.* v. *Secretary of State.*

3. ('18) 5 AIR 1918 Cal 906 (907) : 44 Cal 214 : 37 Ind Cas 956 (DB), *Sarat Chundra Dutta* v. *Jadab Chandra.* (Tenancy at will can be created verbally.)
('10) 5 Ind Cas 826 (826) (DB) (Mad), *Narayanah Shah* v. *Kadigar Parasurama.*
('97) 1897 All W N 69 (70), *Khairat Hussain* v. *Maheshri Prasad.*
('42) 29 AIR 1942 Oudh 408 (409) : 18 Luck 201 : 200 Ind Cas 593, *Md. Farooq* v. *Masjidi Begam.*

4. ('94) 17 Mad 275 (277) (DB), *Seetharama Raju* v. *Bayanna Pantulu.*

5. ('11) 11 Ind Cas 863 (863) (Low Bur), O' *Leary* v. *Maung On Gaing.*
('36) 23 AIR 1936 Nag 174 (175) : 164 Ind Cas 557, *Mt. Nasiban* v. *Mohammad Sayed.*
('31) 18 AIR 1931 Lah 501 (502) : 134 Ind Cas 289, *Kidar Nath* v. *Dungar Mal.*

6. ('11) Ind Cas 849 (850) (Low Bur), *Karam Chand* v. *Hurdial.*
('41) 28 AIR 1941 Pat 577 (583) : 20 Pat 346 : 192 Ind Cas 451 (DB), *Mohammad Hanif* v. *Khairat Ali.* (Title cannot be com-

means actual delivery.[7] Where such delivery is not possible, the lease must be effected in the first mode only, i.e., by a registered instrument.[8] But in a recent Full Bench decision of the Lahore High Court it has been held that it is not necessary that delivery of possession must be physical at the time of the agreement and that the delivery of constructive possession is quite sufficient for the purpose of the section.[8a] In that case, mortgage with possession was executed in favour of a person. The mortgagor, however, did not vacate the property but executed a 'kabuliyat' in favour of the mortgagee. The mortgagee afterwards sued for rent. It was held that in the circumstances a lease must be considered to have come into being as the result of the oral agreement and delivery of possession.

Where the lease is effected by an oral agreement accompanied by delivery of possession and there is also an unregistered instrument evidencing it, the question arises whether the existence of the unregistered instrument prevents the passing of title by delivery. Under S. 49 of the Registration Act, 1908, before its amendment in 1929, it was held that that section applied to documents compulsorily registrable under the Registration Act only and the document of lease for one year or less, being not compulsorily registrable under the Registration Act, could be admitted in evidence to prove the oral agreement embodied in it which, when accompanied by delivery of possession would create a valid lease.[9] The words "or by any provision of the Transfer of Property Act, 1882" were inserted in 1929 in S. 49 of the Registration Act and it is now clear that the ground that was available for the admissibility of such documents before 1929 is now no longer available.[10] In the undermentioned Madras case,[11] however, decided after the above amendment in S. 49 of the Registration Act, an unregistered document of a lease for one year was admitted in evidence to prove the oral agreement. The amendment was not adverted to and the Court merely followed a Full Bench decision given before the amendment.

When a lease is effected by oral agreement accompanied by delivery of possession and there is a kabuliat executed by the lessee, it can be admitted in evidence to prove the oral agreement.[12]

See also Note 21 on section 54.

10. Paragraph 3. — This paragraph was added in 1929 by S. 55 of the

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plete without delivery of possession.)
('34) 21 AIR 1934 Pesh 81 (81) : 148 Ind Cas 548, *Hari Chand* v. *H. H. Hammond.*
('26) 13 AIR 1926 Oudh 609 (610) : 96 Ind Cas 410, *Gulabkhan* v. *Lal Md. Khan.*

7. ('26) 13 AIR 1926 Oudh 609 (610) : 96 Ind Cas 410, *Gulab Khan* v. *Lal Md. Khan.*
('14) 1 AIR 1914 Cal 754 (754) : 23 Ind Cas 318 (DB), *Fakira Mahton* v. *Leakut Hossain.*
[*See also* ('34) 21 AIR Pesh 81 (81) : 148 Ind Cas 548, *Hari Chand* v. *H. H. Hammond.* (Delivery of the key of a vacated bunglow is sufficient delivery of possession.)]
See also Section 54, Note 22.

8. ('39) 26 AIR 1939 Lah 162 (163), *Mt. Malan* v. *Dayal Singh.*

8a. ('43) 30 AIR 1943 Lah 127 (129) : ILR (1943) Lah 695 : 208 Ind Cas 22 (FB), *Mohan Lal* v. *Ganda Singh.* (What is regarded as sufficient delivery of possession to complete a gift made by a Muslim or a Hindu should be enough under this section as well.)

9. ('31) 18 AIR 1931 Lah 501 (502) : 134 Ind Cas 289, *Kidar Nath* v. *Dungar Mal.*
('21) 8 AIR 1921 Mad 337 (340) : 44 Mad 55 : 59 Ind Cas 350 (FB), *Rama Sahu* v. *Gowro Ratho.*
('31) 18 AIR 1931 Mad 352 (352) : 131 Ind Cas 621, *Gnanaprakasan* v. *Vaz.*
[*See also* ('28) 15 AIR 1928 All 726 (730) : 50 All 986 : 118 Ind Cas 177 (FB), *Sohan Lal* v. *Mohan Lal.* (Case under S. 54 of the Transfer of Property Act.)]

10. ('38) 1938 Oudh W N 1080 (1083), J. H. *Mathews* v. *Mirza Ismail Beg.* (A lease for eight months.)

11. ('36) 23 AIR 1936 Mad 301 (303) : 59 Mad 779 : 164 Ind Cas 645 (DB), *Md. Gosukani* v. *Md. Sekka Marakayar.*

12. † ('43) 30 AIR 1943 Lah 127 (128): ILR (1943) Lah 695 : 208 I. C. 22 (FB), *Mohan Lal* v. *Ganda Singh.*
('10) 5 Ind Cas 826 (826) (DB) (Mad), *Narayanah Shah* v. *Kadigar Parasurama.*
('10) 6 Ind Cas 201 (203) (DB) (Mad), *Thambi* v. *Avayambal.*
('22) 9 AIR 1922 All 54 (54) : 65 Ind Cas 836 (DB), *Kashinath* v. *Abdur Rahaman.*

Transfer of Property (Amendment) Act, 1929. Prior thereto, there was a difference of opinion on the question whether a 'kabuliat' or other document signed by the lessee only could be called a lease-deed within the meaning of this section. One view was that a lease being a transfer under the Act, it could not be effected by a document not signed by the transferor and that consequently a 'kabuliat' being signed by only the lessee could not be called a lease within the meaning of this section.[1] According to the contrary view, a 'kabuliat,' although signed by the lessee, was sufficient to operate as a lease under this section if it was accepted by the lessor.[2]

The third paragraph of the section has now set the conflict at rest and it is now clear that a document signed only by the lessee[3] or only by the

Note 10

1. † (24) 11 AIR 1924 All 514 (518): 46 All 303 : 78 Ind Cas 934 (DB), *Kedar Nath* v. *Shankar Lal.*
('30) 17 AIR 1930 All 678 (680) : 130 Ind Cas 8 (DB), *S. Safdar Ali* v. *Ambika Prasad.*
('04) 26 All 368 (369) : 1904 All W N 46 (DB), *Nandulal* v. *Hanuman Das.* (Per Blair J.)
('05) 27 All 190 (191) : 1904 All W N 212 (DB), *Beni* v. *Puran Das.*
('25) 12 AIR 1925 Nag 121 (122) : 80 Ind Cas 736, *Ahmed Khan* v. *Sadasheo.*
† ('35) 22 AIR 1935 Pat 291 (293, 303): 14 Pat 672 : 157 Ind Cas 98 (FB), *Ramkrishna Jha* v. *Jainandan.*
('09) 2 Ind Cas 994 (995) (DB) (Cal), *Nilmamud Sarkar* v. *Bowl Chandra Das.*
('10) 5 Ind Cas 350 (351) (All), *Bhagwan Das* v. *Hari Ram.*
('27) 14 AIR 1927 Rang 169 (169) : 5 Rang 95 : 102 Ind Cas 105. *Mg. Ba* v. *Htoon.* (Document executed by lessee alone agreeing to pay rent and occupy the premises.)
('25) 12 AIR 1925 Rang 273 (274) : 3 Rang 379 : 90 Ind Cas 693, *U Tha Nyo* v. *Mg. Kyaw Tha. (Obiter.)*
('37) 24 AIR 1937 All 36 (37, 38) : 166 Ind Cas 897 (DB), *Bagchi* v. *Mrs. Morgan.*
('05) 27 All 126 (137), *Kashi Gir* v. *Jogendra Nath Ghose.*
('27) 14 AIR 1927 All 729 (729) : 104 Ind Cas 410 (DB), *Bhagwati* v. *Nandu Mal.*
('26) 13 AIR 1926 Nag 389 (392) : 24 Nag LR 68 : 95 Ind Cas 183, *Birdichand Lalchand* v. *Popatlal.*
('38) 25 AIR 1938 All 32 (33) : 172 Ind Cas 973, *Mirza Md. Hasan* v. *Buddhu.*
('06) 9 Oudh Cas 296 (298, 299) (DB), *Mt. Raj Kuar* v. *Nabi Baksh.*
('09) 12 Oudh Cas 140 (141) : 2 Ind Cas 920 (920) (DB), *Udit Narayan Singh* v. *Rampal Singh.*
('25) 12 AIR 1925 Bom 512 (512) : 88 Ind Cas 648 (DB), *Ramsingh Harisingh* v. *Bai Dyanba.*
('39) 26 AIR 1939 Lah 423 (425) : ILR (1940) Lah 70 : 186 I. C. 426 (DB), *Taj Din* v. *Abdul Rahim.*
('40) 42 Pun LR 75 (76), *Kishori Lal* v. *Udhoram.* (A rent deed does not fall within the purview of S. 107 of the Transfer of Property Act, in view of the definition of lease in S. 105 of the Transfer of Property Act.)

2. ('12) 39 Cal 1016 (1024) : 14 Ind Cas 540 (542) (DB), *Rai Moni Dassi* v. *Mathura Mohan.*
('38) 42 Cal W N 771 (773), *Udoytara Saha* v. *Habibar Rahaman.* (Presumed.)
('28) 15 AIR 1928 Cal 392 (396) : 55 Cal 435 : 110, Ind Cas 368 (DB), *Dinanath* v. *Janki Nath.*
('26) 13 AIR 1926 Bom 374 (374) : 95 Ind Cas 424 (DB), *Sona Bai* v. *Bai Hiragavri.* (NOTE.—Point not decided but seems to have been assumed.)
† ('12) 35 Mad 95 (100, 101): 8 Ind Cas 668 (670, 672) (FB), *Syed Ajam* v. *Ananthanarayana Aiyar.* (Overruling 30 Mad 322.)
('38) 25 AIR 1938 Mad 100 (101) : 176 Ind Cas 402 (DB), *Rathnaswami* v. *Nagaraja.* (35 Mad 95 followed. Lease of reversion.)
('14) 1 AIR 1914 Mad 96 (97): 24 Ind Cas 784 (DB), *Sommayya* v. *Khatya Begam.*
('04) 7 Oudh Cas 169 (172), *Partab Narain Singh* v. *Ragho Behari.*
('05) 8 Oudh Cas 197 (199) (DB), *Bhopal* v. *Chattar Singh.*
('47) 34 AIR 1947 Pat 78 (79): 229 Ind Cas 94 (DB), *Budhan Mahton* v. *Ramanugrah Singh.* Patta signed by lessor and Kabuliat signed by lessee.
('47) 1947 Rang L. R. 394 (395) *Cheru* v. *S.* Rahmon. [Unilateral deed by tenant—Registration—Question as to registration has to be determined by S. 17, Registration Act and not by S. 107, T. P. Act—Deed does not require registration.]
('44) 31 AIR 1944 Pat 35 (36) : 213 Ind Cas 394, *Hadu Maharana* v. *Ramdulal.* Where a person is put in possession under the agreement to lease which is expressed in two registered documents *patta* signed by landlord alone and *kabuliyat* signed by tenant alone, the transaction does not operate to transfer the right of enjoyment and is not a validly executed lease.]

3. ('43) 30 AIR 1943 All 212 (213, 214): 207 Ind Cas 323 (DB), *Muhomed Liaqat Ali Khan* v. *Ajudhai Prasad.* (Kabuliyat is not a lease at all—Lessee remaining in possession for 12 years under a kabuliyat acquires title which agreement accompanied by registered lease would have conferred.)
('43) 30 AIR 1943 Lah 127 (128) : ILR (1943) Lah 695 : 208 Ind Cas 22 (FB), *Mohan Lal* v. *Ganda Singh.* (A kabuliyat is not a lease.)
('42) 29 AIR 1942 All 330 (330) : 202 Ind Cas 678, *Ganga Sahai* v. *Badrul Islam.* (A

lessor[4] will not be operative as a lease under this section. Such a document would, however, be otherwise perfectly valid and would bind the executant by the terms thereof unless he is able to prove fraud or coercion.[5] Thus a person in possession under a 'kabuliat,' though not liable to pay rent, is liable to pay whatever is due under the 'kabuliat as compensation for the use and occupation of the land.[6]

Where there are more lessors than one or more lessees than one, 'all' of them must join in the execution of the instrument, unless the executing lessors or the lessees, as the case may be, had authority to sign on behalf of the others also.[7]

11. Proviso. — The proviso deals with leases coming under the second paragraph of the section. It empowers the Provincial Government to exempt such leases from the formality of registration when they are made in writing and from delivery of possession when they are made otherwise.[1]

This power has been exercised by the Government of Bombay by a notification[2] and the result is that in the Presidency of Bombay a lease for a term of one year or less can be made either by an unregistered document or by merely an oral agreement. The present Province of Sind was a part of the Bombay Presidency at the time of the above notification and hence it applied to Sind also.[3]

12. Crown Grants Act and this section. — Section 2 of the Crown Grants Act, 1895, provides as followes:

> "Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made, by or on behalf of the Crown to, or in favour of, any person

registered kirayanama executed by lessee alone held operated neither as lease nor as licence.)

('38) 25 AIR 1938 Mad 746 (747) : 182 Ind Cas 299, *Md. Rowther* v. *Tinnevelly Municipal Council.*

('40) 27 AIR 1940 Nag 143 (144) : 189 Ind Cas 753, *Tulsiram Rajaram* v. *Govinda Ramji.*

('32) 19 AIR 1932 Sind 217 (219) : 26 Sind LR 377 : 140 Ind Cas 618 (DB), *Devidas Zowkiram* v. *Aluwalla Bros.*

('34) 21 AIR 1934 Pesh 81 (81) : 148 Ind Cas 548, *Hari Chand* v. *Hammond.*

('46) 33 AIR 1946 All 403 (405), *Shubrati* v. *Kunj Behari.* [*See also.* Agreement by A that he would vacate when called upon by B to do so—Agreement does not amount to lease and is not admissible in evidence for any purpose.]

Also see S. 105, Note 9.

4. ('47) 34 AIR 1947 Pat 78 (79) : 229 Ind Cas 394 (DB), *Budhan Mahton* v. *Ramanugrah Singh. (Patta signed by lessor and Kabuli-Yat signed by lessee.)*

('46) 33 AIR 1946 Oudh 129 (143) : 21 Luck 194 (DB), *Sant Bux Singh* v. *Ali Raza Khan.*

('44) 31 AIR 1944 Pat 35 (36) : 213 Ind Cas 394, *Hadu Maharana* v. *Ramdulal.* (Patta signed by landlord alone and kabuliyat signed by tenant alone.)

('40) 27 AIR 1940 Oudh 425 (425, 427) : 190 Ind Cas 444 (DB), *Bithal Dass* v. *Mt. Iqbalunnisa.*

('42) 29 AIR 1942 Oudh 231 (233, 235) : 17 Luck 530 : 199 Ind Cas 35 (DB), *Qamar Jahan Begam* v. *Bansi Dhar.* (Assumed.)

('37) 24 AIR 1937 Oudh 151 (152) : 12 Luck 514 : 164 Ind Cas 830, *Shiam Sunder Lal* v. *Chootey Lal.*

5. ('49) 36 AIR 1949 All 455 (456), *Maqbool Ahmed* v. *Debi.* (Rent note.)

('44) 31 AIR 1944 All 221 (221) : ILR (1944) All 346 (DB), *Pyare Lal* v. *Ram Sarup.* (Usufructuary mortgage—Mortgagor executing kabuliyat of even date and continuing possession—No lease-deed executed—No relation as lessor and lessee created but the mortgagor held bound by the terms of the kabuliyat.)

('42) 29 AIR 1942 All 330 (330) : 202 Ind Cas 678, *Ganga Sahai* v. *Badrul Islam.* (Kirayanama executed by tenant.)

6. ('44) 31 AIR 1944 All 221 (222) : ILR (1944) All 346 (DB), *Pyarelal* v. *Ram Sarup.*

7. ('08) 1908 Pun LR No. 189 p. 609 (611), (DB), *Jhandad Khan* v. *Abbas Khan.*

SECTION 107—Note 11

1. ('36) 23 AIR 1936 Nag 174 (175) : 164 Ind Cas 557, *Mt. Nasiban* v. *Md. Sayed.*

2. See Government Notification No. 12501, dated 8th December 1908, published in the Bombay Gazette, 1908, Part I Page 2116. But it seems that later on the Province of Sind was exempted from the effect of this notification. For the present position see Note 'g' printed just below the text of the section.

3. ('32) 19 AIR 1932 Sind 217 (219) : 26 Sind LR 377 : 140 Ind Cas 681 (DB), *Devidas* v. *Aluwalla Bros.*

whomsoever; but every such grant and transfer shall be construed and take effect as if the said Act had not been passed."

It has been held by the High Court of Allahabad that the concluding portion of the above section shows that the Courts can disregard the provisions of this Act only where a question of the construction of a grant arises[1] that those provisions which deal with the formality of a transfer do not affect the 'construction' of a grant and that therefore a lease even by Government, must be made according to the provisions of this section.[2] The High Court of Patna has taken a contrary view in the undermentioned case.[3] According to the Judicial Commissioner's Court of Oudh[4] the provisions of S. 107 of the Transfer of Property Act are applicable to leases by Government but that section being supplemental to the Registration Act and leases by Government being excepted from registration by S. 90 (1) (d) of the same Act, Government leases are exempted from the provisions of S. 107 of this Act also. The High Court of Madras has held that a licence given by Government to prospect red oxide of iron in land is not required to be registered as it is in the nature of a Crown grant.[5]

13. Lease embodied in a decree or order of a Court.—When the parties to a suit enter into a compromise by which a lease is granted by one to the other and the compromise is embodied in the decree or order of the Court, the lease cannot be said to be one by operation of law or in execution of a decree or order of a Court within the meaning of S. 2 (d) and will not be exempt form the provisions of this section.

Under the Registration Act also such decrees or orders are not exempt from registration under S. 17 (2) (vi) of the Act as the exemption under that clause only applies to cases coming under clauses (b) and (c) of sub-section (1) of S. 17 and not to cases under clause (d) of that sub-section—which is the clause applicable to leases.[1]

When a decree or order does not purport to create a lease and only recognises it, it need not be registered either under the Registration Act[2] or for the purposes of this Act.

14. Leases and the doctrine of part performance. — The doctrine of part performance embodied in S. 53A is applicable also to leases. (See Notes on that section.) That section enables the lessee to take certain defences if a suit is brought against him by the lessor to enforce rights other

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SECTION 107—Note 12

1. ('06) 3 All L Jour 130 (131) (DB), *Dost Mohammad Khan* v. *The Bank of Upper India.*
2. ('14) 1 AIR 1914 All 120 (121) : 36 All 176 : 22 Ind Cas 933 (DB), *Munshi Lal* v. *Gopi Ballabh.*
3. ('27) 14 AIR 1927 Pat 319 (322) : 6 Pat 446 : 104 Ind Cas 209 (DB), *Secretary of State* v. *Nistarini Annie Mitter.*
4. ('23) 10 AIR 1923 Oudh 114 (115) : 27 Oudh Cas 64 : 74 I. C. 369, *Ragho Pershad* v. *Secretary of State.*
   Also see Section 4, Note 6.
   ('46) 33 AIR 1946 Mad 180 (181), *Ranga-swami* v. *Vishnu Nimbakar.*

SECTION 107—Note 13

1. • ('44) 31 AIR 1944 Mad 273 (275) : ILR (1944) Mad 543 : 214 Ind Cas 327 (FB), *Kasim Marakkayar* v. *Muhammad Abdul Rahiman.* (33 Mad 102 overruled, relying on AIR 1919 P C 79 : 47 Cal 485 : 46 Ind App 240 (PC).)
   ('32) 19 AIR 1932 Pat 97 (100) : 11 Pat 98 : 136 Ind Cas 54 (DB), *Sachindra Mohan* v. *Ramjash.*
   ('41) 28 AIR 1941 Pat 536 (538) : 194 Ind Cas 428, *Jagdish Chandra* v. *Biseswarlal.*
   ('27) 14 AIR 1927 Cal 913 (913) : 104 Ind Cas 812 (DB), *Rajani Kanta* v. *Raj Kumari.*
   ('30) 17 AIR 1930 Cal 94 (97) : 57 Cal 775 : 126 Ind Cas 550 (DB), *Janki Nath Roy* v. *Mohendra Narain Roy.* (The saving clause in S. 17 (2) (vi) has no application to the case of a lease created by decree, compromise decree or order of a Court and it falls under S. 17 (1) (d).
   ('30) 17 AIR 1930 Cal 559 (560) : 126 Ind Cas 715, *Sailash Chandra* v. *Bireswar Chatterji.*
   ('35) 22 AIR 1935 Cal 261 (262) (DB), *Nagendra Chandra* v. *Purna Chandra.*
   ('37) 24 AIR 1937 Cal 499 (499, 500) : 173 Ind Cas 996, *Haladhar Pathak* v. *Madan Mohan.*
2. ('20) 57 Ind Cas 798 (800) (DB) (Cal), *Jogendra Chandra* v. *Shyam Sundar Das.*

than those embodied in the deed. Section 27A of the Specific Relief Act, 1877, which also embodies the principle of part performance goes further and allows the lessee a positive right to get the unregistered lease deed registered by a suit for the specific performance of the contract to grant the lease.[1]

15. Agreement to lease. — This is one of the sections referred to in S. 4 which must be read as supplemental to the Registration Act. "Lease" is defined both in the Registration Act as well as in this Act. But the definition that is to be adopted for the purpose of this section in that which is given in this Act in S. 105.[1] The result is that an agreement to lease, which is not of a lease according to the definition given in S. 105 of this Act, is not required to be registered for the purpose of this section, though under the Registration Act, S. 2 (7), a lease has been defined as including, 'inter alia' an "agreement to lease".[2] But even for the purpose of the Registration Act, it is the settled view now that registration is only compulsory if there is a present demise and not where the agreement is a merely executory one.[2a] (See also S. 105 Note 4.)

An agreement to lease does not, of itself, create any interest in or charge on, the property agreed to be leased.[3]

Where an agreement to lease under which the parties reserve a yearly rent is not followed by a duly registered document and the proposed lessee enters into possession of the property, his possession is only that of a licensee.[4] See also S. 105, Notes 4 and 19. An 'oral' agreement to grant a lease is valid and enforceable.[5]

Rights and liabilities of lessor and lessee.

108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased :—

(A) Rights and Liabilities of the Lessor.

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover :

(b) the lessor is bound on the lessee's request to put him in possession of the property :

(c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

SECTION 107—Note 14

1. ('37) 24 AIR 1937 Nag 74 (76) : ILR (1936) Nag 115 : 170 Ind Cas 554 (DB), *Hari Prasad* v. *Hanumant Rao.*

SECTION 107—Note 15

1. ('43) 30 AIR 1943 Lah 127 (128) : ILR (1943) Lah 695 : 208 Ind Cas 22 (FB), *Mohan Lal* v. *Ganda Singh.*
   ('10) 5 Ind Cas 562 (563) (Cal), *Nanda Lal Ghose* v. *Sarat Chandra* .
   ('23) 10 AIR 1923 Oudh 237 (238) : 74 Ind Cas 480, *Mahomed Ali* v. *Syed Hasan Jafer.*
2. ('36) 63 Cal 31 (37), *Battersby* v. *DeCruze.*
2a. ('19) 6 AIR 1919 P C 79 (80) : 47 Cal 485 : 46 Ind App 240 : 53 Ind Cas 534 (PC), *Hemanta Kumari Debi* v. *Midnapur Zamindari.*
   ('36) 63 Cal 31 (37), *Battersby* v. *DeCruze.*
3. ('10) 5 Ind Cas 38 (39) (Cal), *Satyendra Nath* v. *Anil Chandra Ghose.*
   ('12) 35 Mad 63 (73) : 8 Ind Cas 520 (524) (FB), *Narayanan Chetty* v. *Muthiah Servai.*
   ('33) 20 AIR 1933 Rang 220 (222) : 148 Ind Cas 301 (DB), *Syriam Land Co., Ltd.* v. *Rodriguez.*
4. ('43) 30 AIR 1943 All 279 (280) : 208 Ind Cas 422, *Anand Sarup* v. *Taiyab Hasan.*
5. ('33) 20 AIR 1933 Rang 220 (222) : 148 Ind Cas 301 (DB), *Syriam Land Co. Ltd.* v. *J. D. Rodriguez.*

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(B) Rights and Liabilities of the Lessee.

(d) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease :

(e) if by fire, tempest or flood, or violence of an army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void :

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision :

(f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor :

(g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor :

(h) the lessee may [a][even after the determination of the lease] remove, at any time [b][whilst he is in possession of the property leased but not afterwards] all things which he has attached to the earth : provided he leaves the property in the state in which he received it :

(i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them :

(j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be Subject to any of the liabilities attaching to the lease :

nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee :

(k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest :

(l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf :

(m) the lessee is bound to keep, and on the termination of the lease to

restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition, and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left:

(n) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference, with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor:

(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell [c][or sell] timber, pull down or damage buildings [c][belonging to the lessor, or] work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto:

(p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes:

(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

a. These words were *inserted* by Section 56 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

b. These words were *substituted, ibid,* for the words "during the continuance of the lease".

c. These words were *inserted, ibid.*

Section 108 (General).

1. Scope of the section. — This section lays down the rights and liabilities of the lessor and the lessee. All or nearly all the clauses are expressions of well settled principles familiar to the law of England.[1] The rights and liabilities are made subject to a contract or local usage to the contrary.

The section does not in terms apply to agricultural leases but the principles underlying the various clauses have been generally applied to such leases[2] and to leases arising in provinces to which the Act does not apply.[3]

Section 73 provides for the payment of mortgage amount to the mortgagee in cases where the mortgaged property has been acquired under the Land Acquisition Act. There is no similar provision as to the lessee's right under such circumstances. On principle, however, the lessee will be entitled

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SECTION 108 (Gen)—NOTE 1

1. ('29) 16 AIR 1929 Cal 272 (275) : 117 Ind Cas 838 (DB), *Indu Bhushan* v. *Moazan Ali.*

2. † ('17) 4 AIR 1917 Mad 465 (469): 40 Mad 910 : 35 Ind Cas 254 (DB), *Secretary of State* v. *Perumarraju.* (Per Srinivasa Aiyangar, J.)
('15) 2 AIR 1915 Mad 717 (718) : 25 Ind Cas 812 (DB), *Srinivasa* v. *Rangasami.*
('10) 33 Mad 499 (501) : 5 I. C. 479 (480), *Narayanaswami Naidu* v. *Ramakrishnayya.* (Section 108 cl. (b)—Principle applies).

3. ('34) 21 AIR 1934 Pesh 101 (102) : 152 Ind Cas 231, *Ganda Singh Mehr Singh* v. *Secretary of State.* (North-West Frontier Provinces.)
('37) 24 AIR 1937 Lah 930 (931) : ILR (1937) Lah 649 : 175 Ind Cas 840 (DB), *Kesheo Chander* v. *Sher Singh.* (Principle underlying the covenant for quiet enjoyment in cl. (c) is of universal application.)
('20) 7 AIR 1920 Lah 390 (391) : 60 Ind Cas 477, *Dharam Narain* v. *Labh Singh.*
F. A. No. 10 of 1943, D|-28-2-46 (DB) (Lah), *Bhim Sen* v. *Secretary of State* (The section does not apply to a lease of land situate in Delhi Province and the rights of the parties will be governed by the terms of the lease.)

to claim the proportion of the compensation amount representing the value of the lease-hold interest still to run. See the undermentioned case.[4]

Section 108 Clause (a)

Synopsis

1. Duty to disclose defect.
2. Defect in proptrty, if includes defect in title.
3. Effect of breach of obligation.
4. Breach of obligation, not fraudulent.

1. Duty to disclose defect.—This clause is worded in terms similar to clause (a) of S. 55, sub-section (1). Analogous provisions are also found in S. 150 of the Contract Act relating to the bailment of goods, and S 57 of the Easements Act, relating to licences.

The lessor is bound, under this clause, to disclose to the lessee all latent defects which are material and of which he is aware and the lessee is not aware. If the lessee is aware of the defect or could, with ordinary care, have discovered the defect, he cannot claim that the lessor has committed a breach of the obligation under this clause.[1]

The defect which the lessor is under an obligation to disclose under this clause must have reference to its 'intended use.' Where there was a thatch over a chimney in the leased premises of which the lessor was aware but not the lessee, and the furniture of the lessee was destroyed by a fire arising from the chimney, it was held by the Calcutta High Court that the lessor had committed a breach of the obligation to disclose the defect and was liable in damages.[2]

But the duty to disclose a defect under this clause is not the same thing as a warranty that the premises demised are fit for the intended use. A warrantly has no reference to the knowledge of the warrantor or the want of a knowledge of the warrantee, whereas the obligation under this clause arises only where the lessor is aware and the lessee is not aware of the defect. Under the English law there is no warranty of fitness in the case of a demise of a land or of unfurnished dwelling houses.[3] In the undermentioned case[4] before the Act it was held by the Punjab Court that there is a warranty of fitness in the case of a demised house. It is clear that in cases falling under this clause there is no warranty of fitness of the premises for the purpose for which they are intended to be used.[5]

2. Defect in property, if includes defect in title. — Under the English Common Law a contract for a lease implied also a contract that the lessor had a title to grant the lease.[1] By statute,[2] however, the right of the intending lessee to call for the title of the lessor has been taken away. The words "defect in property with reference to its intended use" in this clause make it clear that the obligation to disclose the defect does not include a defect in the title of a lessor. As has been pointed out by the Calcutta High Court,[3] a defect in property with reference to its intended use has a reference to the

4. ('30) 17 AIR 1930 Bom 592 (593) : 128 Ind Cas 899, *Ganu Dadu* v. *Panditrao*.

SECTION 108, Clause (a)—NOTE 1

1. ('13) 19 Ind Cas 815 (818) (DB) (Cal), *Muktar Ahmad* v. *Sundar Koer*.
2. ('69) 12 Suth W R 145 (145) (DB), *Radha Krishna* v. *O'Flaherty*.
3. Halsbury, *Laws of England*, (Hailshan Edition) Vol. 20, paragraphs 219 and 220.
4. ('75) 1875 Pun Re No. 33, page 97 (100) (DB), *Doyle* v. *Ross*.
5. ('17) 4 AIR 1917 Bom 34 (38) : 43 Ind Cas 258, *Doongersey Lakhmidas* v. *Keshavji Meghji*. (There is no implied warranty in contracts of leasing.)

SECTION 108—Note 2

1. Woodfall, *Landlord and Tenant*, 22nd Edn., Pages 115, 116.
2. Law of Property Act, 1925, (15 Geo. V. Ch. 20), S. 44 sub-s. (2).
3. † ('13) 19 Ind Cas 815 (817) (DB) (Cal), *Muktar Ahmad* v. *Sundar Koer*.
   ('30) 17 AIR 1930 Cal 561 (564) : 57 Cal 1189 : 128 Ind Cas 321 (DB), *Jyoti Prasad* v. *H. V. Low & Co. Ltd.*

'nature and condition' of the property and not title to the property. It may also be noted that S. 55, sub-s. (1), clause (a) clearly makes a distinction between a defect in property and a defect in seller's title thereto.

But though the lessor is not, under this clause, bound to disclose a defect in title, as part of his obligation to disclose a defect in property, he is bound to 'give' a good title to the lessee. Where the lessee discovers, before the lease is executed, that the lessor has no title to grant the lease, he may resile from the contract. In 'Jyotiprosad Singh v. H. V. Low & Co. Ltd.,[4] Rankin, C. J., observed as follows:

> "I do not think that the Indian law makes a distinction in principle between the obligation of a lessor and of a vendor so far as regards the duty to give a good title, though the incidents of these different types of transfers may be different as regards the obligation to give 'disclosure' and furnish a proof thereof."

This view was affirmed, on appeal, by their Lordships of the Privy Council.[5] In the undermentioned case[6] where the lessor was found to have no title to the land, with the result that the lessee did not get possession of the property leased, the High Court of Nagpur held, following the above view, that the lessee was entitled to recover the premium paid by him.

3. Effect of breach of obligation.—A breach of the obligation imposed by this clause will, if discovered before the lease is granted, enable the lessee to avoid the contract. The intending lessee may also defend himself against a suit for specific performance of the agreement.[1] Where the lease is executed, the effect of the breach of the obligation will, if he has suffered any damages thereby, enable the lessee to sue for damages.[2]

4. **Breach of obligation, not fraudulent.** — A breach of the obligation under cl. (a) of S. 55, sub-s. (1) has been declared by the last paragraph of that section as being fraudulent. There is no corresponding provision to that effect in this section.

Section 108 clause (b)

Synopsis

1. Obligation to give possession.
2. "On the lessee's request."
3. Failure to give possession—
   Effect.
4. Contract to the contrary.

1. Obligation to give possession. — Under the English law he who lets, agrees to give possession; that is to say, in every lease there is an 'implied contract' that the lessor will give possession of the land to the lessee.[1] This principle was applied to cases in this country even before the passing of this Act.[2] This clause imposes a 'statutory obligation' to the same effect and is thus an enactment in substance of what the law was before.[3] The question as to what amounts to delivery of possession in any particular case will depend on the nature of the property leased.[4] Where the property leased is

4. ('30) 17 AIR 1930 Cal 561 (567) : 57 Cal 1189 : 128 Ind Cas 321 (DB).
5. ('31) 18 AIR 1931 P C 299 (301) : 58 Ind App 392 : 59 Cal 699 : 135 Ind Cas 632 (PC), *Low & Co. v. Jyoti Prasad.*
6. ('42) 29 AIR 1942 Nag 103 (105) : ILR (1942) Nag 349 : 202 Ind Cas 9 (DB), *Vinayakrao v. Bhondu.*

SECTION 108—Note 3

1. Woodfall, *Landlord and Tenant*, 22nd Edition, Page 116.
2. ('69) 12 Suth W R 145 (145) (DB), *Radha Krishna v. O'Flaherty.*

SECTION 108, Clause (b)—NOTE 1

1. (1829) 30 R R 699 (699) : 7 L J C P 162, *Coe v. Clay.*
   Halsbury, *Laws of England* (Hailshan Edition), Vol. 20 Para 270.
   Fawcett, *Landlord and Tenant*, 3rd Edn., p. 398.
2. ('69) 11 Suth W R 278 (279) (DB), *Munee Dutta Singh v. Mr. William Campbell.*
3. ('02) 25 Mad 587 (597) : 12 Mad L Jour 249 (DB), *Zamindar of Vizianagaram v. B. Suryanarayan.*
4. ('10) 33 Mad 102 (110) : 3 Ind Cas 701 (706, 707) (DB), *Natesan Chetty v. Vengu*

rent payable by tenants, the giving of notice to the tenant to attorn in future to the lessee amounts to a delivery of possession of the leased property to the lessee.[5] But it is necessary that the lessor himself must have possession to give to the lessee. The fact that the lessee can take legal proceedings to recover possession himself from the party in occupation will not relieve the lessor from his obligation to deliver possession.[6]

A lease by a person who is not in possession is, however, not 'ipso facto' void.[7] The lessee's suit against a third person in possession on the strength of the lease cannot be dismissed on the ground that the lease was void for the reason that the lessor had no possession.[8]

The onus is on the lessor to show, in a suit for rent, that he has discharged his obligation to put the lessee in possession.[9] But where the tenant has already paid the rent under the lease[10] or where the lessee claims that certain subjects of which he has not got possession are within the subjects let,[11] the 'onus' will be on the lessee to show that he did not get possession.

The question as to when the possession is to be delivered under the lease will depend upon the terms of the contract in the particular case.[12]

2. "On the lessee's request." — The lessor is, under this clause, bound to give possession to the lessee only on the 'request' of the lessee.[1] He is not bound to put an unwilling and recalcitrant lessee into possession against his will.[2] In an old case before the Act, it was held that there was no obligation on the part of the lessee to require the lessor to give possession.[3] It has also been held in some cases that a request by the lessee is not necessary in cases where, to the knowledge of both the lessor and the lessee, the property is not in the possession of the lessor,[4] but that the lessor is bound to make it possible for the lessee to take possession by removing third persons from possession.[5]

3. Failure to give possession — Effect. — A lessee to whom possession has not been delivered by the lessor can sue him for damages for breach of

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Nachiar. (Overruled on a different point in AIR 1944 Mad 273 : ILR (1944) Mad 543 (FB).)

5. † ('27) 14 AIR 1927 Lah 1 (3) : 7 Lah 423 : 98 I. C. 584 (DB), *Obedur Rahman* v. *Darbari Lal.*
('10) 33 Mad 102 (110) : 3 Ind Cas 701 (707 (DB), *Natesan Chetty* v. *Vengu Nachiar.* Overruled on a different point in AIR 1944 Mad 273 : ILR (1944) Mad 543 (FB).)

6. † ('18) 5 AIR 1918 Lah 238 (238, 239) : 1918 Pun Re No. 19 : 40 Ind Cas 684 (DB), *Abdul Karim* v. *Upper Indian Bank.*

7. ('75) 1 Cal 297 (301) (DB), *Lokenath Ghose* v. *Jugoobundhoo Roy.*

8. ('68) 11 Suth W R 80 (81) (SB), *Pran Kristo Dey* v. *Bissumbhur Sein.*

9. ('32) 19 AIR 1932 P C 28 (30) : 59 Ind App 29 : 59 Cal 1012 : 136 Ind Cas 398 (PC), *Jogesh Chandra* v. *Emdad Meah.*
('34) 21 AIR 1934 Pesh 101 (102) : 152 Ind Cas 231, *Ganda Singh* v. *Secy. of State.*

10. ('32) 19 AIR 1932 P C 28 (30) : 59 Ind App 29 : 59 Cal 1012 : 136 Ind Cas 398 (PC), *Jogesh Chandra* v. *Emdad Meah.*

11. ('32) 19 AIR 1932 P C 28 (30) : 59 Ind App 29 : 59 Cal 1012 : 136 Ind Cas 398 (PC), *Jogesh Chandra* v. *Emdad Meah.*

12. ('27) 14 AIR 1927 Lah 1 (3) 7 Lah 423 : 98 I. C. 584 (DB), *Obedur Rahman* v. *Darbari Lal.*

SECTION 108 (b)—Note 2

1. ('22) 9 AIR 1922 Cal 348 (353) : 49 Cal 257 : 69 Ind Cas 117 (DB), *Katyani Debi* v. *Uday Kumar.*
[*See also* ('10) 33 Mad 499 (501) : 5 Ind Cas 479 (480), *Narayanaswami Naidu* v. *Ramakrishnayya.* (This principle applies to agricultural leases also.)]

2. † ('36) 23 AIR 1936 Lah 815 (816) : 165 Ind Cas 56, *Nur Mohammad* v. *Ahmad Ali Khan.* (Two lessees executing joint lease —One lessee put in possession—Other lessee not requesting lessor to be put in possession—Such other lessee not being obstructed, he is liable for rent.)
('09) 4 Ind Cas 63 (64) (DB) (Cal), *Gopal Chandra Maity* v. *Chowdhury Krishna.*

3. ('69) 12 Suth W R 149 (149) (DB), *Munee Dutt Singh* v. *William Campbell.*

4. ('18) 5 AIR 1918 Lah 238 (239) : 1918 Pun Re No. 19 : 40 Ind Cas 684, *Abdul Karim* v. *Upper India Bank.*
('10) 33 Mad 499 (501) : 5 Ind Cas 479 (480), *Narayanaswami Naidu* v. *Ramakrishnayya.*

5. ('10) 33 Mad 499 (501) : 5 Ind Cas 479 (480), *Narayanaswami Naidu* v. *Ramakrishnayya.*

the obligation.[1] He can also sue for possession of the property demised. The lessor cannot, in answer to such a suit claim that the lessee has failed to pay the stipulated premium, unless the document provides that the lessee is not to have possession until the premium is paid.[2] Where a third party is in possession, the lessee can sue such third party for possession.[3] Thus, where A leases certain properties to B for a certain period and then leases the same properties to C for a further period after the expiry of B's lease, C can, after such expiry, sue B for possession.[4]

The lessee may also repudite or rescind the whole contract for failure of the lessor to give possession under S. 55 of the Contract Act,[5] though he cannot do this where he takes possession of a portion of the demised property.[6] If he rescinds the whole contract he can, if he had paid any premium or other consideration for the lease, recover it back from the lessor.[7]

SECTION 108 (b)—Note 3

1. † ('43) 30 AIR 1943 P C 24 (28): ILR (1943) 1 Cal 372 : ILR (1943) Kar (PC) 39 : 70 Ind App 18 : 206 Ind Cas 266 (PC), *Ram-Lal Dutt* v. *Dhirendra Nath.*
('11) 34 Mad 108 (112) : 6 Ind Cas 727 (729) (DB), *Pemmaraju* v. *Secy. of State.*
Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Para 270.
('26) 13 AIR 1926 Pat 508 (511) : 6 Pat 94 : 96 Ind Cas 558 (DB), *Razia Begam* v. *Mahammad Daud.* (The assignee of the lessee can also claim damages for non-delivery of possession.)
('67) 7 Suth W R 22 (22) (DB), *Fireengee Singh* v. *Ahmed Hossein.*
('10) 5 Ind 712 (712) (DB) (Mad), *Ghanta Ramanna* v. *Narayanasami.*
† ('17) 4 AIR 1917 Mad (467, 469): 40 Mad 910 : 35 Ind Cas 254 (DB), *Secy of State* v. *Venkayya Garu.* (He can claim the whole value of the term as damages.)
('25) 12 AIR 1925 Lah 262 (264) : 5 Lah 527 : 85 Ind Cas 421 (DB), *Abdul Latif* v. *Ladha Ram.*
('28) 109 Ind Cas 335 (335) (Lah), *Dewa Mal* v. Moolchand Shiv Dhan. (Measure of damages pointed out.)
('27) 14 AIR 1927 Lah 844 (845) : 100 Ind Cas 662 (DB), *Neki Ram* v. *Pirbhu Dayal.* (Do.)
('25) 12 AIR 1925 Rang 261 (262, 263) : 90 Ind Cas 635 (DB), *Ma Hnin Yi* v. *Chew Whee Shien.* (Do.)
('74) 22 Suth W R 260 (261) (DB), *Ashruf-junissa Begam* v. *Tosudduck Hoossein.*
[*See also* ('82) 8 Cal 963 (965) : 11 Cal LR 330 (DB), *Rajdhur Chowdhury* v. *Kali Krishna Buttacharya,* (Grant of patta to *P* by *A* on his behalf and on behalf of his co-proprietors *B*, *C* and *D*—Lessee entering upon land—*B*, *C* and *D* repudiating contract (patta) and ejecting *P*—Suit by *P* to enforce contract (patta) to place *P* in possession of land under patta and in the alternative, for compensation against *A* for breach of contract, held maintainable.)
('71) 6 Beng LR (App) 44 (45, 46) (DB), *Mahomed Isa Khan* v. *Kisho Lal.*]

2. † ('19) 6 AIR 1919 Mad 168 (170, 171): 42 Mad 203 : 51 Ind Cas 507 (SB), *Kandasami Pillai* v. *Ramasami Mannadi.*

3. ('C· 11 Suth W R 80 (81) (DB), *Pran Kisto* v. *Biswambhur.*
('02) 25 Mad 587 (591) : 12 Mad L Jour 249 (DB), *Zemindar of Vizianagaram* v. *Behara Suryanarayana.*
('91) 14 Mad 269 (270) (DB), *Achayya* v. *Hanumantarayudu.*
* ('21) 8 AIR 1921 Mad 42 (44, 46) : 44 Mad 937 : 62 Ind Cas 284 (DB), *Mohideen Rowther* v. *Jayarama Aiyar.*
('93) 16 Mad 194 (198) (DB), *Vythilinga* v. *Venkatachala.* (Suit by lessees from Shortriemdars of a village for possession against defendants who claimed permanent occupancy rights—Defendants found to be trespassers—Suit is maintainable without proof of notice to quit. 14 Mad 269 relied on.)
[*See also* ('35) 22 AIR 1935 Cal 202 (203) : 155 Ind Cas 733, *Sundar Ali* v. *Nur Mamud.* (In a suit for possession by a tenant against a trespasser, it is not necessary that the tenant should prove the terms of the tenancy with his landlord. If he proves that the alleged landlord has accepted rent from him, that would be quite sufficient for the purpose of maintaining the suit against the trespasser.)]

4. † ('32) 19 AIR 1932 All 314 (315): 139 Ind Cas 828 (DB), *Mohomed Fazihzzaman* v. *Anwar Hussain.*
('31) 18 AIR 1931 All 649 (651) : 136 Ind Cas 273 (DB), *Bishen Sarup* v. *Abdul Samad.*
('89) 13 Bom 294 (296) (DB), *Bhutia Dhondu* v. *Ambo.*

5. ('28) 15 AIR 1928 Nag 328 (328) : 110 Ind Cas 420, *Rajpal* v. *Municipal Committee, Arvi.*
('28) 15 AIR 1928 Nag 328 (328): 109 Ind Cas 465 (DB), *Hanumantha Goundan* v. *Doraiswami Pillai.*
[*See also* ('43) 30 AIR 1943 P C 24 : (28) ILR (1943) 1 Cal 372 : ILR (1943) Kar (PC) 39 : 70 Ind App 18 : 206 Ind Cas 266 (PC), *Ram Lal Dutt* v. *Dhirendra Nath.*)

6. ('28) 15 AIR 1928 Mad 380 (381) : 109 Ind Cas 465 (DB), *Hanumantha Goundan* v. *Doraiswami Pillai.*

7. ('19) 6 AIR 1919 Oudh 134 (136) : 53 Ind Cas 140, *Ibad-Ullah Khan* v. *Ram Charan.*
('27) 14 AIR 1927 Lah 844 (845) : 100 Ind

In a recent decision of the Privy Council,[8] a relief by way of 'specific performance' has also been referred to as one of the ordinary remedies of a tenant who is not given possession of the property or any part thereof. See also clause (c), Note 8.

As to whether the lessee can withhold payment of rent or claim abatement or suspension of the rent to any extent on the lessor's failure to give possession in whole or in part, see Notes on clause (l).

4. Contract to the contrary. — The clause is subject to a contract to the contrary. Where the lessee agrees, by the contract of tenancy, that he will himself take possession of the leased property the agreement is a "contract to the contrary" and the lessor has no duty to place the lessee in possession.[1]

Section 108 Clause (c).

Synopsis

1. Scope.
2. "Without interruption."
3. Interruption by holder of paramount title.
4. Interruption by trespasser.
5. "Shall be deemed to contract."
6. Benefit of covenant runs with the land.
7. Crown grants.
8. Effect of breach of covenant.

1. Scope. — In England an express covenant for quiet enjoyment is usually inserted in every lease. Where no covenant is inserted in the lease the law implies such a covenant from the use of the word "demise" or even from a mere contract of letting in whatever form it is expressed.[1] The express covenant may be either in a qualified form or in an unqualified form, though usually, it is in a qualified form, that is to say, it protects the lessee from interruption 'by the lessor or by persons claiming under him,' but not from interruption by third persons. The implied covenant also is only a limited covenant.[2] This clause gives the lessee in India the same rights as he would have under what, in England, is a covenant for quiet enjoyment in an 'unqualified form'. In other words the lessee is protected against interruption by 'whomsoever' it is occasioned.[3]

. Cas 662 (DB), *Neki Ram* v. *Pirbhu Dayal*.
('69) 11 Suth W R 278 (279) (DB), *Munee Dutt Singh* v. *Compbell*.
('19) 6 AIR 1919 Oudh 398 (398) : 52 Ind Cas 836, *Razzaq Ali* v. *Ram Autar*.
('30) 17 AIR 1930 Cal 385 (386, 387) : 57 Cal 114 : 125 Ind Cas 607 (DB), *Ahmadar Rahaman* v. *Jaminiranjan*. (Lessee knowing that lessor could not put him in possession of a part—Suit delayed for three years —*Held*, claim for interest on premium not justified.)
(1864) 2 Mad HCR 315 (316) (DB), *Vayalil Pudia* v. *Udaya Varma*. (Kanom lease.)

8. ('43) 30 AIR 1943 P C 24 (28) : ILR (1943) 1 Cal 372 : ILR (1943) Kar (P C) 39 : 7a Ind App 18 : 206 Ind Cas 266 (PC), *Ram Lal Dutt* v. *Dhirendra Nath*.

SECTION 108—Note 4

1. † ('29) 16 AIR 1929 Mad 611 (615, 616) : 119 Ind Cas 169 (DB), *Krishna* v. *Subbanna*.

SECTION 108, Clause (c)—NOTE 1

1. Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Paras. 265 to 270.
Woodfall *Landlord and Tenant*, 22nd Edition, page. 207.
[*See also* (1895) 64 L J Q B 787 (790) : (1895) 2 Q B 610 : 73 L T 250 : 44 W R (Eng) 328, *Baynes & Co.* v. *Lloyd & Sons*.]

2. Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Paras. 265 to 270.

3. ('20) 7 AIR 1920 Lah 390 (391) : 60 Ind Cas 477, *Dharam Narain* v. *Labh Singh*.

† ('23) 10 AIR 1923 Cal 41 (43) : 50 Cal 68 : 70 Ind Las 161 (DB), *Naorang Singh* v. *A. J. Meik*.
('29) 16 AIR 1929 Cal 272 (275) : 117 Ind Cas 838 (DB), *Indu Bhushan* v. *Moazam Ali*.
† ('35) 22 AIR 1935 Mad 973 (975) : 158 Ind Cas 851, *Nandi Reddi* v. *Lakshmi Reddi*.
('38) 25 AIR 1938 Nag 439 (440) : 181 Ind Cas 394, *Gajadhar* v. *Rambhau*.
• ('01) 25 Bom 269 (273) : 2 Bom L R 1070 (DB), *Tayawa* v. *Girshidappa*.
('17) 4 AIR 1917 Pat 549 (550) : 2 Pat L Jour 713 : 42 Ind Cas 111 (DB), *Kadir Baksh* v. *Sheo Prasad*. (The lessors are not entitled to intrude upon the property of the lessees by inducting any person thereupon.)
[*See also* (1864) 1 Suth W R I (2), *Bishen Dayal* v. *Probho Dass*.
('13) 19 Ind Cas 815 (816) (DB) (Cal), *Muktar Ahmad* v. *Sundar Koer*.]
[But see ,'05) 7 Bom L R 713 (722, 723), *Bomanji* v. *Mahomadali*. (To constitute a breach of the covenant for quiet enjoyment on the landlord's part there must be some act of interruption by him or those claiming under him.)]

But though the implied contract under this clause if for quiet possession against interruption by whomsoever caused, it has reference, where it is caused by a third party, only to a 'lawful' eviction. It does not extend to maintaining the lessee's possession against unlawful or tortious evictions by third parties.[4] The reason is that against such acts the lessee has his proper remedy against the wrong-doers.[5] As pointed out by Rankin, C. J., in 'Indubhushan v. Moazam Ali.'[6]

> "No lessor can guarantee that his lessee will not be subject to trespass or wrongful acts on the part of a third party. What he does covenant is that his title is such that no lawful entry or eviction or interruption will occur."

The words "if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee" do not make the payment of rent and the performance of the contracts 'conditions precedent' to the enforceability of the obligation to secure quiet enjoyment.[7] This is also the English law on the point. In a covenant for quiet enjoyment by the lessee the usual qualification "by paying the rent thereby reserved and performing the covenants" does not make the payment of rent, etc., a condition precedent to the performance of the covenant by the lessor.[8] The covenant, if it is express, holds good during the whole of the term expressed to be granted by the lease and not merely during the actual continuance of the estate of the lessor.[9] Where a lease is to commence in future, the lessee cannot, before his right to possession accrues, sue for breach of the covenant for quiet enjoyment.[10]

2. "Without interruption." — In order to constitute an interruption within the meaning of this clause there must be a substantial interference

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4. ('47) 34 AIR 1947 Nag 48 (51) : ILR (1946) Nag 568 (DB), *Narayan Ramchand* v. *Gokuldas Bholadas.*
('45) 32 AIR 1945 All 425 (427) : ILR (1945) All 412 (DB), *British India Corpn.* v. *Secy. of state.*
('38) 25 AIR 1938 Cal 690 (691, 692) : 177 Ind Cas 996, *Surendra Nath* v. *Bhudar Chandra.*
('33) 20 AIR 1933 Mad 465 (466) : 144 Ind Cas 16, *Ayyanna* v.. *Gangayya.* (In connexion with proceedings for the determination of mesne profits a receiver was appointed to auction the land and the respondent in the case executed a security bond to raise the second crop and give a certain amount of paddy—*Held*, whether or not there was technically a lease, the security bond had the same practical effect as a lease and though T. P. Act did not apply, the principles of S. 108 applied.)
('15) 2 AIR 1915 Mad 717 (718) : 25 Ind Cas 812 (DB), *Shrinivas Ayangar* v. *Rangaswami Iyengar.* (Clause is applicable to agricultural lease also as a rule of equity, justice and good conscience.)
* ('22) 9 AIR 1922 Cal 87 (90) : 49 Cal 948 : 69 Ind Cas 126 (DB), *Chandi* v. *Katyani Debi.*
† ('37) 24 AIR 1937 Lah 930 (931) : 171 Ind Cas 114, *Keshav Chander* v. *Sher Singh.*
('70) 14 Suth W R 273 (274) (DB), *Gobin Chunder* v. *Kristo Kanto.*
† ('23) 10 AIR 1923 Cal 41 (43, 44) : 50 Cal 68 : 70 Ind Cas 161 (DB), *Naorang Singh* v. *A. J. Meik.*
('26) 13 AIR 1926 Lah 371 (372) : 94 Ind Cas 121, *Jamita Mal* v. *Gokul Chand.*
Woodfall, *Landlord and Tenant*, 22nd Edn., page. 875.
[*See also* ('21) 8 AIR 1921 Cal 532 (534) : 68 Ind Cas 477 (DB), *Banka Behari* v. *Madan Mohan.*]

5. Woodfall, *Landlord and Tenant*, 22nd Edn., page 868.
('47) 34 AIR 1947 Nag 48 (51) : ILR (1946) Nag 568 (DB), *Narayan Ramchandra* v. *Gokuldas Bholadas.*
('45) 32 AIR 1945 All 425 (42) : ILR (1945). All 412 (DB), *British India Corpn.* v. *Secy. of State.*
('23) 10 AIR 1923 Cal 41 (43) : 50 Cal 68 : 70 Ind Cas 161 (DB), *Naorang Singh* v. *A. J. Meik.*

6. ('29) 16 AIR 1929 Cal 272 (276) : 117 Ind Cas 838 (DB).

7. (12) 15 Ind Cas 711 (713, 714) (DB) (Mad), *Meenakshi Sundara* v. *Chidambaram Chetti.*

8. Woodfall, *Landlord and Tenant*, 22nd Edn., page 875.

9. ('35) 2 AIR 1935 Mad 973 (975) : 158 Ind Cas 851, *Nandi Reddi* v. *Lakshmi Reddi.*
Woodfall, Landlord and Tenant, 2nd Edn., page 875.
(1862) 139 R R 730 (733) : 32 L J Q B 67 : 11 W R (Eng) 169 : 7 L T (NS) 384, *Penfold* v. *Abbot* (Implied covenant.)

10. (1835) 42 R R 532 (539) : 2 Bing (NC) 90 : 4 L J (NS) CP 305, *Treland* v. *Bircham.*

with the enjoyment by the lessee of the leased property.[1] Actual dispossession is, however, not necessary.[2] Disturbance of enjoyment which is merely temporary and which does not interfere with the title or possession of the lessee is not a breach of obligation.[3]

Where there is an interruption of enjoyment under compulsion of a statute it has been held in England that there is no breach of the covenant for quiet enjoyment.[4] Where the lessee was evicted by the Plague Authorities under the powers vested in them by law, it was held by the Bombay High Court that there was no breach on the part of the lessor of the covenant for quiet enjoyment.[5] In the undermentioned case,[6] however, where land was leased for being used for sale of firewood, but the municipality refused permission for such sale, it was held by the Oudh Chief Court that the lessor did not secure the lessee possession with reference to its intended use, and that there was a breach of the obligation to secure quiet enjoyment. It is submitted that this view does not seem to be correct.

A covenant for quiet enjoyment does not include a covenant for title.[7]

3. Interruption by holder of paramount title.—An interruption of the lessee's enjoyment by the holder of a paramount title is an "interruption" within the meaning of this clause.[1] This follows from the principle stated in

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SECTION 108—Note 2

1. • ('97) 24 Cal 296 (304) (DB), *Dhunput Singh* v. *Mahomed Kazim Ispahain.*
('15) 2 AIR 1915 Mad 717 (719) : 25 Ind Cas 812 (DB), *Srinivasa* v. *Rangasami.* (Agricultural lease—Third person taking away the crops harvested by the lessee, and delivering it subsequently to the lessor, constitutes disturbance.)
('01) 5 Cal W N 353 (355) (DB), *Rani Lalita Sundari* v. *Rani Surnomoyee.*
Halsbury, *Laws of England (Halisham* Edition), Vol. 20 Para. 271.
[*See also* (1858) 115 R R 854 (859, 860) : 27 L J Ex 253 : 6 W R (Eng) 327 : 30 L T (OS) 352, *Shaw* v. *Stenton.* (Lease of mine—lessor cannot use surface in such a way as to disturb the lessee in his occupation.)]
2. ('12) 17 Ind Cas 238 (241) (DB) (Cal), *Kalanand Singh* v. *Jarao Kumari.*
• ('01) 5 Cal W N 353 (355) (DB), *Rani Lalita Sundari* v. *Rani Surnomoyee.*
('23) 10 AIR 1923 Nag 31 (32) : 69 Ind Cas 234, *Deboo* v. *Jiwan Rao.* (Plaintiff repudiated the kabuliyat granting the lease—He also took forcible possession of a certain amount of juari harvested in the field and put it in the possession of another person—*Held*, the plaintiff's action in repudiating the lease and the seizure of juari grown by the tanent showed eviction in the eye of the law.
('26) 13 AIR 1926 Cal 906 (907) : 96 Ind Cas 11 (DB), *Ram Ranjan* v. *Jayanti Lal.*
('22)9 AIR 1922 Cal 237 (242) : 63 Ind Cas 754 (DB), *Ramchandra Chatterjee* v. *Pramatha Nath.* (Interference with receipt of rent.)
('21) 8 AIR 1921 Cal 532 (533) : 68 Ind Cas 477 (DB), *Banka Behari* v. *Madan Mohan.* (Interference with collection of rent.)
('35) 22 AIR 1935 Cal 464 (465) : 157 Ind Cas 353 (DB), *Wazuddin Gazi* v. *Syed Ahmad.* (Property X leased to *A* and property Y leased to *B* for purposes which interfered with the enjoyment by *A*—*Held*, there was an interruption.)
[*See also* ('20) 7 AIR 1920 Pat 258 (258) : 57 Ind Cas 69, *Surendra Mohan* v. *Sarba Lal.* (Wrongfull accumulation of water by landlord on his tenant's land amounts to an interference with the tenant's possession.)]
Also see Section 108 (1), Note 14.
3. Halsbury, *Laws of England* (Halisham Edition), Vol. 20, Para. 274.
(1888) 58 L J Ch. 124 (126) : 40 Ch. D 71 : 60 L T 105 : 37 W R (Eng) 253, *Jenkins* v. *Jackson.* (A nuisance committed on adjoining land by the lessor or his tenant is not a breach of the covenant for quiet enjoyment.)
4. Woodfall, *Landlord and Tenant*, 22nd Edn., page 880.
5. ('99) 23 Bom 510 (512, 513) : 1 Bom LR 267, *Merwanji* v. *Syed Sirdar.*
6. ('19) 6 AIR 1919 Oudh 398 (398) : 52 Ind Cas 836, *Razzak Ali* v. *Ram Autar.*
7. ('17) 4 AIR 1917 Mad 465 (467, 470) : 40 Mad 910 : 35 Ind Cas 254 (DB), *Secy. of State* v. *Pemmaraju.*
('30) 17 AIR 1930 Cal 561 (564) : 57 Cal 1189 : 128 Ind Cas 321 (DB), *Jyoti Prosad* v. *H. V. Low & Co.*
('34) 1 AIR 1934 Cal 437 (438) : 149 Ind Cas 1027 (DB), *Hiralal Ray* v. *Satyapriya Ghosal.*
[But see (1864) 1 Suth W R 1 (2) (DB), *Bisen Dyal* v. *Probhov Das.* (Case before the Act.)]
('47) 34 AIR 1947 Nag 48 (51) : ILR (1946) Nag 568 (DB), *Narayan Ramchand* v. *Gokuldas Bholadas.*

SECTION 108—Note 3

('02) 25 Bom 269 (273, 274) : 2 Bom L R 1570 (DB), *Tayawa* v. *Girshidapa.*
('13) 19 Ind Cas 815 (816, 817) (DB) (Cal), *Muktar Ahmad* v. *Sundar Koer.*
('38) 25 AIR 1938 Nag 439 (440) : 181 Ind Cas

Note 1 that the covenant for quiet possession under this clause extends to all lawful evictions by third parties. A title paramount means a title superior to that of the lessor, i.e., a title against which a lessor cannot make a valid defence.[2] Where a third person files a suit against the lessee without making the lessor a party, and, in execution of the decree, dispossesses the lessee it cannot be said that such dispossession is necessarily by a person with paramount title.[3] But where a lessor is made a party the dispossession will be by the owner of the paramount title.[4]

4. Interruption by trespasser. — As seen in Note 1, the covenant under this clause does not extend to 'tortious' acts of third parties. Where, therefore, the lessee is evicted or interrupted in his enjoyment of his property by a trespasser, the lessor cannot be said to have committed any breach of his obligation under this clause. In such cases the lessee can himself sue the trespasser for ejectment. There is a difference of opinion on the question whether the lessor himself can sue the trespasser for possession in such cases. In 'Ramanathan v. Pulikutty[1]' it was held by the Madras High Court that the lessor, not being entitled to possession himself after the execution of the lease, was not entitled to sue the trespasser for possession. This view has not been followed by that Court in later cases. It has been held that a lessor, although he has granted lease to another is entitled for the purpose of putting the lessee in possession, to maintain a suit to eject the trespasser.[2] It has also been held that if the lessor's right to the reversion is affected by the trespass he will be entitled to a declaration of title and to the delivery of "formal" possession by proclamation of his reversionary right.[3] The same view, namely, that the lessor is entitled to sue to eject the trespasser for the purpose of putting the lessee in possession has been taken by the Calcutta and Patna High Courts also.[4]

There is also a difference of opinion as to whether a lessor can maintain a suit for ejectment under S. 9 of the Specific Relief Act. According to one view he is not entitled to maintain such a suit.[5] A contrary view is that he can maintain such a suit.[6] It is submitted that the latter view is to be preferred.

394, *Gajadhar* v. *Rambhau*.
• ('35) 22 AIR 1935 Mad 973 (975 : 158 Ind Cas 851, *Nandi Reddi* v. *Lakshmi Reddi*.
('20) 7 AIR 1920 Lah 390 (391): 60 Ind Cas 477, *Dharm Narain* v. *Labh Singh*.
('22) 9 AIR 1922 Cal 237 (240) : 63 Ind Cas 754 (DB), *Ramchandra Chatterji* v. *Pramtaha Nath Chatterji*.
('47) 35 AIR 1947 Nag 48 (51) : ILR (1946) Nag 568 (DB), *Narayan Ramchandra* v. *Gokuldas Bholadas*.

2. ('21) 8 AIR 1921 Cal 532 (533) : 68 Ind Cas 447 (DB), *Banka Behari* v. *Madan Mohan*.
† ('29) 16 AIR 1929 Cal 22 (25): 55 Cal 1013 : 112 Ind Cas 172 (DB), *Jogendra Lal* v. *Mahesh Chandra*.

3. ('21) 8 AIR 1921 Cal 532 (533, 534) : 68 Ind Cas 477 (DB), *Banka Behari* v. *Madan Mohan*.

4. ('22) 9 AIR 1922 Cal 237 (242) : 63 Ind Cas 754 (DB), *Ramchandra Chatterji* v. *Pramatha Nath*.
('29) 16 AIR 1929 Mad 195 (196) : 113 Ind Cas 289, *Kunhammad* v. *Etakarati Ammad*.

SECTION 108—Note 4

1. ('98) 21 Mad 288 (290) : 8 Mad L Jour 121 (DB).

2. † ('15) 2 AIR 1915 Mad 358 (360) : 26 Ind Cas 347 (DB), *Somai Ammal* v. *Vellayya*. (21 Mad 288 not followed.)

3. ('17) 4 AIR 1917 Mad 760 (761) : 39 Mad 1042 : 32 Ind Cas 198 (DB), *Tiruvengada* v. *Venkatachala*. (18 All 440 (FB) followed.)

4. † ('23) 10 AIR 1923 Cal 192 (193): 70 Ind Cas 792 (DB), *Raj Kumar* v. *Ali Mia*.
('84) 10 Cal 1076 (1079) : 9 Ind Jur 226 (DB), *Bissesuri Dabea* v. *Barada Kanta*.
† ('28) 15 AIR 1928 Pat 354 (355): 7 Pat 496 : 110 I.C. 642 (DB), *Damodar Prasad* v. *Lachimi Prasad*.
('28) 112 Ind Cas 314 (315) (DB) (Pat), *Basoo Mahton* v. *Bhagwan Das*.

5. ('26) 13 AIR 1926 Mad 18 (20) : 92 Ind Cas 20, *Veeraswami* v. *Venkata Chala*.
('02) 6 Cal W N 616 (617) (DB), *Sonaton* v. *Sheikh Helim*. (Lessor cannot bring a suit for possession against trespasser even where, subsequent to such dispossession the tenant in collusion with the trespasser refused to bring a suit.)

6. ('05) 28 Mad 238 (239) (DB), *Jagannath* v. *Rama Rayar*.
('11) 5 Sind L R 42 (44) : 12 Ind Cas 190 (191) (DB), *Sahibrakhio* v. *Jamromal*.
('09 1 Ind Cas 150 (150) (DB) (Cal), *Bindubashini* v. *Shrimati Jahnavi*.

5. "Shall be deemed to contract." — The covenant for quiet enjoyment in this clause is deemed to be a part of the contract and to be read into the contract. The other clauses of this section are merely 'statutory obligations' and are not deemed to be part of the contract itself.[1]

6. Benefit of covenant runs with the land.—The paragraph following this clause applies only to this clause and not to clause (a) or (b). Consequently, it is only the benefit of a covenant for quiet enjoyment that runs with the land and not the benefit of the obligations under clauses (a) or (b).[1]

As will be seen in the Notes on S. 111, the right of a lessee in the lease is a heritable right.[2] By virtue of clause (j) of this section it is also a transferable right. The legal representatives of the lessee or the assignee of the lessee will therefore be entitled to enforce the covenant for quiet enjoyment given by this clause.[3]

7. Crown grants. — This Act does not apply to Crown grants by virtue of the provisions of the Crown Grants Act, XV of 1895. But it has been held that the provisions of this section may be referred to in order to determine the nature of the ordinary covenants by which the lessor and the lessee are bound.[1]

8. Effect of breach of covenant. — Where, after the lease is executed the covenant for quiet enjoyment is broken by the lessor, the lessee is entitled to sue the lessor for damages as on breach of a contract.[1] The measure of damages in such a case will, as in the case of any other contract, have to be determined by reference to S. 73 of the Contract Act. But a claim for damages is not the only remedy of the lessee. He can sue the lessor for specific performance of the contract by putting him in possession.[2] He can

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('09) 3 Ind Cas 466 (467) (DB) (Cal), *Shyama Churn* v. *Mohamed Ali.*
† ('10) 7 Ind Cas 924 (926) (DB) (Cal), *Nabin Das* v. *Kailash Chandra.*
('29) 16 AIR 1929 Bom 467 (468) : 53 Bom 777 : 122 Ind Cas 54 (DB), *Ratanlal Ghelabhai* v. *Amarsingh Rupsing.*
* ('11) 10 Ind Cas 455 (455) (DB) (Cal), *Akhil Chandra* v. *Akhil Chandra.*

SECTION 108—Note 5

1. ('37) 24 AIR 1937 Pat 44 (47) : 166 Ind Cas 599 (DB), *Ramparikha Pandey* v. *Mt. Ramjhari Kuer.*

SECTION 108—Note 6

1. ('17) 4 AIR 1917 Mad 465 (469) : 40 Mad 910 : 35 I.C. 254 (DB), *Secy. of State* v. *Pemmaraja.*
2. ('37) 24 AIR 1937 Nag 321 (322) : ILR (1937) Nag 406 : 172 Ind Cas 543, *Rajib Husain* v. *Nawab Yanuskhan.*
3. ('29) 16 AIR 1929 Mad 195 (196) : 113 I.C. 289, *Kunhtammad* v. *Etakarai.*

SECTION 108—Note 7

1. ('17) 4 AIR 1917 Mad 465 (469) : 40 Mad 910 : 35 Ind Cas 254 (DB), *Secy. of State* v. *Venkayya.*
('47) 34 AIR 1947 Nag 48 (53) : ILR (1946) Nag 568 (DB), *Narayan Ramchand* v. *Gokuldas Bholadas.* (Lessee evicted by title paramount—Lessee is entitled to recover from lessor pecuniary loss suffered by him by action for eviction as well as refund of consideration for lease.)
('45) 32 AIR 1945 All 425 (427) : ILR (1945) All 412 (DB), *British India Corpn.* v. *Secy.*

SECTION 108—Note 8

1. ('13) 19 Ind Cas 815 (817) (DB) (Cal), *Muktar Ahmad* v. *Sundar Koer.*
('97) 1897 Bom P J 372 (DB), *Giriappa* v. *Anandrao.*
(1864) 1 Suth W R 49 (49) (DB), *Ram Manikchand Sircar* v. *Meer Mahomed Gunnial.*
('38) 25 AIR 1938 Nag 439 (440) : 181 Ind Cas 394, *Gajadhar* v. *Rambhau.* (Lease of theatre—Measure of damages stated.)
[*See also* ('35) 22 AIR 1935 Cal 464 (465) 157 Ind Cas 353 (DB), *Wazuddin Gazi* v. *Sayeb Ahamad.*
('23) 10 AIR 1923 Mad 392 (395) : 74 Ind Cas 416 (DB), *Gopala Iyenger* v. *Mummachi Reddiar.*
('09) 4 Ind Cas 1142 (1142) (DB) (Mad), *Ramaswami* v. *Thiruvenkatam Pillai.*
('70) 14 Suth W R 43 (44) (DB), *Gobind Chand Juittee* v. *Mun Mohun Jha.*
('95) 21 Bom 175 (183) (DB), *Nagardas Saubhagyadas* v. *Ahmedkhan.*]
2. ('04) 31 Cal 647 (656) : 8 Cal W N 446 (FB), *Tamizuddin* v. *Ashrub Ali.* (A suit under S. 9 of the Specific Relief Act is not the only remedy.)
(1864) 1 Suth W R 49 (49) (DB), *Ram Manikchand* v. *Meer Mahomed.*
('82) 11 Cal L R 387 (388) (DB), *Chundra Kumar Guha* v. *Mongul Mollah.*
('82) 8 Cal 963 (965) : 11 Cal L R 330 (DB), *Raj Dhur Chowdhry* v. *Kali Kristna Bhuttacharjya.* (One co-sharer granting lease—Other co-sharers ejecting lessee—

also treat the contract of lease as rescinded and deliver to the lessor the properties in his possession.[3] But the fact that the lessee has not been able to enjoy the property for the full term of the lease, has not the effect of extending the period of the lease as fixed under the terms of the lease deed.[4] As to abatement or suspension of rent on disturbance of possession, see Notes on clause (1).

Section 108 Clause (d).

Synopsis

1. Accession.
2. Accretion to land by alluvion.
3. Encroachment by tenant.
4. "Shall be deemed to be comprised in the lease."

1. Accession. — A lessee is under this clause entitled to any accessions made to the demised property during the continuance of the lease.[1] As to the meaning of the word "accession," see generally Note 1 on S. 63 and Note 2 on S. 70. The question whether a particular addition to the demised property is an "accession" must be decided, as seen in the said Notes, in the light of various facts — upon the intention of the parties, upon the law applicable to the particular case and in some cases upon both these things.

2. Accretion to land by alluvion. — Under the English law where there is an acquisition of land from the sea or a river by 'gradual, slow and imperceptible' means then, from the supposed necessity of the case and the difficulty of having to determine year by year to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land.[1] This principle was applied by their Lordships of the Privy Council in the case of 'Felix Lopez v. Muddun Mohun[2] and by the Allahabad High Court in 'Narendra v. Achhaibar.[3] In 'Raja Srinath Roy v.

Lessee suing all co-sharers to enforce lease or for damages—*Held*, claim for damages was maintainable under Specific Relief Act, S. 19.)

[*See also* ('43) 30 AIR 1943 P C 24 (28) : ILR (1943) 1 Cal 372 : ILR (1943) Kar (P C) 39 : 70 Ind App 18 : 206 Ind Cas 266 (P C), *Ram Lal Dutt* v. *Dhirendra Nath*.]

3. ('76) 25 Suth W R 492 (492) (DB), *Mt. Lali Konwar* v. *Phillip William Carter*.
('12) 15 Ind Cas 711 (716) (DB) (Mad), *Meenakshi Sundara* v. *Chidambaram Chetty*.
('27) 14 AIR 1927 Lah 880 (880) : 109 Ind Cas 799, *Kundan Lal* v. *Lekh Raj*. (If the tenant does not deliver possession, he may be liable in damages.)
[See however ('27) 14 AIR 1927 Lah 1 (4) : 7 Lah 423 : 98 Ind Cas 584 (DB), *Obedur Rahman* v. *Darbari Lal*. (A landlord's unlawful entry on the demised premises during the continuance of a tenancy, though it may suspend his right to demand rent from the tenant, does not *ipso facto* extinguish the currency of the lease.)]
4. *See* ('29) 16 AIR 1929 Oudh 286 (287) : 113 Ind Cas 734, *Panchu* v. *Deputy Commr. Sultanpur*. (Lease for 7 years—Lessee ejected by previous lessee after one year—Previous lessee ejected by lessor after 6 years of occupation—Lessee claiming extension of lease on the ground that he was not able to enjoy the property for the full period of lease—*Held*, the lessee might or might not have his remedies against the landlord, but period of the lease as fixed under the terms was not extended.)

SECTION 108, Clause (d)—Note 1

1. ('08) 2 Sind L R 1 (6) (DB), *Seth Asandas* v. *Mir Hassan Khan*.
† ('27) 14 AIR 1927 Cal 902 (904) : 55 Cal 201 : 104 Ind Cas 655 (DB), *Latifa Khatun* v. *Tofer Ali*. (Accretion by alluvion.)
('25) 12 AIR 1925 Cal 758 (759) : 87 I.C. 442 (DB), *Dhirendra Chandra Rai* v. *Khaja Habibullah*.
[*See also* (1864) 1 Suth W R 113 (114) (DB), *Narain Doss Bepary* v. *Soobul Bepary*.
('80) 5 Cal L R 192 (193) (DB), *Mutura Kanto Shah Chowdhry* v. *Meajan Mundul*.]

SECTION 108—Note 2

1. (1828) 5 Bing 163 (166) : 27 R R 292 (308) : 2 Bligh (N S) 147, *Gifford* v. *Lord Yarborough*.
† (1824) 107 E R 668 (673, 674) : 3 B & C 91 : 2 L J K B 196 : 4 Dowl & Ry 790, *R.* v. *Lord Yarborough*.
('15) 2 AIR 1915 P C 131 (136) : 84 LJPC 98 (104) : 1915 App Cas 599 : 112 L T 955 (P C), *A. G. of South Nigeria* v. *Holt & Co.* (Where an addition is caused artificially by execution of works of reclamation, acquisition cannot be said to be slow and therefore doctrine of natural accretion will not apply.)
2. ('70) 13 Moo Ind App 467 (473) : 14 Suth W R 11 (P C).
3. ('06) 28 All 647 (649) : 3 All L Jour 453 : 1906 All W N 169 (DB).

Dinabandhu Sen[4]' their Lordships of the Privy Council, however, observed as follows :

> " It is to be observed that here too Indian law doubtless guided by local physical conditions, has adopted a rule varying somewhat from the rule established in this country. Where under English conditions the rule applies to 'imperceptible' alterations, Regulation XI of 1825 (Bengal), Arts. 1 and 4, speak of 'gradual accession.' The analogy of the English rule can hardly be prayed in aid when Indian legislation has thus an established and different rule on the same subject. Further, as the 'Indian rule is established now beyond question,' it may perhaps be said without offence of the Indian as of the English rule, that it represents rather a compromise of convenience than an ideal of justice, for, that which is a man's own does not become another's any more agreeably to ideal justice by being filched from him gradually instead of being swallowed whole."

The decision of 'Srinath Roy's case' has been regarded as settling the view, so far as this country is concerned, that an accretion need not be 'imperceptible'[5] See also the undermentioned cases[6] under Bengal Regulation XI of 1825 under which an accretion is required only to be gradual and not imperceptible.

Where the accretion to land is 'sudden' and not gradual it cannot be said to become part and parcel of the land to which it is added and so does not constitute an " accession." If a land is submerged and is again re-formed and can be identified as forming part of a particular estate the owner of that estate is entitled to it.[7]

It was held in 'Secretary of State v. Kadirkutti[8]' that even though an accretion has been brought about artificially and not by natural causes, the party bringing it about may become entitled to it, but that the rule will not apply where it is brought about intentionally with the motive of getting the benefit of accretion. This view was rested on the decision in 'Attorney-General v. Chambers.'[9] The view expressed in the last mentioned case appears, however, to be no longer good law in view of the decision of the House of Lords in 'The Mayor of Bradford Corporation v. Pickels'[10] where it has been held that, provided that an act is done lawfully, the party cannot be deprived of any benefit that may be derived from such act by reason merely of the fact that his motive is bad.

3. Encroachment by tenant.—A tenant encroaching upon other property of the landlord does not, merely by reason of such encroachment, become a tenant of such property also. His possession will be really adverse to the landlord. To what extent it would be adverse would, however, depend upon the nature of the right in assertion of which the adverse possession was held. Where the tenant is in adverse possession claiming an absolute right in the

4. * ('14) 1 AIR 1914 P C 48 (59) : 42 Cal 489 : 10 Nag L R 108 : 41 Ind App 221 : 25 I.C. 467 (P C).

5. † ('18) 5 AIR 1918 Mad 1083 (1084, 1088) : 40 Mad 1083 : 40 Ind Cas 896 (DB), *Secretary of State* v. *Raja of Vizianagram*. (AIR 1914 P C 48 : 42 Cal 489 : 10 Nag LR 108 : 41 Ind App 221 (P C) referred to.)
('20) 7 AIR 1920 Pat 330 (331) : 5 Pat L Jour 1 : 52 Ind Cas 147 (DB), *Lachmi Narayan* v. *Kesho Prasad*.

6. (1900) 4 Cal W N 508 (511) (DB), *Khondkar Abdul Hamid* v. *Mohini Kant Saha Chowdhri*.
('09) 4 Ind Cas 511 (512) (DB) (Cal), *Ahmud Bepari* v. *Tohi Mahomed*.
(1864) 2 Bom H C R 345 (347) (DB), *Nasarvanji Pestamji* v. *Nasarvanji Darasha*.

7. * ('74) 2 Ind App 28 (32) : 14 Beng LR 268 (P C), *Hursahai Singh* v. *Syed Lootf Ali Khan*.
* ('06) 3 Cal L Jour 316 (333) (DB), *Ananda Hari Basak* v. *Secretary of State*.
('74) 21 Suth W R 115 (116) (DB), *Gunga Narain Chowdhry* v. *Radhika Mohun Roy*.
('06) 3 Cal L Jour 560 (562) (P C), *Rani Hemanta Kumari* v. *Secretary of State*.

8. (90) 13 Mad 369 (377) (DB).

9. 45 E R 22 (27).

10. (1895) 64 L J Ch 759 (762).

land he would acquire by prescription an absolute title to the land. But where he claims to be a tenant of the land he will acquire a tenant's right in the land. The 'presumption' is, however, that he only claims the additional land as part of the land. "The true presumption," said Markby, J., in 'Gooroo Doss Roy v. Issur Chunder.[1]' "as to encroachments made by the tenant during his tenancy upon the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure, and form part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of the landlord, unless it clearly appeared by some act done at the time that the tenant made encroachments for his own benefit."[2]

Before the tenant acquires by prescription an absolute title, or the tenancy right the landlord can eject the lessee from the portion encroached upon.[3] Where the lessor treats the lessee as a tenant in respect of the encroachment while the latter professes to hold it as part and parcel of the leased property, the two plots constitute one tenancy and stand on the same footing.[4] After a title by prescription has been acquired by the lessee to the tenancy rights, the lessor cannot eject the lessee before the termination of the lease.[5] If the lessee has acquired a full title by prescription the landlord's title will be extinguished.[5a]

Where the tenant encroaches on land which adjoins his holding but which belongs to a person 'other than the landlord' the possession of such land may be adverse to the owner thereof. But the presumption in this case also is that he has made the encroachment, not for his own benefit, but for that of his landlord,[6] and the burden of proof is on the tenant to show that

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SECTION 108—Note 3

1. ('74) 22 Suth W R 246 (247) (DB).
2. *Also see the following cases :*
   (1895) 64 L J Q B 245 (247), *Tabor* v. *Godfrey.*
   (Tenant occupying an encroachment must be deemed to have occupied it as part of the holding.)
   * ('12) 35 Mad 618 (621) : 10 Ind Cas 575 (576) (DB), *Muthurakku Thevan* v. *R. G. Orr.*
   ('05) 2 Cal L Jour 125 (133, 134) (DB), *Ishan Chandra Mitter* v. *Raja Ramranjan Chakarbutty.* (Per Mookerjee, J.)
   ('25) 12 AIR 1925 Cal 193 (194) : 84 Ind Cas 657 (DB), *Golam Nazar* v. *Abbas Molla.*
   Also see Section 105, Note 81.
3. * ('12) 14 Ind Cas 212 (212) (DB) (Cal), *Gopal Krishna Jana* v. *Lakhiram Sardar.*
   ('17) 4 AIR 1917 Pat 471 (473) : 2 Pat L Jour 506 : 41 Ind Cas 114 (DB), *Midnapur Zamindari Co.* v. *Pandey Sardar.*
   ('97) 25 Cal 302 (304, 305) (DB), *Prohlad Teor* v. *Kedar Nath.* (Tenant encroaching upon land of his landlord does not become the tenant in respect of such land against the will of the landlord.)
   * ('05) 2 Cal L Jour 125 (135) (DB), *Ishan Chandra Mitter* v. *Raja Ramranjan Chakarbutty.*
   (1900) 4 Cal W N 508 (511) (DB), *Khondkar Abdul Hamid* v. *Mohini Kant Saha Choudhuri.* (But when the landlord has once exercised his option and treated the person as tenant he cannot subsequently treat him as trespasser.)
   ('21) 8 AIR 1921 Cal 83 (83) : 67 Ind Cas 639 (DB), *Abdul Hossain* v. *Afsaruddin.*
   ('84) 10 Cal 820 (821, 822) (DB), *Nuddyarchand* v. *Mea Jan.*
   ('18) 5 AIR 1918 Cal 639 (641) : 41 Ind Cas 530 (DB), *Sarada Kripa Lala* v. *Akhil Chandra Biswas.*
   ('11) 11 Ind Cas 30 (30) (DB) (Cal), *Taran Chandra* v. *Ganendra Nath.*
   ('03) 16 C P L R 36 (40), *Gadi Kunbi* v. *Ram Lal.*
4. ('18) 5 AIR 1918 Cal 639 (641, 642) : 41 Ind Cas 530 (DB), *Sarada Kripa Lala* v. *Akhil Chandra.*
5. ('12) 14 Ind Cas 212 (212) (DB) (Cal), *Gopal Krishna* v. *Lakhirma.*
   ('09) 4 Ind Cas 526 (528) (DB) (Cal), *Krishna Govinda* v. *Banka Behari.*
   [*See also* ('29) 16 AIR 1929 Lah 469 (470) : 117 Ind Cas 810, *Amar Nath* v. *Thakru.* (Lessor's right to fair rent is not barred.)]
5a. ('26) 13 AIR 1926 Cal 883 (885) : 95 Ind Cas 622 (DB), *Devendra Narayan* v. *Jhumur Pramanik.*
6. * ('84) 10 Cal 820 (821) (DB), *Nuddhyarchand Shaha* v. *Mea Jan.*
   * ('35) 22 AIR 1935 Cal 771 (772) : 159 Ind Cas 685 (DB), *Saroj Kumar* v. *Surjya Kanta.*
   ('16) 3 AIR 1916 Cal 596 (597) : 29 Ind Cas 216 (DB), *Tepu* v. *Tefayit.*
   ('19) 6 AIR 1919 Cal 378 (379) : 51 Ind Cas 797 (DB), *Rakhal Chandra* v. *Mohendra Narain.* (Encroachment by tenant on another's land enures for benefit of landlord from date of encroachment.)
   ('28) 15 AIR 1928 Lah 351 (352) : 107 Ind Cas 386, *Nanak Chand* v. *Gaman.* (On termination of tenancy tenant must render it up to the landlord.)
   † ('18) 5 AIR 1918 Mad 278 (279) : 43 Ind Cas 677 (DB), *Ammu Ammal* v. *Puthiparambath.*

the encroachment was for his own benefit.[7] A subsequent severance of the encroached portion from the demised property is sufficient to rebut the said presumption.[8]

Where the lessor is entitled to the benefit of an encroachment on the principles stated above, he will be entitled to claim, and the tenant will be bound to pay, additional rent for the excess area.[9] After the termination of the lease, the lessee would also be bound to hand over the excess area to the landlord along with the property originally demised.[10]

4. "Shall be deemed to be comprised in the lease." — The accession becomes under this clause a part of the leased property. According to the English law the covenants to repair, etc., in the lease extend also by implication to the encroachments and the buildings thereon.[1]

Section 108 Clause (e).

Synopsis

1. Scope.
2. "Flood."
3. "Substantially and permanently unfit."
4. "At the option of the lessee."
5. Proviso.
6. Effect of repudiation.
7. Contract to the contrary.

1. Scope. — This clause enacts a rule which appears to be somewhat different from the English law. Under that law, the fact that the demised property is destroyed by flood or fire or lightning or by the violence of an army is not a ground for the tenant to free himself from the liabilities under the lease unless there is an express contract or convenant to the effect.[1] In a recent case[1a] Lord Russell of Killowen and Lord Goddard observed that the doctrine of frustration can never apply to put an end to a lease while Lord Seimon L. C. and Lord Wright held that the doctrine may in certain circumstances apply. Under this clause the fact that the demised property is destroyed or substantially and permanently rendered unfit will, apart from any contract, enable the lessee, at his option, to put an end to the lease. But the clause has reference only to cases of positive actual destruc-

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[*See also* ('14) 1 AIR 1914 Low Bur 194 (196) : 8 Low Bur Rul 71 : 29 Ind Cas 872 (DB), *Sit Yin* v. *Ma Shin*. (Though Act not applicable, principle embodied therein followed.)] .

7. ('18) 5 AIR 1918 Mad 278 (279) : 43 Ind Cas 677 (DB), *Ammu Ammal* v. *Puthiaparambath*.
[*See also* ('28) 15 AIR 1928 Lah 351 (352) : 107 Ind Cas 386, *Nanak Chand* v. *Gaman*.
('84) 10 Cal 820 (822) (DB), *Nuddyarchand* v. *Mea Jan*.]

8. ('15) 2 AIR 1915 Cal 386 (387) : 30 Ind Cas 896 (DB), *Birendra Kishore* v. *Lakshmi*.

9. • ('35) 22 AIR 1935 Cal 771 (773) : 159 Ind Cas 685 (DB), *Saroj Kumar* v. *Surjya Kanta*.
('74) 22 Suth W R 246 (247) (DB), *Gooroo Doss* v. *Issur Chunder*.
• ('26) 13 AIR 1926 Cal 883 (885, 886) : 95 Ind Cas 622 (DB), *Devendra Narayan* v. *Jhumer Pramanik*.
('99) 26 Cal 739 (744, 745) (DB), *Assanullah Bahadur* v. *Mohini Mohan Das*. (Bengal Tenancy Act.)
('36) 23 AIR 1936 Cal 454 (455) : 168 Ind Cas 375 (DB), *Khaje Habibulla* v. *Bepin Chandra*. (Do.)
('11) 11 Ind Cas 30 (31) (DB) (Cal), *Taran Chandra* v. *Ganendra Nath*. (Do.)
('82) 8 Cal 706 (707) : 4 Shome L R 272 (DB), *Brojendra Coomar* v. *Wopendra Narain*. (Alluvion Regulation (Bengal) XI of 1825.)
('81) 7 Cal 479 (482, 483) : 8 Cal L R 517 (DB), *Golan Ali Kali Krishna*. (Do.)

10. ('25) 12 AIR 1925 Cal 1114 (1116) : 87 Ind Cas 630 (DB), *Indu Bhusan* v. *Atul Chandra*. Fawcett, *Landlord and Tenant*, 3rd Edn., page 564, See also Notes on clause (q).

SECTION 108—Note 4

1. Woodfall, *Landlord and Tenant*, 22nd Edn., page 926.

SECTION 108, Clause (e)—Note 1

1. ('14) 1 AIR 1914 Sind 75 (78) : 8 Sind L R 222 : 28 Ind Cas 5 (DB), *Ghulam Mahomed* v. *Saheb Singh*.
Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Paras. 196, 263.
Woodfall *Landlord and Tenant*, 22nd Edn., pages 521, 522.
('36) 23 AIR 1936 Mad 664 (664) : 165 Ind Cas 855, *Raman Nambiar* v. *Kannan Nambiar*.
('45) 1945 App Cas 221 : (1945) 1 All ER 252 : 114 L J K B 110. *Crickwood Property & Investment Trust* v. *Leighton's Investment Trust Ltd*.

tion or injury by some 'violent force.' It has no reference to the case of the property becoming unprofitable or unfit for cultivation through the failure of its ordinary water supply or through something not happening which was expected to happen.[2] Thus, the failure of rain is not a ground under this clause for avoiding the lease.[3]

2. "Flood". — It was held in 'Subramania Pattar' v. 'Kattambath Rama[1]' that the word "flood" in this clause must be restricted to sea-water flooding and not fresh water flooding. This view was, however, dissented from by Venkatasubba Rao, J., in the undermentioned case.[2]

3. "Substantially and permanently unfit." — The words "substantially and permanently unfit" imply that the damage must be so great that the land could not be rendered fit for cultivation at a reasonable expenditure during any portion of the remaining period of the lease.[1] The burden of proof will be on the lessee to establish that the demised property was rendered substantially and permanently unfit.[2] Where a part of a house was rendered dangerous for habitation by reason of an earthquake shock, it was held by the Allahabad High Court that that cannot be said to render the house substantially and permanently unfit" for residence.[3] Where a godown was burnt down so badly that it could not be repaired within three months it was held by the Bombay High Court that it was rendered substanially and permanently unfit for use.[4] In another Bombay case it was held that an eviction of the tenant from the demised premises by the Plague Authorities acting under the Epidemic Diseases Act (III of 1897) could not be said to render the premises permanently unfit within the meaning of this clause.[5] It is submitted that such an eviction cannot, even otherwise, be regarded as falling within any of the categories of fire, tempest, flood, violence of an army or mob or other irresistible force.

The inability of the lessee of salt works to carry on his work owing to the strike of the workers cannot be said to have rendered the leased property substantially unfit by reason of any of the causes mentioned in this clause.[6] In the undermentioned case[7] the lease was one for agricultural purposes not governed in terms by this clause. The land leased were silted up by floods, but it was possible to put them right by means of certain expenditure. It was held that the tenancy cannot be put an end to.

4. "At the option of the lessee." — The lease does not 'ipso facto' become void on the destruction, etc., of the premises; only the exercise of the option by the lessee will render it void from the moment of such exercise.[1] The

2. ('14) 1 AIR 1914 Sind 75 (77) : 8 Sind L R 222 : 28 I. C. 5 (DB), *Ghulam Mahomed* v. *Sahib Singh*.
3. ('10) 1 Upp Bur Rul 2nd Qr. 22 : 8 Ind Cas 471 (473), *Mi Me* v. *Nga On Gaing*.

SECTION 108—Note 2

1. ('20) 7 AIR 1920 Mad 584 (584) : 43 Mad 132 : 53 Ind Cas 397 (DB).
2. ('36) 23 AIR 1936 Mad 664 (665) : 165 Ind Cas 855, *Raman Nambiar* v. *Kannan Nambiar*.

SECTION 108—Note 3

1. ('28) 109 Ind Cas 243 (243) (Mad), *Singaravelu Pillai* v. *Marimuthu Pillai*.
2. ('28) 109 Ind Cas 243 (243) (Mad), *Singaravelu Pillai* v. *Marimuthu Pillai*.
3. ('10) 7 Ind Cas 201 (202) (DB) (All), *J. O. Brian Donaghey* v. *George Weatherdon*. (Engineer certifying that the danger was not imminent but that the house required immediate repairs.)
4. ('99) 23 Bom 15 (19), *Dhuramsey* v. *Ahmedbhai*.
5. ('99) 1 Bom L R 739 (742) (DB), *Mahomadally* v. *Campbell*.
6. ('28) 15 AIR 1928 Bom 61 (63) : 52 Bom 142 : 108 Ind Cas 19 (DB), *Hari Laxman* v. *Secretary of State*.
7. ('29) 16 AIR 1929 Mad 575 (576) : 118 Ind Cas 79, *Sinnappa Pillai* v. *Ramaswami Ayyar*.

SECTION 108—Note 4

1. ('99) 23 Bom 15 (19), *Dhuramsey* v. *Ahmedbhai*.
   ('26) 13 AIR 1926 Lah 371 (372) : 94 Ind Cas 121, *Firm Jamita Mal* v. *Gokal Chand*.
   † ('10) 6 Ind Cas 906 (909) (Bom), *Breul & Co.* v. *Haji Siddick Haji Ibrahim*.
   ('33) 20 AIR 1933 Lah 517 (519) : 150 Ind

exercise of the option need not be by any written notice; nor need such notice, if given, require any length of time for its operation.[2] The option must, however, be exercised within a reasonable time of the occurrence.[3] Otherwise the lessee cannot be allowed to repudiate the lease.[4] The question as to what is reasonable time will depend upon the facts and circumstances of the case.[5] In the undermentioned case[6] it was held that there was no valid exercise of option until the lessee delivered possession of the property to the lessor. It is submitted that this view is not correct.

But the fact that the lessee has not exercised his option to avoid the lease under this clause will not render him liable, in the absence of a contract to the contrary, to restore the property to the lessor in its original state by repairing or re-building the premises[7] though he would continue to be liable for the rent until the determination of the lease.[8]

5. Proviso. — If the injury is caused by the wrongful act or default of the lessee himself he cannot get the benefit of this clause. The reason is that no person can derive any advantage from his own wrong. On the other hand, the lessee may be liable to pay damages to the lessor.[1] Where, owing to the neglect of the lessee himself for failure to give intimation as required by the rules, he was evicted by the Plague Authorities, it was held that he was not thereby absolved from the liabilities under the lease.[2] A rented certain premises in which he had stored a large number of bales of piece-goods, and put a watchman in charge, who, one night, lit a hanging light in close proximity to the goods, locked up the premises and went away. The premises were destroyed by fire. It was held that the fire was caused through A's default within the meaning of this clause.[3]

6. Effect of repudiation. — Where the lessee validly repudiates the lease by exercising the option given to him by this clause, he can refuse to pay future rent in respect of the premises.[1] He can also sue the lessor to recover, under S. 65 of the Contract Act, any rent or premium which he had paid already for the period after the repudiation.[2] But the lessee is bound after repudiation to restore vacant possession to the lessor under clause (q).

Cas 682, *Banarsi Das* v. *Cantonment Authority Ambala Cantonment.*
('14) 1 AIR 1914 Sind 75 (77) : 8 Sind L R 222 : 28 I. C. 5 (DB), *Ghulam Mahomed* v. *Saheb Singh.*
[*See* ('28) 109 Ind Cas 243 (243) (Mad), *Singaravelu Pillai* v. *Marimuthu Pillai.* (Up to the date of avoidance liability for rent continues.)]

2. ('16) 3 AIR 1916 Cal 707 (707) : 31 Ind Cas 697 (DB), *Damoda Coal Co.* v. *Hurmook Marwari.* (Section 106 does not apply to notice under S. 108, cl. (e).)
3. ('10) 6 Ind Cas 906 (909) (Bom), *Breul & Co.* v. *Haji Siddick Haji Ibrahim.*
4. ('10) 6 Ind Cas 906 (909) (Bom), *Breul & Co.* v. *Haji Siddick Haji Ibrahim.*
5. ('10) 6 Ind Cas 906 (909) (Bom), *Breul & Co.* v. *Haji Siddick Haji Ibrahim.* (Lease was to terminate in due course within four months after fire—Notice not given till more than a month expired—Notice held not given within reasonable time.)
6. ('10) 35 Bom 333 (338) : 8 I. C. 1049 (1050) (DB) *Siddick Haji Hoosein* v. *Breul & Co.* (Affirming 6 Ind Cas 906.)
7. ('28) 15 AIR 1928 Mad 1140 (1141, 1142) : 51 Mad 994 : 114 Ind Cas 234 (DB), *East India Distilleries & Factories Ltd.* v. *P. F. Mathias.*
8. (1811) 13 R R 556 (557) : 4 Taunt 45 : 128 E R 244, *Baker* v. *Holtpzaffel.*

SECTION 108—Note 5

1. * ('26) 13 AIR 1926 All 695 (697) : 48 All 404 : 94 Ind Cas 425 (DB), *Mulchand Nemi Chand* v. *Basdeo Ram Sarup.*
[*See also* ('10) Ind Cas 716 (717) (DB) (All), *Mathura Das* v. *Mohan Lal.* (Where injury is not due to lessee's fault he is not liable to pay damages.)]
2. ('99) 1 Bom L R 739 (742) (DB), *Mahomadally* v. *Campbell.*
3. ('20) 7 AIR 1920 Mad 493 (495) : 59 Ind Cas 252 (DB), *Girdaridoss* v. *Ponnu.*

SECTION 108—Note 6

1. ('94) 17 Mad 98 (99) : 4 Mad L Jour 21 (DB), *Kunhayen Haji* v. *Mavan.*
2. ('33) 20 AIR 1933 Lah 517 (519) : 150 Ind Cas 682, *Banarsi Das* v. *Cantonment Authority, Ambala Cantonment.*
('35) 22 AIR 1935 Nag 208 (209) : 31 Nag L R 368 : 158 Ind Cas 358, *Shrawan* v. *Sheoratan.*
('99) 23 Bom 15 (21), *Dhuramsey Soonderdas* v. *Ahmedbhai Hubibbhoy.* (The lessee will also be entitled to interest.)

If he fails to do so he will be liable to the lessor for damages.[3] If, however, the lessor accepts rent from the lessee, the latter will become, under S. 116, a tenant from year to year or from month to month according to the purpose for which the property was leased.[4]

7. Contract to the contrary. — S. 108 (e) can not be involved where the parties to a lease have themselves provided for the contingencies referred to. Thus where the parties have specifically agreed that in spite of land being lost by delunion or damage being caused by flooding the lessee would remain liable to pay the whole of the rent stipulated for. S. 108 (e) will have no application. (1)

Section 108 Clause (f).

Synopsis

1. Scope.
2. Remedy of the lessee.
3. Contract to the contrary.

1. Scope. — There is no general rule of law that a lessor is bound to keep the demised property in good repair or to expend any money on the property.[1] Nor is the lessor liable to compensate the lessee for any loss sustained by him by reason of want of repair.[2] The lessee himself is under a qualified obligation in that respect under clause (m).[3]

But the parties may enter into a contract that the lessor should make certain repairs. In such cases the lessor would be bound on notice being given to that effect,[4] to effect such repairs. This clause applies to such cases. The failure of the lessor to effect the repairs will not entitle the lessee to 'terminate' the lease.[5] It will only enable him to effect such repairs himself and deduct the expense of such repairs from the rent or otherwise recover it from the lessor.[6]

2. Remedy of the lessee. — The clause provides that the lessee who himself makes the repairs which, under the contract of lease, the lessor is bound to make, may deduct such expense from the rent or otherwise may recover it from the lessor. It has been held that he can also claim damages

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3. ('10) 35 Bom 333 (338) : 8 Ind Cas 1049 (1050) (DB), *Sidick Hazi Hoosain* v. *Bruel & Co.* (Affirming 6 Ind Cas 906.)
4. ('10) 35 Bom 333 (338) : 8 Ind Cas 1049 (1050) (DB), *Sidick Haji Hoosein* v. *Bruel & Co.*
   ('45) 32 AIR 1945 Pat 300 (305) : 24 Pat 197 (DB), *Surat Singh* v. *Sheo Prasad.*

SECTION 108, Clause (f)—Note 1

1. * ('98) 2 Cal W N 34 (36), *Charles Stuart* v. *Patrick Playfair.*
   ('23) 10 AIR 1923 Cal 524 (525) : 72 Ind Cas 98 (DB), *Bijoi Chandra Singh* v. *Howrah Amta Light Railway Co., Ltd.*
   ('27) 14 AIR 1927 Bom 115 (118) : 51 Bom 274 : 101 Ind Cas 210 (DB), *Lakhmichand* v. *Ratanbai.*
   Woodfall, *Landlord and Tenant*, 22nd Edn., page 760.
   Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, para 219.
   Fawcett, *Landlord and Tenant*, 3rd Edn., pp. 333-334.
2. ('98) 2 Cal W N 34 (37), *Stuart* v. *Playfair.*
   ('43) 1943 App Cas 283 (1943), All E R 68 : 112 L J K B 65 *Summers* v. *Salford Corpn.* (Housing Act, 1936, case under—There is an implied undertaking to keep house in all respects fit for human habitation—But for damages lies for breach of undertaking.)
3. See Section 108 (m), Note 1.
4. Woodfall, *Landlord and Tenant*, 22nd Edn., page 761.
5. Woodfall, *Landlord and Tenant*, 22nd Edn., page 762.
   ('26) 13 AIR 1926 Cal 546 (549) : 93 Ind Cas 81, *Gopiram Bhotica* v. *Bisseswar Dutt.* (Unless the failure constitutes such a substantial interference with the right of the lessee as to constitute an eviction.)
   * ('36) 23 AIR 1936 Mad 564 (566) : 59 Mad 942 : 163 Ind Cas 384 (DB), *Zeebunnissa Begum* v. *Mrs. Danagher.*
   ('23) 19 AIR 1923 Cal 524 (526) : 72 Ind Cas 98 (DB), *Bejoy Chandra Sinha* v. *Howrah Amta Light Railway Co. Ltd.*
6. ('26) 13 AIR 1926 Cal 546 (549) : 93 Ind Cas 81, *Gopiram Bhotica* v. *Bisseswar Dutt.*
   ('10) 6 Ind Cas 131 (132) (DB) (Cal), *Katic Graham* v. *Colonial Govt. of British Guina.*
   [*See also* ('36) 23 AIR 1936 All 522 (523) : 163 Ind Cas 872 (DB), *Kamal Devi* v. *Khudadad.*]

against the lessor for breach of his obligation.[1] He can, in a suit for rent by the lessor, claim to set off such damages against the rent.[2] Where he has himself carried out the repairs he can, in a suit for rent, counter-claim for the money so spent.[3] But he cannot claim specific performance against the lessor by compelling him to carry out the repairs.[4]

The words "or otherwise recover it from the lessor" give a right of reimbursement to the lessee apart from his right of deduction of the expense from rent.[5] It has been held in the undermentioned case[6] that the claim to reimbursement would be under S. 70 of the Contract Act.

3. Contract to the contrary. — Where under the terms of tenancy, the lessee is himself bound to make the repairs at his own expense, he cannot claim anything from the lessor on that account,[1] or deduct the value of the repairs from the rent due.[2] Where the contract provides that it is the lessor that must make the repairs and that the lessee should have no right to do so, the latter, if he effects the repair, cannot deduct the expenditure from the rent.[3] Where the contract expressly provides that if the lessor does not make the repair, the lessee should make it 'and deduct the costs from the rent', he cannot claim damages against the lessor for non-repair.[4]

Section 108 Clause (g).

Synopsis

1. Scope.
2. "Which he is bound to make."
3. Right to damages and reimbursement.
4. Contract to the contrary.

1. Scope. — Under the English law, a lessee who, under actual or implied compulsion, has paid any rate or tax which the landlord is liable to pay, may deduct the amount from his rent unless there is an express covenant or stipulation to the contrary.[1] This is the principle which is found enacted in this clause. This clause is, however, in some respects, wider than the English law. It is not limited to the payment of rates and taxes. Further, unlike the English law, it is not necessary that the deduction should be made only from the rent of the current year and not afterwards.[2] A lessee claiming the benefit of this clause must show—

(a) that the lessor is bound to make the payment,
(b) that he neglected to do so,
(c) that the amount was recoverable from the lessee or against the property leased, and

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SECTION 108—Note 2

1. * ('36) 23 AIR 1936 Mad 564 (568) : 59 Mad 942 : 163 Ind Cas 384 (DB), *Zeebunnissa Begum* v. *Mrs. Danagher.*
(1924) 93 L J K B 729 (732), *Hewit* v. *Rowlands.* (It is not necessary that tenant should have actually expended money on the repairs.)
2. ('14) 1 AIR 1914 Lah 186 (186) : 23 Ind Cas 358 (DB), *Nidar Mal* v. *B. Borrooach and Co.*
3. Woodfall, *Landlord and Tenant,* 22nd Edn., page 763.
4. ('36) 23 AIR 1936 Mad 564 (568) : 59 Mad 942 : 163 Ind Cas 384 (DB), *Zeebunnissa Begum* v. *Mrs. Danagher.*
5. ('10) 6 Ind Cas 131 (133) (DB) (Cal), *Katie Graham* v. *Colonial Government of British Guiana.*
6. ('42) 29 AIR 1942 Oudh 231 (237) : 17 Luck 530 : 199 Ind Cas 35 (DB), *Qaumar Johan Begam* v. *Bansi Dhar.*

SECTION 108—Note 3

1. *See also* ('15) 2 AIR 1915 Mad 659 (659) : 27 Ind Cas 361 (DB), *Mangalaswami Thevar* v. *Raja Rajeswara Dorai.*
2. ('06) 3 All L Jour 134 (135) (DB), *Bolton* v. *Donald.*
3. ('66) 6 Suth W R Civ. Ref. 26 (27) (DB), *Mt. Zummeerunnissa* v. *Mr. E. Gayer.*
4. ('68) 1868 Pun Re No. 14, Page 46 (47) *Roopa* v. *Baness.*

SECTION 108, Clause (g)—Note 1

1. Woodfall, *Landlord and Tenant,* 22nd Edn., page 698.
2. Woodfall, *Landlord and Tenant,* 22nd Edn., page 698.
(1817) 18 R R 444 (446) : 1 B & Ald 123, *Denby* v. *Moore.* (If the deduction is not made, the tenant cannot recover it.)

(d) that he made such payment himself.

It may be noted that the lessee is not bound, as he is required under clause (f), to give any notice to the lessor before making the payment himself.

This clause does not apply in terms to agricultural leases. But the principle underlying it is of general applicability[3] and is applicable to agricultural lease also as being in consonance with justice, equity and good conscience.[4]

2. "Which he is bound to make." — In order that the lessee may take advantage of this clause he must show that the lessor was bound to make the payment which he (the lessee) has made. Where, in execution of a decree against the lessor his interest was sold in auction and the lessee thereafter deposited the decree amount under O. 21 R. 89 of the Civil Procedure Code and claimed to recover the same from the lessor, it was held by the Calcutta High Court that, after the sale, the lessor could not be said to be bound to make any payment and that, consequently, the payment by the lessee would not come within this clause.[1]

Where property which was subject to a maintenance charge payable by A was leased by him to B and, on failure of A to pay the maintenance, B paid it, it was held that, inasmuch as the maintenance might have been collected by the sale of the leased property, B can deduct the amount so paid from the rent due.[2] Where the property leased is subject to a mortgage, the lessor, in view of the covenant for quiet enjoyment, may be said to be bound to pay the mortgage, as between himself and the lessee. Consequently, if the lessee pays off the mortgage he can invoke the benefit of this clause.[3]

The general rule is that the lessor is bound to pay the Government revenue of the leased property. If the lessor fails to pay it the lessee may make the payment and recover it from the lessor.[4] It has been held that even if the Government assessment is increased after the lease is granted it is the lessor that is bound to make the increased payment also.[5] But where the rent fixed was Rs. 19, and the Government assessment which was originally Re. 0-15-3 was raised to Rs. 59-8-6, it was held that the implication of the contract of lease must be taken to be, that up to the rent amount of Rs. 19 the landlord is liable for the Government assessment and that the lessee is responsible beyond that amount.[6] Where the tenant undertook to pay the whole of the cesses which were levied under the Bengal Cess Act (1880) at the time of contract of lease, inclusive of the share payable by the tenant and also of the share payable by the landlord, it was held that if the amount of

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3. ('71) 15 Suth W R 545 (547) (DB), *Hills* v. *Wooma Moyee*. (Case before the Act.)
4. ('40) 27 AIR 1940 Mad 410 (412), *Nanjappa* v. *Rangaswami*.

SECTION 108—Note 2

1. ('02) 6 Cal W N 336 (337) (DB), *Bepin Behary Sarnokar* v. *Kalidas Chaterjee*.
2. ('40) 27 AIR 1940 Mad 410 (411), *Nanjappa Goundan* v. *Rangaswami Goundan*.
3. † ('34) 21 AIR 1934 Mad 658 (660, 661): 152 Ind Cas 201, *Iswara Shetty* v. *Ramappa Shetty*.
   ('28) 15 AIR 1928 Mad 380 (381) : 109 Ind Cas 465 (DB), *Hanumantha Goundan* v. *Doraiswami Pillai*.
   (1888) 20 Q B D 209 (219, 220) : 57 L J Q B 129 : 58 L T 457 : 36 W R (Eng) 298, *Underhay* v. *Read*.
4. ('27) 14 AIR 1927 Oudh 609 (609) : 104 Ind Cas 358, *Mt. Faiyazunnisa* v. *Bajrang Bahadur*.
   ('86) 12 Cal 213 (216) (DB), *Smith* v. *Dina Nath Mukerjee*.
5. ('10) 7 Ind Cas 321 (326) (FB) (Mad), *Vidyapurna* v. *Uggannu*.
   ('25) 12 AIR 1925 Bom 168 (170) : 86 Ind Cas 96 (DB), *Ladhuram Manormal* v. *Sale Mohammad*.
6. ('25) 12 AIR 1925 Bom 168 (170) : 86 Ind Cas 96 (DB), *Ladhuram Manormal* v. *Sale Mohammad*.

(1839) 9 A & E 809 (813) : 112 E R 1421 : 8 L J (N S) Q B 124, *Johnson* v. *Jones*.
[*See also* ('40) 27 AIR 1940 Mad 410 (411), *Nanjappa Goundan* v. *Rangaswami Gounden*. (Property subject to maintenance charge.)]

cess was increased subsequently, the incidence of the new burden must be regulated according to the statute.[7]

See also the undermentioned cases.[8]

3. Right to damages and reimbursement. — A lessee making a payment under this clause may not only deduct the amount so paid from the rent, but may also be entitled to claim damages against the lessor for breach of the obligation to make the payment.[1] He can also recover the amount so paid from the lessor under Ss. 69 and 70 of the Contract Act.[2]

4. Contract to the contrary. — Where the lessee has himself undertaken to make a payment which the lessor was bound to pay, there is a contract to the contrary and the lessee cannot get the benefit of this clause. On the other hand, if the lessor himself pays it he can recover it from the lessee.[1] If his property is sold owing to the failure of the lessee to make the payment, the lessor will be entitled to damages against the lessee.[2]

Section 108 Clause (h).

Synopsis

1. Legislative changes.
2. Scope of the clause.
3. Time for removal.
4. Right to compensation.
5. "Attached to the earth."
6. Void lease.
7. Property acquired under the Land Acquisition Act.
8. Contract to the contrary.

1. Legislative changes.

(1) The words "even after the determination of the lease" are new and were inserted by the amending Act of 1929.

(2) The words "whilst he is in possession of the property leased but not afterwards" were substituted for the words "during the continuance of the lease." As to the reason for this amendment, see the Report of the Special Committee.

2. Scope of the clause. — Under the Roman Civil law a tenant was entitled to remove all fixtures which he had attached to the lease-hold property where it could be effected without material injury to the property. Under the English law the maxim adopted was 'quicquid plantatur solo cedit' (whatever is affixed to the soil becomes part of it), the rule being relaxed only in respect of certain kinds of tenant's fixtures and not generally.[1]

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7. ('08) 12 Cal W N 154 (156) : 8 Cal L Jour 525 (DB), *Mahanand Sahai* v. *Mt. Sayedunisa Bibi.*
('45) 32 AIR 1945 Mad 509 (511) : ILR (1946) Mad 349 (DB), *Shanmuga Raja v. Annamabai.* (Where under the Madras Local Boards Act, the land-holder is responsible for the payment of cess to the Govt. but the sub-landholder pays it on failure of the landlord to avert attachment and sale of the lands, the latter has his remedy under S. 108 (*g*).)

8. ('09) 3 Ind Cas 464 (464) (DB) (Mad), *Venkatapayya* v. *Rukku Hengsu.* (Where under a deed of lease, the tenant agrees to pay government assessment, and the assessment is afterwards enhanced, the tenant is bound to pay the excess assessment.)

SECTION 108—Note 3

1. ('31) 18 AIR 1931 Cal 129 (130) : 130 Ind Cas 140 (DB), *Mt. Kshirodamoyi Dasi* v. *Kashi Lal Seal.*

2. ('27) 14 AIR 1927 Oudh 609 (609) : 104 I. C. 358, *Mt. Faiyazunnisa* v. *Bajrang Bahadur.*
('86) 12 Cal 213 (216) (DB), *Smith* v. *Dinonath Mookerjee.*
('34) 21 AIR 1934 Cal 667 (668) : 152 Ind Cas 167, *Abdul Aziz* v. *Rahimullah.*

SECTION 108—Note 4

1. ('22) 9 AIR 1922 Pat 75 (76) (DB), *Raja Nilkanth* v. *Niharan Chandra.*

2. ('15) 2 AIR 1915 Cal 601 (604) : 26 Ind Cas 466 (DB), *Rahim Baksh Mandal* v. *Sajjad Ahmad Choudhuri.*
[*See also* ('08) 35 Cal 683 (689) : 9 Cal L Jour 1 (DB), *Girishchandra Das Mazumdar* v. *Kunjo Behari Malo.*]

SECTION 108, Clause (h)—Note 2

1. (1802) 6 R R 376 (378, 379) : 2 East 88 : 4 ('47) 34 AIR 1947 Cal 159 (161) : ILR (1946) 2 Cal 157 : 230 Ind Cas 457 (DB), *Ballygunge Bank Ltd., Calcutta* v. *Income Tax Commr. Bengal.*
Esp 33, *Penton* v. *Robert.* (Trade fixtures —Removable during term.)
(1743) 26 E R 811 (812) : 3 Atk 13, *Lowton* v. *Lawton.*

The strict rule of English law was never applied in this country.[2] In 'Thakoor Chunder Poramanick' v. 'Ramdhone Bhuttacharjee',[3] Sir Barnes Peacock observed as follows:

> "We think it clear that, according to the usages and customs of this country, buildings and other such improvements made on land do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil; and we think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any 'bona fide' title or claim of title, he is entitled either to remove the materials restoring the land of the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil—the option of taking the building, or allowing the removal of the material, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess."[4]

There was a difference of opinion as to whether trees planted by the tenant could be removed by him.[5]

This clause enacts in substance the principles of the Roman Civil law as stated above and the pre-existing law of the land[6] as interpreted by the Full Bench in 'Poramanick's case'.[6a]

The clause must be read with clause (o) which provides that the lessee cannot fell or sell timber, pull down or damage buildings belonging to the lessor, and, when so read, it is clear that this clause will apply only to such things that the 'tenant himself' has attached to the land and not to other things. Thus, trees planted by the tenant or buildings erected by him or things attached to the earth by the tenant can be removed by the tenant under this clause, while trees already on the land, or spontaneously growing

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(1802) 102 E R 510 (516, 518) : 3 East 38 : 6 R R 523, *Elwes* v. *Maw*.

2. ('99) 21 All 496 (503) : 26 Ind App 58 (PC), *Beni Ram* v. *Kundan Lal*.
See also the cases under Note 1 on Section 51.
[But see ('14) 1 AIR 1914 Oudh 212 (213) : 23 Ind Cas 957, *Sardar Singh* v. *Gaja Singh*. ('20) 7 AIR 1920 Lah 373 (374) : 1 Lah 210 : 56 Ind Cas 733, *Harnaman* v. *Dasondhi*.]

3. ('66) 6 Suth W R 228 (229, 230) (FB).
Also see Section 51, Note 1.

4. *Also see* ('75) 14 Beng L R 201 (208), *Parbutty Bewah* v. *Woomatara Debee*.

5. ('28) 108 Ind Cas 242 (244) (DB) (Cal), *Kedar Nath* v. *Govinda Chandra*. (Tenant cannot cut and remove trees planted by him.)
('81) 1881 Bom P J 44, *Narayan* v. *Bhik Patil*.. (A tenant who plants a tree on the land leased to him is not, as a rule, entitled to cut down such tree.)
(1864) 1864 Suth W R 367 (367) (DB), *Abdool Rahman* v. *Dataram*. (Tenant cannot cut timber.)
('81) 1881 All W N 20 (20) (DB), *Jhagaru* v. *Shamshere Khan*. (Where a cultivator plants trees on the lands in his possession, the trees go to the landlord after the cultivator had ceased to cultivate.)
('10) 37 Cal 815 (823) : 6 Ind Cas 796 (799) (DB), *Mofiz Sheikh* v. *Rasik Lal*. (Tenant can remove trees planted by him.)
('47) 34 AIR 1947 Cal 159 (161) : ILR (1946) 2 Cal 157 : 230 Ind Cas 457 (DB), *Ballygunge Bank Ltd., Calcutta* v. *Income Tax Commr., Bengal*. (Buildings or other things erected by lessee on leased land belong to lessee.)

6. ('04) 27 Mad 211 (217) : 14 Mad L Jour 25, *Ismal Kani* v. *Nazarali*.
[*See also* ('47) 34 AIR 1947 Cal 353 (357) (DB), *Subodh Chand* v. *Bhagwandas Sha*. Oral agreement between *S* and *B* in 1933 for grant of permanent lease of land by *S* to *B* at monthly rent of Rs. 101 and on condition of payment of salami—In anticipation of execution of lease *B* let into possession —*B* erecting substantial structures with knowledge and approval of *S*—No lease executed—In 1940 *S* suing for ejectment —Held S. 53A was not applicable—Suit was governed by Privy Council decision in *Ariff* v. *Jadunath Mujumdar*. AIR 1931 PC 79 : 58 Ind App 91 : 58 Cal 1235 (PC)—*B* was not entitled to compensation for structures erected but could remove them under S. 108 (h).]

6a. ('66) 6 Suth W R 228 (229, 230) (FB), *Thakoor Chunder Poramanick* v. *Ramdhone Buttacharjee*.

there even after the commencement of the tenancy, and building on the land cannot be removed by the tenant.[7]

It has been held in the undermentioned cases[8] that, in cases not governed by the Act, trees even planted by the tenant belong to the landlord and cannot be removed by the tenants, but the general trend of view is that trees planted by the tenant can, on the principle of this section, be removed by him.[9] (See also clause (o), Note 4.)

3. Time for removal. — Under the clause as it stood before the amendment of 1929, a tenant could remove the things he had attached to the earth only "during the continuance of the lease."[1] But notwithstanding this, it was held in some cases[2] that a tenant could, on equitable grounds, or on the ground of local usage, be granted a reasonable time for removing the fixtures even after the determination of the tenancy. This uncertainty regarding the tenant's right of removal has now been removed by the amendment of the clause, allowing the tenant a right to remove his fixtures so long as he is in possession of the property even though the tenancy has come to an end. If once the tenant quits possession, however, the fixtures become the property of the lessor. The tenant loses all right, title and interest in the structures[3] and cannot return and remove them.[4]

4. Right to compensation. — This clause does not say anything as to the rights of the parties if the tenant has handed over the property with the thing he has attached to the land. In 'Poramanick's case'[1] the observations

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7. ('28) 108 Ind Cas 242 (244) (DB) (Cal), *Kedar Nath* v. *Govinda Chandra.*
• ('01) 24 Mad 47 (55) : 10 Mad L Jour 321 (FB), *Vasudevan* v. *Valia Chathu.*
('20) 7 AIR 1920 Nag 113 (115) : 54 Ind Cas 789, *Tikaram* v. *Ramchandra.*
('10) 33 Mad 253 (253) : 5 Ind Cas 437 (437) (DB), *Gagamma* v. *Bommakka.* (Mulgeni lease.)
('15) 2 AIR 1915 Mad 891 (892) : 26 Ind Cas 271 (DB), *Latifa Bibi* v. *Narayanachari.* (Do.)
('16) 3 AIR 1916 Mad 939 (939) : 31 Ind Cas 12 (DB), *Krishnacharya* v. *Anthakki.* (Do.)
†('12) 14 Ind Cas 582 (583) (All), *Lachman Das* v. *Mohan Singh.* (Timber of tree belongs to zamindar even if the tenant happens to be exproprietary tenant who himself had planted tree.)
('30) 17 AIR 1930 All 433 (433) : 121 Ind Cas 826, *Nazir Khan* v. *Faiz Mohammad.* (Do.)

8. ('01) 23 All 211 (212) : 1901 All W N 52 (DB), *Janki* v. *Sheoadhar.*
('28) 108 Ind Cas 242 (244) (DB) (Cal), *Kedar Nath* v. *Govind Chandra.*
('10) 8 Ind Cas 151 (151) (All), *Ram Bakhsh* v. *Ram Sarup.*
('14) 1 AIR 1914 Oudh 212 (213) : 23 Ind Cas 957 (DB), *Sardar Singh* v. *Gaja Singh.*

9. ('20) 7 AIR 1920 Nag 113 (115) : 54 Ind Cas 789, *Tikaram* v. *Ramchandra.*
• ('01) 24 Mad 47 (58) : 10 Mad L Jour 321 (FB), *Vasudevan* v. *Valia Chathu.* (Kanom tenure.)
('14) 1 AIR 114 Bom 312 (312) : 38 Bom 716 : 28 Ind Cas 140 (DB), *Sitabai* v. *Shambhu.*
('09) 4 Ind Cas 1119 (1119) (Mad), *Narayanaswami* v. *Sitaramayya.* (Trees falling down from natural causes belong to the ryot and not to the zemindar.)
† ('03) 26 Mad 252 (256, 257) : 12 Mad L Jour 449 (DB), *Narayana* v. *Orr.*
('06) 29 Mad 24 (25) : 16 Mad L Jour 8 (DB), *Kakarla* v. *Raja Venkata.*
('23) 10 AIR 1923 All 417 (418) : 72 Ind Cas 108, *Ram Nath* v. *Mata Sahai.*
('16) 3 AIR 1916 Mad 939 (939) : 31 Ind Cas 12 (DB); *Krihsnacharya* v. *Anthakki.*
('22) 9 AIR 1922 Oudh 249 (249) : 25 Oudh Cas 181 : 77 Ind Cas 592, *Chatur* v. *Rukmangad Singh.*

SECTION 108—Note 3

1. ('80) 2 All 896 (897) (DB), *Ram Baran Ram* v. *Salig Ram Singh.* (Case before the Act.)
('96) 20 Bom 439 (449)), *Sarafali Tyabali* v. *Subraya Bateraya.*
2. ('14) 1 AIR 1914 Cal 896 (898) : 23 Ind Cas 762 (DB), *Kanaiya Lal* v. *Rasik Lal.*
('22) 9 AIR 1922 Mad 349 (349) : 66 Ind Cas 48 (DB), *Thacharkavil Manavikraman* v. *Noor Mohamed Sait.*
[*See also* ('33) 20 AIR 1933 Cal 875 (878) : 60 Cal 1042 : 147 Ind Cas 1238 (DB), *Govinda Prosad* v. *Charusila Dassi.*]
3. ('41) 28 AIR 1941 Bom 337 (339) : 197 Ind Cas 253 *Khimjee Thakarsee* v. *Pioneer Fibre Co.*
('20) 7 AIR 1920 Bom 87 (87) : 44 Bom 950 : 58 Ind Cas 323 (DB), *Ramachandra* v. *Vishnu.*
('36) 164 Ind Cas 837 (841) (Cal), *Chandi Charan Mitra* v. *Ashutosh Lahiri.*
4. ('41) 28 AIR 1941 Bom 337 (338) : 197 Ind Cas 253, *Khimjee Thakarsee* v. *Pioneer Fibre Co.*

SECTION 108—Note 4

1. ('66) 6 Suth W R 228 (229, 230) (FB), *Thakoor Chunder Poramanick* v. *Ramdhone Bhuttacharjee.*

of Sir Barnes Peacock, C. J., lent some colour to the view that the lessor was liable to pay 'compensation' to the lessee for the things attached to the land which were taken over by him. It was consequently held, on the strength of the said case, that the tenant would be entitled to claim compensation from the lessor even after he had parted with the lease-hold interest after termination of the lease.[2] A contrary view has been held in a number of cases on the ground that a lessee who erects permanent structures or attaches other things to the earth, does so at his own risk and that his only right is to remove the things so attached and not claim compensation[3] or resist ejectment at the end of the term.[4] It is submitted that whatever might have been the view before the amendment, the clause, as amended, seems to make it clear that after delivery of possession to the lessor, the lessee cannot claim any compensation. Of course, if a structure had been erected by the tenant with the consent of the landlord or by his acquiescence, different considerations will apply and the lessee may be entitled to claim compensation.[5]

5. "Attached to the earth." — As to the meaning of the expression "attached to the earth," see Note 6 on section 3.

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2. ('14) 1 AIR 1914 Upp Bur 2 (3) : 2 Upp Bur Rul 11 : 24 Ind Cas 708, *Mi Himat Tok* v. *Nga Kywee Hla.*
   ('16) 3 AIR 1916 Mad 220 (221) : 38 Mad 710 : 21 Ind Cas 583 (FB), *Angammal* v. *Syed Aslami Sahib.* (Affirming 11 Ind Cas 745 (Mad).)
   ('80) 5 Cal 688 (691, 692) : 5 Cal L R 492, *Russick Loll Mudduck* v. *Lokenath Kurmokar.*
   [*See also* ('71) 15 Suth W R 363 (363) (DB), *Gopal Mullick* v. *Anundo Chunder Chatterjee.*]
   ('47) 34 AIR 1947 Cal 353 (357) (DB), *Subodh Chand* v. *Bhagwandas Sha.*
3. ('94) 16 All 328 (332) : 1894 All W N 99, *Naunihal Bhagat* v. *Rameshar Bhagat.*
   ('14) 1 AIR 1914 Mad 564 (569) : 37 Mad 1 : 7 Ind Cas 202 (DB), *Raja of Venkatagiri* v. *Narasayya.*
   ('30) 17 AIR 1930 Mad 16 (18) : 53 Mad 54 : 120 Ind Cas 561, *Sabju Sahib* v. *Malabar District Board.*
   ('16) 3 AIR 1916 Low Bur 81 (84) : 8 Low Bur Rul 433 : 35 Ind Cas 735 (DB), *Moola Mahammad* v. *P. K. Ebrahim.*
   ('36) 164 Ind Cas 837 (841) (Cal), *Chandi Charan Mitra* v. *Ashutosh Lahiri.*
   ('15) 2 AIR 1915 Lah 235 (236) : 26 Ind Cas 936 (DB), *Kishen Singh* v. *Church Missionary Trust Association.*
   ('96) 20 Bom 1 (6) (DB), *Shaik Hussain* v. *Govardhandas Parmanandas.*
   ('01) 5 Cal W N 846 (858) (DB), *Ismail Khan Mahomed* v. *L. P. D. Broughton.* (Especially where there is an express covenant not to build.)
   (1900) 27 Cal 570 (586) : 4 Cal W N 210, *Ismail Khan Mahomed* v. *Jaigun Bibi.*
   ('19) 6 AIR 1919 Nag 144 (147) : 51 Ind Cas 780, *Buneshwar* v. *Lal Bahadur.*
   ('33) 20 AIR 1933 Cal 875 (878) : 60 Cal 1042 : 147 Ind Cas 1238 (DB), *Govinda Prosad* v. *Charusila Dassi.*
   [*See also* ('66) 1866 Pun Re No. 48, Page 65 (66) (DB), *Kay Mahomed* v. *Mt. Ruhmoon.*]
4. ('99) 21 All 496 (503) : 26 Ind App 58 (PC), *Beni Ram* v. *Kundan Lall.*
   ('04) 27 Mad 211 (216) : 14 Mad L Jour 25 (DB), *Ismail Kani Bowthen* v. *Nazarali Sahib.*
   [*See also* ('99) 1 Bom LR 191 (194) (DB), *Narayan* v. *Daji.*]
5. ('15) 2 AIR 1915 Lah 235 (236) : 26 Ind Cas 936 (DB), *Kishen Singh* v. *Church Missionary Trust Association.*
   * ('94) 16 All 328 (331, 332) : 1894 All W N 99, *Naunihal Bhagat* v. *Rameshar Bhagat.* (The principle upon which the doctrine of acquiescence is based is that a man who acts in such a way as would make it fraudulent for him to set up his legal rights will be deprived of those rights. But where his acquiescence or other conduct does not amount to a fraud actual or constructive, he cannot be deprived of his legal rights.)
   ('42) 29 AIR 1942 Pesh 74 (75) : 202 Ind Cas 627 (DB), *Abdul Ghafur* v. *Jeta Mal.*
   ('16) 3 AIR 1916 Mad 502 (502) : 28 Ind Cas 840 (DB), *Perumal Gramany* v. *Mahamad Kasin Sahib.*
   ('20) 7 AIR 1920 Bom 87 (87) : 44 Bom 950 : 58 Ind Cas 323 (DB), *Ramchandra* v. *Vishnu.* (Tenant in possession for number of years constructing substantial building—Compensation held payable before ejectment.)
   ('01) 6 Cal W N 134 (140) (DB), *Ismail Khan Mahomed* v. *Kali Krishna Mondol.*
   ('37) 24 AIR 1937 All 512 (513) : 170 Ind Cas 944, *Secy. of State* v. *Itwari.*
   [See however ('44) 31 AIR 1944 Pat 30 (34, 35) : 22 Pat 554 (DB), *Darbari Lal Mudi* v. *Raneeganj Coal Association, Ltd.* (Lessees under the erroneous belief that they had permanent rights, constructing valuable structures on land demised, to the knowledged of landlord—Landlord not interfering—*Held*, lessees could not claim compensation for the structures on equitable principles, as equitable principles could not override S. 108 (h). 27 Cal 570 followed.)]
   See also Section 51, Notes 22 to 25.

A well sunk by the tenant cannot be said to be a thing which he has attached to the earth and there is no question of any removal thereof.[1]

6. Void lease. — This clause does not apply in terms to a lease which is void. But the principle has been held applicable and the lessee who has erected a structure on the land has been held entitled to remove the same, but not to any compensation.[1]

7. Property acquired under the Land Acquisition Act. — Where the property leased was acquired before the expiry of the lease under the Land Acquisition Act and compensation was awarded for both the land and the thing attached thereto by the lessee, it was held that the tenant was entitled to a share in the compensation amount for the thing he had so attached.[1]

8. Contract to the contrary. — The right of a tenant to remove the thing he has attached to the demised property is subject to a contract[1] or local usage[2] to the contrary.. In South Kanara there is a usage that the tenant can either remove the structure erected by him on the land or claim compensation for the value thereof. This usage will prevail over the provisions of this Act.[3] A lease of certain buick fields stipulated for the forfeiture of the materials remaining on the demised promises on the expiring of the lease. After the expiring of the lease the landlord allowed certain time or a matter of grace to the lessee to remove his property. It was held that this did not amount on the part of the condition of the forfeiture.[4]

Section 108 Clause (i).

Synopsis

1. Scope.
2. "Uncertain duration."
3. Lessee in fault.

1. Scope. — Growing crops are, as has been seen in S. 3, not included in the definition of "immoveable property." They, however, constitute a legal incident of immovable property within the meaning of S. 8. It would follow from this that if a person is lawfully evicted from land he cannot lay claim to the growing crops on the land at the time of eviction. There are, however, some exceptions to the rule. Under S. 51 a transferee of immovable property who is evicted by a person having a better title is entitled, under certain circumstances, to crops planted or sown by him and growing at the time of eviction.

SECTION 108—Note 5

1. ('87) 10 Mad 112 (113) (DB), *Venkatavaradappa* v. *Thirumalai.*
[*See also* ('43) 30 AIR 1943 Mad 311 (312, 313) : 209 Ind Cas 561, *Thirumalareddi Inna Reddi* v. *Gade Gopireddi.* (Tenant digging well on land demised—No acquiescence on the part of landlord—Tenant not entitled to compensation—Further, well was not improvement of such character as to entitle lessee to claim compensation under Hindu law. 10 Mad 112, relied on.)]

SECTION 108—Note 6

1. ('17) 4 AIR 1917 Mad 333 (334) : 34 Ind Cas 1 (DB), *Govindaswami* v. *Ethirajammal.*
('09) 4 Ind Cas 1129 (1129) (DB) (Mad), *Mahomed Meera* v. *Nizur Ali.*

SECTION 108—Note 7

1. ('95) 22 Cal 820 (826) (DB), *Dunia Lal Seal* v. *Gopi Nath.*

SECTION 108—Note 8

1. ('41) 28 AIR 1941 Bom 337 (339) : 197 Ind Cas 253, *Khimjee Thakarsee* v. *Pioneer Fibre Co., Ltd.*, (Lessee to remove structure on determination of tenancy—Contract held excluded operation of this clause.)
('31) 18 AIR 1931 Cal 133 (134) : 130 Ind Cas 222 (DB), *Cook & Co.* v. *Phillips.* (Lease providing for fixtures and erections raised subsequently to pass to lessor at expiration them reserved by lessee on payment of rent or sooner determination—Right to remove and performance of other covenants—On failure in payment of rent lessee agreeing with lessor to surrender and relinquish possession—Right to fixtures held passed to lessor on surrender by lessee.)
('25) 12 AIR 1925 Mad 732 (734) : 87 Ind Cas 433, *Rama Rao* v. *Thimmappa.* (Lessor contracting to pay compensation for improvements made by lessee.)
2. ('14) 1 AIR 1914 Cal 896 (898) : 23 Ind Cas 762 (DB), *Kanai Lal* v. *Rasik Lal.*
3. ('21) 8 AIR 1921 Mad 284 (284) : 69 Ind Cas 282 (DB), *Rammappa* v. *Abdullah.*
4. ('49) 36 AIR 1949 Cal 47 (54) (DB), *Karnani Industrial Bank Ltd.*, v. *Province of Bengal.*

Under the Common law of England a tenant for an uncertain period has, under the name of 'emblements', the benefit of growing crops of such species as ordinarily repay the labour by which they are produced within the year in which that labour is bestowed.[1] In other words, a right is given, by law, in certain cases to the tenant of an estate of uncertain duration which has unexpectedly determined, without any fault of such tenant, to take the crops growing upon the land when his estate determines, although the estate itself has ceased.[2] This clause enacts in substance the principles of the Common law as stated above[3] and of what was also the Common law of India[4] and furnishes another exception to the general rule stated above. The right to growing crops involves, as an incident thereto, a right to free ingress and egress to gather and carry them.[5] A, the lessor, sued B, the lessee for possession. A decree was passed for possession on condition of A depositing a certain amount on a date specified. A failed to do so and B continued to be in possession and raised crops on the land; it was held by the High Court of Madras that B was entitled to the benefit of this clause and that A could not get the crops by subsequently depositing the amount.[6]

The principle of this clause will apply to agricultural leases. The principle has been held applicable to usufructuary mortgages of uncertain duration[7] and was applied in the undermentioned case[8] to a 'known' mortgage.

2. "Uncertain duration." — This clause will apply only to leases of uncertain duration. For example, a lease from year to year or from month to month or a lease in which the period is limited conditionally on the happenings of some event is a lease of uncertain duration.[1a] Where the tenant 'knows' when his term is to cease, he can have no equity in his favour and will not be entitled to the benefit of this rule.[1]

3. Lessee in fault. — The equity of the rule in this clause cannot obviously apply to cases where the determination of the tenancy is brought about by the lessee's own negligence or misconduct.[1] Thus, where the tenancy is determined by forfeiture under clause (g) of S. 111 the tenant cannot claim the benefit of this rule.[2] It has been held in England that where a tenancy is determined by the tenant's own act, such as by the marriage of a

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SECTIONS 108, CLAUSE (i)—NOTE 1

1. ('20) 7 AIR 1920 Upp Bur 56 (58): 3 Upp Bur Rul 141: 53 Ind Cas 444, *Gaw Ya Mg.* v. *Maung Talok.* (It is recognised in English law on the termination of the tenure of a tenant for life, or for another's life, and on the termination of a tenancy at will.)
('14) 1 AIR 1914 Mad 225 (225, 226) : 22 Ind Cas 515 (DB), *Narayanan Nambudripad* v. *Krishna Pattar.*
Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Para. 362.
2. Woodfall, *Landlord and Tenant,* 22nd Edn., page 934.
3. ('14) 1 AIR 1914 Mad 225 (226): 22 Ind Cas 515 (DB), *Narayanan Nambudripad* v. *Krishna Pattar.*
4. ('14) 1 AIR 1914 Mad 225 (225): 22 Ind Cas 515 (DB), *Narayanan Nambudripad* v. *Krishna.*
('90) 13 Mad 15 (16), *Ramalinga* v. *Samiappa.*
5. Woodfall, *Landlord and Tenant,* 22nd Edn., page 935.
6. ('37) 24 AIR 1937 Mad 879 (882): 176 Ind Cas 920, *Gangamma v. Mahabala Bhatta.*
7. ('20) 7 AIR 1920 Upp Bur 56 (58): 3 Upp Bur Rul 141: 53 Ind Cas 444, *Gaw Ya Mg.* v. *Maung Talok.*
8. ('14) 1 AIR 1914 Mad 225 (226): 22 Ind Cas 515 (DB), *Narayanan Nambudripad* v. *Krishna Pattar.*

SECTION 108—Note 2

1a. [*See*] ('45) 32 AIR 1945 Pat 162 (168): 23 Pat 871 (DB), *Shiba Prasad* v. *Lekhraj & Co.* [Grant for Maintenance—Condition providing for cancellation of grant and re-entry by landlord in case property was sold by auction for debts of grantee—*Held* there was no lease for uncertain duration within S. 108 cl. (i)]
1. ('90) 13 Mad 15(16), *Ramalinga* v. *Samiappa.*

SECTION 108—Note 3

1. ('90) 13 Mad 15 (16), *Ramalinga* v. *Samiappa.*
2. (1830) 33 R R 408 (414): 7 Bing 154: 9 LJCP 44, *Davis* v. *Eyton.*

female tenant who held during widowhood, the claim to emblements does not arise.[3]

Section 108 Clause (j).

Synopsis

1. Scope.
2. Absolute transfer.
3. Rights of assignee.
4. Liabilities of assignee.
5. Mortgage or sub-lease by lessee.
6. Lessee continues liable.
7. Rights of lessee against assignee or sub-lessee.
8. Last paragraph.
9. Agricultural leases.
10. Clause not retrospective.

1. Scope. — As has been seen in S. 6, Note 1, it is the general principle of law that property of any kind may be transferred except as provided by this Act or any other law for the time being in force. This general principle is applicable to lease-hold interest as well.[1] Even before the Act this general rule was followed in this country as to tenancies[1a] except in certain classes of tenancies which were held as non-transferable in the absence of a contract or custom to the contrary.[2] This clause merely enacts the pre-existing law[3]

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3. Woodfall, *Landlord and Tenant*, 22nd Edn., Page 936.
(1819) 21 R R 358 (360) : 2 B & Ald 470, *Bulwer* v. *Bulwer*.

SECTION 108, CLAUSE (j)—NOTE 1

1. ('27) 14 AIR 1927 Cal 220 (223): 110 Ind Cas 302 (DB), *Bhagban Das* v. *Bisweswar Nath*. (Non-permanent agricultural lease.)
('37) 24 AIR 1937 Lah 360 (362): 173 Ind Cas 198 (DB), *Rahmat-Ullah* v. *Atta Mohammad*.
[*See also* (1808) 10 R R 74 (76) : 15 Ves 258: 33 E R 752, *Church* v. *Brown*. (Under an agreement for a lease, the lessor is not without express stipulation entitled to covenant restraining alienation without licences as a proper and usual covenant.)]

1a. ('69-70) 5 Mad H C R 227 (247) (DB), *Venkatasamy* v. *Kulundapuri*. (*Held*, on the construction of a lease that the language did not evidence a contract purely personal to the lessee and his heir so as to exclude the right to assign.)
('90) 13 Mad 60 (62) (DB), *Appa Rau* v. *Subbanna*.
('89) 14 Bom 384 (387) (DB), *Vishnu* v. *Anant*. (A lessee, who is not restrained by his lease from subletting, may demise for any less term than he himself has. It is only in case the lessee has incurred a forfeiture that the original lessor may evict the sub-lessee.)

2. ('32) 19 AIR 1932 Cal 431 (432): 138 Ind Cas 72 (DB), *Kamala Mayee* v. *Nibaran Chandra*. (Homestead tenancy created before passing of Transfer of Property Act is not transferable except by custom.)
('37) 24 AIR 1937 Cal 373 (374): 173 Ind Cas 498, *Kumud Behari* v. *Himanshu Kumar*.
('06) 7 Cal L Jour 309 (310, 311) (DB), *Hanuman Prasad v. Deo Charan*. (Previous to the passing of the Transfer of Property Act tenancies of homestead land created for the purpose of habitation were not transferable except by custom or usage.)
('06) 7 Cal L Jour 107 (108) (DB), *Ram Charan* v. *Hari Charan*.
('21) 8 AIR 1921 Cal 582 (584): 60 Ind Cas 826 (DB), *Sulin Mohan* v. *Raj Krishna*. (The only recognised exception to this rule was that one man granted a tenure to another for the purpose of living upon the land, that tenure in the absence of evidence to the contracy was assignable.)
('17) 4 AIR 1917 Cal 798 (799): 37 Ind Cas 939 (DB), *Ramada Sundari* v. *Syhama Kanta*. (Tenancies from year to year of homestead lands were not transferable except by custom previous to the passing of the T. P. Act.)
('15) 2 AIR 1915 Cal 711 (711): 27 Ind Cas 500 (DB), *Kaluram* v. *Puranchand*. (Tenancies from year to year of homestead lands.)
('27) 14 AIR 1927 Cal 39 (40): 54 Cal 333: 97 Ind Cas 817 (DB), *Sarada* v. *Nabin*. (Tenancies whether of homestead lands or of agricultural lands were not transferable.)
('16) 3 AIR 1916 Cal 827 (829): 33 Ind Cas 565 (DB), *Ananda Mohan* v. *Gobinda*.
('27) 14 AIR 1927 Cal 373 (373): 100 Ind Cas 167 (DB), *Adhar Chandra* v. *Bipin Chandra*. (A tenancy of homestead land created for the purpose of habitation.)
('24) 11 AIR 1924 Cal 1012 (1013): 84 Ind Cas 28 (DB), *Safar Ali* v. *Abdul Rasid*. (A permanent tenancy created before the passing of the Transfer of Property Act for the purpose of habitation.)
('38) 25 AIR 1938 Pat 569 (572): 17 Pat 358: 179 Ind Cas 566 (DB), *Bansi Singh* v. *Chakradhar Prasad*.
('16) 3 AIR 1916 Pat 194 (195): 1 Pat L Jour 253: 36 Ind Cas 126 (DB), *Ambica Prasad* v. *Baldeo Lal*.
(1900) 4 Cal W N 574 (575, 576) (DB), *Madhab Chandra* v. *Bejoy Chand*.

and applies to all kinds of leases governed by the Act.[4] The lessee is entitled, under this clause to transfer absolutely, or by way of mortgage or sub-lease, the whole, or any part of his interest in the property unless the right is clearly not transferable.[5]

Covenant against alienation.

It has been held that the mere fact that there is a covenant against alienation does not render an alienation by the lessee of his interest 'ipso facto' void, unless there is a condition for re-entry by the lessor on breach of the covenant, as required under S. 111 (g).[5a] This view is, however, open

('98) 25 Cal 896 (907): 2 Cal W N 405 (FB), *Nabu Mondul* v. *Cholim Mullick.* (Homestead.)

('05) 32 Cal 1023 (1030): 9 Cal W N 895 (DB), *Madhu Sudan* v. *Kamini Kanta.* (The incident of non-transferability was common to ordinary tenancies of agricultural lands and tenancies from year to year of homestead lands.)

[*See also* ('09) 1 Ind Cas 362 (364) (DB) (Cal), *Kailash Chandra* v. *Hari Mohan.*) also see S. 2 Note 5 and S. 108 (j) Note 10.

[But see ('17) 4 AIR 1917 Cal 574 (575): 33 Ind Cas 502 (DB), *Madhu Mati* v. *Harendra Lal.* (Permanent tenancy of homestead land created before T. P. Act held transferable under general law.)]

3. ('47) 34 AIR 1947 All 49 (50): 224 Ind Cas 290 *Mohd. Sharif* v. *Waqf Banam-I-Khuda.* [Lease-hold interest created before passing of Act is transferable.)]
('32) 19 AIR 1932 All 473 (474): 139 Ind Cas 346 (DB), *Joti Prasad* v. *Har Prasad.*
('90) 13 Mad 60 (62) (DB), *Appa Rau* v. *Subbanna.*

4. ('21) 8 AIR 1921 Cal 741 (747): 48 Cal 359: 61 Ind Cas 503 (DB), *Mahumed Ayejuddin Mea* v. *Prodyot Kumar.* (Yearly tenancy created after the T. P. Act is capable of transfer.)
('08) 12 Cal W N 724 (726) (DB), *Bhola Nath* v. *Raja Durga Prosad.* (All lessees including lessees holding under permanent leases are liable for rent even after they have transferred their rights.)
('18) 5 AIR 1918 Cal 182 (183): 46 Ind Cas 656 (DB), *Mohendra Lal* v. *Krishna Kumari.* (Interest of a lessee of a homestead is transferable under Transfer of Property Act.)

5. ('49) 36 AIR 1949 Bom 131 (132): (DB) *D. N. Cooper* v. *Shiavax Cowasji.* [Right given to tenant by S. 108 (j) is an unrestricted right not conditioned by his having to inform the lessor about it—clause is subject to contract to contrary.]
('26) 13 AIR 1926 All 432 (434): 48 All 385: 95 Ind Cas 1048 (DB), *Ballabha Das* v. *Murat Narain.* (*Held*, the lease must be treated as not an agricultural lease, so as to be exempted from the operation of S. 108, T. P. Act, and to be governed by the Agra Tenancy Act.)
('71) 15 Suth W R (275) (DB), *Durga Prasad* v. *Brinadaban.*
('19) 6 AIR 1919 Cal 251 (251): 51 Ind Cas 953 (DB), *Hemaprova Mozumdar* v. *Debendra Nath.* (In the District of Noakhali and its neighbourhood, there is local usage or custom ,prohibiting the transfer of an osat raiyati holding granted for the purpose of erecting houses without the consent of the landlord.)
('14) 1 AIR 1914 Lah 472 (472): 1914 Pun Re No. 33: 23 Ind Cas 395, *Allah Ditta* v. *Mt. Farz Bibi.*
('15) 2 AIR 1915 All 35 (38): 37 All 144: 26 Ind Cas 446 (DB), *Abdul Haq* v. *Datti Lal.*
('30) 17 AIR 1930 All 315 (317): 127 Ind Cas 516, *Raghunath* v. *Buddhu Ram.*
('32) 19 AIR 1932 Lah 518 (519): 139 Ind Cas 680, *Yaqub Khan* v. *Mohan Lal.* (In the absence of a prohibition by law, custom or agreement every right is transferable.)
('98) 2 Cal W N 122 (124), *Hari Nath* v. *Raj Chandra.*
('32) 19 AIR 1932 All 473 (474): 139 Ind Cas 346 (DB), *Joti Prasad* v. *Har Prasad.*
('24) 11 AIR 1924 Pat 324 (326): 72 Ind Cas 662, *Mahadeo Saran* v. *Dharamnath Sahay.* (Where the defendants deny the fact that the holding came into existence before the Transfer of Property Act, it is for the plaintiff to prove that the tenancy came into existence before the Transfer of Property Act.)
('69) 7 Beng L R 152 (158): 12 Suth W R 495 (FB), *Beni Madhab* v. *Jai Krishna*
('15) 2 AIR 1915 Cal 154 (154): 25 Ind Cas 530 (DB), *Khitish Chunder* v. *Bhikan Mamud.* (A lease for a definite term for general purposes is heritable, and when the conduct of the parties shows it to be transferable, it must be treated as such.)
('95) 8 CPLR 33 (35), *Bisni Ram* v. *Ram Pershad.* (In the absence of any local usage or law forbidding it, a lease would be capable of transfer.)
(1900) 5 Cal L Jour 205 (207) (DB), *Habul* v. *Kashimani Debi.* (Sale of homestead land.)

5a. ('45) 32 AIR 1945 Bom 399 (401): ILR (1945) Bom 343. *John Nadjarian* v. *E. F. Trist.*
†('94) 18 Bom 603 (606) (DB), *Narayan Dasapa* v. *Ali Saiba.*
('06) 28 All 400 (401): 3 All L Jour 196 (DB), *Netrapal Singh* v. *Kalyan Das.*
('15) 2 AIR 1915 Cal 209 (210): 26 Ind Cas 23 (DB), *Promode Ranjan* v. *Aswin Kumar.*
('97) 21 Bom 195 (197) (DB), *Madar Saheb* v. *Sannabawa.*

to question in view of the express recognition in S. 10 of conditions restraining alienation inserted in leases for the benefit of the lessor. (See S. 10, Note 13 and S. 111, Note 13.) Even where there is a proviso for re-entry, the lease does not 'ipso facto' cease to be operative unless the lessor exercises his option to forfeit it.[6] But the lessor can, when a transfer is made in contravention of the covenant against alienation, sue the lessee for damages[7] or, if the lessee threatens to make an alienation, for an injunction restraining the lessee from making it.[8]

Where the covenant is that the lessee should not alienate without the consent of the lessor it has been held that the consent cannot be withheld arbitrarily, unreasonably or vexatiously.[9]

A lessor contracting for a right of re-purchase of the lessee's right does not in any way derogate from the transferable quality of the lessee's right.[10]

A lessee cannot make a transfer to last beyond his own interest. The determination of the lease will put an end to the interests transferred by him.[11]

The mere fact that a lessee's interest is made transferable under this clause does not necessarily imply that every tenancy is also 'heritable'. For instance, a tenancy for life comes to an end at the death of the tenant and is not a heritable interest.[12]

Also see S. 10, Note 17 and S. 111, Note 13.

6. †('20) 7 AIR 1920 Mad 1006 (1008):43 Mad 503: 61 I. C. 658 (DB), *Seshagiri* v. *Seshama*.
('19) 6 AIR 1919 Cal 132 (133): 53 Ind Cas 545, *Brojabashi Rudrapal* v. *Sarat Chandra*.
('09) 36 Cal 745 (748): 2 Ind Cas 416 (416) (DB), *Basarat Ali Khan* v. *Manirulla*.
('25) 12 AIR 1925 Pat 68 (92): 93 Ind Cas 454 (FB), *Harihar Prasad* v. *Kesho Prasad*.
(1910) 79 L J K B 921 (923, 924): (1910) 2 K B 32: 102 L T 685: 26 T L R 453, *Parker* v. *Jones*.
[*See also* ('03) 26 Mad 156 (161), *Abdulla* v. *Mahomod*. (Where, by the terms of a lease of a ferry, the renter should not transfer or sub-rent the ferry, but such a transfer or sub-lease is not prohibited by statute, or by a rule framed under a statute, a transfer of it will be valid as between the renter and his transferee, though it may be invalid as against Government.)]

7. ('48) 35 AIR 1948 Bom 349 (350) (DB), *Treasurer of Charitable Endowments* v. *S. F. B. Tyabji*. [Lessee transferring without landlord's consent as agreed.]
('09) 36 Cal 745 (748): 2 Ind Cas 416 (416) (DB), *Basarat Ali Khan v. Mauirulla*.
('21) 8 AIR 1921 Bom 27 (27): 45 Bom 1197: 63 Ind Cas 240 (DB), *Gurushantappa* v. *Mallava Sangappa*. (It must be proved that landlord has suffered damage.)
[*See also* (1868) 37 L J Q B 231 (232): (1868) 3 Q B 739: 19 L T 238: 16 W R (Eng) 1041, *Williams* v. *Earle*. (Action against assignee who had come in under an assignment made with lessor's licence, but who had himself assigned over without licence.)]

8. ('70) 7 Bom H C R A C 69 (70) (DB), *Mohana* v. *Shekh Sadodin*.

9. †('28) 15 AIR 1928 Sind 137 (140): 23 Sind L R 325: 109 Ind Cas 13, *Bombay Telephone Co.* v. *Karachi Municipality*. (Such consent can only be refused on the grounds connected with premises actually leased or the character of the proposed assignee and not to obtain some collateral advantage for the lessor.)
(1921) 90 L J Ch 417 (419), (420): (1921) 2 Ch 7: 125 L T 159, *In re Winfrey & Chatterton's Agreement*.
(1896) 65 L J Q B 578 (582): (1896) 2 Q B 241: 74 L T 751: 44 W R (Eng) 659, *Bates* v. *Donaldson*.
(1933) 102 L J Ch 353 (358): 1933 Ch 904: 149 L T 479: 77 S J 523, *Premier Confectionary Co.* v. *London Commercial Sale Rooms, Ltd.*
[*See* (1907) 76 L J Ch 507 (510): (1907) 2 Ch 229, *Jenkins* v. *Price*.]

10. ('23) 10 AIR 1923 Oudh 47 (48): 66 Ind Cas 106 (DB), *Shaikh Rutap Ali* v. *Md. Zaman Beg*.

11. ('74) 22 Suth W R 274 (275) (DB), *Hurish Chunder Roy* v. *Sree Kalee Mookerjee*.
('74) 25 Suth W R 347 (350) (DB), *Ranee Shoorut Soondry* v. *Charles Binny*.
('26) 13 AIR 1926 Nag 62 (62): 89 Ind Cas 872, *Govindrao* v. *Sarjabai*.
('99) 12 C P L R 158 (159), *Saiyad Noor* v. *Ramji Patil*. (Mortgage.)
('26) 13 AIR 1926 Nag 184 (186): 90 Ind Cas 364 *Sheobux* v. *Jagannath*. (Do.)
[*See also* ('25) 12 AIR 1925 Pat 216 (224): 4 Pat 139: 84 Ind Cas 586 (DB), *Ram Rachhya* v. *Kamakhya Narain*.]
Also see Section 115, Note 1.

12. ('43) 30 AIR 1943 Bom 148 (149): 207 Ind Cas 62 (DB), *Donkangouda Ramchandragouda* v. *Revanshiddappa Shivalingappa*. (AIR 1926 Bom 374 dissented from.)

2. Absolute transfer. — A lessee can transfer his interest absolutely, for example, by sale.[1] Such a transfer creates a 'privity of estate' between the lessor and the transferee, but not a 'privity of contract'.[2] The consequence of this is that the assignee is liable to the lessor for all the burdens of the lease, burdens which are imposed upon him by the mere assignment, whether he enters into possession or not,[3] but not for personal contracts of the lessee.[4]

3. Rights of assignee. — The assignee is entitled to the option of the lessee to purchase the leased property.[1] On the principles stated in Notes 1 and 25 on S. 40 the benefit of all covenants between th lessor and the lessee will run with the land if they touch and concern the land and will therefore pass to the assignee of the lessee's interest. In the case noted below[2] it was held that an assignee from the lessee, to whom possession had not been given by the lessor, could sue the lessor for damages for breach of the obligation.

Where the lease is terminable by a notice to quit, the lessor is not bound to give notice to quit to the assignee from the lessee and it is enough if such notice is given to the lessee (3).

4. Liabilities of assignee. — There is no provision in the Act dealing with the liability of the transferee of the lessee.[1] But, as has been seen already, the assignee will be liable to perform all the burdens of the lease by reason of the privity of estate that comes into existence between himself and the lessor.[2] Thus, a covenant to pay rent runs with the land and will be

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NOTE 2

1. ('12) 14 Ind Cas 799 (800) (All), *Ismail Khan* v. *Mithu Lal.*
   ('32) 19 AIR 1932 All 473 (474): 39 Ind Cas 346 (DB), *Joti Prasad* v. *Har Prasad.*
   (1900) 5 Cal L Jour 205 (206) (SB), *Habul* v. *Kashimani Debi.*
2. *('39) 26 AIR 1939 P C 14 (16): ILR (1939) 1 Cal 283: ILR (1939) Kar (P C) 78: 66 Ind App 50: 179 I. C. 328 (PC), *Ram Kinkar* v. *Sattya Charan.*
   [But see ('34) 21 AIR 1934 Bom 134 (135): 58 Bom 327: 148 Ind Cas 993 (FB), *Keshavlal* v. *Maganlal.* (Doctrine of privity of estate does not apply to India—This view is no longer good law in view of the Privy Council decision in AIR 1939 P C 14.)]
3. * ('39) 26 AIR 1939 P C 14 (16): ILR (1939) 1 Cal 283: I L R (1939) Kar (PC) 78: 66 Ind App 50: 179 Ind Cas 328 (PC), *Ram Kinkar* v. *Sattya Charan.*
   ('40) 27 AIR 1940 Pat 516 (527, 528): 19 Pat 433: 192 Ind Cas 17 (DB), *Jyoti Prasad Singh* v. *Samuel Henry Seddon.*
   Woodfall, *Landlord and Tenant,* 22nd Edn., pages 316, 317.
4. Woodfall, *Landlord and Tenant,* 22nd Edn., page 316.

NOTE 3

1. ('17) 4 AIR 1917 Bom 111 (113): 42 Bom 103: 42 Ind Cas 882, *Ladhabhai* v. *Sir Jamsetji.*
2. ('26) 13 AIR 1926 Pat 508 (511): 6 Pat 94: 96 Ind Cas 558 (DB), *Mt. Razia Begum* v. *Md. Daud.* (The assumption in this case that a sub-lease for the residue of the term operates as an assignment is however not correct.)
   ('48) 35 AIR 1948 Bom 349 (351) (DB), *Treasurer of Charitable Endowments* v. *S. F. B. Tyabji.*

NOTE 4

1. ('25) 12 AIR 1925 Bom 330 (330): 88 Ind Cas 79, *Ardeshar* v. *K. D. & Brothers.*
   ('34) 21 AIR 1934 Bom 134 (135): 58 Bom 327: 148 Ind Cas 993 (FB), *Keshavlal* v. *Maganlal.*
2. ('44) 31 AIR 1944 Cal 219 (221): ILR (1944) 2 Cal 90: 214 Ind Cas 179 (DB), *Pulin Behari* v. *Ram Ranjan.* (An assignee of a lease-hold interest is liable to pay rent to the landlord only on the ground of privity of estate. AIR 1939 PC 14: ILR (1939) 1 Cal 283: ILR (1939) Kar (PC) 78: 66 Ind App 50 (PC) and AIR 1941 PC 36: 20 Pat 521: ILR (1941) Kar (PC) 66: 68 Ind App 67 (PC) relied on.)
   *('39) 26 AIR 1939 PC 14 (16): ILR (1939) 1 Cal 283: ILR (1939) Kar (PC) 78: 66 Ind App 50: 179 Ind Cas 328 (PC), *Ram Kinker* v. *Sattya Charan.*
   ('22) 9 AIR 1922 Nag 224 (225): 56 Ind Cas 268, *Sitaram Maharaj* v. *Narain.* (Covenant not to alienate would run with the land if there is an assignment by the lessee and the assignee would be bound by the covenant.)
   ('31) 18 AIR 1931 Cal 790 (790): 133 Ind Cas 102 (DB), *Fate Chand* v. *Nagendra.* (Assignee is liable for arrears of rent as much as the original lessee.)
   ('96) 20 Bom 439 (448), *Sarafali* v. *Subraya.*
   †('40) 27 AIR 1940 Bom 154 (155): ILR (1940) Bom 328: 187 Ind Cas 680 (DB), *Virbhadraya* v. *Basangowda.*
   ('36) 23 AIR 1936 Pat 493 (494): 15 Pat 673: 164 Ind Cas 811 (DB), *Thakur Dayal Singh* v. *Promatha Natha.* (An express covenant in a lease not to transfer the

binding upon the assignee,[3] though the liability does not extend to rents accrued due before the date of assignment.[4] The assignment must, of course, be a valid one. Where there has been no assignment or where the assignee has accepted the assignment but never executed it or entered into possession of the premises, he will not be liable to lessor for the rent.[5] Where the assignment is not valid but the assignee enters into possession he may be liable to the lessor for damages for use and occupation.[6]

The liability of the assignee to the lessor being founded upon privity of estate it obtains only so long as the estate and no longer; consequently, on the one hand, his liability on the covenants dates only from the date of the assignment[7] and on the other hand ceases upon the transfer of his interest to another.[8] Where, however, the assignee agrees with the landlord that he will, during the residue of the term granted by the lease, pay the rent and observe other conditions of the lease, he is liable for the rent even after the assignment. (8a)

Where a lessee, M, assigns a share of his interest to X and both M and X are in possession of the whole of the leased property as tenants in-common[9] or where the lessee assigns the whole of his interest to X and Y who are in

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demised property without the consent of the landlord is a covenant running with the land and therefore binds a purchaser of the lessee's interest.)

3. ('92) 14 All 176 (177): 1892 All W N 25 (DB), *Gaya Prasad* v. *Baij Nath.*
('37) 24 AIR 1937 Cal 373 (374), *Kumud Behari Basu* v. *Himanshu.*
('27) 14 AIR 1927 Mad 931 (931): 105 Ind Cas 179, *Musafkanni Ravuthar* v. *Doraisingam.* (The liability of the assignee of a lease to pay rent is by reason of privity of estate.)
('35) 22 AIR 1935 Mad 669 (669): 157 Ind Cas 1005 (DB), *Suryaprakasa* v. *Venkata.*
('86) 12 Cal 185 (189) (DB), *Lala Bharub Chandra Karpur* v. *Lalit Mohan Singh.* (Where leasehold property is mortgaged with possession under circumstances so as to amount to an assignment the mortgagee becomes liable for rent.)
('94) 17 Mad 296 (297), *Kunhanujan* v. *Anjelu.*
('05) 3 Low Bur Rul 90 (90), *Hoossain Ismail Atcha* v. *Ebrahim Mahomad Makda.*
('10) 6 Ind Cas 766 (773) (DB) (Mad), *Chengiah* v. *Thimma Nayanim.*
('35) 22 AIR 1935 Cal 368 (388): 62 Cal 346: 159 Ind Cas 98 (DB), *Kumar Raj* v. *Barabani Coal Concern, Ltd.*
(1802) 6 RR 511 (515): 2 East 575, *Stevenson* v. *Lambard.*
(1823) 107 E R 152 (154): 1 L J (os) KB 138: 25 RR 437, *Vyiyan* v. *Arthur.*
[*See also* ('78) 2 Cal LR 323 (324, 325) (DB), *Macnaghten* v. *Bheekaree Singh.*
('11) 10 Ind Cas 885 (885) (Lah), *Mrs. Grose Jones* v. *Mr. Cumper.*)
Also see Section 76, Note 8.

4. (75) 1875 Bom P J 308 (DB), *Rupchand* v. *Govind.*
('78) 3 Cal L Rep 285 (286) (DB), *E. R. Macnaghten* v. *Lalla Mewa Lall.*
[*See also* (1900) 4 Cal W N 590 (592) (DB), *Sreemutty Jogemaya Dassi* v. *Girindra Nath.*]

5. Woodfall, *Landlord and Tenant,* 22nd Edn., page 316.

6. ('92) 14 All 176 (178): 1892 All W N 25 (DB), *Gaya Prasad* v. *Baij Nath.*

7. ('21) 8 AIR 1921 Pat 76 (76): 60 Ind Cas 297, *Bhupendra Nath Bose* v. *Ami Prasad Singh.* (Breaches of covenant happening before assignment—Assignee is not liable.)
†('96) 9 CPLR 113 (116), *Nathoo Ram* v. *Raja Bijaya Bahadur Singh.* (Do.)
('93) 3 Mad L Jour 292 (293), *Srimanavedan* v. *Anjela.* (The assignee of a lease is liable to the lessor for rent from the date on which he purchased the lessee's interest, and not from the date of possession.)
('16) 3 AIR 1916 Mad 768 (768, 769): 38 Mad 86: 17 Ind Cas 933 (DB), *Kunhisow Karnavan* v. *Mulloli Chathu.* (Do.)

8. ('44) 31 AIR 1944 Cal 219 (221, 222): ILR (1944) 2 Cal 90: 214 Ind Cas 179 (DB), *Pulin Behari* v. *Ram Ranjan.*
†('10) 7 Ind Cas 198 (199) (DB) (Cal), *R. D. Mehta* v. *Gajadhar Rai.*
('13) 18 Ind Cas 479 (480) (DB) (Cal), *Ram Dhan Dhar* v. *Sharup Chandra.*
Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Para. 442.
Woodfall, *Landlord and Tenant,* 22nd Edn., page 318.
(1828) 32 RR 456 (459): 7 LJKB 12, *Paul* v. *Nurse.*
[*See also* ('10 6 Ind Cas 766 (773) (DB) (Mad), *Chengiah* v. *Thimma Nayanim.*]

8a. (1943) 1 KB 366 (1943) 1 All ER 477: 112 IGKB 449: *Lyons J. & Co., Ltd.* v. *Knowles.*

9. ('40) 27 AIR 1940 Pat 516 (540): 19 Pat 433: 192 Ind Cas 17 (DB), *Jyoti Prasad Singh* v. *Samuel Henry Seddon.* (Liability of assignee is joint and several with lessee.)
('25) 12 AIR 1925 Cal 1056 (1059, 1060): 90 Ind Cas 211 (FB), *Kailash Chandra Mitra* v. *B. K. Chakraverti.* (Transfer by some of lessee's heirs to others.)

possession of the whole of the property as tenants-in-common,[10] M and X in the one case, and X and Y in the other will be each liable to the lessor to perform the whole of the covenants in the lease, including the payment of rent. But where M and X, in the one case, or X and Y in the other sever their interests and hold their shares in 'physical severalty', the privity of estate between the lessor and any of the said persons extends only to that portion of the property which is in his possession with the result that he will be liable on the covenants in the lease in so far as the covenants affect the portion in his possession, provided that the obligation under the covenants can be divided, for example, a covenant to pay rent.[11]

See also the undermentioned cases. [12]

See also section 109, Note 10.

5. Mortgage or sub-lease by lessee. — A mortgage or a sub-lease by the lessee of his interests creates neither a privity of estate nor a privity of contract between the lessor and the transferee.[1] Even an absolute demise for

10. ('27) 14 AIR 1927 Mad 931 (932): 105 Ind Cas 179 (DB), *Musofkanni* v. *Doraisingam.*

11. ('44) 31 AIR 1944 Pat 129 (133): 214 Ind Cas 84 (DB), *Madhabilata Debi* v. *Butto Kristo Roy.* (Although there is no express provision in the Transfer of Property Act for apportionment of rents and royalty which must be paid by the assignee of a portion of land, as the lessee is authorised by S. 108 (j) to transfer a lease absolutely or in part, there is no reason why the principle provided in the latter part of S. 109 should not be applied, that is to say, the lessor, the transferee and the lessee may determine what proportion of the rent reserved by the lease is payable in respect of the part so transferred by the lessee, and in case they disagree such determination may be made by the Court having jurisdiction to entertain a suit for the possession of the property leased.)
('27) 14 AIR 1927 Mad 931 (932): 105 Ind Cas 179 (DB), *Musafkanni Ravuthar* v. *Doraisingam.*
('38) 42 Cal W N 1088 (1090), *Lakshminarayan* v. *Girja Sankar.* (A suit for rent cannot be decreed against some only of the heirs of a deceased lessee, when the plaintiff lessor admits an assignment of the lease in favour of another and does not prove that the heirs continue to be in possession.)

12. ('30) 17 AIR 1930 Lah 515 (518): 11 Lah 427: 127 Ind Cas 1 (FB), *Moti Lal* v. *Kartar Singh.*
('75) 1875 Bom P J 273 (274) (DB), *Guna* v *Parashram.* (By accepting rent from the assignee of a lessee the lessor recognizes the assignee as his tenant and the assignment as valid. But this does not amount to a new lease to the assignee, but merely to an admission that he has legitimately become the assignee of the original lessee's interest, and does not confer any better position or higher right on the assignee than his assignor had.)

NOTE 5

1. ('45) 32 AIR 1945 Cal 89 (92): ILR (1947) 1 Cal 365: 221 Ind Cas 10 (DB) *Ganges Manfg. Co.* v. *Radharani Dasi.* (As purchaser of the lessee's interest at an execution sale, the lessor would doubtless be entitled to realise rent direct from the sub-lessee, but rent would be the rent payable under the sub-lease.)

NOTE 5

('44) 31 AIR 1944 Nag 141 (142): ILR (1944) Nag 267: 218 Ind Cas 25: *Nawabali* v. *Mohammad Ramzan.* (Therefore, the sub-lessee is not liable for rent nor on convenants in the head lease to the head lessor.)
('34) 21 AIR 1934 Mad 563 (564): 154 Ind Cas 541, *Modin Kutty* v. *Puthia Pureyil Manna.* (Transfer by usufructuary mortgage.)
*('41) 28 AIR 1941 PC 36 (37, 38): 20 Pat 521: ILR (1941) Kar PC 66: 68 Ind App 67: 193 I.C. 890 (PC), *Jagadamba Loan Co.* v. *Shiba Prasad.* (Lessee mortgaging leasehold interest.)
('39 26 AIR 1939 PC 14 (19): ILR (1939) 1 Cal 283: ILR (1939) Kar (PC) 78: 66 Ind App 50: 179 Ind Cas 328 (PC), *Ram Kinkar* v. *Satya Charan.* (Grantee of lease transferring whole of his term to sub-grantee—Transfer operates by way of sub-demise and not of assignment.)
(1906) 76 L J Ch 78 (81): (1906) 2 Ch 631: 76 LT 48, *South of England Dairies Ltd.* v. *Baker.* (Sub-demise by lessee.)
†('22) 9 AIR 1922 Nag 224 (225): 18 Nag LR 89: 56 Ind Cas 268, *Sitaram Maharaj* v. *Narain.* (Sub-lease.)
('18) 5 AIR 1918 Mad 425 (426): 40 Mad 1111: 40 Ind Cas 841 (DB), *Thithalan* v. *Eralpod Rajah.* (Mortgage with possession.)
('95) 21 Bom 311 (313): 1895 Bom PJ 441 (DB), *Timmappa* v. *Rama Venkanna.* (Sub-lease.)
('31) 18 AIR 1931 Lah 614 (614): 131 Ind Cas 121, *Jethanand v. Udhodas.* (Do.)
('14) 1 AIR 1914 Low Bur 45 (46): 24 Ind Cas 51, *Arachan* v. *Maung Po Win.* (Sub-lessee not liable to pay rent.)
('28) 15 AIR 1928 Nag 147 (148): 113 Ind Cas 111, *Ramchandra* v. *Seth Bhawaniram.* (Mortgage from tenant.)

the unexpired residue of the term, by way of sub-lease does not operate as an assignment in this country and does not create any privity of estate or of contract between the lessor and the sub-lessee.[2] In this respect the English law is different. Under that law a sub-lease of the residue of the whole term operates as an assignment, if it be by deed.[3] In this country the mortgage, or the sub-lessee, therefore, is not liable to perform the covenants of the lease.[4] The contrary view that has been taken in some cases[5] is no longer good law in view of the decisions of their Lordships of the Privy Council in 'Ramkinkar Banerjee' v. 'Satyacharan'[6] and 'Jagadamba Loan Co., Ltd.' v. 'Raja Siba Prasad'[7] that there is no privity of estate between the lessor and a transferee from the lessee of a 'partial interest' in the lease.

But though the transferee of a partial interest in the lease such as a mortgagee or a sub-lessee has no privity estate or of contract with the lessor and is not bound to perform, as such, the covenants in the lease, he may be liable under S. 40 on the 'restrictive' covenants, if any, in the head-lease if he had taken the transfer with the notice of such covenants.[8] In the case of a sub-

[See also ('36) 23 AIR 1936 Cal 727 (731): 170 Ind Cas 690 (DB), *Mati Lal* v. *Iswar Radha*. (Sub-lease of coal mines.)]
('49) 36 AIR 1949 Nag 336 (337): ILR (1949) Nag 432 *Baban Purnaji* v. *Champabai*.
('47) 34 AIR 1947 Sind 163 (164): ILR (1946) Kar 454 *Abba Ali Mahomed* v. *Mulraj Gupta*.

2. *('30) 17 AIR 1930 PC 59 (60): 57 Ind App 110: 57 Cal 1176: 122 Ind Cas 20 (PC), *Hunsraj* v. *Bejoy Lal Seal*. (An absolute demise by sub-lease for the unexpired residue of the term is therefore not a breach of a covenant against assignment.)
*('39) 26 AIR 1939 PC 14 (15): ILR (1939) 1 Cal 283: ILR (1939) Kar (PC) 78: 66 Ind App 50: 179 Ind Cas 328 (PC), *Ram Kinkar* v. *Satya Charan*.
('14) 1 AIR 1914 Low Bur 45 (46): 24 Ind Cas 51, *Arachan* v. *Maung Po Win*.
('40) 27 AIR 1940 Mad 410 (411), *Nanjappa Goundan* v. *Rangaswami Goundan*.
[See however ('26) 13 AIR 1926 Pat 508 (511): 6 Pat 94: 96 Ind Cas 558 (DB), *Razia Begam* v. *Muhammad Daud*.]

3. Woodfall, *Landlord and Tenant*, 22nd Edition, page 322.
(1946) 1 KB 306: (1946) 1 All ER 288: 115 1 JKB 278 *Milmo* v. *Carreras*.
(If by a sub-lease a lessee divests himself of everything he has got the relationship of landlord and tenant cannot exist between him and the sub-lessee.)
[See also (1888) 67 LJQB 507 (509): (1898) 1 QB 716: 78 LT 397: 46 WR (Eng) 386: 62 JP 324, *Bryant* v. *Hancock*.
(1779) 99 ER 119 (122): 1 Doug 183, *Hal Ford* v. *Hatch*.]

4. ('45) 32 AIR 1945 Cal 89 (92): ILR (1947) 1 Cal 365: 221 Ind Cas 10 (DB) *Ganges Manfg. Co.* v. *Radharani Dasi*. (Covenant in headlease implying obligation to pay specified rent—Covenant being affirmative cannot bind sub-lessee.)
('44) 31 AIR 1944 Nag 141 (142): ILR (1944) Nag 267, *Nawabali* v. *Mahomed Ramzan*.
*('34) 21 AIR 1934 Bom 134 (136): 58 Bom 327: 148 Ind Cas 993 (FB), *Keshavlal Tribhuwan* v. *Maganlal Shivlal*. (Overruling 29 Bom 391.)
('96) 20 Bom 439 (448), *Sarafali, Tyabali* v. *Subraya Bateraya*.
('27) 14 AIR 1927 Cal 100 (101): 91 Ind Cas 501 (DB), *Benoy Krishna* v. *Fanindra Nath Roy*.
('34) 21 AIR 1934 Mad 563 (564): 154 Ind Cas 541, *Modin Kutti* v. *Puthia Purayil Mannan*. (Usufructuary mortgage by the lessee.)
('18) 5 AIR 1918 Mad 425 (427): 40 Mad 1111: 40 I.C. 841 (DB), *Thethalan* v. *Eralpod Rajah*. (Do.)
('28) 15 AIR 1928 Nag 147 (148): 113 Ind Cas 111, *Ramchandra* v. *Seth Bhawaniram*. (Even a voluntary payment of rent would not make him liable for future rent.)

5. ('84) 10 Cal 443 (444) (DB), *Kannye Loll Sett* v. *Nistoriny Dossee*.
('03) 5 Bom LR 118 (119) (DB), *Govind Sesha Kamti* v. *Shamtaya Dattaya*.
('25) 12 AIR 1925 Bom 330 (331): 88 Ind Cas 79, *Ardeshir Cowasji Patel* v. *K. D. and Brothers*.
('06) 3 Low Bur Rul 90 (90), *Hossain Ismail* v. *Ebrahim Mahomed*.

6. ('39) 26 AIR 1939 PC 14 (16, 19): ILR (1939) 1 Cal 283: ILR (1939) Kar PC 78: 66 Ind App 50: 179 Ind Cas 328 (PC).

7. ('41) 28 AIR 1941 PC 36 (38): 20 Pat 521: ILR (1941) Kar PC 66: 68 Ind App 67: 193 Ind Cas 890 (PC).

8. ('45) 32 AIR 1945 Cal 89 (92): ILR (1947) 1 Cal 365: 221 Ind Cas 10 (DB) *Ganges Manfg. Co.* v. *Radharani Dasi*. (Remedy of lessee for breach of such convenant is not by way of specific performance but by injunction against violation of the covenant.)
†('36) 23 AIR 1936 Cal 727 (732, 733): 170 Ind Cas 690 (DB), *Mati Lal* v. *Iswar Radha Damodar*.
('20) 7 AIR 1920 Pat 383 (402): 55 Ind Cas 113 (DB), *Lodna Colliery Co. Ltd.* v. *Bipin Behari*.
Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Para. 438.

lease it is well settled that the sub-lessee is deemed to have constructive notice of the covenants in the head-lease.[9] It has been held in the undermentioned case[10] that a mortgagee from the lessee who has taken the mortgage with notice of the covenant to pay rent can be sued by the lessor for relief under S. 27 of the Specific Relief Act, 1877, and S. 91 of the Trusts Act, 1882.

6. Lessee continues liable. — The lessee does not, under this clause cease to be liable for the rent and for the performance of the other obligations of the lease.[1] The English law is also the same on the point.[2] The lessee cannot, by merely giving the lessor notice of transfer of the lease, get rid of his obligation to pay rent[3] and cannot plead in answer to a suit for rent that the transferee is willing to pay it.[4]

Where the lessor accepts rent from the assignee a privity of contract also will be created between the lessor and the assignee with the result that the lessee ceases to be liable for the rent.[5] Where there is, however, an express covenant to pay rent the lessee will not be absolved from payment

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[*See also* ('73) 11 Beng LR App 40 (42): 20 Suth W R 230 (231) (DB), *Monindro Chunder Sircar* v. *Moneerudeen Biswas*. (Covenant not to excavate enforceable against sub-lessee.)]

9. Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, para 438.
Woodfall, *Landlord and Tenant*, 22nd Edition, page 323.

10. ('38) 25 AIR 1938 All 167 (169): ILR (1938) All 288: 174 Ind Cas 245 (DB), *Girendra Narain* v. *Ganga Narain*.

SECTION 108 cl (J) NOTE 6

1. ('48) 35 AIR 1948 Bom 349 (351) (DB) *Treasurer of Charitable Endowments* v. *S. F. B. Tyabji*. (No distruction in this respect between liabilities based on privity of contract and those based on privity of estate.)
('45) 32 AIR 1945 Pat 414 (416): 24 Pat 401 (DB) *Mahidhar* v. *Bansidhar*.
('10) 34 Mad 179 (181): 7 Ind Cas 210 (211): (DB), *Ramaswami Aiyangar* v. *Shanmugam Pillai*. (But a kudivaramdar is in a different position.)
('25) 12 AIR 1925 Bom 330 (330): 88 Ind Cas 79, *Ardeshar* v. *K. D. and Bros*. (A lessee does not by assignment escape personal liability on the covenant of the lease.)
('35) 22 AIR 1935 Mad 669 (669): 157 Ind Cas 1005 (DB), *Suryaprakasa* v. *Venkata*.
('94) 17 Mad 296 (298), *Kunhanujan* v. *Anjelu*.
('24) 11 AIR 1924 Cal 359 (359): 70 Ind Cas 111, *Manmatha Nath* v. *Balai Chandra*.
('08) 12 Cal W N 724 (726) (DB), *Bhola Nath Das* v. *Raja Durga Prosad*.
[*See also* ('26) 13 AIR 1926 Cal 845 (845): 94 Ind Cas 400 (DB), *Siataj Shaikh* v. *Bishnudas Dhar*.]
[But see ('21) 8 AIR 1921 Bom 27 (27): 63 Ind Cas 240: 45 Bom 1197 (DB), *Gurashantappa* v. *Mallava Sangappa*.]

2. Woodfall, *Landlord and Tenant*, 22nd Edn., pages 315, 520.
Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Para 440.
('25) 12 AIR 1925 Cal 423 (423): 79 Ind Cas 557 (DB), *Manmatha Nath* v. *Nalinaksha Rai*.
('25) 12 AIR 1925 Bom 330 (330): 88 Ind Cas 79, *Ardeshar* v. *K. D. & Bros*.
('42) 29 AIR 1942 Cal 514 (516): 202 Ind Cas 663 (DB), *Saradindu* v. *Kunja Kamini*.
('36) 23 AIR 1936 Bom 88 (89): 60 Bom 394: 161 Ind Cas 57 (DB), *Abdul Rekman* v. *Phiroze Cursetji*.
[*See* (1790) 2 RR 341 (341): 4 TR 94: 1 Hy Bl 433, *Mills* v. *Auriol*.]

3. *('30) 17 AIR 1930 PC 13 (15, 17): 127 Ind Cas 749 (PC), *Satya Niranjan* v. *Surajubala*.
('71) 7 Beng LR 152 (158) (FB), *Beni Madhab* v. *Jaikrishna*.
('95) 22 Cal 494 (500) (DB), *Sasi Bhushun* v. *Tara Lal*.

4. ('18) 5 AIR 1918 Cal 49 (49): 47 Ind Cas 800 (DB), *Akrurmani* v. *Madhab Chandra*.

5. ('48) 35 AIR 1948 Bom 349 (351) (DB), *Treasurer of Charitable Endowments* v. *S. F. B. Tyabji*.
(1882) 52 LJQB 340 (341): 10 QBD 48: 47 LT 657: 31 WR (Eng) 506, *Swan Sea Corporation* v. *Thomas*.
†('18) 5 AIR 1918 Mad 425 (426): 40 Mad 1111: 40 Ind Cas 841 (DB), *Theethalan* v. *Eralpod Rajah*.
('42) 29 AIR 1942 Cal 514 (516): 202 Ind Cas 663 (DB), *Saradindu* v. *Kunja Kamini*.
('19) 6 AIR 1919 Lah 304 (305): 1919 Pun Re No. 34: 51 Ind Cas 121, *Muharram Ali* v. *Bansi Lal*.
('36) 23 AIR 1936 Bom 88 (89): 60 Bom 394: 161 Ind Cas 57 (DB), *Abdul Rehman* v. *Phiroze Cursetji*.
[*See also* (1863) 1 Mad HCR 24 (26) (DB), *Kamala Nayak* v. *Ranga Rau*. (Agreement between lessor and lessee that former should accept rent from assignee.)
('38) 25 AIR 1938 All 167 (169): ILR (1938) All 288: 174 Ind Cas 245 (DB), *Girandra Narain* v. *Ganga Narain*. (The principle was applied to the lessor accepting rent from a mortgagee from the lessee.)]

under the covenant by reason merely of the fact that the lessor has received rent from the assignee.[6] Where rent is accepted from the assignee, not as a transferee from the lessee, but as an agent of the lessee, there is no recognition of the assignment by the lessor.[7]

Where there is no receipt of rent by the lessor from the assignee, the lessee and the assignee will both be liable on the covenants in the lease which run with the land. The lessee is, prior to the assignment, liable in a dual capacity, namely, privity of contract and privity of estate. By the assignment he divests himself of the latter capacity but retains the former. The result is that the lessor may avail himself of the relation that has come into existence between him and the assignee, as well as of the contractual relation that exists between him and the lessee. Thus, he has a remedy against them both, but can take out execution against one of them only.[8]

7. Rights of lessee against assignee or sub-lessee. — As between the lessee and his assignee the latter is primarily liable to perform the covenants in the lease, and will be deemed to have impliedly contracted to indemnify the lessee against the claims of the lessor for breach of the obligations imposed by virtue of the contract of lease.[1] But as seen in Note 4 the liability of the assignee to perform the covenant will cease by his assigning his interests to a second assignee, inasmuch as he is liable to the lessor only by virtue of privity of estate, and when that passes to the second assignee, his liability ceases.[2] Nevertheless, he will continue liable as to all breaches committed between the date of his taking the assignment and his transfer to the second assignee.[3] He would also continue liable on any express contract which he might have entered into with the lessee.[4] An 'under-lessee' is not liable to indemnify the lessee in respect of rent which the lessee has been compelled to pay to his lessor under his covenant to pay rent.[5]

8. Last paragraph. — This paragraph is identical in terms with clause (i) of S. 6. As seen in Note 37 on that section, occupancy tenancies have, by various Acts of the Legislature, been declared to be not transferable. An alienation of such tenancy would, in fact, have the effect of defeating the provisions of law. It is on this ground that such tenancies have been excepted from the operation of this clause. The clause will, therefore, not operate so as to enable a valid transfer being made of such tenancy.[1]

9. Agricultural leases. — This clause, in terms, does not apply to agri-

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6. ('36) 23 AIR 1936 Bom 88 (89): 63 Bom 394: 161 Ind Cas 57 (DB), *Abdul Rehman* v. *Phiroze Cursetji*.
7. ('12) 15 Ind Cas 156 (157) (DB) (Cal), *Digbijoy Roy* v. *Ata Rahman*.
8. ('48) 35 AIR 1948 Bom 349 (351) (DB), *Treasurer of Charitable Endowments* v. *S. F. B. Tyabji*.
†('25) 12 AIR 1925 Cal 423 (423, 424): 79 Ind Cas 557 (DB), *Manmatha Nath* v. *Nalinaksha Rai*.
('25) 12 AIR 1925 Sind 296 (297): 87 Ind Cas 802, *Gobindram* v. *Mohamed Hussain*. (In so far as this decision seems to "assume" that there is a privity of estate between a sub-tenant and the lessor, it is not correct.)
('07) 30 Mad 410 (412): 17 Mad L Jour 258 (DB), *Monica Kitheria* v. *Subraya Hebbara*.
('05-06) 3 Low Bur Rul 90 (90), *Hossain Ismail* v. *Ebrahim Mahomed*.
*('94) 17 Mad 296 (298), *Kunhanujan* v. *Anjelu*.
Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, Para 440.
Woodfall, *Landlord and Tenant*, 22nd Edn., page 315.

SECTION 108 cl (J) NOTE 7

1. †('80) 5 Cal 811 (817): 6 Cal LR 167, *Pepin* v. *Chunder Seekur*.
(1870) 39 LJ Ex 69 (73): LR 5 Ex 132: 22 LT 342: 18 WR (Eng) 697, *Moule* v. *Garratt*. (Lessee can recover from assignee damages paid by former to lessor for breach of covenant committed during the time of his being assignee.)
2. Woodfall, *Landlord and Tenant*, 22nd Edn., page 318.
3. Woodfall, *Landlord and Tenant*, 22nd Edn., page 318.
4. Woodfall, *Landlord and Tenant*, 22nd Edn., page 318.
5. (1899) 68 LJQB 114 (116): (1899) 1 QB 161: 79 LT 611: 47 WR (Eng) 161, *Bonner* v. *Tottenham & Edmonton etc., Society*.

SECTION 108 cl (J) NOTE 8

1. ('06) 28 All 696 (697): 3 All L Jour 476, *Madan Lal* v. *Mohammad Ali*. (Agra Tenancy Act.)

cultural leases. But the principle underlying this clause will apply and every lessee can, under S. 6 of the Act, transfer his interest to another person unless otherwise provided by this Act or by any other law for the time being in force.[1] The lessee will continue liable notwithstanding the assignment to another.[2] Where the relationship of landlord and tenant with permanent occupancy right was not created by any contract of the parties it was held in the undermentioned case[3] that neither this clause nor the principle underlying it applied and that an occupancy tenant was not liable for rent after he had transferred his holding and had given notice of the transfer to his landlord.

10. Clause not retrospective. — This clause is not retrospective and does not apply to leases executed before the Act.[1] It will not make a tenancy which was not transferable before the Act, assignable subsequent to the Act.[2]

Section 108 Clause (k).

1. Scope. — This clause may be compared with S. 55, sub-s. (5) clause (a) which is worded in similar terms. See Note 13 on that section.

Section 108 Clause (l).

Synopsis

1. Scope
2. Interest on rent.
3. Rent not a charge.
4. Rent in kind.
5. Tender or payment at the proper time and place.
6. "To the lessor or his agent."
7. Payment must be by lessee.
8. Increase of rent.
9. Question of title.
10. Concurrent lease.
11. Covenant to pay rent runs with the land. See Note 25 on S. 40 and Note 4 on Clause (j).
12. Void lease.
13. Non-payment of rent.
14. Suspension, abatement and reduction of rent.

1. Scope. — A right to recover rent or the liability to pay rent involves the position that there exists a relationship of landlord and tenant between the parties.[1] Where there is no such relationship, no liability to pay rent

SECTION 108 cl (J) NOTE 9

1. ('18) 5 AIR 1918 Nag 155 (156): 14 Nag LR 188: 43 Ind Cas 970, *Narayandas* v. *Krishna Rao*. (The provisions of the C. P. Tenancy Act require the consent of the landlord to transfer by a tenant only but a transfer of a sub-lease is valid without the consent of the landlord.)
('12) 17 Ind Cas 656 (656) (DB), (All), *Muhammad Ismail* v. *Mithu Lal*. (Letters Patent appeal from 14 Ind Cas 799 (All).
2. ('07) 30 Mad 410 (412): 17 Mad L Jour 278 (DB). *Monica Kitheria* v. *Subraya*.
('42) 29 AIR 1942 Cal 514 (516): 202 Ind Cas 663 (DB), *Saradindu* v. *Kunja Kamini*.
†('18) 5 AIR 1918 Mad 928 (930): 40 Ind Cas 590 (DB), *Bapiraju* v. *Narayanaswami* [But see ('25) 12 AIR 1925 Cal 423 (424): 79 Ind Cas 557 (DB), *Manmatha Nath* v. *Nalinaksha Rai*. (This principle does not apply to agricultural lands or to cases under the Bengal Tenancy Act—Obiter dictum.)]
3. ('15) 2 AIR 1915 Mad 34 (35): 25 Ind Cas 804 (DB), *Rangaramanuja Chariar* v. *Srinivasa Iyengar*.

SECTION 108 cl (J) NOTE 10

1. ('98) 25 Cal 896 (906): 2 Cal WN 405 (FB), *Nabu Mondul* v. *Cholim Mullick*.
('98) 2 Cal WN 122 (124), *Hari Nath* v. *Raj Chandra*.
('09) 1 Ind Cas 362 (364) (DB) (Cal), *Kailash Chandra* v. *Hari Mohan*.
2. ('14) 1 AIR 1914 Cal 664 (666): 23 Ind Cas 246 (DB), *Umakanta* v. *Kashiram*. Also see Note 1 and S. 2 Note 5.

SECTION 108 CLAUSE (L) NOTE 1

1. ('07) 31 Bom 159 (161): 8 Bom LR 988 (DB), *Manjappa Subaya* v. *Venkatesh Bab Prabhu*. (Assignee of lessee who has himself assigned to another is not liable for rent as there is no privity of estate or contract between the lessor and the first assignee after his assignment.)
[*See also* ('28) 15 AIR 1928 Nag 147 (148): 113 Ind Cas 111, *Ram Chandra* v. *Seth Bhawani Ram*. (Mortgagee from lessee who has no privity of estate or contract with the lessor is not liable for rent, even if he has paid rent voluntarily to the landlord.)]

arises.[2] But so long as the relationship of landlord and tenant continues, the tenant will be liable for the rent.[3] The fact that the tenant was not in actual occupation of the demised property is not a valid defence to a claim by the landlord for the rent.[4] If the lease is a voidable one and is avoided, the obligation to pay rent will cease.[5]

The right to the rent is vested in the landlord and the tenant cannot contract with a third party to divest his landlord of that right.[6]

Where a lump rent is fixed for several estates leased out to a person, the landlord cannot split up or apportion it and claim a proportionate rent for a particular estate.[7]

The clause applies in terms only to cases where a "lease" as defined in S. 105 has been executed. But even if no such lease is actually executed, if there is a relationship of landlord and tenant established between the parties in point of fact, the landlord would, on general principles, be entitled to recover the rent due as a debt.[8]

2. Interest on rent. — The word "rent" will not include interest payable on arrears of rent, as the payment of interest can neither be said to be a "consideration" for the lease nor a payment "to be rendered periodically, or on specified occasions" within the meaning of S. 105.[1] If, therefore, a sum of money is paid by the lessee to the lessor as rent and is accepted by the lessor as such, he cannot apply it towards any interest that may be due on

2. ('05) 32 Cal 567 (570): 3 Cal L Jour 141 (DB), *Girindra Chandra* v. *Sreenath*.
[*See also* ('14) 1 AIR 1914 Oudh 220 (221): 25 Ind Cas 6, *Indal Sah* v. *Bhabhuti Singh*. (Tenant at will—Transfer of such interest is illegal—Transferee cannot recover rent from sub-tenant as no relationship of landlord and tenant exists between these parties.)]

3. ('84) 8 Bom 160 (163) (DB), *Venkatesh Narayan* v. *Krishnaji Arjun*.
('74) 21 Suth WR 5 (6) (DB), *Mohun Mahtoo* v. *Meer Shumsool Hoda*.
('28) 110 Ind Cas 438 (439) (DB) (Cal), *Satu Pramanik* v. *Joynab Bibi*.
('02) 5 Oudh Cas 113 (115), *Gobind Prasad* v. *Asmat Ara Begam*.
†('02) 15 CPLR 9 (10), *Tikaram* v. *Budhu*.
('12) 15 Oudh Cas 295 (300): 15 Ind Cas 857 (859), *Habibullah* v. *Surji*.
('09) 36 Cal 675 (691): 1 Ind Cas 626 (631) (DB), *Mathewson* v. *Sriram Kanai Singh*.
†('29) 16 AIR 1929 Pat 440 (444): 120 Ind Cas 776 (DB), *Deo Lal Jha* v. *Bindeswari Narayan*.
[*See* ('20) 7 AIR 1920 Cal 965 (966): 59 Ind Cas 312 (DB), *Basanta Kumari* v. *Krishna Nalini*. (In a suit for rent if allegations of surrender and dispossession are not proved and the tenant is in possession of the holding the mere fact that the plaintiff is unable to establish the identity of the holdings is no reason for depriving him of the rent therefor.)]
[*See also* ('05) 9 Cal WN 871 (873) (DB), *Srimati Moni* v. *Kalachand Gharam*. (Landlord receiving kabuliyats from sub-tenants but tenant's possession not disturbed—Tenant's liability to pay rent does not cease.)]

4. ('84) 8 Bom 164 (167) (DB), *Balaji* v. *Bhikaji*.
('74) 21 Suth WR 5 (6) (DB), *Mohun Mahtoo* v. *Meer Shumsool Hoda*.
('36) 23 AIR 1936 Lah 815 (816): 165 Ind Cas 56, *Nur Mohammad* v. *Ahmad Ali Khan*. (Lessee not requesting lessor to be put in possession—Lessee not being obstructed by lessor is liable for rent.)
('84) 8 Bom 160 (163) (DB), *Venkatesh Narayan Pai* v. *Krishnaji Arjun*.
('66) 5 Suth WR Act X 78 (78) (DB), *Saroda Soonduree Debee* v. *Hazee Mahomed*. (As long as ryot retains possession of any portion of his jote, he is liable for the rent of the whole.)

5. ('09) 36 Cal 675 (691): 1 Ind Cas 626 (631) (DB), *Mathewson* v. *Sri Ram Kanai Singh Deb*.

6. ('11) 12 Ind Cas 855 (856) (Low Bur), *Maung Lon Gyi* v. *Rahman Chetty*.

7. ('73) 5 NWPHCR 42 (43) (DB), *Oosman Khan* v. *Choudhry Sheoraj Singh*.

8. ('09) 12 Oudh Cas 140 (143): 2 I.C. 920 (922) (DB), *Udit Narayan Singh* v. *Rampal Singh*. (Where the defendant was in possession of a village under a kabuliat executed by him, undertaking to pay rent at a certain rate, but no lease had been executed, held that the undertaking contained in kabuliyat could be enforced against him.)
('85) 11 Cal 221 (225) (DB), *Rutnessur Biswas* v. *Hurish Chunder*. (Amount held recoverable as damages for breach of contract.)

SECTION 108 cl (L) NOTE 2

1. †('06) 5 Cal L Jour 69 (70): 11 Cal WN 110 (DB), *Bhagabati Debya* v. *Basanta Kumari*.
('19) 6 AIR 1919 Cal 391 (391): 50 Ind Cas 975 (DB), *Mani Lal Seal* v. *Bhola Nath Basu*.

Also see Section 105, Note 66.

the arrears of rent.[2] But this does not mean that interest is not recoverable on the arrears of rent where there is a stipulation for such interest.[3] Interest can also be claimed as damages on the arrears of rent in the absence of a stipulation for interest.[4].

See also the undermentioned cases.[5]

3. Rent not a charge. — The rent or premium payable is not a charge on the leasehold premises.[1] Nor is it a charge on the crops raised by the tenant.[2] As to whether rent is a charge under local Tenancy Acts, see Note 12 on section 100.

4. Rent in kind. — Where rent is stipulated to be paid in kind the lessor cannot, on failure to pay such rent, claim interest either under the Interest Act, 1839, or as damages under S. 73 of the Contract Act. The Interest Act does not apply because rent in kind is not a "debt". Section 73 of the Contract Act will enable the award only of the value of the grain at the time it is due as 'damages' and not as interest.[1]

The fact that the lessor might have received in previous years the value in money for the rent in kind, fixed by the contract of lease, will not disable him from claiming the payment of rent in kind for any particular year.[2] As to the lessor's rights where the rent is fixed as payable in kind or partly in kind and partly in money and a value of the rent is kind is also mentioned in the lease, see Note 62 on section 105.

5. Tender or payment at the proper time and place. — A tender of rent must be of the exact sum due.[1] It is the duty of the lessee, where no place of payment is fixed by the contract, to apply to the lessor for a reasonable place being named for payment of the rent; where this is not done the lessee must make the payment at the place where the lessor is, on the principle that "the debtor must find his creditor".[2] The lessee may, however, prove a

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2. †('06) 5 Cal L Jour 69 (70): 11 Cal WN 110 (DB), *Bhagabati Debya* v. *Basanta Kumari*.
('19) 6 AIR 1919 Cal 391 (391): 50 Ind Cas 975 (DB), *Mani Lal Seal* v. *Bhola Nath Basu*.

3. ('02) 30 Cal 213 (215) (DB), *Raj Narain* v. *Panna Chand*.
('13) 21 Ind Cas 82 (82) (Oudh), *Kifayat Ullah* v. *Protab Bahadur Singh*.
('21) 8 AIR 1921 Pat 301 (302), *Shahid Hussain* v. *Jagmohan Lal*. (Court cannot reduce rate fixed in the lease as interest.)

4. *See* ('12) 14 Ind Cas 713 (714) (DB) (Cal) *Jatadhari Lal* v. *Shah Shamsul Bari*. (Damages not allowed on the facts disclosed.)

5. ('34) 21 AIR 1934 All 115 (117): 153 Ind Cas 432, *Madan Mohan Garg* v. *Bohra Ram Lal*. (In the absence of any contract or usage, interest on arrears of rent is not allowed.)
('19) 6 AIR 1919 Cal 159 (160): 49 Ind Cas 1006 (DB), *Jiban Kali* v. *Manimala Dassi*. (A tender of rent without interest accrued due at the time of the tender is not a good tender.)

SECTION 108 cl (L) NOTE 3

1. ('26) 13 AIR 1926 Mad 55 (56): 48 Mad 821 : 90 Ind Cas 725 (DB), *Venkatacharyulu* v. *Venkatasubba Rao*. (English law not followed. AIR 1919 Mad 168 : 42 Mad 203 dissented from.)
('36) 23 AIR 1936 Rang 488 (490): 167 Ind Cas 110 (DB), *Ramanuja Naidu* v. *N. K. Chettyar Firm*.

2. ('36) 23 AIR 1936 Rang 488 (490): 167 Ind Cas 110 (DB), *Ramanuja Naidu* v. *N. K. Chettyar Firm*.

SECTION 108 cl (L) NOTE 4

1. † ('10) 8 Ind Cas 411 (412) (DB) (Bom), *Narayana Ramachandra* v. *Manager Nagappa*.
('69) 2 Beng LR App 27 (28): 11 Suth WR 151 (151) (DB), *Lachman Prasad* v. *Holas Mahtoon*.

2. ('99) 3 Cal WN 151 (152) (DB), *Sohobut Ali* v. *Abdul Ali*.
See also ('99) 9 Mad L Jour 26 (27) (DB), *Venkatramayya* v. *Ganganna*. (Rent payable by usage in kind.)]

SECTION 108 cl (L) NOTE 5

1. ('92) 1892 All WN 217 (219) (DB), *Bakhto* v. *Raja Ram*.

2. ('33) 20 AIR 1933 All 147 (148): 150 Ind Cas 289, *Bhagauti Shukul* v. *Chandrika Prasad Kueri*. (Decision in this case was based on implied contract to pay at lessor's place.)
('12) 14 Ind Cas 713 (714) (DB) (Cal), *Jatadhari Lal* v. *Shah Shamsul Bari*.
†('29) 16 AIR 1929 Sind 13 (14): 23 Sind LR 29: 111 Ind Cas 530, *Allibhoy Adamji* v. *Gordhandas*.
(1900) 4 Cal WN 324 (326) (DB), *Fakir Lal* v. *W. C. Bannerjee*.
(1853) 91 RR 705 (711): 8 Exch 689: 22 LJ Ex 264, *Haldane* v. *Johnson*.

contract subsequent to the lease, that the rent should be paid at a particular place.[3] There is nothing in the clause to require the landlord to make a 'demand' for the rent. The lessee is bound to pay the rent without any demand.[4]

Where the lease stipulates that the rent should be paid at a particular time, the lessee is bound to pay it at the time so specified. Where no such time is specified in the deed the rent will become due at the close of the period in respect of which the rent is reserved, unless there is any usage to the contrary governing the case.[5] The contrary view taken in the undermentioned case[6] that the rent becomes due as soon as the lease is granted, though payable at a future date, is, it is submitted, not correct. The landlord is not bound to accept rent in advance. If he however accepts it he is bound to appropriate the advance in his hands towards the rent as and when it occurs due.[7]

6. "To the lessor or his agent." — A payment or tender of the rent must be made not only at the proper time and place, but must be made to the 'lessor or his agent in this behalf'.[1] A payment to a person directed by the lessor will be a payment to the lessor himself.[2] A payment of rent after the death of the lessor to a person who is not the heir is not binding on the real legal representative of the lessor.[3] Where the lessor is a 'benamidar' for another person, it has been held that a payment of the rent to the real owner by the lessee is a good discharge of his liability.[4]

Joint lessors.

It has been seen in Note 14 on S. 60 that a payment or tender to one of several co-creditors is not a valid discharge of the debt against all of them.

On this principle a payment of rent by the lessee to one of several co-lessors will not be a valid discharge of the debt against them all.[5] The contrary view taken in the undermentioned cases[6] cannot be considered, in view of the discussion in S. 60, Note 14, to be good law. In any view, a payment to one of several co-lessors, will not be a good discharge of the liability against them all if such payment is made fraudulently or collu-

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3. ('25) 12 AIR 1925 Nag 281 (282): 23 Nag LR 26: 89 Ind Cas 273, *Onkarprasad* v. *Badridas.*

4. ('41) 28 AIR 1941 Bom 286 (287): ILR (1941) Bom 521: 196 Ind Cas 385, *Nasiruddin* v. *Umerji Adam & Co.*
('29) 16 AIR 1929 Sind 13 (14): 23 Sind LR 29: 111 I.C. 530, *Alibhoy Adamji* v. *Gordhandas.*

5. ('45) 32 AIR 1945 Lah 158 (163): 221 Ind Cas 48 (DB), *Ruplal Mehra* v. *Emperor.*
*('04) 27 Mad 143 (150): 31 Ind App 17:8 Sar 617 (PC), *Rangayya Appa Rao* v. *Bobba Shiramulu.*
(1900) 10 Mad L Jour 26 (27) (DB), *Rama Naidu* v. *Sri Mahant Ramakissori.*
('98) 8 Mad L Jour 201 (202) (DB), *Paramasiva* v. *Kandappa.*
Woodfall, *Landlord and Tenant*, 22nd Edition page 505.

6. ('26) 13 AIR 1926 Nag 314 (315): 22 Nag LR 13: 94 Ind Cas 741, *Maruti* v. *Ukarda.*
('49) 36 AIR 1949 Mad 535 (538): ILR (1949) Mad 657 (DB), *Krishnaswamy v. Mohanlal.*
('45) 32 AIR 1945 Lah 158 (162): 221 Ind Cas 48 (DB), *Ruplal Mehra* v. *Emperor.*
(Rent can only be charged when it becomes payable—Payment of rent before it is due is not a fulfilment of the obligation to pay rent but is in fact an advance to the landlord with an agreement that on the date when the rent becomes due such advance shall be treated as fulfilment of the obligation to pay rent. *De Nicholls* v. *Saundoss. (1870) LR 5 CP 589 (594) Ref.)*

SECTION 108 cl (L) NOTE 6

1. ('71) 16 Suth WR 79 (80) (DB), *Eshan Chunder Roy* v. *Khajah Assanoollah.*
2. (1864) 1864 Suth WR Act X Rul 112 (113) (DB), *Mt. Joykooer* v. *J. Furlong.*
3. ('03) 1903 Pun Re No. 72 page 304 (307): 1903 Pun LR No. 164, *Golak Nath* v. *Craddock.*
4. ('15) 2 AIR 1915 Mad 48 (48): 25 Ind Cas 679, *Muthusami Aiyar* v. *Solai Kanan.*
5. ('98) 25 Cal 324 (330) (DB), *Azim Sirdar* v. *Ramlall.*
6. ('74) 11 Bom HCR 106 (110) (DB), *Krishnarav Ramchandra* v. *Manaji.*
('98) 22 Bom 794 (800) (DB), *Sambhu* v. *Kamalrao Vithalrao.*
('86) 1886 Bom PJ 238 (238) (DB), *Vithal* v. *Sagun.*
(1865) 2 Suth WR Act X Rul 15 (15) (DB), *Baboo Oodit Narain Singh* v. *Mr. H. Hudson.*

sively.[6a] A payment to all the joint lessors is not invalid by reason merely of the fact that they have severed their interests, if there is no arrangement between them and the lessee for apportionment of the rent.[7] As a general rule one of several joint lessors cannot sue for his share of the rent,[8] in the absence of a special agreement between the lessee and the lessors for payment to them of their shares separately.[9] But one of the joint lessors can sue for the entire rent due making all the others defendants.[10] An arrangement

('68) 10 Suth WR 441 (441) (DB), *Ramnath Singh* v. *Gondee Singh.*

6a. ('16) 3 AIR 1916 Mad 208 (209): 28 Ind Cas 141 (DB), *Chockalingam Chetti* v. *Periakarupan.*
†('28) 15 AIR 1928 Bom 420 (421): 113 Ind Cas 618 (DB), *Gendal Raju* v. *Maganlal.*
('25) 12 AIR 1925 Bom 69 (74): 49 Bom 245: 89 Ind Cas 553 (DB), *Hirachand* v. *Jayagopal.*
*('12) 35 Mad 685 (687): 10 Ind Cas 874: *Sheik Ibrahim* v. *Rama Aiyar.*

7. ('80) 5 Cal 902 (905): 6 Cal LR 421 (FB), *Ishwar Chunder* v. *Ram Krishna.*

8. ('98) 1898 All WN 129 (130), *Girja Nand* v. *Ram Prasad.*
†('34) 21 AIR 1934 PC 58 (59): 61 Cal 313: 61 Ind App 35: 147 Ind Cas 884 (PC), *Baraboni Coal Concern Ltd.* v. *Gokulanand.*
('25) 12 AIR 1925 Cal 197 (197): 83 Ind Cas 931 (DB), *Kamalesh Ray* v. *Dwarika Nath.*
†('19) 6 AIR 1919 Cal 997 (998): 45 Ind Cas 721 (DB), *Satyesh Chandra* v. *Jillar Rahman.* (Joint landlords cannot at their choice collect rent in separate shares even after giving due notice to the tenants of their separate demands.)
('12) 16 Ind Cas 458 (458) (DB), (Mad), *Srinivasa Varadachariar* v. *Sami Reddi.*
('21) 62 Ind Cas 47 (48) (Pat), *Ram Rattan Prasad* v. *Jang Bahadur Singh.*
('82) 5 All 40 (41): 1882 All WN 143 (DB), *Manohar Das* v. *Manzur Ali.* (The making of the other lessors defendants did not cure defect in the suit.)
('04) 31 Cal 707 (709) (SB), *Nepal Chundra Ghose* v. *Mohendra Nath Roy.*
('93) 20 Cal 107 (110) (DB), *Bindu Basini* v. *Peary Mohun.* (Some of the cosharers may bring a suit only if others refuse to join; but in that case the suit must be for the adjustment of the entire rent, and all necessary parties must be properly before the Court.)
('92) 19 Cal 735 (741) (DB), *Pergash Lal* v. *Akhouri Balgobind.*
('02) 6 Cal WN 326 (328) (DB), *Lala Ram Saran Lal* v. *Nem Narain Singh.*
('76) 25 Suth WR 221 (221), *Rakhal Chunder Roy* v. *Mahtab Khan.*
† ('75) 23 Suth WR 37 (37), *Brijokishore* v. *Ooma Soonduree.*
('74) 22 Suth WR 526 (528), *Bykunt Kyburto* v. *Shushee Mohun.*
('66) 5 Suth WR Act X Rul 68 (68) (DB), *Ramjoy Singh* v. *Nagur Gazee.*
('74) 22 Suth WR 394 (395) (DB), *Tara Chunder Ameer Mundul.*
('73) 20 Suth WR 76 (77) (DB), *Mt. Lalun* v. *Hemraj Singh.* (Onus is on lessor to show that he is entitled to sue for a fractional portion.)
†('69) 12 Suth WR 30 (31) (DB), *Gunga Narain* v. *Shasoda Mohun.*
('68) 10 Suth WR 108 (109, 110) (DB), *Jagadamba Dasi* v. *Haran Chandra Dutt.*
('27) 14 AIR 1927 Cal 79 (80): 97 Ind Cas 444 (DB), *Durga Mohan* v. *Ali Buksha.*
(1834) 131 ER 999 (1000): 10 Bing 526: 3 LJCP 198: 4 Moo & S 400, *Decharms* v. *Horwood.*
[*See also* ('05) 9 Cal WN (44) (SB), *Promoda Nath* v. *Ramoni Kant.* (Agreement to pay rent separately—Suit for whole rent brought by one of cosharers joining others as defendants, held not maintainable.)]
[*But see* (1864) 1 Suth WR 253 (253) (DB), *Mohammed Sing* v. *Maghy Chowdhrain.* (Case under Act X of 1859.)
(1900) 27 Cal 479 (483): 4 Cal WN 494 (496) (DB), *Raj Narain* v. *Ekadasi.* (They can sever their interests and then sue separately for their shares, provided the suits are so framed as to free the tenant from all further liability to any of them.)
(1864) 1864 Suth WR Gap No. Act X Rul, 63 (64) (DB), *Umrit Chowdhry* v. *Hyder Ali. (Case under Act X of 1859.)*]

9. ('92) 19 Cal 735 (741) (DB), *Pergash Lal* v. *Akhowri Balgobind.*
†('12) 16 Ind Cas 458 (458) (DB) (Mad), *Srinivasa Varadachariar* v. *Sami Reddi.*
†('04) 31 Cal 707 (709) (SB), *Nepal Chandra* v. *Mahendra Nath.*
('05) 9 Cal WN 34 (48) (SB), *Promoda Nath* v. *Ramoni Kant.* (Agreement between lessors and lessee to pay rent separately—One of the lessors is not entitled to rescind the agreement without consent of others.)
('02) 6 Cal WN 326 (328) (DB), *Ram Saran* v. *Nem Narain Singh.*
('66) 5 Suth WR Act X Rul 68 (68) (DB), *Ramjoy Singh* v. *Nagur Gazee.*
('11) 14 Ind Cas 292 (292) (DB) (Cal), *Shyama Charan* v. *Jogesh Chandra.*
('69) 12 Suth WR 30 (31) (DB), *Ganga Narayan* v. *Saroda Mohan.*
('21) 62 Ind Cas 47 (48) (Pat), *Ram Rattan* v. *Jang Bahadur Singh.*

10. ('97) 1 Cal WN 221 (222) (DB), *Bissesswar Ray* v. *Broja Kant.*
†('27) 14 AIR 1927 Cal 79 (80): 97 Ind Cas 444 (DB), *Durga Mohan* v. *Ali Buksha.*
('10) 7 Ind Cas 351 (351) (Lah), *Ruldu Ram* v. *Aya Ram.*
('08) 35 Cal 744 (745): 7 Cal L Jour 425 (426) (DB), *Sashi Kumar* v. *Sitanath.*
*('08) 35 Cal 331 (344): 35 Ind App 73 (PC), *Pramada Nath* v. *Ramani Kanta.*

between the lessors and the lessee for collection of rent in separate shares does not preclude the lessors from together suing for the whole rent.[11] One of several lessors can also sue the lessee for apportionment of rent making all the other lessors parties to the suit.[12]

7. Payment must be by lessee. — A lessor cannot be compelled to accept payment of rent from a person who was not established to be his tenant.[1] Nor can the lessor claim rent from a person who is not his tenant. But a 'benamidar' for the lessee is in law the same person as the lessee himself and therefore the lessor can sue him for rent.[1a] Where A leases to B certain property and B happens to be one of several partners, there is a difference of opinion as to whether the lessor can sue the partners for rent. According to the Bombay High Court[2] he cannot, while according to the Madras High Court[3] he can. Where a lease is granted to several persons, each of the lessees is liable for the whole rent.[4] A suit is therefore maintainable against one of them for the whole rent.[5] The executor of a deceased lessee is not personally liable to pay the rent accruing due after the death of the lessee unless he enters into possession, in which case his position will be that of an assignee of the term.[6] In the undermentioned case[7] decided under the English law a lease was granted to A and B. A and B jointly and severaly covenanted to pay the rent and both of them paid rent in equals shows. On the death of A it was held that as the lease created a joint tenancy and as B succeeded to the whole benefit of the lease, the executors of A were not liable to contribute towards the payment of rent.

8. Increase of rent. — A lessor is not entitled to increased rent merely on the ground that the prevailing rent on other land in the vicinity is higher.[1]

Where a lease stipulates that, if the tenant continues after the expiry of the period fixed, he should pay an increased rent from that date, the stipula-

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('26) 13 AIR 1926 Cal 333 (334): 90 Ind Cas 673 (DB), *Mohini Mohan* v. *Meajan.*
('92) 19 Cal 735 (741) (DB), *Pergash Lal* v. *Akhowri Balgobind.*
('11) 14 Ind Cas 292 (293) (DB) (Cal), *Shyama Charan* v. *Jogesh Chandra.*
[But see ('21) 62 Ind Cas 47 (48) (Pat), *Ram Rattan* v. *Jang Bahadur.* (One can sue for entire rent even though others are not parties.)]

11. ('11) 10 Ind Cas 891 (892) (DB) (Cal), *Bhola Nath* v. *Belchamber.*

12. ('80) 5 Cal 902 (905): 6 Cal LR 421 (FB), *Iswar Chunder* v. *Ram Kriskha.*

SECTION 108 cl (L) NOTE 7

1. ('10) 6 Ind Cas 357 (357) (DB) (Cal), *Sarajendra Krishna Deb* v. *Sannyasi Charan Ghosh.* (Deposit by a person alleging to be a purchaser of the lessee.)

1a. ('21) 8 AIR 1921 Pat 351 (351): 64 Ind Cas 515 (DB), *Tharat Karim* v. *Mt. Bal Kuar.*

2. ('92) 16 Bom 568 (574), *Ragoonathdas Gopal Das* v. *Morarji Jutha.*

3. ('96) 19 Mad 471 (476): 6 Mad L Jour 115 (DB), *Chinnaramanuja Ayyangar* v. *Padmanabha Pillaiyan.*

4. †('28) 15 AIR 1928 All 534 (535): 111 Ind Cas 156, *Har Sarup* v. *Tohfa Singh.*
('74) 22 Suth WR 295 (295) (DB), *Gour Mohun Roy* v. *Anund Mundul.*
('74) 22 Suth WR 285 (285) (DB), *Jhoomuck Lall* v. *Mt. Shurfoon.*
('67) 7 Suth WR 272 (272) (DB), *Jogendra Deb Roy* v. *Kishen Bundhoo Roy.*
('68) 10 Suth WR 392 (392) (DB), *Bholanath* v. *Baharam Khan.* (Allotment of land in certain shares amongst the lessees not recognized by the lessor is no defence to a suit for rent by the lessor.)
†('20) 7 AIR 1920 Mad 509 (510, 511): 56 Ind Cas 552 (DB), *Singaraju Venkatasubramanian* v. *Rajah of Venkatagiri.* (Heirs and descendants are also jointly and severally liable.)
[But see ('10) 7 I.C. (840) (DB) (Cal), *Kashi Kinkar Sen* v. *Satyendra Nath Bhadro.*]

5. †('07) 11 Cal WN 1026 (1028) (DB), *Jogendra Nath Roy* v. *Nagendra Narain Nandi.*
('10) 6 Ind Cas 387 (387) (DB) (Cal), *Rameswar Singh* v. *Jaideb Jha.*
('14) 1 AIR 1914 Lah 500 (501): 1914 Pun Re No. 107: 27 Ind Cas 94, *Livingstone* v. *Feroz Din.*
[But see ('68) 10 Suth WR 304 (304) (DB), *Roopnarain Singh* v. *Juggoo Singh.*]

6. ('36) 165 Ind Cas 121 (122) (Cal), *Kameshwara Singh* v. *Pherozsha Merwanji.*
(1944) 1 KB 602 (1944) 2 All ER 6: 113 lg KB 489, *Cunningham-Reid* v. *Public Trustee.*

SECTION 108 cl (L) NOTE 8

1. ('14) 1 AIR 1914 Cal 475 (476): 23 Ind Cas 967 (DB), *Jadu Nath Das* v. *Manindra Chandra Nandi.*

tion is not a penalty and is valid.[2] If the tenant continues in spite of the notice he will be deemed to have agreed to pay the enhanced rent.[3] The same principle will apply where the lease contains a stipulation to pay a higher rent if the tenant fails to make certain payments at specified times.[4] The view taken in the undermentioned cases[5] that notwithstanding the stipulation to pay the increased rent, the lessor was not entitled to claim it, is, it is submitted, not correct.

A stipulation for enhanced rent, if the area of the demised property is found, on measurement, to exceed that mentioned in the lease, does not enable the lessee to an abatement of the rent if the area is found to be less.[6] If the area is in excess of that mentioned in the lease, the lessor will be entitled to rent for such excess area.[7].

A stipulation to pay higher rent by the tenant in certain events has been held to be enforceable even against a court auction-purchaser of the tenant's interests.[8]

9. Question of title. — The question of the lessor's title is wholly foreign to a suit for rent against the lessee inasmuch as the tenant is estopped from denying the title of the landlord.[1] A lessor can, therefore, recover rent from the lessee even though he may have no title to the land.[2] A lessee from one joint owner cannot set up the rights of the cosharers of his lessor and refuse to pay rent to his lessor.[3]

10. Concurrent lease. — Where A leases property to B for a period of years and then grants another lease to C which is to commence before the expiry of the prior lease, the lease in favour of C would be called "a concurrent lease". Such a lease operates as an assignment of a part of the reversion during the continuance of such previous lease, and thenceforth, as a lease in possession during the residue of the term therein expressed to be granted. The landlord, having thus assigned the reversion during the concurrent period, cannot sue the first lessee for rent but can claim rent from the second lessee who, in his turn, could recover from the first lessee.[1]

('12) 14 Ind Cas 229 (230) (Cal), *Manindra Chandra Nandi* v. *Jagannath Khan.*

2. ('29) 16 AIR 1929 Pat 717 (720): 9 Pat 487: 124 Ind Cas 625 (DB), *Kuman Das* v. *Radhika Singh.*
3. ('25) 12 AIR 1925 Oudh 189 (190): 28 Oudh Cas 77:82 Ind Cas 585, *S. Burge* v. *Maulvi Md. Inamullah Khan.*
4. ('99) 22 Mad 453 (454): 9 Mad L Jour 201 (DB), *Bal Kuraya* v. *Sankamma.*
5. ('95) 22 Cal 658 (665) (SB), *Tejendra Narain Singh* v. *Bakai Singh.* (Per Prinsep and Ghose, JJ—Rampini, J., *contra.*)
   ('72-92) 1872-1892 Low Bur Rul 439 (440), *Ramzan Ali* v. *Shew Bux.* (Lessor entitled only to a fair rent.)
6. (1865) 2 Suth WR Act X Rul 71 (71) (DB), *Ramakant Chowdry* v. *Bindaban Chunder Gopee.*
7. ('14) 1 AIR 1914 Cal 475 (476): 23 Ind Cas 967 (DB), *Jadu Nath Das* v. *Manindra Chandra Nandi.*
8. ('71) 15 Suth WR 448 (449) (DB), *Lalla Mitterjeet* v. *Raj Chunder.*

SECTION 108 cl (L) NOTE 9

1. ('06) 1906 Pun Re No. 141, p. 511 (512): 1907 Pun LR No. 96, *Bogar* v. *Karam Singh.*
2. †('15) 2 AIR 1915 Low Bur 10 (10): 31 I.C. 888, *Ahamuat* v. *Kalu.* (AIR 1915 Low Bur 75: 8 Low Bur Rul 227 (FB), followed.)
   ('89) 13 Bom 323 (325) (DB) *Jamesedji Sorabji* v. *Lakshmiram Rajaram.*
   ('10) 32 All 213 (214): 5 Ind Cas 870 (871) (DB), *Kesho Das* v. *Moksodan Das.* (Tenant taking a lease from one of several trustees is not competent to deny his lessor's right to sue alone for rent.)
3. †('89) 13 Bom 323 (325) (DB), *Jamsedji Sorabji* v. *Lakshmiram Rajaram.*
   ('98-99) 3 Cal WN 214 (215) (DB), *Behary Churn Sen* v. *Bhut Nath Pramanick.*
   ('76) 1876 Bom P J 11 (11) (DB), *Dada* v. *Bhau.*
   ('84) 1884 Bom P J 33 (33) (DB), *Sayad Fatulla* v. *Bala Shivaya.*
   †('84) 1884 Bom PJ 286 (286) (DB), *Jethu* v. *Ganpatrav.*
   †('13) 18 Ind Cas 592 (593) (Lah), *Narpat Rai* v. *Nausharia Mal.* (Lease by a Hindu father.)
   [But see ('10) 7 Ind Cas 874 (874, 875) (Mad), *Chidambara Velar* v. *Velu Pillai.* (Lease by *A—B* also owner of share—Tenant not estopped from taking a plea that *A* cannot sue for whole rent.)]

SECTION 108 cl (L) NOTE 10

1. ('08) 30 All 369 (370): 5 All L Jour 423 (DB), *Rama Anant Singh* v. *Shankar Singh.*

11. Covenant to pay rent runs with the land. — See Note 25 on S. 40 and Note 4 on clause (j) of this section.

12. Void lease. — Where a lease is void there is no relationship of landlord and tenant created between the parties. The party in occupation under such a lease is not liable to pay any 'rent' to the owner of the property.[1] He will, however, be liable to the owner for damages for use and occupation.[2]

13. Non-payment of rent. — The non-payment of rent does not determine the tenancy or constitute adverse possession so long as the relation of landlord and tenant continues.[1] Where under the contract of lease, the lessee, in case of default of payment of rent, is liable to be evicted on three days' notice and is also liable to pay interest on the rent due, it has been held that the remedy of a suit for damages for breach of contract in case of default in the payment of rent, is also available to the lessor, although such remedy is not expressly stipulated for in the lease deed.[2]

14. Suspension, abatement and reduction of rent. — This clause does not say that if the lessor fails to put the lessee in possession or if, having put him in possession, the lessee is deprived of possession in whole or in part, the lessee is not bound to pay rent.[1] But the rule is well settled that non-delivery of possession or the failure to secure possession of the property in whole or in part is a good answer to suit for rent in respect of the property not delivered or secured and for the period the tenant is out of possession.[2] The basis of

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Woodfall, *Landlord and Tenant*, 22nd Edn., page 256.
Fawcett, *Landlord and Tenant*, 3rd Edn., page 191.
Also see Section 109, Note 4.

SECTION 108 cl (L) NOTE 12

1. ('72) 9 Beng L R App 37 (38): 18 Suth W R 445 (446) (DB), *Gaurinath* v. *Madhumani*. (A landlord cannot recover rent of lodgings knowingly let to a prostitute who carries on her vocation there.)
†('09) 31 All 58 (59): 1 Ind Cas 52 (53) (DB), *Chogalal* v. *Mt. Piary*. (Do.)
('36) 23 AIR 1936 Cal 628 (629): 62 Cal 294: 163 Ind Cas 845, *In the matter of Jambad Coal Syndicate, Ltd.* (Unregistered lease.)
[*See also* ('75) 24 Suth W R 91 (91) (DB), *Kalee Doss Banerjee* v. *Nubeen Chunder Chatterjee*. (Lease set aside as granted without authority.)]
2. ('24) 11 AIR 1924 Oudh 97 (98): 74 Ind Cas 582, *Ajodhya Singh* v. *Khusro Begum*. (Lessor failing to prove lease may be allowed a decree on the basis of use and occupation.)
('69) 12 Suth W R 289 (290) (DB), *Paroma Soondaree Dossee* v. *Prollad Chunder* Doss (Possession under unregistered kabuliyat.)
('25) 12 AIR 1925 All 100 (101): 82 Ind Cas 296 (DB), *Nand Ram Singh* v. *Hari Saran Das*. (Possession under a kabuliyat—No lease.)
†('09) 31 All 276 (278): 2 Ind Cas 211 (212) (FB), *Sheo Karan Singh* v. *Prabhu Narayan Singh*. (Do.)
Also see Section 105 Notes 19 and 70 and S. 107 Note 7.

SECTION 108 cl (L) NOTE 13

1. See Note 79 on S. 105 and Note 14 on S. 111.

[*See also* ('28) 15 AIR 1928 Pat 63 (64): 104 Ind Cas 124 (DB), *Sheonandan Singh* v. *Kesho Prasad Singh*. (Mere failure of the landlord to realise rent even for more than 12 years would not confer a rent-free title.)
('78) 4 Cal 314 (318): 3 Cal L Rep 119 (DB), *Rangolal Mundul* v. *Abdool Gaffoor*.
('12) 16 Ind Cas 911 (914) (DB) (Cal), *Raji Kumar Roy Chowdhury* v. *Alimaddi*.]
2. ('42) 29 AIR 1942 Pat 269 (270): 198 Ind Cas 116, *Rajeshwar Prasad* v. *Chunilal Daruka*. (It was contended for the lessee that in case of default by the lessee, the lessor was confined to two remedies mentioned in the deed.)

SECTION 108 cl (L) NOTE 14

1. ('12) 15 Ind Cas 711 (714) (DB) (Mad), *Meenakshi Sundara Nachiyar* v. *Chidambaram Chettiar*.
2. ('43) 30 AIR 1943 PC 24 (28): ILR (1943) 1 Cal 372: ILR (1943) Kar (PC) 39: 70 Ind App 18: 206 Ind Cas 266 (PC), *Ram Lal Dutt* v. *Dhirendra Nath*. (Lump sum rent—Failure to give possession of part —Relief by abatement or apportionment of rent can be granted—Doctrine of suspension of rent is inapplicable in Bengal.)
*('12) 15 Ind Cas 711 (714) (DB) (Mad), *Meenakshi Sundara Nachiar* v. *Chidambaram Chettiar*. (25 Mad 587 followed.)
*('32) 19 AIR 1932 PC 28 (30): 59 Cal 1012: 59 Ind App 29: 136 Ind Cas 398 (PC), *Jogesh Chandra Roy* v. *Emdad Meah*. (Lessor must deliver possession before he can enforce the tenant's obligation to pay rent.)
('09) 2 Ind Cas 484 (484) (Mad), *Gopal Naicken* v. *Suppa Pillai*. (Where a suit is for rent that had accrued due already, the subsequent eviction by the landlord before the expiry of the term of the lease is not

this rule is that, in cases of continuous relationship involving mutual rights and obligations, a party who acts in violation of his obligations cannot claim to enforce his rights against the other party.[3]

As has been seen in the Notes on clauses (b) and (c), a lessee not put in possession of any part of the demised property or not secured by the lessor in his possession of any portion thereof after delivery of possession, will be entitled to rescind the whole contract of lease, but must in such a case, deliver to the lessor the property in his possession.[4] He can also, as has been seen in the said Notes, claim damages for breach of the obligations of the lessor. If, however, he retains possession of a part of the property, 'prima facie' it would be reasonable that he should be bound to pay to the

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a good defence to the suit.)
('20) 7 AIR 1920 Pat 611 (613): 58 Ind Cas 186 (DB). *Udhab Chandra Singh* v. *Narain.*
('33) 20 AIR 1933 Pat 678 (679): 149 Ind Cas 573. *Moheshwar Singh* v. *Jageshwar Singh.* (Substantial interference—Suspension of entire rent.)
('17) 4 AIR 1917 Pat 52 (53): 36 Ind Cas 537 (DB). *Ram Chandra* v. *Madho Prasad.* (Co-tenant depriving the other of possession in collusion with the lessor.)
('34) 21 AIR 1934 Pesh 101 (102): 152 Ind Cas 231. *Ganda Singh Mehr Singh* v. *Secy. of State.*
('34) 21 AIR 1934 Oudh 97 (98): 148 Ind Cas 1079. *Raja Ram Pal Singh* v. *Abdul Hamid.*
('31) 18 AIR 1931 Oudh 12 (13): 129 Ind Cas 326. *Rajjab* v. *Ghulam Hussain Khan.*
('69) 13 Suth WR 338 (339) (DB). *Kadumbinee Dossia* v. *Kasheenath Biswas.* (Dispossession from whole of the property.)
('15) 2 AIR 1915 Mad 717 (719): 25 Ind Cas 812 (DB). *Srinivasa Iyengar* v. *Ranga-swami Aiyangar.*
('29) 16 AIR 1929 Cal 719 (722): 122 Ind Cas 220 (DB). *Manmatha Nath* v. *Mati Lal.* (If the landlord dispossesses a tenant there would be no doubt a suspension of rent; but when the tenant gets mesne profits from the landlord for such dispossession the landlord is entitled to deduct the amount of rent payable to him on account of the land in question.)
('01) 5 Cal WN 816 (818) (DB). *Shama Prosad Ghose* v. *Taki Mullik.*
('68) 9 Suth WR 582 (582) (DB). *Hurish Chunder Koondoo* v. *Mohini Mohun Mitter.* (Non-delivery of whole of the property —Suit for rent—*Held*, delivery of possession on the part of the landlord is ordinarily a condition necessary for the maintenance of an action for rent.)
('28) 15 AIR 1928 Cal 136 (137): 106 Ind Cas 841 (DB). *Sailendra Nath* v. *Satish Chandra.* (Dispossession.)
('69) 3 Beng L R App 119 (119, 120) (DB). *Bullan* v. *Lalit Jha.* (Non-delivery of possession of the whole of the property.)
('12) 17 Ind Cas 238 (241) (DB) (Cal). *Kalanand Singh* v. *Jarad Kumari.*
[*See also* ('20) 7 AIR 1920 Pat 258 (258): 57 Ind Cas 69. *Surendra Mohan* v. *Gena Sardar.* (Dar-patnidar paying rent due to the superior landlord, in order to save the patni from sale, can deduct the amount so paid from the rent payable to his patnidar.)
('67) 8 Suth W R 54 (55) (DB). *Madhub Chunder* v. *Sidhee Nuzeer Ali Khan.* (Interruption is not an answer to a claim for rent that accrued due before the interruption.)
('79) 4 Cal L R 100 (101) (DB). *Ram Kishore Lall* v. *Nund Ram.* (As a general rule the Court does not ordinarily enforce payment of rent, unless the lessor puts the lessee in possession of the whole area leased, but it is quite competent to parties to waive any such privilege—*Held* in circumstances of the case, that privilege was waived.)
('09) 4 Ind Cas 324 (324) (DB) (Cal). *Gobinda* v. *Ramachandra.* (Tenant is not relieved from liability of paying rents before eviction.)]

3. *('12) 15 Ind Cas 711 (714) (DB) (Mad). *Meenakshi Sundara Nachiyar* v. *Chidambaram Chetty.*
('32) 19 AIR 1932 PC 28 (31); 59 Cal 1012: 59 Ind App 29: 136 Ind Cas 398 (PC). *Jogesh Chandra Roy* v. *Emdad Meah.*
[*See also* ('11) 10 Ind Cas 392 (393) (DB) (Mad). *Ramanathan Chettiar* v. *Veera Nagappa Chettiar.* (The right of a lessor to claim payment of a premium reserved under a lease does not depend upon his obligation to put the lessee in possession, as a matter of law—But Courts will not be justified in passing a decree for the payment of the premium alone without compelling the lessor at the same time to perform his obligation and to give possession as is done in the case of sales.)
('70) 15 Suth W R 230 (231) (DB). *Kristo Soondur Sandyal* v. *Chunder Nath Roy.* (Right of the zemindar to receive rent from the farmers depends on his securing to them quiet possession and giving him means of realizing rent from the royts.)]

4. ('12) 15 I.C. 711 (716) (DB) (Mad) *Meenakshi Sundara Nachiyar* v. *Chidambaram Chetty.*
Also see Note 3 on clause (b) and Note 8 on clause (c).

lessor rent for the portion in his enjoyment and from which he has received income.[5]

In England, the law, however, is different. A tenant who is not put in possession of a part of the demised property[6] or who, after being put in possession, is evicted from a part thereof by the lessor[7] is entitled to a suspension of the 'entire rent' for the period he is out of possession. The reason of this rule was originally connected with the feudal system which once prevailed in that country and is to the effect that no man may be encouraged to injure or disturb his tenant in his possession whom by the policy of the feudal law, he ought to protect and defend;[8] further that, "because of the demise every part of the land was equally chargeable with the whole rent, therefore, the lessor shall not, by his own act, discharge any part from the burden during the continuance of such contract."[9]

It has been held by the High Court of Madras that the doctrine of suspension as applicable in England, does not apply to this country, and that if the tenant continues in possession of a part of the property, he will be liable to an abated share of the rent.[10] The High Court of Allahabad and the Chief Court of Oudh also appear to be of the same opinion.[11]

The High Court of Calcutta has, however, applied the doctrine of suspension of rent not only to cases of eviction by the lessor of the lessee from a part of the demised property[12] but also to cases of non-delivery of possession

5. ('12) 15 I.C. 711 (716) (DB) (Mad), *Meenakshi Sundara Nachiyar* v. *Chidambaram Chetty*.
('08) 12 Cal W N 767 (769) (DB), *Siba Kumari Debi* v. *Biprodas Pal*.

6. (1844) 70 R R 800 (802): 1 Car & Kir 341, *Holgate* v. *Kay*.
('19) 6 AIR 1919. Cal 379 (380): 46 Cal 959: 52 Ind Cas 13 (DB), *Manindra Chandra Nandi* v. *Narendra Chandra Lahiri*.
('31) 18 AIR 1931 Cal 537 (541): 59 Cal 155: 133 Ind Cas 577 (FB), *Arun Chandra Sinha* v. *Bhagaban Chandra Roy*.

7. Halsbury, *Laws of England* (Hailsham Edition), Vol. 20, para. 199.
('14) 1 AIR 1914 Cal 480 (481): 23 Ind Cas 552 (DB), *Fateh Ali* v. *Parshanath Das*. (Eviction by person claiming under landlord.)
('27) 14 AIR 1927 Cal 737 (738): 55 Cal 689: 104 Ind Cas 775 (DB), *Susil Biswas* v. *Rajanikanta Chakravarti*.

8. ('12) 15 I.C. 711 (716) (DB) (Mad) *Meenakshi Sundra Nachiaar* v. *Chidambaram Chetty*. (Citing Bacon's Abridgment Vol. VII, page 62.)
('69) 12 Suth W R 109 (109) (DB), *Gopanund Jha* v. *Lalla Gobind Pershad*.
[*See* ('01) 28 Cal 188 (190) (DB), *Harro Kumari* v. *Purna Chandra*.]

9. ('12) 15 Ind Cas 711 (716) (DB) (Mad), *Meenakshi Sundara Nachiar* v. *Chidambaram Chetty*. (Citing Baron Gilbert's Treatise on Rents.)
[*See* ('96) 24 Cal 296 (304) (DB), *Dhunput Singh* v. *Mahomed Kazim*.]
[*See also* (1900-01) 5 Cal W N 353 (355) (DB), *Rani Lalita Sundari* v. *Rani Surnomoyee Dasi*.]

10. ('28) 15 AIR 1928 Mad 380 (381): 109 Ind Cas 465 (DB), *Hanumantha Goundan* v. *Doraiswami Pillai*.
('23) 10 AIR 1923 Mad 459 (461): 69 Ind Cas 517 (DB), *Suryanarayanaraju Garu* v. *Rajah of Tekkali*. (Ordinarily, there will be proportionate reduction of rent according to the area unless one side or the other shows that the lands lost possession of were of superior or inferior quality, when that factor would have to be considered in ascertaining the proportion.)
('12) 15 I.C. 711 (716, 717) (DB) (Mad), *Meenakshi Sundara Nachiar* v. *Chidambaram Chetty*.

11. ('29) 16 AIR 1929 All 52 (52): 111 Ind Cas 790, *Pir Bakhsh* v. *Rameshwar Nath*.
('20) 7 AIR 1920 Oudh 125 (126): 60 Ind Cas 462, *Girraj Kunwar* v. *Chandrasekhar*. (A tenant who holds both cultivated and uncultivated land, the latter under a grove-tenure, at a certain rental and who is ejected from the cultivated portion is liable to pay proportionate rent for the remainder.)

12. ('33) 20 AIR 1933 Cal 566 (571): 146 Ind Cas 398, *Sakhi Sona Dassi* v. *Prankrishna Das*.
('10) 8 Ind Cas 30 (31) (DB) (Cal), *Sarip Jan Bibi* v. *Aftab-ud-Din*.
('10) 6 Ind Cas 478 (480, 481) (DB) (Cal), *Chandra Kanta Das* v. *Rama Nath Barman*.
('10) 5 Ind Cas 105 (106) (DB) (Cal), *Rasseswari Chowdhurani* v. *Sourendra Mohun Tagore*. (Substantial interference amounts to eviction.)
('25) 12 AIR 1925 Cal 1187 (1188, 1189): 90 Ind Cas 47 (DB), *Suresh Chandra* v. *Mathura Nath*.
('13) 21 Ind Cas 957 (958) (DB) (Cal), *Godai Molla* v. *Aminuddi Howladar*. (Dispossession by subsequent tenant.)

of a part of the demised property.[13] The High Court of Patna and the Judicial Commissioner's Court of Nagpur have also taken a similar view.[14]

('13) 18 Ind Cas 621 (622) (DB) (Cal), *Ashutosh Dhar* v. *Joy Lal Sardar.*

('22) 9 AIR 1922 Cal 153 (154, 156): 67 Ind Cas 800: 49 Cal 1019 (DB), *Nagendra Chandra* v. *Manindra Chandra.* (No *eviction*—Tenant held liable to proportionate rent under circumstances of the case.)

('19) 6 AIR 1919 Cal 1004 (1005): 46 Ind Cas 539 (DB), *Pramatha Nath* v. *Chandrasekhar Banerjee.* (Where one of several landlords who jointly let out land to the tenant, dispossesses the tenant, the entire rent is suspended during the time tenant is kept out of possession.)

('19) 6 AIR 1919 Cal 379 (380, 381): 46 Cal 956: 52 Ind Cas 13 (DB), *Manindra Chandra* v. *Nareddra Chandra.*

('18) 5 AIR 1918 Cal 8 (9): 48 Ind Cas 699 (DB), *Rajani Manna Bagdi* v. *Satish Chandra Roy.*

('17) 4 AIR 1917 Cal 177 (178, 179): 39 Ind Cas 209 (DB), *Dwijendra Nath Roy* v. *Aftabuddi Sardar.*

('17) 4 AIR 1917 Cal 80 (81): 41 Ind Cas 91 (DB), *Tipan Prasad Singh* v. *Ramji Ram.*

('15) 2 AIR 1915 Cal 554 (554): 28 Ind Cas 371 (DB), *Saroda Prosad* v. *Monmotho Nath.*

('14) 1 AIR 1914 Cal 480 (481): 23 Ind Cas 552 (DB), *Fateh Ali* v. *Parsha Nath Das.*

('35) 22 AIR 1935 Cal 134 (137): 155 Ind Cas 506 (DB), *Mahomed Ali Fakir* v. *Karam Ali.*

('32) 19 AIR 1932 Cal 385 (386): 137 Ind Cas 696 (DB), *Krishna Chandra Ray* v. *Surendra Nath.*

('34) 21 AIR 1934 Cal 146 (148): 149 Ind Cas 1117, *Dharani Mohan Roy* v. *Rajani Kanta.* (For application of principle, land from which lessee is dispossessed should be proved to be part of tenancy and dispossession should be wrongful or tortious.)

('29) 16 AIR 1929 Cal 516 (519): 119 Ind Cas 132, *Mahim Chandra* v. *Karam Ali.*

('29) 16 AIR 1929 Cal 395 (396): 119 Ind Cas 297 (DB), *Dhirendra Nath* v. *Bhabatarini Debi.*

('31) 18 AIR 1931 Cal 537 (541): 59 Cal 155: 133 Ind Cas 577 (FB), *Arun Chandra Singha* v. *Bhagaban Chandra Roy.* (AIR 1921 Cal 220 overruled on another point.)

('31) 18 AIR 1931 Cal 397 (398): 132 Ind Cas 81 (DB), *Reshee Case Law* v. *Satish Chandra Pal.* (Mere obtaining of a decree for possession by the tenant is not sufficient to defeat the tenant's right to suspension of entire rent for eviction from a portion of the demised premises.)

('29) 16 AIR 1929 Cal 568 (571): 57 Cal 137: 123 Ind Cas 653 (DB), *Abhoya Charan Sen* v. *Hem Chandra Pal.*

('28) 15 AIR 1928 Cal 428 (430): 108 Ind Cas 587 (DB), *Sarat Kumar Roy* v. *Surendra Nath.*

('23) 10 AIR 1923 Cal 162 (163): 68 Ind Cas 495 (DB), *Ramani Kanta Roy* v. *Hara Chandra.*

(1900) 5 Cal W N 353 (355) (DB), *Rani Lalita Sundari* v. *Rani Surnomoyee Dasi.*

('25) 12 AIR 1925 Cal 805 (806): 85 Ind Cas 781 (DB), *Joyram Chandra* v. *Bishnu Charan.*

[*See also* ('35) 22 AIR 1935 Cal 554 (555) (DB), *Jotindra Nath* v. *Aswini Kumar.* (Onus is on the tenant to prove the fact of dispossession and extent of it.)

('33) 20 AIR 1933 Cal 290 (292): 60 Cal 247: 143 Ind Cas 30 (DB), *Satish Chandra Pal* v. *Reshee Case Law.* (Plea of suspension of rent on account of dispossession by landlord — Onus is upon tenant to prove dispossession and not upon the landlord to prove restoration where finding in previous suit was that tenant was dispossessed by landlord. AIR 1931 Cal 537: 59 Cal 155 (FB) relied on.)

('21) 8 AIR 1921 Cal 303 (304): 65 Ind Cas 839 (DB), *Masbahuddin Ahmed* v. *Abdul Borkat (Obiter.)*

('11) 9 Ind Cas 568 (571) (DB) (Cal), *Purna Chandra* v. *Rasik Chandra.* (A tenant's right to suspension of entire rent for eviction from a substantial portion of land of the tenancy continues till effective steps are taken by the landlord to restore him in possession.)]

13. ('19) 6 AIR 1919 Cal 379 (380, 381): 46 Cal 956: 52 Ind Cas 13 (DB), *Manindra Chandra* v. *Narendra Chandra.*
[*See also* ('28) 15 AIR 1928 Cal 137 (138): 105 Ind Cas 741 (DB), *Midnapore Zamindary Co. Ltd.* v. *Shib Narayan Dutta.* (But the right to suspension of rent may be lost by acquiescence by payment of full rent for over 60 years.)]

14. †('39) 26 AIR 1939 Pat 356 (357): 180 Ind Cas 98 (DB), *Mt. Deoki Kuar* v. *Shiva Prasad.* (AIR 1938 Pat 379 reversed. Lump rent for the whole area.)

('28) 15 AIR 1928 Pat 428 (429): 108 Ind Cas 891, *Khub Lal Singh* v. *Daroga Singh.*

('26) 13 AIR 1926 Pat 513 (514): 96 Ind Cas 585, *Jagat Narain Singh* v. *Tulsi Chamar.* (A tenant, who has been dispossessed of a portion of his holding by the landlord, can withhold payment of the rent of the entire holding, even though his right to recover possession of the dispossessed portion has become barred by limitation.)

('18) 5 AIR 1918 Pat 335 (335): 44 Ind Cas 658 (DB), *Mosudan Potdar* v. *Satis Chandra.*

('17) 4 AIR 1917 Pat 34 (34): 36 Ind Cas 528 (DB), *Sham Narayan* v. *Chandra Sekhar.*

('35) 22 AIR 1935 Pat 38 (39): 14 Pat 323: 153 Ind Cas 298 (DB), *Dalip Narain Singh* v. *Suraj Narain.*

('09) 5 Nag L R 47 (49): 2 Ind Cas 29 (31), *Mohanlal* v. *Mt. Mungia.*

In some cases[15] it has been held that the English doctrine is not to be rigidly applied in this country, but should be applied only as a rule of justice, equity and good conscience, and in other cases[15a] that where possession of a part of the property is not given, but the tenant has taken possession of the other part, or acquiesced in the non-delivery by payment of rent, or the non-delivery was due to some 'bona fide' mistake, there should be an apportionment and not a suspension of rent.

It has further been held that the doctrine of suspension rests upon the facts that the tenure is an entire and indivisible one, the rent being fixed as a lump sum for the entire land,[16] and that, where the rent is separately assessed for separate parcels of the property demised, the doctrine is not applicable.[17] Before the decision of the Privy Council in 'Katyayani Devi' v.

15. (1945) 49 Cal W N 470 (472) (DB), *Ashutosh Roy* v. *Indu Bhusan Sen Gupta*.
('35) 40 Cal W N 166 (172) (DB), *Jagadish Nath Roy* v. *Surendra Prosad Lahiri*.
('27) 14 AIR 1927 Cal 737 (738, 739): 55 Cal 689: 104 Ind Cas 775 (DB), *Susil Kumar* v. *Rajani Kanta*.
('26) 13 AIR 1926 Cal 1148 (1149): 96 Ind Cas 557 (DB), *Manik Chandra* v. *Hari Mistri*. (To justify a suspension of entire rent it must be shown that the eviction was the act of the landlord, done not merely accidentally owing to want of knowledge of the real boundaries, but with the deliberate intention of depriving the tenant of the enjoyment of the demised premises.)
('26) 13 AIR 1926 Cal 908 (910): 94 Ind Cas 418 (DB), *Biseshwar* v. *Kali Charan*. (Tenants would not be entitled to suspension of rent, only because of a mistake of the landlord in including certain portion of land, in a previous decree not comprising in the subject-matter of that suit, and consequently having it sold, as the tenants could have corrected the mistake in a subsequent suit.)
('34) 21 AIR 1934 Pat 653 (655): 13 Pat 396: 152 I.C. 992 (DB), *Rameshwar* v. *Butto Kristo*.

15a. ('41) 28 AIR 1941 Cal 384 (385): 195 Ind Cas 701, *Sourendra Mohan* v. *Kanai Lal*. (The Court should consider whether the landlord's failure to put the tenant in possession of the entire demised area was due to some mistake as to the extent of the boundaries or some other *bona fide* act.)
('22) 9 AIR 1922 Cal 153 (156): 49 Cal 1019: 67 Ind Cas 800 (DB), *Nagendra Chandra* v. *Manindra Chandra*. (In this case the lessee was aware at the time of taking possession that some part of the land was in the possession of a third party.)
('21) 8 AIR 1921 Cal 806 (807) (DB), *Raj Kumari Bose* v. *Surendra Nath Guha*. (By long acquiescence.)
('38) 42 Cal W N 1030 (1031, 1032) (DB), *Dhirendra Nath* v. *Ramlal Datta*. (Failure to give possession of part of the property —Lessee acquiescing in such failure for 55 years—No suspension but abatement.)
('25) 12 AIR 1925 Cal 805 (806): 85 Ind Cas 781 (DB), *Joyram Chandra* v. *Bisnu Charan*. (But there is exception, namely, that there will be only an abatement of rent where with the knowledge of the tenant, before he entered into the land, a portion of it had been let to another and was in that other's possession.)
('09) 2 Ind Cas 123 (125) (DB) (Cal), *Annada Prasad* v. *Mathura Lal*. (It may be questioned how far the technicalities to be found in the English law should be allowed to affect the relations of landlord and tenant in this country.)
('15) 2 AIR 1915 Cal 554 (555): 28 Ind Cas 371 (DB), *Saroda Prasad* v. *Manmatho Nath*.
('10) 37 Cal 293 (313): 4 Ind Cas 713 (720) (DB), *Durga Prosad* v. *Rajendra Narain*.
('25) 12 AIR 1925 Cal 1187 (1188): 90 Ind Cas 47 (DB), *Suresh Chandra* v. *Mathura Nath*. (Acquiescence.)
[*See also* ('18) 5 AIR 1918 Cal 525 (525, 526): 43 I.C. 47 (DB), *Nara Narayana* v. *Kali Mohan*.
('26) 91 Ind Cas 686 (687) (DB) (Cal), *Binod Kumar* v. *Ram Kishore*.]

16. ('29) 16 AIR 1929 Cal 395 (396): 119 Ind Cas 297 (DB), *Dhirendra* v. *Bhabatarini*.
('13) 21 Ind Cas 957 (957) (DB) (Cal), *Godai Molla* v. *Aminuddin*. (Per Caspersz, J.)
('14) 1 AIR 1914 Cal 480 (481): 23 Ind Cas 552 (DB), *Fateh Ali* v. *Parsha Nath*.
('38) 42 Cal W N 1030 (1031, 1032) (DB), *Dhirendra Nath* v. *Ramlal Datta*.
('97) 24 Cal 296 (305) (DB), *Dhunpat Singh* v. *Mahomed Kazim*.
('35) 22 AIR 1935 Cal 134 (137, 139): 155 Ind Cas 506 (DB), *Mahammad Ali* v. *Karam Ali*.
('34) 21 AIR 1934 Pat 653 (655): 13 Pat 396: 152 Ind Cas 992 (DB), *Rameshwar* v. *Butto Kristo*.
[*See also* ('32) 19 AIR 1932 Cal 385 (386): 137 Ind Cas 696 (DB), *Krishna Chandra* v. *Surendra Nath*.]

17. ('96) 24 Cal 295 (305) (DB), *Dhunpat Singh* v. *Mahomed Kazim*.
('29) 16 AIR 1929 Cal 130 (131): 112 Ind Cas 71 (DB), *Dwarkanath* v. *Sri Gobinda*.
('43) 30 AIR 1943 Cal 91 (92): ILR (1942) 2 Cal 406: 205 Ind Cas 502, *Samsunnehar* v. *Hari Nath*. (AIR 1929 Cal 130 followed.)
('10) 5 Ind Cas 352 (354) (DB) (Cal),

'Udoy Kumar',[18] it was held that the fact that rent was fixed at so much per acre, did not prevent it from being an entire rent so long as the rent was equally chargeable on every part of the property.[19] In 'Katyayani Debi's case'[20] which was one of eviction by a paramount title, of the lessee from a part of the demised property their Lordships of the Privy Council observed:

> "The doctrine of suspension of payment of rent, where the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump rent for the whole land leased treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or bigha."

This observation of their Lordships has given rise to a conflict of decisions. On the one hand, it has been held that, where rent is fixed at so much per bigha or acre, the doctrine of suspension has no application to the case.[21] On the other hand, the view has been taken that their Lordships' observations refer only to cases of non-delivery of possession and not to cases of eviction, and, provided there is an indivisibility of the tenure, the question of lump rent or a rental at so much per bigha is not relevant.[22] In a recent decision of the Privy Council [22a] a question arose as to suspension of rent in case of the lessor's failure to deliver possession of a part of the demised lands. The rent fixed was a lump sum and in a suit for rent by the lessor, the lessee raised the contention, nearly fifty years after the granting of the lease, that the failure of the lessor to deliver possession of a portion of the lands caused a suspension of the whole rent. The case was one from Bengal. In rejecting the contention and upholding the decision of the High Court holding that the landlord was entitled to apportionment of rent, the Privy Council reviewed exhaustively the trend of law in Bengal on this subject and laid down that in case of failure to deliver possession of a portion of the demised lands, the doctrine of suspension of rent should not be applied. Their Lordships expressly confined their decision to a case of failure to give possession and declined to express their view as to what would be the correct legal position in case of 'eviction'. In the course of their judgment their Lordships referred to the previous decision of the Board in 'Katyayani's case' and observed as follows as regards that case:

> "The observations of the Board in 52 I.A. 160 have only added to the perplexity since they have in some cases been wrongly taken to lay down that if the rent is a lumpsum rent, then in all cases of failure to give possession of any part, there must be a suspension of the entire rent.

Mahome-Zeaulla v. *Sukliannessa Bibi*.
[*See also* ('38) 25 AIR 1938 Cal 690 (691): 177 Ind Cas 996, *Surendra Nath* v. *Bhudar Chandra*. (Onus is on the tenant to prove dispossession.)]

18. *('25) 12 AIR 1925 PC 97 (99): 52 Cal 417: 52 Ind App 160: 88 Ind Cas 110 (PC).

19. ('01) 28 Cal 188 (189) (DB), *Harro Kumari* v. *Purna Chandra*.
[*See also* ('07) 34 Cal 191 (196) (DB), *Kali Prasanna* v. *Mathura Nath*.]

20. *('25) 12 AIR 1925 PC 97 (99): 52 Cal 417: 52 Ind App 160: 88 Ind Cas 110 (PC), *Katyayani Debi* v. *Udoy Kumar*. (The facts as explained in AIR 1931 PC 104: 58 Cal 1281: 58 Ind App 141 (PC) (which was also in connexion with same matter) show that it is a case of eviction by paramount title.)

21. ('29) 16 AIR 1929 Cal 568 (571): 57 Cal 137: 123 Ind Cas 653 (DB), *Abhoy Charan* v. *Hem Chandra*.
('29) 16 AIR 1929 Cal 516 (519): 119 Ind Cas 132, *Mahim Chandra* v. *Karam Ali*.
('26) 13 AIR 1926 Cal 1226 (1227): 98 Ind Cas 215 (DB), *Tarap Sheikh* v. *Kunja Behary*.
('27) 14 AIR 1927 Cal 951 (952): 100 Ind Cas 501, *Ebad Ali* v. *Fatima Bibi*.
('31) 18 AIR 1931 Cal 397 (398): 132 Ind Cas 81 (DB), *Reshee Case Law* v. *Satish Chandra*.
('39) 26 AIR 1939 Pat 356 (357): 180 Ind Cas 98, *Mt. Deoki Kuar* v. *Shiva Prosad*. (Assumed.)

22. ('33) 20 AIR 1933 Cal 566 (570, 571): 146 Ind Cas 398, *Sakhisona Dasi* v. *Pran Krishna*.
('36) 40 Cal W N 166 (172) (DB), *Jagadish Nath* v. *Surendra Prosad*.

22a. ('43) 30 AIR 1943 PC 24 (28, 29): 70 Ind App 18: ILR (1943) 1 Cal 372: ILR (1943) Kar (PC) 39: 206 Ind Cas 266 (PC), *Ramlal Dutt* v. *Dhirendra Nath*.

They were intended only as showing that on its facts that case raised no question of suspension. . . . ."

The above decision clearly establishes that in Bengal at any rate, even where the rent is fixed as a lump sum for whole area leased, the doctrine of suspension of rent does not apply to cases of failure of the lessor to give possession of a part of the land leased.

In order to constitute an 'eviction' by the lessor for the application of the doctrine of suspension of rent, the act done by the lessor must be a 'wrongful' or 'tortious' act of dispossession.[23] It must not be a mere trespass but must be something of a grave and permanent character done with the intention of depriving the tenant of the enjoyment of the demised property.[24] Further, there must be a substantial interference with the enjoyment of the property, though actual physical expulsion is not necessary.[25] A 'bona fide' or innocent dispossession does not constitute an eviction by the lessor and is not a ground for a suspension of rent.[26]

Eviction by paramount title.

Eviction by paramount title is a good defence to a suit for rent.[27] But in order to constitute such an "eviction"—

23. ('34) 21 AIR 1934 Cal 146 (148): 149 I.C. 1117, *Dharani Mohan* v. *Rajani Kanta*.
('35) 23 AIR 1935 Cal 134 (137): 155 Ind Cas 506 (DB), *Mahammad Ali* v. *Karam Ali*. (Forcible and deliberate dispossession.)
('34) 21 AIR 1934 Pat 653 (656): 13 Pat 396: 152 Ind Cas 992 (DB), *Rameshwar Lal* v. *Butto Kristo*.

24. ('41) 28 AIR 1941 Pat 417 (417): 193 Ind Cas 250, *Basantilal* v. *Jamuna Prasad*. (Landlord realising rent of part of demised land from sub-tenant by mistake and not with intention of evicting tenant —Tenant not entitled to suspension of rent.)
('36) 23 AIR 1936 Cal 135 (138): 166 Ind Cas 299, *Nishi Kanta* v. *David Ezra*.
('36) 40 Cal W N 166 (172) (DB), *Jagadish Nath* v. *Surendra Prosad*.
('96) 24 Cal 296 (304) (DB), *Dhunpat Singh* v. *Mahommed Kazim*.
('42) 29 AIR 1942 Pat 266 (267): 197 Ind Cas 160, *Sukhraj Rai* v. *Dip Narain*. (Dispossession by landlord must be deliberate —Portion of tenancy included by mistake in kabuliat executed by landlord in favour of third person—Plea of suspension cannot prevail.)
('12) 17 Ind Cas 238 (241) (DB) (Cal), *Kalanand Singh* v. *Jarao Kumari*.
('34) 21 AIR 1934 Pat 75 (79): 154 Ind Cas 1066 (DB), *Hira Lal Singh* v. *Rinkauri Singh*.
('26) 13 AIR 1926 Cal 1226 (1227): 98 Ind Cas 215 (DB), *Tarap Sheikh* v. *Kunja Behary*.
('26) 13 AIR 1926 Cal 1148 (1148, 1149): 96 Ind Cas 557 (DB), *Manik Chandra* v. *Hari Mistri*. (To justify a suspension of the entire rent it must be shown that the eviction was the act of the landlord and was done with the intention of depriving the tenant of the enjoyment of the demised premises or land and not that it was merely accidental resulting from ignorance of the parties as to the real boundaries of the land.)
(1900) 5 Cal W N 353 (355) (DB), *Lalita Sundari* v. *Surnomoyee Dasi*.
('26) 13 AIR 1926 Cal 908 (910): 94 Ind Cas 418 (DB), *Biseswar Sarkar* v. *Kali Charan*.

25. †('96) 24 Cal 296 (304) (DB), *Dhunpat Singh* v. *Mahomed Kazim*.
('36) 23 AIR 1936 Cal 135 (138): 166 Ind Cas 299, *Nishi Kanta* v. *David Ezra*. (Where a tenant claims suspension of rent owing to an encroachment of few inches on the leased premises by the erection of a platform by the landlord the question of fact which has to be determined is, did the landlord by the erection of this platform do something of a grave and permanent character with the intention of permanently depriving the tenant of a portion of the subject-matter of the demise?)
(1900) 5 Cal W N 353 (355) (DB), *Lalita Sundari* v. *Surnomoyee Dasi*.
('10) 5 Ind Cas 105 (106) (DB) (Cal), *Rasseswari* v. *Sourendra Mohun*.
('17) 4 AIR 1917 Cal 177 (178, 179): 39 Ind Cas 209 (DB), *Dwijendra* v. *Aftabuddi*.
('13) 21 Ind Cas 957 (958) (DB) (Cal), *Godai Molla* v. *Aminuddi Howladar*.
Also see S. 108 (c), Note 2.

26. ('36) 40 Cal W N 166 (172) (DB), *Jagadish Nath* v. *Surendra Prosad*. (Mistake about the extent of the property demised.)
('41) 28 AIR 1941 Pat 417 (417): 193 Ind Cas 250, *Basantilal* v. *Jamuna Prasad*.

27. ('74) 22 Suth W R 542 (543) (DB), *Wajed Ali* v. *Mt. Chundrabuty Kooeree*.
('82) 1882 Bom P J 167 (167) (DB), *Subrao* v. *Ratnushet*.
†('31) 18 AIR 1931 Cal 537 (541): 59 Cal 155: 133 Ind Cas 577 (FB), *Arun Chandra* v. *Bhagaban*.
('29) 16 AIR 1929 Cal 22 (25): 55 Cal 1013: 112 Ind Cas 172 (DB), *Jogendra Lal* v. *Mahesh Chandra*.

(1) it must have been from something actually forming part of the demised premises,

(2) the party evicting must have a good title, and

(3) the tenant evicted must have quitted against his will.[28]

Forcible expulsion is, however, not necessary.[29] If, upon a claim being made by title paramount the lessee consents to an attornment to such person or to change the title under which he holds, or enters into a new arrangement for holding under him, this will be an eviction by paramount title.[30] The mere institution of a suit for possession[31] or the mere apprehension of eviction is not sufficient.[32]

Where the lessee is evicted by title paramount from the 'whole' of the property demised, there is no liability upon the lessee to pay any rent at all.[33] Where the eviction is from a 'part' of the demised premises, there will be an 'abatement' of the rent to the extent of the property lost to the lessee.[34] The doctrine of suspension does not apply to such cases.[35] In 'Imambandi Begam' v. 'Kamleshwari Pershad',[36] the lessor was unable to give possession to the lessee of a part of the demised property by reason of a third person

28. ('14) 1 AIR 1914 Cal 730 (731): 18 Ind Cas 87 (DB), *Nourjani Sardar* v. *Bimala Sundari.*
('35) 22 AIR 1935 Cal 368 (384, 385): 62 Cal 346: 159 Ind Cas 98 (DB), *Raj Krishna Prasad* v. *Baraboni Coal Concern, Ltd.*
('29) 16 AIR 1929 Cal 22 (25): 55 Cal 1013: 112 I.C. 172 (DB), *Jogendra Lal* v. *Mahesh Chandra.*
('29) 16 AIR 1929 Cal 272 (275): 117 Ind Cas 838 (DB), *Indu Bhusan* v. *Moazan Ali.*

29. ('35) 22 AIR 1935 Cal 368 (385): 62 Cal 346: 159 Ind Cas 98 (DB), *Raj Krishna Prasad* v. *Baraboni Coal Concern, Ltd.*
('14) 1 AIR 1914 Cal 730 (731): 18 Ind Cas 87 (DB), *Nourjani Sardar* v. *Bimala Sundari.*
('39) 26 AIR 1939 Cal 216 (218): ILR (1938) 2 Cal 559: 181 Ind Cas 529 (DB), *Amritalal Ojha* v. *Uttam Lal Sarkar.*
('29) 16 AIR 1929 Cal 22 (25): 55 Cal 1013: 112 Ind Cas 172 (DB), *Jogendra Lal* v. *Mahesh Chandra.*

30. ('35) 22 AIR 1935 Cal 368 (385): 62 Cal 346: 159 Ind Cas 98 (DB), *Raj Krishna Prasad* v. *Baraboni Coal Concern, Ltd.*
('29) 16 AIR 1929 Cal 22 (25): 55 Cal 1013: 112 Ind Cas 172 (DB), *Jogendra Lal* v. *Mahesh Chandra.*
†('39) 26 AIR 1939 Cal 216 (218): ILR (1938) 2 Cal 559: 181 Ind Cas 529 (DB), *Amritalal Ojha* v. *Uttam Lal Sarkar.*
[*See also* ('14) 1 AIR 1914 Cal 730 (731): 18 Ind Cas 87 (DB), *Nourjani Sardar* v. *Bimala Sundari.*
(1825) 28 RR 375 (381): 4 LJKB 2, *Hill* v. *Saunders.*]

31. ('39) 26 AIR 1939 Cal 216 (218): ILR (1938) 2 Cal 559: 181 Ind Cas 529 (DB), *Amritalal Ojha* v. *Uttam Lal Sarkar.* (It is essential that the person asserting such title should take possession or should be taken in the eye of law to have taken possession of the demised premises.)

32. ('36) 23 AIR 1936 Cal 628 (629): 62 Cal 294: 163 Ind Cas 845, *In the matter of Jambad Coal Syndicate, Ltd.*
(1870) 14 Suth W R 85 (87) (DB), *Messrs. Burn & Co.* v. *Rusho Moyee Dossee.*

33. ('25) 12 AIR 1925 All 275 (275): 47 All 63: 85 Ind Cas 756, *Moti Lal* v. *Yar Muhammad.*
(1864) 1 Suth W R 1 (2) (DB), *Bishen Dyal Singh* v. *Probhoo Das.*

34. *('31) 18 AIR 1931 PC 104 (105, 107): 58 Cal 1281: 58 Ind App 141: 131 Ind Cas 309 (PC), *Jatindra Nath Chowdhury* v. *Uday Kumar Das.*
('35) 22 AIR 1935 Cal 134 (138): 155 Ind Cas 506 (DB), *Mahammad Ali* v. *Karam Ali.*
*('31) 18 AIR 1931 Cal 537 (541): 59 Cal 155: 133 I.C. 577 (FB), *Arun Chandra* v. *Bhagaban.*
('23) 10 AIR 1923 Cal 429 (431): 70 Ind Cas 828 (DB), *Jitendra Nath Roy* v. *Ashutosh Goswami.*
('69) 12 Suth W R 109 (109, 110) (DB), *Gopanand Jha* v. *Lalla Gobind Pershad.*
('68) 10 Suth WR 120 (121) (DB), *Brajnath Pal Chowdhury* v. *Hiralal Pal.*
('10) 6 Ind Cas 206 (207) (DB) (Cal), *Rani Dassi* v. *Asutosh Roy Chowdhury.*
('16) 3 AIR 1916 Cal 63 (64): 43 Cal 554: 36 Ind Cas 33 (DB), *Surendra Narain* v. *Dina Nath Bose.* (But the lessor must show what is the fair rent of the lands out of which the tenant was not evicted.)
('15) 2 AIR 1915 Cal 568 (570): 27 I.C. 265 (DB), *Rash Mohinee Dassee* v. *Nafar Chandra Pal.*

35. ('43) 30 AIR 1943 PC 24 (26, 28): ILR (1943) 1 Cal 372: ILR (1943) Kar (PC) 39: 70 Ind App 18: 206 Ind Cas 266 (PC), *Ram Lal Dutt* v. *Dhirendra Nath.*
('35) 22 AIR 1935 Cal 134 (138): 155 Ind Cas 506 (DB), *Mahammad Ali v. Karam Ali.*

with paramount title being in possession. Their Lordships of the Privy Council held that the lessee was in a position similar to that of a person who has been evicted from that part and that there was the same equity for apportionment as in the case of "eviction." The word "eviction" used by their Lordships must be taken to mean eviction by a paramount title and not by the lessor himself.

Diluvion.

Where the lessee is deprived of a part of the demised property by diluvion[37] or by earthquake[38] or other such similar causes there will be an 'abatement' of rent to the extent of the property lost to the lessee, unless there is a contract to the contrary.[39]

Acquisition under the Land Acquisition Act.

It has been held that where part of the demised property has been acquired under the Land Acquisition Act (1 of 1894) and the lessor has received compensation for the land acquired, he is bound to make an abatement of the rent.[40] But where the 'lessee' receives the whole of the compensation amount, he cannot claim any abatement of rent.[40a]

Trespasser.

An eviction by a trespasser is not a ground for abatement of rent.[41] The lessee must protect himself from illegal encroachment by others. If he fails to do so, this is no ground for prejudicing the landlord's claim for rent.[42]

Mistaken inclusion in lease of tenant's own property.

Where the tenant's own property is by mistake included in the lease

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37. ('48) 35 AIR 1948 Pat 322 (322) *Medinikumar* v. *P. C. Mallick.*
('85) 11 Cal 625 (628) (DB), *Kali Prosanna Roy* v. *Dhananjai Ghose.* (Right to abatement is under the general law and as such passes with the land to the purchaser.)
†('31) 18 AIR 1931 Cal 537 (539): 59 Cal 155: 133 I.C. 577 (FB), *Arun Chandra* v. *Bhagaban.* (1864) Suth W R Gap No. Act X Rul 42 followed.)
('09) 36 Cal 856 (858, 863): 2 Ind Cas 169 (170) (DB), *Rai Charan Sar Mazumdar* v. *Administrator-General of Bengal.*
('21) 8 AIR 1921 Cal 220 (221): 62 Ind Cas 474 (DB), *Krista Das* v. *Abdul Karim.*
(1864) 1864 Suth WR Gap No. Act X Rul 42 (43) (DB), *Sheik Enayutoollah* v. *Sheik Elaheebuksh.* (Title to rent is founded upon the presumption that the tenant enjoys the thing during the contract.)
('16) 3 AIR 1916 Cal 962 (963): 33 Ind Cas 349 (DB), *Salimullah* v. *Kali Prosanna.*

38. ('14) 1 AIR 1914 Lah 42 (42): 25 Ind Cas 26, *Pir Bakhsh* v. *Hiralal.*

39. ('12) 15 Ind Cas 458 (458) (DB) (Cal), *Manindra Chandra Nandi* v. *Kashi Chandra Bakhshi.*

40. ('84) 10 Cal 544 (546) (DB), *Watson & Co.* v. *Nistharini Gupta.*
('83) 9 Cal 571 (573): 11 Cal LR 366 (DB), *Uma Sankar Sarkar* v. *Tarini Chunder Singh.* (Landlord and tenant taking a moiety of the compensation as per agreement — Tenant held entitled to abatement of rent.)
('14) 1 AIR 1914 Mad 113 (113): 24 Ind Cas 724, *Nagoor Rowthar* v. *Akbar Alisha Sathguru.*
('71) 16 Suth WR 201 (202) (DB), *Mahtab Chand* v. *Chittro Kumari Bibi.*

40a. ('82) 10 Cal LR 526 (528) (DB), *Peari Mohan* v. *Audhiraj Aftab Chand.*

41. ('38) 25 AIR 1938 Cal 690 (692): 177 I.C. 996, *Surendra Nath Mondal* v. *Bhudar Chandra.*
†('25) 12 AIR 1925 PC 97 (98): 52 Ind App 160: 52 Cal 417: 88 Ind Cas 110 (PC), *Katyayini Debi* v. *Udoy Kumar Das.*
('23) 10 AIR 1923 Cal 429 (430): 70 Ind Cas 828 (DB), *Jitendra Nath Roy* v. *Ashutosh Goswami.*
('70) 14 Suth WR 273 (274) (DB), *Gobind Chunder* v. *Kristo Kanto Dutt.*

42. †('25) 12 AIR 1925 PC 97 (98): 52 Ind App 160: 52 Cal 417: 88 Ind Cas 110 (PC), *Katyayini Debi* v. *Udoy Kumar Das.*
†('22) 9 AIR 1922 Cal 87 (92): 49 Cal 948: 69 I.C. 126 (SB), *Uday Kumar Das* v. *Katyani Debi.*
('07) 34 Cal 191 (196, 198) (DB), *Kali Prasanna* v. *Mathura Nath.* (Dispossession by other lessee under the same landlord without his authority.)
('38) 25 AIR 1938 Cal 690 (691, 692): 177 Ind Cas 996, *Surendra Nath Mondal* v. *Bhudar Chandra.* (Thus where *A* let out certain land to *B* in a mouza and other tenants of *A* in that mouza dispossessed *B* on their own initiative it is for *B* to recover the land from the tenants.)
[*See also* (1864) 1 Suth WR 1 (2) (DB), *Bishen Dyal Singh* v. *Probheo Doss.*]

and there is no fraud or misreprsentation, the lease is not altogether void, but the lessee will be liable for the rent in proportion to the property of which he is given possession under the lease.[43]

Surrender by tenant.

Where the lessor accepts a surrender of a part of the land from his tenant, he cannot claim rent for that portion.[44]

Miscellaneous.

Where A usufructuarily mortgaged his land to B who leased it back to A, it was held that in a suit for rent by B, A was not entitled a reduction of rent on the ground that B did not advance the full amount of consideration shown in the mortgage document.[45]

The fact that the lessor has taken a lesser rent for some years than that actually due, will not disentitle him from claiming the rent at the stipulated rate.[46]

Where the leased property consists of certain villages identified by boundaries given and the rent fixed is not calculated with reference to the extent of lands at all, the lessee cannot claim any abatement of rent on the ground that the lessor failed to deliver possession of the total extent of lands mentioned in the lease deed.[47] Under a thick settlement of certain villages the dependant undertook to make collections from the tenants and to pay a fixed annual sum as rent to the plantiff. During the currency of the 'thick' the rents of tenants were reduced by the Rent Reduction Officer. It was held that the defendant was not entitled to a proportionate reduction in the absence of a term in his contract to that effect.[48]

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43. ('12) 39 Cal 1016 (1027): 14 Ind Cas 540 (543, 544) (DB), *Rai Moni* v. *Mathura Mohan.*

44. ('40) 27 AIR 1940 Pat 516 (523): 19 Pat 433: 192 Ind Cas 17 (DB), *Jyoti Prasad Singh Deo Bahadur* v. *Samuel Henry Seddon.*

45. ('43) 30 AIR 1943 Mad 220 (221): 207 Ind Cas 425, *Achutha Kurup* v. *Govindan Nayar.* (Possessory mortgage — Property leased back to mortgagor—Mortgage binding only to extent of one-fourth its nominal amount — *Held* that although lease back might be by way of machinery for collection of interest on mortgage, mortgagee lessor was entitled to recover rent under the lease at the contract rate —There could be no proportionate reduction of the rent.)

46. ('16) 3 AIR 1916 Cal 104 (105): 32 Ind Cas 251 (DB), *Kailash* v. *Darbaria.*
('17) 4 AIR 1917 Cal 734 (735): 32 Ind Cas 185 (DB), *Manindra Chandra* v. *Durga Sundari.*
*('13) 41 Cal 493 (506): 40 Ind App 223: 21 Ind Cas 750 (752) (PC), *Durga Prasad* v. *Rajindra Narayan.*
('29) 16 AIR 1929 Pat 717 (719): 9 Pat 487: 124 Ind Cas 625 (DB), *Kuman Das* v. *Radhika Singh.* (But where the conduct of the landlord shows that he has sued the tenant on the basis of the reduced rent as if that was the rent payable for the land, it may be presumed that the landlord has waived the right to recover higher rent.)
('12) 14 Ind Cas 817 (818) (DB) (Cal), *Baijnath Prosad* v. *Raghunath Rai.*
('09) 2 Ind Cas 160 (161) (Cal), *Bishambar Roy* v. *Lakhatullaha Sheikh.*
('17) 4 AIR 1917 Mad 143 (144): 32 Ind Cas 703 (DB), *Maharaja of Bobbili* v. *Appala Naidu.*
('03) 26 Mad 195 (196), *Karampali Unnikurup* v. *Tekku Vittil Muthroakutti.*
('99) 22 Mad 261 (264): 8 Mad L Jour 196 (DB), *Mayandi Chetti* v. *Oliver.* (An agreement therefore by which the land-
('12) 14 Ind Cas 817 (818) (DB) (Cal), *Baijnath Prosad* v. *Raghunath Rai.*
('09) 2 Ind Cas 160 (161) (Cal), *Bishambar Roy* v. *Lakhatullaha Sheikh.*
('17) 4 AIR 1917 Mad 143 (144): 32 Ind Cas 703 (DB), *Maharaja of Bobbili* v. *Appala Naidu.*
('03) 26 Mad 195 (196), *Karampali Unnikurup* v. *Tekku Vittil Muthroakutti.*
('99) 22 Mad 261 (264): 8 Mad L Jour 196 (DB), *Mayandi Chetti* v. *Oliver.* (An agreement therefore by which the landlord agreed to accept the lower rate of rent than what was specified in the registered lease, and in pursuance of which he did accept such reduced rent for a number of years cannot be proved in a suit for rent at the rate provided in the registered lease.)
('04) 14 Mad L Jour 477 (479) (DB), *Jagannatha* v. *Muthia Pillai.* (Non-payment of rent.)

47. ('23) 10 AIR 1923 Mad 459 (460): 69 Ind Cas 517 (DB), *Suryanarayanaraju Garu* v. *Rajah of Tekkali.*
Appeal No. 164 of 1944, D|-6-2-1947 (DB) (Pat), *Ramlakhan Singh* v. *Abdul Wahab Khan.*

Section 108 Clause (m).

Synopsis

1. Scope.
2. "Keep . . . in as good condition .....possession."
3. "Reasonable wear and tear."
4. Irresistible force.
5. Right of entry upon the property.
6. Notice.
7. Contract to the contrary.
8. Liability to third persons for damage caused as a result of non-repair.

1. Scope. — This clause refers to the liability of the lessee for what is known as "permissive waste" in English law. Clause (o) refers to his liability for what is known as "'voluntary' waste" in English law.[1] A waste which consists in permitting the demised property to become ruinous is called 'permissive' waste and a waste which consists in doing unauthorised acts which alter the character of the demised property is called 'voluntary' waste.[2] In the absence of an express covenant on the subject, the English law implies a covenant on the part of the lessee that he will use the buildings in a tenantable and proper manner and deliver up possession to the landlord at the termination of the tenancy in the same condition as demised, reasonable wear and tear excepted.[3]

This clause enacts, in substance, the above rule. While there is no general rule of law apart from contract or statute to compel the 'lessor' to repair the demised property, there is an implied obligation on the part of the tenant to keep the premises "wind and water-tight" and to make fair and tenantable repairs.[4] But the doctrine of permissive waste is to be applied under the rules of general common sense and goes no further than that a tenant is bound to take reasonable care of the property entrusted to him and see that through no neglect of his own it is irreparably damaged.[5]

2. "Keep.....in as good condition.....possession." — The tenant is bound to keep and restore the property to the lessor in as good condition as it was when he received it.[1] He is bound to preserve the boundaries of the land he holds as tenant and not to permit them to be destroyed. This is especially so, where he holds adjoining land of his own. If he does not do so he is bound to make good to the landlord the quantity of the land to which the latter is entitled.[2] Where a lessee entered into a covenant "to keep a house in good condition" it was held by Fletcher-Moulton, L. J., in 'Lurcott' v. 'Wakeley and Wheeler'[3] that the covenant involved an obligation on the part of the covenantor to do all that is necessary to maintain it as a habitable house and, if necessary, to put it in that condition, whether the means to that

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SECTION 108, CLAUSE (M)—NOTE 1

1. ('17) 4 AIR 1917 Bom 34 (36): 43 Ind Cas 258, *Doongersey Lakhmidas* v. *Keshaoji Meghji & Co.*
2. Topham, *New Law of Property*, pages 51, 52.
3. Woodfall, *Landlord and Tenant*, 22nd Edn., Page 215.
4. ('23) 10 AIR 1923 Cal 524 (525): 72 Ind Cas 98 (DB), *Bijoi Chandra Singh* v. *Howrah Amta Light Railway Co. Ltd.*
   ('27) 14 AIR 1927 Bom 115 (118): 51 Bom 274: 101 Ind Cas 210 (DB), *Lakshmichand Khetse* v. *Ratanbai*. (This clause imposes a qualified obligation on the tenant to repair.)
   ('17) 4 AIR 1917 Bom 46 (51): 43 Ind Cas 273, *Bai Monghibai* v. *Doongersey Lakhimidass*.
5. ('17) 4 AIR 1917 Bom 34 (36): 43 Ind Cas 258, *Doongersey Lakhmidas* v. *Keshaoji Meghji & Co.*

S. 108 C. (M) NOTE 2

1. ('99) 1 Bom LR 191 (194) (DB), *Narayan* v. *Daji Ram*.
2. ('83) 6 Mad 263 (265, 266) (DB), *Dugappa* v. *Tirthasami*.
   ('01) 5 Cal WN 846 (858) (DB), *Ismail Khan Mahomed* v. *L. P. D. Broughton*.
   (1813) 13 RR 76 (77): 2 Ves & B 263: 35 ER 319, *Attorney-General* v. *Fullerton*.
   [*See also* (1878) 47 LJ Ch 323 (324): 7 Ch D 871: 38 LT 285: 26 WR (Eng) 420, *Spike* v. *Harding*. (Action to ascertain boundaries can be brought by the landlord during term of tenancy.)]
3. (1911) 80 LJKB 713 (722): (1911) 1 KB 905: 104 LT 290: 55 SJ 290.

end consisted of repair or renewal, though the nature of the obligation would vary according to the age and character of the house.

In the undermentioned case[4] where a tenant covenanted to keep the premises "in as good repair and condition as the same are now in," it was held that the tenant would commit a breach of the covenant if he allowed the property to become infested with bugs.

The liability to keep the demised property in good condition continues throughout the period of tenancy. The tenant cannot claim that he is entitled to allow the property to be in a bad condition provided he effects the necessary repairs and restores it at the termination of the tenancy in as good a condition as it was when his tenancy began. The lessor is entitled to sue the tenant, even before the expiry of the tenancy, for relief for breach of the obligation to keep the property in good condition.[5]

3. "Reasonable wear and tear." — The obligation of the lessee to keep the demised property in as good condition as it was when he received it, is subject to the changes in the property caused by reasonable wear and tear. It will exclude dilapidation caused by friction of the air and dilapidations caused by exposure and by ordinary use.[1] In the undermentioned case[2] it was held by the Bombay High Court that if a wall of the leased premises collapsed for no fault of the lessee, he was not liable to the lessor in damages or to restore the building to its original state.

4. Irresistible force. — Fire is "irrestible force" within the meaning of this clause. But the lessee will be free from any liability only if it was not caused by his negligence. If he is responsible for the fire, he will be liable to the lessor.[1]

5. Right of entry upon the property. —In England, under the Common law, a landlord has no right to enter upon the demised premises for any purpose whatsoever. As a general rule, however, a covenant for a right of entry for the purpose of viewing the state of repair is inserted in the lease.[1] This clause gives a statutory right to the lessor to that effect.

6. Notice. — Where the lessor gives the required notice under this clause but the lessee, in answer, repudiates his liability to pay damages, the lessor is not bound to wait till the expiry of the three months before instituting a suit for relief. The tenant, by his repudiation, must be taken to have waived his right to the period of three months.[1]

7. Contract to the contrary. — This clause is, like the other clauses of the section, subject to a 'contract to the contrary' between the parties fixing their own terms and making their own bargains.[1]

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4. (1918) 87 LJKB 510 (512): 34 TLR 455, *Jones* v. *Joseph.*
5. (1818) 1 B & Ald 584 (586): 106 ER 215 (215): 19 RR 396, *Luxmore* v. *Robson.*

SECTION 108, Cl (M) NOTE 3

1. (1901) 17 TLR 570 (570), *Terrell* v. *Murrey.*
2. ('17) 4 AIR 1917 Bom 34 (36, 38): 43 Ind Cas 258, *Dongersey Lakhmidas* v. *Keshavaji Meghji & Co.*

SECTION 108, Cl (M) NOTE 4

1. ('20) 7 AIR 1920 Mad 493 (495, 496): 59 Ind Cas 252 (DB), *Girdaridoss* v. *Ponna Pillai.* (Per Krishnan, J.)

('41) 28 AIR 1941 All 327 (328, 330): 196 Ind Cas 234, *Deputy Lal* v. *Reoti Prasad Gupta.* (Onus is on lessor to establish negligence of lessee.)

('28) 15 AIR 1928 Mad 1140 (1141): 51 Mad 994: 114 Ind Cas 234 (DB), *East India Distilleries and Sugar Factories Ltd.* v. *Mathias.*

SECTION 108, Cl (M) NOTE 5

1. Woodfall, *Landlord and Tenant*, 22nd Edn., page 766.

SECTION 108, Cl (M) NOTE 6

1. ('20) 7 AIR 1920 Mad 493 (494, 496): 59 Ind Cas 252 (DB), *Girdaridoss* v. *Ponna Pillai.*

SECTION 108, Cl (M) NOTE 7

1. (1900) 4 Cal WN 521 (523) (FB), *Hechle* v. *Tellery.* (Lessee covenating to keep the premises wind and water-tight and in habitable condition—Premises subsequently damaged by earthquake—*Held*, covenant was contract to contrary.)
[*See also* (1866) 36 LJCP 1 (9): LR 2 CP 153: 15 LT (NS) 279: 15 WR (Eng) 170,

8. Liability to third persons for damage caused as a result of non-repair. — See Woodfall, 'Landlord and Tenant', 22nd Edn., page 910 and the undermentioned case.[1]

Section 108 Clause (n).

1. Scope. — It is the duty of every lessee to protect his lessor's property from encroachment or unlawful eviction. If he fails to do so he exposes himself to an action for damages by his landlord.[1] The clause merely reproduces the law existing prior to the Act, namely, that a tenant on whose land there is an encroachment must give such notice to the landlord as would enable him to defend his right.[2] It will be noticed that the 'lessor' does not owe any duty to the lessee to protect him from legal proceedings or trespasses which would interfere with his possession, though he is under a duty under cl. (c) to secure the lessee in his possession without interruption by the lessor himself or by persons with paramount title. This clause throws the duty upon the 'lessee' to give notice to the lessor of legal proceedings to recover the property or of encroachment upon the lessor's right, in order that the lessor may, if he so chooses, protect his own interests and may be safeguarded against the results of a collusive eviction submitted to by the lessee.[3]

The encroachment or interference, in respect of which the tenant is bound to give notice, is an encroachment upon or interference with the 'lessor's rights' concerning such property. If, for instance, a stranger enters upon the land and destroys trees and buildings on the land, this will be an encroachment upon or interference with the lessor's rights. But a mere trespass on the land leased without any damage to the property is only an interference with the lessee's rights and not with the lessor's rights so as to oblige the lessee to give notice to the lessor under this clause. The reason is that the possession of such a trespasser is not adverse to the landlord[4] who is not bound to sue the trespasser for possession. But if the trespass is such that it interferes with the lessor's right to recover rent, it will be an interference in respect of which the lessee will be bound to give notice under this clause.[5]

Section 108 Clause (o).

Synopsis

1. Scope.
2. Reasonable user of demised property.
3. User for purposes other than those for which the property is leased.
4. Cutting of trees on the land.
5. "Belonging to the lessor."
6. Working mines and quarries.
7. "Any other act which is destructive" etc.
8. Effect of breach of obligation.

Coward v. *Gregory*. (Covenant by lessor to put demised property in repair—There could be only one breach of covenant and one recovery of damages.)]

SECTION 108, Cl (M) NOTE 8

1. ('17) 4 AIR 1917 Bom 46 (52): 43 Ind Cas 273, *Bai Monghibai* v. *Doongersey Lakhmidas*. (Tenant alone held liable for damage caused to third person by fall of wall.)

SECTION 108, CLAUSE (N)—NOTE 1

1. ('82) 9 Cal L Rep 347 (348) (DB), *Prosonnomoyi Dasi* v. *Kali Das Roy*.
2. ('82) 1882 Bom PJ 167 (167) (DB), *Subrao* v. *Ratnushet*.
3. ('29) 16 AIR 1929 Cal 272 (276): 117 Ind Cas 838 (DB), *Indu Bhushan* v. *Moazam Ali*.
4. ('18) 5 AIR 1918 Cal 244 (245): 46 Ind Cas 587 (DB), *Joy Chandra* v. *Sm. Khuki*. (Trespass on tenant's land — Cause of action to landlord does not accrue till termination of tenancy.)
   ('25) 12 AIR 1925 Cal 155 (157): 82 Ind Cas 22 (DB), *Kumudini Dasi* v. *Surendrabala Dasi*.
   See the A. I. R. Commentaries on the *Limitation Act*, 2nd (1942) Edn., Arts. 142 & 144, Note 86.
5. *See* ('10) 8 Ind Cas 844 (844) (Mad), *Rangasawmy Iyengar* v. *Krishna Govinden*.

1. Scope. — In England a tenant, whether from year to year of for a term of years or for life, cannot commit what is known as a 'voluntary' waste, i.e., any unauthorised act which alters the character of the land or destroys the land such as cutting down timber, opening or working mines, ploughing up pasture land, pulling down buildings, etc.,[1] or which does a lasting damage to the demised property.[2] This clause enacts, in substance, the said principle of English law and further provides that the lessee may use the property as a person of ordinary prudence would use it if it were his own but that he should not use or permit another to use it for a purpose other than that for which it was leased.

2. Reasonable user of demised property. — The lessee is bound to manage the leasehold property in a proper and efficient manner.[1] Where he uses the property in a reasonable and tenant-like manner he is not liable to the lessor for any damage that may be caused to the property by such user.[2] Thus, where a warehouse was let to the lessee for storing goods, and the lessee stored his goods not unreasonably, but the floor gave way by the weight of the goods, it was held that the lessee was not liable for the damage.[3] It has been held that a tenant cannot be said to make a reasonable use of the land leased if he collects the surface stones on the land and sells the same.[4]

3. User for purposes other than those for which the property is leased. — A tenant must use the property only for the purpose for which it is granted.[1] The words "for a purpose other than that for which it was leased" mean acts inconsistent with the purpose of the lease. The following are instances of such acts:

'Illustrations.'

(1) Building a godown and brick kiln on land let for agricultural purposes[1a].

(2) Converting a wet land into a garden by planting fruit trees.[2]

(3) Turning agricultural land into building land.[3]

(4) Land let for tying cattle and storing cowdung cakes being used for

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SECTION 108, CLAUSE (O)—NOTE 1

1. Topham, *New Law of Property*, 4th Edn., 1932 page 51.
Halsbury, *Laws of England* (Hailsham Edn.), Vol. 20, paras. 213, 216.
Woodfall, *Landlord and Tenant*, 22nd Edn., page 776.
(1900) 69 LJ CH 257 (262): (1900) 1 Ch 624: 82 LT 85: 48 WR (Eng) 284, *West Ham Central Charity Board* v. *East London Water-works Co.*
2. Woodfall, *Landlord and Tenant*, 22nd Edn., page 778.

Section 108, C-(O) NOTE 2

1. ('17) 4 AIR 1917 Pat 549 (550): 2 Pat L Jour 713: 42 Ind Cas 111 (DB), *Kadir Baksh* v. *Sheo Prasad.*
2. ('70) 5 Beng LR 401 (416, 417): 14 Suth WR (oc) 45 (51) (FB), *Koeglar* v. *Yule.*
3. ('70) 5 Beng LR 401 (416, 417): 14 Suth WR (oc) 45 (51) (FB), *Koeglar* v. *Yule.*
4. ('41) 28 AIR 1941 Pat 13 (15, 17): 20 Pat 96: 193 Ind Cas 760 (DB), *Kusum Kamini Debya* v. *Jagdish Chandra Deo Dhabal Deb.* (AIR 1936 Pat 11 not approved.)
[*See also* ('28) 15 AIR 1928 Rang 85 (86): 5 Rang 813: 107 Ind Cas 175, *Burma Ry. Co.* v. *Mg. Hla Tin.* (Tenant cannot take out mineral and cart away the earth.)
('02) 25 Mad 669 (671): 12 Mad L Jour 406, *Chaladom Tholan* v. *Kakkath Kunhambu.* (*Quaere* — Digging shells from paddy fields for the purpose of proper cultivation if justified. But property in the shells is in any case in the landlord.)]

Section 108, C-(O) NOTE 3

1. ('78) 3 Cal 781 (784): 2 Cal LR 294 (DB), *Lal Shahoo* v. *Deo Narain Singh.* (Even an occupancy tenant must use the property only for a purpose for which it was let.)
1a. ('36) 23 AIR 1936 Oudh 316 (317): 12 Luck 256: 163 Ind Cas 186, *Bind Prasad* v. *Bihari Tewari.*
2. ('89) 12 Mad 320 (322) (DB), *Kunhammed* v. *Narayan Mussad.* (Kanom lease.)
3. ('90) 12 All 419 (422): 1890 All WN 162 (FB), *Madho Lal* v. *Sheo Prasad.*

building a structure for keeping and preserving chaff.[4]

See also the undermentioned cases.[4a]

The following are the illustrations of cases in which the user was held not to be inconsistent with the purpose of the lease.

'Illustrations.'

(1) Where a lease of a land was given for winning oil by sinking wells and the lessee, finding that oil could not be got in commercial quantities, made use of the gas that came out of the wells, it was held by their Lordships of the Privy Council that the use of the gas, set free by the wells, was not necessarily inconsistent with the purpose of the lease.[5]

(2) The conversion, by a permanent tenant, of a wet land, used for paddy and raggi cultivation, into a cocoanut garden was held not to be a conversion of the land for a purpose different from that for which it was let.[6] It was observed in that case that what shall be considered in farming as a good and husband-like user must vary according to the nature of the soil, its situation, and the climate.

(3) In 'Harrymohun Misser' v. 'Surendra Narain Singh',[7] where the leased land was used for indigo cultivation and a factory was erected thereon, it was held by their Lordships of the Privy Council that the question whether the user will render the land unfit for the purpose of the tenancy will depend upon the size of the holding, area withdrawn from actual cultivation, and the effect of such withdrawl upon the fitness of the holding taken as a whole for profitable cultivation.

See also the undermentioned cases.[8]

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4. ('26) 13 AIR 1926 All 66 (67): 88 Ind Cas 746, *Bhagwan Rai* v. *Jaddu Raj Rai*.

4a. ('87) 10 Mad 351 (352, 353) (DB), *Lakshmana* v. *Ramachandra*. (In the absence of local custom, tenants are not entitled to convert land under cultivation into a mango grove. Tenants from year to year are not at liberty to change the usual course of husbandry without the consent of the landlord.)

('93) 16 Mad 407 (408, 409): 3 Mad L Jour 185 (DB), *Ramanadhan* v. *Zamindar of Ramnad*. (Agricultural land—Occupancy tenant cannot build dwelling house for purposes not connected with agriculture and thus alter character of land.)

('01) 24 Mad 65 (69) (DB), *Orr* v. *Mrithyunjaya Gurukal*. (Do.)

('40) 27 AIR 1940 Mad 32 (33): 186 Ind Cas 90 (DB), *Doraikannu Ammal* v. *Ramaswami Mudaliar*. (Lease for laying out flower garden — Lessee and his assignee building permanent structures.)

(1898) 67 LJ Ch 205 (205): (1898) 1 Ch 424: 78 LT 224: 46 WR (Eng) 331, *Hobson* v. *Tulloch*. (House let for private residence—User for receiving as lodgers the governesses and pupils of a neighbouring school is a breach of covenant.)

('71) 8 Beng LR App 69 (70) (DB), *Tarini Charan Bose* v. *Debnarayan Mistry*. (Converting cultivable land into tank.)

('09) 4 Ind Cas 734 (735) (DB) (Cal), *Harak Singh* v. *Kirat Narain Singh*. (An agricultural holding misused by growing thereupon a mango orchard.)

5. ('29) 16 AIR 1929 PC 108 (110): 7 Rang 157: 56 Ind App 140: 115 Ind Cas 705 (PC), *U Po Naing* v. *Burma Oil Co*.

6. ('99) 22 Mad 39 (41, 42): 8 Mad L Jour 278 (DB), *Venkayya* v. *Ramasami*. (Distinguishing 12 Mad 320.)

7. ('07) 34 Cal 718 (722, 723): 34 Ind App 133 (PC). (31 Cal 174 reversed.)

8. ('99) 9 Mad L Jour 146 (147) (DB), *Krishna Doss Balamukanda Doss* v. *Venkatappa*. (Planting trees not materially affecting the character of the holding is not an inconsistent user.)

('66) 6 Suth WR (Act X Rulings) 40 (40) (DB), *Nyamutoolah* v. *Gobind Churn*. (Building by occupancy tenant not a misuse.)

('90) 12 All 419 (422): 1890 All WN 162 (FB), *Madho Lal* v. *Sheo Prasad*. (Granting a usufructuary mortgage is not an inconsistent use.)

4. Cutting of trees on the land. — Trees standing upon land at the time of the lease are part of the land and belong to the landlord.[1] The tenant is entitled to enjoy such trees during the period of his tenancy but cannot cut down such trees and appropriate them to himself unless such a right is given by contract or is an incident of the tenure by virtue of some positive law or custom.[1a] Thus, in the case of a perpetual lease at a fixed rent it has been held that it is an incident of the tenure that the tenant is entitled to the ownership of the trees on the land.[2] See also the undermentioned cases.[3] Where a lease is made for the purpose of clearing jungle land and

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SECTION 108 Cl (O) NOTE 4

1. *(67) 11 Moo Ind App 295 (313, 316): 10 Suth WR 13: 2 Sar 292 (PC), *Ruttonji Edulji* v. *Collector of Tanna.*
('23) 10 AIR 1923 All 406 (406, 407): 45 All 361: 71 Ind Cas 971 (DB), *Kampta Prasad* v. *Sheo Prasad.*
†('83) 5 All 616 (618): 1883 All WN 169 (DB), *Kasim Mian* v. *Banda Hussain.*
('99) 21 All 297 (299): 1899 All WN 72 (DB), *Kausalia* v. *Gulab Kuar.*
('07) 29 All 484 (486): 4 All L Jour 452, *Badam* v. *Ganga Dei.*
†('12) 14 Ind Cas 582 (583) (DB) (All), *Lachman Das* v. *Mohan Singh.*
('07) 30 All 134 (135): 5 All L JJour 99 (DB), *Ganga Dei* v. *Badam.* (29 All 484, affirmed.)
('30) 17 AIR 1930 Cal 240 (241): 57 Cal 344: 123 Ind Cas 316 (DB), *Kamal Krishna* v. *Madusudhan Choudhury.*
†('94) 22 Cal 742 (751) (DB), *Nafar Chandra* v. *Ram Lal.*
('24) 11 AIR 1924 Pat 147 (149): 73 Ind Cas 629 (DB), *Nathuni Rai* v. *Rameshwar Singh Bahadur.* (If any custom deviating from this general proposition is alleged it must be proved conclusively by those who maintain it.)
('23) 10 AIR 1923 Pat 295 (295, 296): 72 Ind Cas 157, *Ram Parichan Singh* v. *Biranji Prasad Singh.* (The burden is on the tenant to prove the contrary—Where however the record of rights contains an entry in favour of the tenant the onus is shifted and the landlord must rebut by evidence the presumption raised by the entry.)
('08) 4 Nag LR 104 (110), *Hiria* v. *Mahomad Sirajuddin Khan.* (If cut, landlord can take the trees away.)
('07) 30 Mad 155 (157): 17 Mad L Jour 64 (DB), *Bodda Gaddeppa* v. *Maharaja of Vizianagaram.*
('35) 22 AIR 1935 Pat 188 (191): 155 Ind Cas 966, *Jangbahadur Singh* v. *Thithar Singh.*
('21) 8 AIR 1921 Sind 109 (111): 16 Sind LR 87: 79 Ind Cas 819, *Pir Mukadhum* v. *Malik Boola Khan.* (11 Moo Ind App 295 (PC) followed.)
Also see Section 8, Note 10.

1a. ('90) 3 CPLR 18 (19), *Daryaosingh* v. *Sitru Mokasi.*
('20) 7 AIR 1920 Nag 113 (115): 54 Ind Cas 789, *Tikaram* v. *Ramchandra.* (Mere grant of protected status does not confer right to cut trees.)
(1864) 1864 Suth WR Gap No. 367 (367) (DB), *Sheikh Abdool Rohoman* v. *Dataram Bashee.*
[*See also* ('24) 11 AIR 1924 Pat 655 (656, 657): 75 Ind Cas 1031 (DB), *Maharaja Rai* v. *Janki Kuer.* (According to the general law prevailing in Bihar the landlord would be entitled to the whole of the trees standing upon the holding, but by the custom of the Bittiah Raj the landlord is entitled to a half share in the trees standing upon the holdings of his tenant, the tenant being entitled to the other half — Under the contract of lease, landlord held relinquished his right to the trees, both present and future.)
('07) 5 Cal L Jour 413 (416) (DB), *Nilmani* v. *Mathura Nath.* (Case under Bengal Tenancy Act—Tenant held had no right to cut and appropriate tamarind tree, which was not a mere shrub.)]

2. ('74) 21 Suth WR 344 (346) (DB), *Goluck Rana* v. *Nubo Soonduree Dossee.* (A peshcushi sanad, or grant at a quit rent of homestead and waste land.)
*('68) 10 Suth WR 419 (419) (DB), *Sharoda Soondari Debia* v. *Gonee Sheik.*
('18) 5 AIR 1918 Cal 794 (795): 38 Ind Cas 49 (52) (DB), *Radhika Nath Roy* v. *Samir Fakir.* (10 Suth WR 419 followed.)
('29) 16 AIR 1929 Cal 330 (330): 113 Ind Cas 568 (DB), *Hemangini Dassi* v. *Asutosh Das.* (This Act is not applicable to such lease.)
('25) 12 AIR 1925 Cal 139 (140): 76 Ind Cas 990 (DB), *Midnapore Zamindari Co.* v. *Jagat Chandra.*
('01) 23 All 126 (127): 1901 All WN 15 (DB), *Harbans Lal* v. *Maharaja of Benares.*

3. ('35) 22 AIR 1935 Pat 472 (472): 159 Ind Cas 346, *Ram Brich Lal* v. *Emperor.* (Under S. 23, Bengal Tenancy Act, the tenant can cut trees.)
('86) 8 All 467 (474): 1886 All WN 192 (DB), *Deoki Nandan* v. *Dhian Singh.* (Subject to the restrictions imposed by the statute the occupancy tenant in U.P. practically enjoys the incidents of the ownership of the land and if so he is entitled to the trees on the land and to use them as long as the tenure exists.)
('73) 1873 Pun Re No. 61, p. 86 (87) (DB), *Kalian Das* v. *Buta.* (Occupancy tenant—Wajib-ul-arz allowing tenant to cut trees.)
('81) 1881 Pun Re No. 61, p. 142 (143), *Mt. Gur Devi* v. *Sondha.* (Do.)
('74) 1874 Pun Re No. 79, p. 238 (239) (DB), *Sahiba* v. *Khushal.* (Do.) ....

bringing it under cultivation and the lease contains no reservation, it has been held that the tenant has a right to cut and take the trees for himself.[4] The reason is that a contract to that effect must be implied in such cases. The principles stated above apply equally to trees growing spontaneously on the land during the period of the lease.[5] A tenant, however, will be entitled to prevent the growth of any trees which were not growing at the time of the commencement of his tenancy, and the growth of which would interfere with the purpose for which the land was let to him.[5a]

See also clause (h), Note 2.

The lessor or the landlord cannot interfere with the tenant's enjoyment of the trees during the period of the tenancy.[6]

This clause prohibits the felling or selling of 'timber' belonging to the lessor by the lessee. As has been seen in Notes on S. 3, the word "timber" is used to denote trees intended to be cut and used in the building and repairing of houses and for industrial purposes. The fact that the section refers to 'timber' only does not mean that the lessee can cut other trees belonging to the lessor. The cutting of such trees would clearly be "an act which is destructive or permanently injurious" to the property leased. The reason why the clause refers expressly to timber appears to be to avoid a possible view being taken that timber being trees which are intended to be cut and sold, the felling thereof would not be an act destructive or injurious to the property leased.

('75) 1875 Pun Re No. 4, p. 9 (9, 10) (DB), *Jani* v. *Ghulam Farid Khan.*

4. ('74) 22 Suth WR 523 (524) (DB), *Rotun Ram Doss* v. *Collector of Sylhet.*
('96) 23 Cal 209 (211, 212) (DB), *Mon Mohini Goopta* v. *Raghoonath Misser.*
[*See also* ('67) 11 Moo Ind App 295 (314) (PC), *Ruttonji Edulji Shet* v. *Collector of Tanna.*]

5. †('42) 29 AIR 1942 Oudh 460 (461): 18 Luck 390: 201 Ind Cas 728 (DB), *Gur Prasad Singh* v. *Mehdi Husain.* (Perpetual lease of land for agricultural purposes—Lessee cannot claim timber of trees which have spontaneously grown on land.)
('20) 7 AIR 1920 Nag 113 (115): 54 Ind Cas 789, *Tikaram* v. *Ramchandra.* (Where trees are of spontaneous growth there appears to be no equity in lessee's favour.)
('08) 4 Nag LR 104 (112), *Hiria* v. *Mahomed Sirajuddin Khan.* (Landlord is entitled to the lac spontaneously deposited on trees standing in the lands of the tenant.)
('16) 3 AIR 1916 Mad 939 (940): 31 Ind Cas 12 (DB), *Krishna Charya* v. *Anthakki.* (Mulgeni lease—Tenant can cut trees of spontaneous growth as a customary incident of the tenure. 24 Mad 47 and 33 Mad 253 followed.)

5a. *See* ('91) 13 All 571 (572): 1891 All W N 167 (DB), *Nathan* v. *Kamla Kuar.*

6. *('08) 30 All 134 (135, 136): 5 All L Jour 99 (DB), *Ganga Dei* v. *Badam.* (Affirming 29 All 484.)
('07) 29 All 484 (486): 4 All L Jour 452, *Badam* v. *Ganga Dei.* (Landlord cannot cut trees during period of tenancy.)
('10) 8 Ind Cas 151 (151) (All), *Ram Bakhsh* v. *Ram Sarup.* (Do.)

†('12) 14 Ind Cas 582 (583) (DB) (All), *Lachman Das* v. *Mohan Singh.*
('23) 10 AIR 1923 All 406 (406, 407): 45 All 361: 71 Ind Cas 971 (DB), *Kamta Prasad* v. *Sheo Prasad.*
('10) 5 Ind Cas 256 (256) (DB) (All), *Jugdip Narain Singh* v. *Jokhan Ahir.*
('20) 7 AIR 1920 Nag 113 (115): 54 Ind Cas 789, *Tikaram* v. *Ramchandra.* (It is not open to the lessee to arbitrarily refuse permission to the lessor when the latter as owner of the timber desires to fell what he is entitled to take but reasonable notice of the lessor's intention to enter and fell should be given.)
('26) 13 AIR 1926 Mad 853 (857): 92 Ind Cas 753 (DB), *Thanappa Chetty* v. *Esuf Khan.* (Tenant entitled to minor produce of land during tenancy.)
('17) 1917 Pun Re (Rev) 5: 41 Ind Cas 907 (907, 908), *Pokardas* v. *Amir.* (But, if the landlord has cut a tree, the tenant cannot claim its price.)
('90) 3 CPLR 18 (19), *Daryao Singh* v. *Sitru Mokasi.* (Lessee is entitled to compensation if damage is caused by landlord's interference.)
('08) 4 Nag LR 104 (112, 113), *Hiria* v. *Mahomed Sirajuddin Khan.*
[*See also* ('91) 13 All 571 (572): 1891 All WN 167 (DB), *Nathan* v. *Kamla Kuar.* (Landlord has no right to cut down and remove fruit bearing trees which were growing spontaneously on his tenant's holding, apart from custom or contract.)
('88) 1 CPLR 151 (152), *Puna Patil* v. *Gangji Mokasi.* (In the case of lease of jungle and it was doubted whether the strict rule should be enforced.)]

5. "Belonging to the lessor." — It has been seen in the Notes on clause (h) that the lessee may remove all things which 'he' had attached to the earth and can consequently cut away the trees planted by him and remove the buildings erected by him. Under this clause as it stood before the amendment of 1929, the lessee was prohibited from felling timber or pulling down or damaging buildings, without any distinction being made between timber or buildings belonging to the lessor, and those which the lessee himself had attached to the earth. But obviously, in view of clause (h) the prohibition extended only to trees and buildings which belonged to the lessor and not to the lessee. The amendment of this clause by the addition of the words "belonging to the lessor" makes this position now clear.

6. Working mines and quarries.—As a general rule the grant of a lease, even though a permanent one does not carry with it the right to minerals in the absence of an express contract to the contrary.[1] The property in the

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SECTION 108, Cl (O) NOTE 6

1. *('16) 3 AIR 1916 PC 191 (193): 44 Cal 585: 44 Ind App 46: 40 I.C. 139 (PC), *Sashi Bhusan* v. *Jyoti Prasad.*
('17) 4 AIR 1917 PC 163 (164): 45 Cal 87: 44 Ind App 246: 42 Ind Cas 651 (PC), *Thakur Girdhari Singh* v. *Megh Lal Pandey.* (Construction—Mokurrari lease does not give right to minerals to lessee even though words "Mai hak hakuk" are used.)
†('19) 6 AIR 1919 PC 17 (20): 47 Cal 95: 46 Ind App 158: 50 Ind Cas 849 (PC), *Raghunath Roy* v. *Durga Prasad Singh.* (Principle applies to rent-free tenure.)
('31) 18 AIR 1931 PC 299 (301): 58 Ind App 392: 59 Cal 699: 135 Ind Cas 632 (PC), *H. V. Low & Co.* v. *Jyoti Prasad Singh Deo.* (AIR 1930 Cal 561: 57 Cal 1189, affirmed.)
('31) 18 AIR 1931 PC 302 (302): 10 Pat 877: 134 Ind Cas 1073 (PC), *Jagat Mohan Nath* v. *Pratap Udai Nath.*
('29) 16 AIR 1929 PC 152 (156): 56 Ind App 223: 52 Mad 538: 117 Ind Cas 481 (PC), *Surya Row Bahadur* v. *Secy. of State.*
('34) 21 AIR 1934 All 906 (907): 153 Ind Cas 691, *Basdeo Sahi* v. *Man Singh.* (Removal of kankar is analogous to extracting of minerals — Therefore landlord is owner of kankar and not tenant.)
('12) 39 Cal 696 (703): 15 Ind Cas 219 (221) (PC), *Durga Prasad Singh* v. *Brojo Nath.*
*('10) 37 Cal 723 (730): 37 Ind App 136: 6 I.C. 785 (787) (PC), *Hari Narayan Singh* v. *Sri Ram Chakravarti.* (33 Cal 54 reversed.)
('17) 4 AIR 1917 Pat 477 (478): 42 Ind Cas 808 (DB), *Ranjit Narayan Singh* v. *Motilal Marwari.* (No express grant.)
('26) 13 AIR 1926 Pat 103 (109): 4 Pat 799: 90 Ind Cas 513 (DB), *Satya Niranjan Chakravarty* v. *Sushila Bala Dasi.*
†('28) 15 AIR 1928 Pat 482 (484): 8 Pat 190: 112 I.C. 659 (DB), *Mangobinda Sahu* v. *Satya Niranjan.* (No express grant.)
('43) 30 AIR 1943 Pat 31 (31): 203 Ind Cas 442 (DB), *Purnendu Narain* v. *Narendra Nath.* (The right of a tenant to make bricks for his own domestic or agricultural purposes, i.e., for his own use on the tenure or holding cannot be questioned, though it cannot be held that the making of bricks is a use of the surface to which the tenant is ordinarily entitled, unless the right is expressly excluded. A right of quarrying can of course be acquired by adverse possession. But unless the tenant has acquired by grant or by adverse possession a right of ownership in the subsoil, the digging of earth for bricks to be taken away from the area of the tenure and to be disposed of to strangers is an appropriation of the corpus of the grant which a tenant in India is not entitled to make.)
('36) 23 AIR 1936 Pat 111 (111): 160 Ind Cas 114, *Ras Behari* v. *Jagadish.* (Lessee is however entitled to collect and remove lime-stone found on surface.)
('35) 22 AIR 1935 Pat 149 (151): 163 Ind Cas 169, *Jyoti Prasad Singh* v. *Bengal Coal Co. Ltd.* (Fisheries are not under-ground rights.)
('11) 38 Cal 845 (859): 12 Ind Cas 482 (485) (DB), *Jooti Prosad* v. *Lachipore Coal Co.*
('28) 15 AIR 1928 PC 234 (237, 238): 55 Ind App 320: 56 Cal 1: 111 I.C. 345 (PC), *Bejoy Singh* v. *Surendra Narayan.* (Lessee excavating land for brick-making—Landlord can obtain injunction against lessee to prevent him from making bricks.)
('06) 33 Cal 203 (215): 32 Ind App 185: 8 Sar 908 (PC), *Tituram Mukerjee* v. *Cohen.* (A lessee under a jungleburi lease becomes entitled to the use and possession of the surface. The mineral rights remain in the owner.)
†('31) 18 AIR 1931 PC 162 (163, 164): 58 Ind App 228: 59 Cal 80: 132 Ind Cas 610 (PC), *Bhupendra Narayan Sinha* v. *Rajeshwar Prosad.* (The words "Chaya Hrad" (shades and lakes) and "Daro bast Hakuk" (with all rights) in a patni grant do not pass subsoil rights.)

mines and minerals remains in the proprietor of the soil.[2] A lessee therefore cannot work new mines in the land leased out to him.[3] Where the right to minerals is, however, expressly granted to the lessee, the right to work mines is also impliedly granted thereby.[4]

7. "Any other act which is destructive," etc. — A tenant cannot alter the land in such a way as to permanently injure the interests of the landlord.[1] The felling of timber, the pulling down or damaging of buildings, the working of mines and quarries, are all illustrations of acts which are destructive or permanently injurious to the leased property. An excavation of agricultural land for the purpose of making bricks will be injurious to the property and a tenant cannot make such excavations in the absence of a provision in the lease to that effect.[2] Even if there is such a provision in the lease it has been held in the undermentioned case[3] that the terms cannot be construed as giving the lessee a right to make such excavations as would cause the complete destruction of the property. But in the case noted below[3a] where a tenant having a permanent and heritable right at a fixed rent in a large tract of land, made a small excavation in an area of a few square feet for the purpose of making bricks, it was held that the act was not detrimental to the land and that the tenant's right of enjoyment extended to making such excavations.

The construction of a well upon an agricultural holding is not a destructive or a permanently injurious act.[4] Nor is the use of an agricultural land temporarily for a theatrical company, where there are no crops on the

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[*See* ('12) 16 Ind Cas 441 (442) (DB) (Cal), *Ali Quader* v. *Jogendra Narain*. (Patni lease—On construction held to have passed mineral rights to the lessee.)]

[*See also* ('25) 12 AIR 1925 PC 42 (45): 4 Pat 244: 52 Ind App 109: 86 Ind Cas 289 (PC), *Satya Niranjan* v. *Ram Lal*. (Whether grant of putni tenure includes grant of mineral rights is an open question.)]

Also see Section 8, Note 10.

The following cases are no longer good law:

('07) 34 Cal 358 (365, 366): 11 Cal WN 527 (DB), *Megh Lal Panday* v. *Girdhari*.

('07) 34 Cal 753 (784): 12 Cal WN 193 (DB), *Brojonath Bose* v. *Durga Pershad*.

('06) 33 Cal 511 (530): 10 Cal WN 738 (DB), *Shyama Charan Nundy* v. *Abhiram Goswami*. (Reversed on a different point in 36 Cal 1003.)

2. ('35) 22 AIR 1935 Cal 368 (381): 62 Cal 346: 159 Ind Cas 98 (DB), *Raj Krishna Prasad* v. *Borabani Coal Concern Ltd.*

3. ('11) 38 Cal 845 (859): 12 I.C. 482 (485) (DB), *Jyoti Prosad* v. *Lachipore Coal Co.* (Injunction restraining lessee from working mines granted.)

[*See also* ('05) 2 Cal L Jour 20 (38) (DB), *Mahomed Buktyar Shah* v. *Rani Dhojamani*. (Case of maintenance grant—Principle under English law that a life-tenant is not entitled to open any new mines held equally applicable to life estates in India.)

('83 7 Bom 109 (116, 118), *In re Purmanandas Jeewandas*. (A lessee for years of a hill has not in the absence of express words, power to remove and sell the soil and stones except in the case of mines, quarries or pits open when he came in.)]

4. ('25) 12 AIR 1925 PC 42 (44): 4 Pat 244: 52 Ond App 109: 86 Ind Cas 289 (PC), *Satya Niranjan* v. *Ram Lal Kaviraj*.

('06) 33 Cal 462 (472): 10 Cal WN 17 (DB), *Ramessur Malia* v. *Ram Nath Bhattacharjee*. (The owner of the underground rights will, however, be justified in doing such acts only as may be reasonably necessary for the above purposes.)

SECTION 108, Cl (O) NOTE 7

1. ('83) 9 Cal 609 (611): 12 Cal LR 300 (DB), *Noyna Misser* v. *Rupikun*.
1865 2 Suth WR 157 (158) (DB), *Kadumbenee Dabee* v. *Nobeen Chunder Adukh*. (A ryot destroying land by making holes in it for providing earth for bricks, or allowing another to do so, renders himself liable for damages.)

2. ('72) 17 Suth WR 416 (417) (DB), *Anund Coomar Mookerjee* v. *Bissonath Banerjee*.

3. ('05) 9 Cal WN 255 (257) (DB), *Girish Chandra Chando* v. *Sirish Chandra*.

3a. ('24) 11 AIR 1924 Cal 56 (57): 50 Cal 694: 75 Ind Cas 55 (DB), *Barada Prasad* v. *Bhupendra Nath*.

4. ('12) 15 Oudh Cas 170 (175, 176): 13 Ind Cas 554 (556) (DB), *Raghunandan Singh* v. *Jarao*.

(1864) 1864 Suth W R Gap No. Civ 279 (279), *Dheput Singh* v. *Halal Khoory*.

('92) 1892 All WN 103 (104), *Muhammad Raza Khan* v. *Dalip*.

('99) 21 All 386 (389): 1899 All WN 133 (DB), *Dharmraj Kunwar* v. *Sumeeran*.

land, destructive or injurious to the land.[5] A transfer by way of usufructuary mortgage is also not an act which can be said to injure the property.[6] An act cannot be said to be detrimental to the land unless it injures the land itself.[7]

8. Effect of breach of obligation. — A breach of the obligation under this clause does not necessarily entail a forfeiture of the lease. But the lessor would be entitled to claim damages for such breach[1] or, in the case of a threatened breach, for an injunction restraining the tenant from committing such breach.[2] He cannot on his own responsibility evict the tenant or induct any other person on the land.[3]

Section 108 Clause (p).

1. Scope. — Under the English law, there is no prohibition against a tenant erecting permanent structures on the land which do not cause damage to the land but which really improve it.[1] This clause departs from the English law in this respect. A lessee cannot erect any permanent structure on the land for non-agricultural purposes.[1a] The lessee of a building cannot even add a structure to it, for it might have wholly different effects from what was contemplated when the lease was given.[2] But where a house on the premises, not used for agricultural purposes, falls into disrepair, the tenant has been held entitled to rebuild and repair that portion.[3]

The clause excepts buildings for 'agricultural purposes'. Thus, a tenant can erect a dwelling house on the land for the purpose of facilitating his agricultural work.[4] An agriculturist tenant can also erect a walled enclosure on the land and build a cattle-shed, as they are for agricultural purposes.[5]

In the case of 'agricultural' leases to which the provisions of this Act are not applicable, it has been held that the English law should be applied as to the right of the tenant to erect buildings, and that a tenant with a permanent right of occupancy cannot be prevented from erecting permanent structures on the land[6] unless such an erection will cause permanent damage or injury to the property.[7]

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5. ('98) 20 All 469 (470): 1898 All WN 114, *Yusuf Ali Khan* v. *Hira.* (Case under N.W.P. Rent Act.)
6. (90) 12 All 419 (422, 425): 1890 All WN 162 (FB), *Madho Lal* v. *Sheo Prasad.*
7. ('90) 12 All 419 (422): 1890 All WN 162 (FB), *Madho Lal* v. *Sheo Prasad Misr.*

SECTION 108, Cl (O) NOTE 8

1. ('83) 9 Cal 609 (610, 611): 12 Cal LR 300 (DB), *Noyna Missir* v. *Rupikun.*
2. ('75) 23 Suth WR 298 (300) (DB), *Tarini Churn Bose* v. *Ramjee Pal.* (The act was held not to be injurious — No injunction granted.)
   ('40) 27 AIR 1940 Mad 32 (33): 186 Ind Cas 90 (DB), *Doraikannu Ammal* v. *Ramaswami Mudaliar.* (Lease of land for laying out flower garden—Lessee and his assignee building permanent structures—Mandatory injunction granted.)
   ('10) 6 Ind Cas 286 (286) (DB), *Meera Mohideen Rowthan* v. *Dubash Kadur.* (Conversion of cultivable land into building site restrained by injunction.)
3. ('17) 4 AIR 1917 Pat 549 (550): 2 Pat L Jour 713: 42 Ind Cas 111 (DB), *Kadir Bakhsh* v. *Sheo Pershad.*

SECTION 108, CLAUSE (P)—NOTE 1

1. Woodfall, *Landlord and Tenant,* 22nd Edn., pages 777, 780.
   ('32) 19 AIR 1932 Mad 328 (336): 137 Ind Cas 487 (DB), *Periyanan* v. *Govinda.*
1a. ('82) 9 Cal LR 221 (223), *Jaggannath Baisak* v. *Prosonno Coomar.*
   ('94) 16 All 328 (330): 1894 All WN 99, *Naunihal Bhagat* v. *Rameshar.*
2. ('27) 14 AIR 1927 Lah 225 (225): 100 I.C. 834, *Abdul Rahim* v. *Municipal Committee, Delhi.*
3. ('88) 1888 All WN 125 (126), *Narain Prasad* v. *Dammar.*
4. Section 76 of the Bengal Tenancy Act authorises occupancy tenants to build for agricultural purposes.
5. ('88) 1888 Pun Re No. 122, page 332 (333) (DB), *Daswandhi* v. *Ghulam.*
6. ('32) 19 AIR 1932 Mad 328 (336): 137 Ind Cas 487 (DB), *Perianan* v. *Govinda.*
7. ('01) 24 Mad 65 (68, 69) (DB), *Orr* v. *Mrithyunjaya Gurukkal.*

Where the land is let for 'building purposes' this clause will not apply inasmuch as there must in such a case be deemed to be a covenant of the lessor, for such building.[8]

Where a tenant erects a permanent structure on the land for non-agricultural purposes, the lessor cannot on that ground eject him; he can, however, claim that it should be demolished.[9] It has been held by the High Court of Patna[10] that one of several lessors cannot enforce the obligation under this clause and ask for the demolition of the building erected, where the other co-lessors are not willing to enforce it.

As to the applicability of the doctrine of acquiescence and the doctrine of expectation to those cases in which the lessee erects a permanent structure and the lessor abstains from interfering, see S. 51 Notes 22 to 25 clause (h) Note 4.

Section 108 Clause (q).

1. Scope. — This clause enacts the well settled rule that the tenant must, on the expiration or sooner determination of his tenancy, deliver up to his landlord possession of the demised property.[1] The tenant cannot refuse to give up such possession on the ground that the landlord has no title,[2] unless subsequent to the lease there is an ouster of the landlord's right by a paramount title.[3] Nor can he refuse to give up possession on the ground that at some time during the period of his lease he was disturbed for a few days in

[*See also* ('93) 16 Mad 407 (409) (DB), *Ramanadhan* v. *Zamindar of Ramnad*.]

8. ('35) 22 AIR 1935 All 1040 (1040): 159 Ind Cas 680 (DB), *Ahmad Nazar Beg* v. *Brij Nandan*.

9. ('14) 1 AIR 1914 All 285 (287): 21 Ind Cas 967, *Kehri Singh* v. *Hulasi*.
('07) 17 Mad L Jour 197 (198) (DB), *Appa Rao* v. *Venkatadri*. *(Obiter.)*

10. ('39) 26 AIR 1939 Pat 428 (430): 185 Ind Cas 284, *Jadunandan Das* v. *Mt. Maho*.

SECTION 108, CLAUSE (Q)—NOTE 1

1. Woodfall, *Landlord and Tenant*, 22nd Edn., page 923.
('98) 22 Bom 348 (353, 354) (DB), *Baliramgiri* v. *Vasudev*.
†('37) 24 AIR 1937 Lah 121 (124): 173 Ind Cas 694, *Abdul Qayum* v. *Mohammad Fazal Azim*.
('21) 8 AIR 1921 Bom 93 (101), *Lakshman Gowroji* v. *Ramji Antone*. (The tenant of a several fishery must give up the fishing stakes on the termination of the tenancy, and he cannot claim to retain them on the ground that he has repaired them from time to time or even renewed them. *Prima facia* the boundaries mentioned would include every fixture within their limits at the creation of the tenancy.)
('86) 1886 Bom PJ 314, *Santo* v. *Venkaji*.
('26) 13 AIR 1926 Lah 371 (372): 94 Ind Cas 121, *Firm Jamita Mal Sant Ram* v. *Gokal Chand*.
('05) 15 Mad L Jour 368 (369) (DB), *Bankala Vittil Usman Koya* v. *Chidria Mokkaua Akoth*.
†('17) 4 AIR 1917 Cal 219 (220): 37 Ind Cas 201 (DB), *Parmananda Singh* v. *Syjou Singh*.
('98) 1898 Pun Re No. 14, p. 25 (28) (DB), *Abdul Kadir* v. *Nur-ud-din*. (Upon the determination of a tenancy, it is the duty of the tenant not merely to relinquish possession of the premises but to restore possession thereof to the landlord and if such tenant has underlet the whole or any portion of the premises, he will be liable for a breach of the obligation if his sub-tenant refuses or neglects to give up possession when the term ends.)
[*See also* ('31) 18 AIR 1931 Pat 268 (270): 10 Pat 203: 131 Ind Cas 811 (DB), *Rupan Singh* v. *Akhaj Singh*.
('26) 13 AIR 1926 Cal 354 (355): 90 Ind Cas 114 (DB), *Raj Kristo Ghose* v. *Bata Kristo Ghose*.]

2. ('71) 8 Bom H C R A C 175 (177) (DB), *Vasudev Daji* v. *Babaji Ranu*.
('12) 15 Ind Cas 844 (845) (DB) (Mad), *Narayan Nambudri* v. *Muhammad*.
('28) 15 AIR 1928 Rang 162 (163): 120 Ind Cas 657 (DB), *Q. A. Vertannes* v. *R. G. Robinson*.
†('25) 12 AIR 1925 Oudh 694 (696): 89 I.C. 590, *Mahomad Hussain & Sons* v. *Uberoi & Co. Ltd*.
('21) 8 AIR 1921 Bom 93 (100, 101), *Lakshman Gowroji* v. *Ramji Antone*.
('99) 1 Bom LR 491 (493) (DB), *Lakshman* v. *Raghunath*.

3. ('05) 15 Mad L Jour 368 (369) (DB), *Bankala Vittil Usman Koya* v. *Chidria Mokkaua Akoth*.

his possession,[4] or on the ground that there is a covenant for renewal in his favour,[5] or on the ground that he has erected permanent structures on the land to the knowledge of the lessor and without interference by him,[6] unless the lessor is barred by the doctrine of equitable estoppel from claiming possession.[7]

The lessee is bound to put the lessor in possession of not only the land leased but also the crops on the land,[7a] of any accessions made to the property and of any encroachments made by the lessee which enure for the benefit of the lessor under clause (d).[8]

If the lessee fails to deliver possession on the determination of the lease, the lessor can sue him in ejectment.[9] But he cannot be ejected by force. If he is so ejected he can sue the lessor for the recovery of the possession under S. 9 of the Specific Relief Act.[10] The lessor can also sue the lessee

4. ('26) 13 AIR 1926 Lah 371 (372): 94 Ind Cas 121, *Jamita Mal Sant Ram* v. *Gokal Chand.*
[*See also* ('29) 16 AIR 1929 Oudh 286 (287): 113 Ind Cas 734, *Panchu* v. *Deputy Commr., Sultanpur.* (Lease for 7 years — Lessee ejected after one year by previous lessee —Lessor ejected previous lessee after 6 years of occupation—Lessee held could not claim extension of lease on ground that he did not enjoy possession of property for full period of lease.)]

5. †('16) 3 AIR 1916 Mad 1224 (1224): 31 Ind Cas 919 (DB), *Dt. Board of Tanjore* v. *Vythilinga Chetty.*
('37) 24 AIR 1937 All 328 (332): 169 Ind Cas 145 (DB), *Sewak Ram* v. *Municipal Board, Meerut.*
[*See also* ('18) 5 AIR 1918 Cal 391 (392): 39 Ind Cas 137 (DB), *Azimuddin Chaudhury* v. *Peer Mahomed Bepari.* (Option or covenant to obtain new settlement on expiry of the term of kabuliyat—Term and rent of new settlement uncertain—Tenant holding over can be ejected without notice to quit.)]

6. ('99) 21 All 496 (502, 503): 26 Ind App 58 (PC), *Beni Ram* v. *Kundan Lal.*
('38) 25 AIR 1938 Pat 236 (237): 175 Ind Cas 463, *Mt. Batulan* v. *Sayid Mohamad.* (*Ramsden* v. *Dyson*, (1865) L R I H L 129, followed.)

7. *('99) 21 All 496 (502, 503): 26 Ind App 58 (PC), *Beni Ram* v. *Kundan Lal.*

7a. ('10) 5 Ind Cas 306 (307) (DB) (Cal), *Akhil Chandra* v. *Surendra Nath.* (NOTE.—This must be read subject to the provisions of cls. (h) and (i).)

8. ('25) 12 AIR 1925 Cal 1114 (1116): 87 Ind Cas 530 (DB), *Indu Bhusan Bose* v. *Atul Chandra Biswas.*

9. ('10) 6 Ind Cas 701 (702) (DB) (Mad), *Gandrapu Sinayya* v. *Koppineni Venkataratnam.*
†('17) 4 AIR 1917 Cal 219 (220): 37 Ind Cas 201 (DB), *Paramananda Singh* v. *Syjou Singh.*
[*See also* ('25) 12 AIR 1925 Pat 17 (19): 81 Ind Cas 535 (DB), *Gita Prasad Singh* v. *Emperor.*]

10. ('25) 12 AIR 1925 Sind 275 (278, 279): 87 Ind Cas 1002, *Secretary of State* v. *Dinshaw Navroji.*
†('05) 29 Bom 213 (216, 217): 7 Bom LR 12 (DB), *Rudrappa* v. *Narasing Rao.*
Also see S.105 Note 37 and S.116 Note 13.

11. †('98) 22 Bom 348 (354) (DB), *Baliramgiri* v. *Vasudeo.*
('37) 24 AIR 1937 Lah 121 (124): 173 Ind Cas 694, *Abdul Qayum* v. *Md. Fazal Azim.* (If actual possession is with an under-tenant, who at the determination of the tenancy holds over against the will of the tenant, the remedy of the landlord is to sue the tenant for damages, the measure of which is the rental value of the premises for the time he is kept out of possession, and the costs of the legal proceedings to oust the under-tenant.)
('26) 13 AIR 1926 Lah 371 (372): 94 Ind Cas 121, *Firm Jamita Mal* v. *Gokal Chand.*
('77) 1877 Bom PJ 171 (171) (DB), *Narayan* v. *Pande.*
('32) 19 AIR 1932 Lah 275 (276): 13 Lah 216: 138 Ind Cas 290 (DB), *Narain Das* v. *Dharam Das.*
†('33) 20 AIR 1933 Lah 61 (64): 14 Lah 137: 142 Ind Cas 754 (DB), *Sunder Singh* v. *Ram Saran Das.* (Tenant contumaciously holding over — Double rent by way of damages is proper.)
('37) 24 AIR 1937 All 328 (333): 169 Ind Cas 145 (DB), *Sewak Ram* v. *Municipal Board Meerut.* (Lessor can obtain interest if the lessee was responsible for non-payment earlier.)
†('24) 11 AIR 1924 Cal 240 (242): 50 Cal 667: 83 Ind Cas 757, *Sundernull* v. *Ladhuram Kaluram.*
('14) 1 AIR 1914 All 1 (2): 22 Ind Cas 7, *Munna Lal* v. *Buchchu Lal.*
('10) 6 Ind Cas 766 (769) (DB) (Mad), *Chengiah* v. *Thimma Nayanim.*
(1856) 105 RR 782 (786): 11 Ex 769: 26 LT (os) 260: 25 LJ Ex 101: 4 WR (Eng) 293, *Watson* v. *Lane.*

for damages for wrongful occupation,[11] but not for rent.[12]

Where a lessee surrenders his tenancy by notice to the landlords, followed by delivery of possession to 'one' of them, the others cannot sue the tenant either for rent or for damages for use and occupation.[13] Nor is the lessee liable for rent or for use and occupation if he has offered to deliver possession but the lessor has refused to take it.[14]

Where land is leased to several lessees jointly 'all' the lessees must vacate at the determination of the tenancy. If some of them alone vacate, this will not relieve them of liability so long as any one or some of them remains or remain in occupation.[15]

The clause is subject to a contract to the contrary. Where it is expressly provided in the lease that the lessee need not deliver posssion at the expiry of the lease, he is not under any obligation to put the lessor in possession.[16]

In the undermentioned case[17] the lessee was to construct a cinema hall on the land demised and was entitled to be paid the price of it before he surrendered possession either on the expiry of the lease or at any other future time. It was held by their Lordships of the Judicial Committee that the lessee was entitled to remain in possession as tenant at the rent reserved by the lease until payment of the market price and could not be treated as trespasser liable to account for mesne-profits.

2. Special legislation : — Owing to the increase of population in the cities during the last Great War it was found necessary to give special protection to the tenants against enhancement of rent and ejectment by the landlords and hence there had been emergency legislation during the war period, superseding the rights and liabilities under the Transfer of Property Act. The emergency continues even after the Great War and with it the emergency legislation too. A few important cases decided under the emer-

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[*See also* ('11) 11 Ind Cas 270 (272) (DB) (All), *J. D. Scott* v. *Jyotis Saroop.*]
The use of the expression "damages for use and occupation" in the following decisions does not appear to be correct in view of what has been stated in Note 40 on S. 105:

('33) 20 AIR 1933 Lah 509 (510): 146 Ind Cas 845 (DB), *Ubedul Rahman* v. *Darbari.*
('37) 24 AIR 1937 Mad 478 (480): 171 Ind Cas 642, *Ramiah* v. *Chinnakaruppannan.*

12. ('77) 1877 Bom PJ 171 (171) (DB), *Narayan* v. *Pande.*

13. ('24) 11 AIR 1924 Lah 474 (475): 78 Ind Cas 570, *Ram Gopal* v. *Parmeshri.*

14. ('37) 24 AIR 1937 Lah 121 (124, 125): 173 Ind Cas 694, *Abdul Qayum* v. *Md Fazal Azim.*

15. ('36) 23 AIR 1936 Sind 213 (215): 30 Sind LR 135: 166 Ind Cas 677 (DB), *Ramji* v. *Vasudev.* (1840) 60 RR 779, *Christy* v. *Tancred,* followed.)

16. ('86) 1886 Bom PJ 78 (DB), *Shrimadatmanand* v. *Shivasavant.*

17. ('45) 32 AIR 1945 PC 77 (79): 72 Ind App 72: ILR (1945) Mad 535: ILR (1945) Kar (PC) 197: 221 Ind Cas 432 (PC), *Ethirajulu* v. *Ranganatham.*

gency enactments have been given below by way of illustrations.[1]

SECTION 108 cl. (q) N 2

Bombay Rent Restriction Act (XVI [16] of 1939.)

1. ('45) 32 A.I.R. 1945 Bom 237 (237): 219 I.C. 72: I L R (1945) Bom 310 (F. B.) *Mangaldas* v. *Govind Lal*. [Bombay Rent Restriction Act (1939)—S. 11.—Suit for ejectment by landlord—sub-tenant has no right to join as party.]

('44) 31 A. I. R. 1944 Bombay 181 (182, 183): I L R (1944) Bom 361 (DB), *Ismail* v. *Zuleikhabai*. [Bom. Rent Restriction Act (1939) Land leased for business purposes—Provision for dwelling held only subsidiary and was restricted to lessee and his family —S. 11 held applicable to lease.]

('43) 30 A.I.R. 1943 Bom 141 (143): I L R (1943) Bom 480: 207 I. C. 300, *Punamchand* v. *Bombay Cloth*. [Bom. Rent Restriction Act (1939) mere sub-letting does not justify ejectment.]

Bombay Rents, Hotel Rates, and Lodging House Rates (Control) Act (VII (7) of 1944.)

('45) 32 AIR 1945 Bom 137 (143): ILR (1945) Bom 82 (DB), *Navnitlal* v. *Baburao* (No. 2.)

[Bom Rents, Hotel Rates and Lodging House Rates (Control) Act (VII [7] of 1944) S. 14—Collector on appeal under S. 14 reversing controller's order and holding that controller ought to have issued certificate—Issuing of certificate by controller follows as necessary conclusion and is matter of administrative detail—Absence of provision in Act under which Collector could direct controller to issue certificate does not affect position.]

Calcutta House Rent Control Order (1943.)

('49) 36 AIR 1949 Cal 576 (578): ILR (1945) 2 Cal 585, *Sarat Chandra* v. *Ushangini Dassi*.

[Calcutta House Rent Control Order (1943) Para 9—Monthly tenancy—Security deposit kept with plaintiff for appropriation towards arrears of rent after vacant possession given on determination of tenancy—Suit for eviction after notice to quit—Before suit plaintiff appropriating portion of deposit towards arrears of rent—Suit held liable to be dismissed.]

('47) 34 AIR 1947 Cal 236 (240): 227 Ind Cas 38, *O. C. Ganguli* v. *Kamalpat Sing*. [Calcutta House Rent Control Order (1943) Para 9A (1) —Permission by Controller—Default in payment of rent—Suit for ejectment on ground that house is required by Landlord for his own use—Suit pending when Para 9A (1) came into operation—Para 9(1) does not apply and permission of Rent Controller under Para 9A (1) is not required—Decree for ejectment can be passed under general Law.] ('46) 33 AIR 1946 Cal 81 (83): ILR (1946) 1 Cal 176: 224 Ind Cas 364 (DB), *Keshab Mitter* v. *Mrs. P. Ghose*. Calcutta House Rent Control Order (1943) Para 9(1) and (4)—Payment of rent must continue up-to-date of decree and merely up to filing of suit — Suit for ejectment find to order—No deposit within three months nor payment of each month before 15th of next month—Deposit in lump sum for one year subsequent to suit held. No compliance with Para 9 (4) and tenant not protected from ejectment.]

('44) 31 AIR 1944 Cal 72 (73): ILR (1944) 1 Cal 690: 211 Ind Cas 445, *Babulall* v. *Hariprosad*. (Calcutta House Rent Control Order (1943) S9(1) Proviso—Proviso does not come into play until S. 9(1) has been invoked by the tenant—Hence in suit to eject tenant application by plaintiff landlord seeking to amend plaint by raising a case under S. 9(1) proviso before the defendant has invoked S. 9(1) is misconceived.]

('45) 49 Cal WN 647 (648), *Radharani* v. *Sarat Kumar*.

[Calcutta House Rent Control Order (1943) Para 9—Period of 3 months' grace allowed under Para 9(4) will not assist a judgment debtor in default at the time of decree for possession.]

('44) 48 Cal WN 711 (711), *Narendra* v. *Jugal Kishore*.

[Calcutta House Rent Control Order (1943)—Paras 9, 9A—Tenant not paying rent as required by Para 9(4)—He is not entitled to benefit of para 9 and 9A.]

Bengal House Rent Control Order (1942.)

('47) 34 AIR 1947 Cal 185: 226 Ind Cas 53, *Tarak Chandra* v. *Asoka Prosanna*. [Case under Bengal House Rent Control Order (1942)]

('46) 33 AIR 1946 Cal 113 (115): ILR (1946) 1 Cal 211: 222 Ind Cas 3 (DB), *Nandalal* v. *Suresh Chandra*.

[Bengal House Rent Control Order (1942) as amended in (1944) Para 10 (1) and (4)—Rent neither enhanced by contract nor settled by Rent Controller after 1st December 1941—To claim protection under Para 10 payment of rent at rate payable before notice to quit is sufficient.]

('43) 30 AIR 1943 Cal 247 (250): ILR (1943) 2 Cal 272: 208 Ind Cas 108 (DB), *Kiran Chandra* v. *Kalidas Chatterji*.
[Bengal House Rent Control Order (1942) Para 12—District Judge in exercising powers under Para 12 does not act as a Court.]

109. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all liabilities of the lessor as to the property or part transferred so long as he is the owner of it ; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him :

Rights of lessor's transferee.

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

Synopsis

1. Analogous law.
2. Scope of the section.
3. "Transfers the propety."
4. "The property leased or any part thereof or any part of the interest therein"
5. "All the rights .... of the lessor as to the property or part transferred."
6. "If the lessee so elects, be subject to all the liabilities."
7. Notice.
8. Rent paid in advance. See Notes on S. 50.
9. Arrears of rent.
10. Apportionment of rent.

TOPIC INDICATOR

Protection of lessee as regards *bona fide* payments. See Note 7.
Rights of the lessor's transferee. See Note 5.
Right of part transferee to eject tenant. See Note 5.
Severance of the reversion. See Note 4.
Transfers by operation of law—Section, whether applies. See Note 2.

Analogous law.—The section may be compared with sections 140, 141, 142 and 151 of the Law of Property Act, 1925 (15 Geo. V, C. 20). Provisions similar to the second paragraph of the section have been enacted in the various local Tenancy Acts.[1]

2. Scope of the section.—The general principle is that rights and liabilities *attached to property* i. e., arising *out of the possession and contral of property* will pass with the property.[1] *Qui in jus dominiumve alterius succedit jure ejus uti debet.*[2] Thus, the transferee of the wreck of a vessel which was sunk by accident in a public navigable river would be under same duty as the transferor himself, to take precautions to prevent injury to other vessels by their striking against it.[3]

On the other hand, the general rule as to rights and liabilities, *not attached to property* but arising out of some *personal relationship* of the transferor, whether contractual or otherwise, with third parties, is that a person can transfer his *rights* but

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Section 109—Note 1

1. See S. 72 of the Bengal Tenancy Act (1885) and S. 270 of the Agra Tenancy Act (III of 1926).

Section 109—Note 2

1. Broom, *A Selection of Legal Maxims*, 10th Edition, 1939, Pages 306, 308.
2. Broom, *A Selection of Legal Maxims*, 10th Edition, 1939, Pages 306, 308.
3. (1854) 156 E R 463 (467) : 10 Ex 312 : 2 C L R 1215 : 23 L J Ex 317 : 2 W R (Eng) 624, *White* v. *Crisp*.

not his *obligations*.[3a] If the obligations are inseparable from the rights he cannot transfer even his rights. "A man cannot assign," said Innes, J., in *Cherukomen* v. *Ismala*,[4] "obligations (i. e., cannot substitute some one else as the performer of his duties) without the consent or authority of those to whom the duties are owing; and whereas, in the present case, rights are co-existent with and inseparable from obligations, so that the assignment of the one cannot be effected without the assignment of the other, there can be no valid transfer of rights without the consent and authority of those interested in the performance of the obligations."

This is the principle on which this section is based. The rights and liabilities referred to arise out of the *contractual relationship* of the transferor with his lessee, and the section provides that the *rights* of the transferor as to the property will pass[4a] but not the *liabilities* unless the lessee elects to hold the transferee liable.

Under the English law, however, transfers of leased property have been regarded as an exception to the principle last mentioned, in that such a transfer passes to the transferee all the rights *and liabilities* of the transferor with reference to the subject matter of the lease.[5]

This section, in terms, does not apply to transfers by operation of law.[6] But the principle underlying it is applicable to such cases.[7]

The section does not, by virtue of the provisions of S. 117, apply to a transfer of property which has been leased out for agricultural purposes. But even in such cases, the principle underlying the section is applicable.[8]

3a. Holland, *Jurisprudence*, 6th Edn., Page 373.

4. ('72-73) 6 Mad H C R 145 (151) (DB), [*See also* ('14) 1 AIR 1914 Low Bur 200 (201) : 7 Low Bur Rul 95 : 22 Ind Cas 940, *Dickman Bros. & Co. Ltd.* v. *Sulaiman Hajee Bros. & Co.* (Benefit of contract is, but burden is not, assignable by one party without consent of the other.)]

4a. ('13) 19 Ind Cas 865 (867) (DB), (Cal), *Peary Lal* v. *Madhoji Jiban*.
('91) 4 CPLR 61 (61), *Narayan Das* v. *Parasram*. (Transferee from lessor gets all the rights of the lessor unless there is some express stipulation contrary thereto.)
('87) 14 Cal 176 (183), *Kristo Nath* v. *T. F. Brown*. (Right of re-entry reserved to lessor can pass to the transferee.)
('23) 10 AIR 1923 Cal 189 (191) : 50 Cal 146 : 71 Ind Cas 327 (DB), *Rajendra* v. *Abu Naseer*.
('26) 13 AIR 1926 Nag 495 (495) : 96 Ind Cas 961, *Narsingdas Laxmi Narayan* v. *Sheikh Hussain*.
('20) 54 Ind Cas 569 (570) (DB) (All), *Kudai Khan* v. *Jagat Narain*. (If a proprietor transfers his proprietary rights to a thekadar, the latter becomes the tenant's landlord and has the power to eject the tenant unless the proprietor has reserved such power to himself.)

5. Holland, *Jurisprudence*, 6th Edn., ps. 273, 274.
See sections 141 and 142 of the Law of Property Act, 1925 (15 Geo. V, C. 20.)
†(1820) 106 E R 706 (707) : 3 B & Ald 392 : 21 R R 516, *Cambell* v. *Lewis*. (Covenant for quiet enjoyment is a covenant running with the land.)
(1906) 75 L J K B 149 (150) : (1906) 1 K B 155 : 94 L T 17 : 54 W R (Eng) 379 : 22 T L R 217, *Williams* v. *Gabriel*. (Do.)
(1815) 128 E R 1020 (1022) : 6 Taunt 224 : 2 Marsh 1 : 16 R R 605, *Collison* v. *Lettsone*. [*See also* (1904) 73 L J K B 97 (100) : (1904) 1 K B 362 : 90 L T 78 : 20 T L R 109, *Stuart* v. *Joy*. (Even after assignment, the covenant running with the reversion remains binding on the lessor.)
(1905) 74 L J Ch 555 (563) : (1905) 2 Ch 257 (279) : 54 W R (Eng) 7 : 93 L T 257 : 21 T L R 581, *Woodall* v. *Clifton*.
(1900) 69 L J Q B 904 (906) : (1900) 2 Q B 609 (614) : 48 W R (Eng) 642 : 83 L T 64, *Cohen* v. *Tannar*.]

6. See Section 2 clause (d).

7. ('43) 30 AIR 1943 Cal 160 (162) : ILR (1942) 2 Cal 546 : 204 Ind Cas 349 (DB), *Pashupati* v. *Durjodhan*: [A person who becomes entitled to the possession of property either by contract or by operation of law, becomes landlord of the tenants of that property and by virtue of his right to leases is entitled to collect rents & profits of that property.]
('26) 13 AIR 1926 Nag 495 (495) : 96 I. C. 961, *Narsingdas Laxmi Narayan* v. *Sheikh Hussain*.
('80) 5 Cal 902 (906) : 6 Cal L R 421 (FB), *Iswar Chunder* v. *Ram Krishna*. (No distinction between cases where a tenure is sold privately and those where it is sold by public auction.)
('83) 12 Cal L Rep 479 (483) (DB), *Raisuddin Chowdhry* v. *Khody Newaz*. (A mortgagee who has foreclosed his mortgage is not entitled to rent from a tenant of the property from the date of the foreclosure, but from the date on which he has perfected his title and the tenant has notice of his having done so.)
†('23) 10 AIR 1923 Nag 91 (92) : 82 Ind Cas 616, *Daulat* v. *Sardar Singh*.

8. ('06) 29 Mad 29 (35, 36) (DB), *Appa Rao* v. *Prattipati Ramayya*.

This section may be compared with S. 37. The latter deals with transfers of all kinds of property and is not limited, as this section is, to transfers of *property which has been leased*. Further, it deals with the performance by a *third person* of obligations relating to the property transferred, on a severance of such property into several shares, and not, as this section does, with the performance *by the transferor or his transferee* of obligations relating to the property.

3. "Transfers the property."—As to what is "transfer of property" the meaning of this Act, see generally Notes on S. 5.

An *agreement* to transfer property is not a "transfer of property" and the contractee has no right to the property until the transfer is actually effected, and cannot claim the benefit of this section.[1]

The section assumes that there has been a *valid* transfer of property.[2]

4. "The property leased or any part thereof or any part of the interest therein."—It is not necessary for the section to apply that the *entire* property leased should have been transferred. The transfer may be of a *part* of such property of a part of the lessor's interest in such property. Thus, the section will apply to a transfer of two acres out of ten acres of leased property, or to a mortgage of the leased property[1] or even to a lease of the reversion.[2]

Illustrations.

(1) A, the owner of property leases the property to B, and thereafter usufructuarily mortgages it to C. A cannot after the mortgage accept any surrender from the lessee or enforce a forfeiture clause against him; for, such right will pass to C.[3]

(2) A, the owner of property, executes a lease thereof to B, and subsequently, before the expiry of such lease, executes another lease of the same property in favour of C. A cannot, after the date of the second lease, give B any notice to quit[4] or recover any rent due after the date of the second lease from B.[5] C will be entitled to those rights.

Section 109—Note 3

1. *See also* (1838) 132 E R 1183 (1185) : 5 Bing N C 477 : 7 Scott 494 : 2 Arn 70 : 8 L J C P 299, *Hartshorne* v. *Watson.*

('09) 4 Ind Cas 471 (472) (DB) (Call), *Jarraw Kumari* v. *Hanifuddin Akanda.* (*Held, Sarbakari* Pattah did not create any interest in the land; therefore its holder was not a transferee.)

2. ('22) 9 AIR 1922 All 45 (46) (DB), *Jitan Tamboli* v. *Namko.*

Section 109—Note 4

1. †('27) 14 AIR 1927 Lah 188 (189) : 100 Ind Cas 672, *Tirkha Ram Chunilal* v. *Maman.*

[*See also* (1843) 12 L J Q B 333 (335) : 1 Dowl & L 213 : 67 R R 853, *Burrowes* v. *Gradin.*]

2. ('19) 6 AIR 1919 Lah 31 (32) : 1 Lah 241 : 53 Ind Cas 865, *Parbhu Ram* v. *Tek Chand.*

3. ('30) 17 AIR 1930 Bom 329 (330) : 125 Ind Cas 689 (DB), *Havu* v. *Ganapati.* (Surrender.)

('36) 23 AIR 1936 Mad 116 (117) : 160 Ind Cas 530, *Vamana Pai* v. *Venkatu Naika.* (Forfeiture.)

†('27) 14 AIR 1927 Bom 145 (148) : 100 Ind Cas 1933 (DB), *Barjorji* v. *Shripatprasadji.* (Mortgagee in possession can determine a lease without consent of the mortgagor.)

Also see S. 111, Notes 8 and 19.

4. ('03) 90 L T 89 (90) : 52 W R (Eng) Dig 84, *Wordsley Brewery Co.* v. *Halford.*

5. †('08) 30 All 369 (371) : 5 All L Jour 423 (DB), *Ram Anant Singh* v. *Shankar Singh.*

(1853) 175 E R 566 (567) : 3 Car & Kir 307, *Harmer* v. *Bean.*

*('22) 9 AIR 1922 Cal 412 (415, 416) : 49 Cas 495 : 67 Ind Cas 108 (DB), *Jahar Lal* v. *Bhupendra Nath.* (Landlord can carve out a new tenancy from his reversion but not so as to prejudice the prior tenancy.)

('04) 8 Cal W N 438 (441), *Rani Kanai* v. *Fakir Chand.* (An intermediary holder between a landlord and tenant—He is a transferee of the landlord so far as the right to collect rent from the tenant is concerned—Per Mitra, J.)

[*See* ('23) 10 AIR 1923 Cal 189 (190, 191) : 50 Cal 146 : 71 Ind Cas 327 (DB), *Rajendra* v. *Abu Nasser.* (Bengal Patni Regulations—Patni over patni cannot be created. 9 Cal W N 756 not approved.)]

[*See also* ('26) 13 AIR 1926 Nag 495 (495) : 96 Ind Cas 961, *Narsingdas Laxmi Narayan* v. *Sheikh Hussain.* (Lessee of transferee landlord is not liable to pay rent if he does not get peaceful possession from the lessee of the transferor landlord.)]

Also see S. 108 (1), Note 10.

[*But see* ('23) 10 AIR 1923 Cal 368 (369) : 76 Ind Cas 252 (DB), *Sangsar Ali* v. *Jagannath Pal.* (Case under Bengal Tenancy

5. "All the rights ..... of the lessor as to the property or part transferred."—The transferee under this section gets *all* the rights of the transferor *as to the property or part transferred.* Thus, where the *entire* property is transferred the transferee can sue to eject the tenant on the basis that the tenancy has terminated[1] or on the basis of a forfeiture for breach of *condition*[2] which, as has been seen in Note 5 on S. 10 is a quality annexed to the estate. He can also continue the suit instituted by the lessor in connection with the property leased.[3]

Where *part* of the property is transferred the transferee gets all the rights of the transferor as to the part trnasferred. So far as the right of *ejectment* is concerned, the lessor himself has no right to sue to eject his tenant from a part of his holding[4] and consequently *this section* would not enable the transferee of a part to eject the tenant from such part. But under the general law, independent of this section, an assignment of a part of a holding effects a severance of the holding and entitles the transferee to eject the tenant from the land covered by the assignment.[5] A right under a *covenant running with the land* is one "as to the property" transferred and will therefore pass to the transferee under this section.[6] A *privity of estate* arises in such cases between the lessee and the lessor's assignee, even though there is no contract between them.[7] A covenant to pay rent[8] or to repair[9] is one running with the land and the assignee is therefore entitled to enforce such right. Where in a lease of certain premises the lessee covenanted, *inter alia,* that *S* should not be concerned in the conduct of the business carried on on the demised premises, and there was a clause for re-entry and determination of the lease on breach of covenant, it was

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Act—It would introduce confusion into the administration of the Act to say that if a holding be leased by the landlord first to one raiyat and then to another, the second raiyat would be entitled to collect the rent payable by the first.)]

Section 109—Note 5

1. ('37) 24 AIR 1937 Mad 91 (91) : 168 Ind Cas 462, *Shanmuga* v. *Kandasami.* (Tenant holding over.)
('19) 6 AIR 1919 Mad 1186 (1187) : 43 Ind Cas 210 (DB), *Manirram* v. *Rathnasami.* ('All the rights' in S. 109 include right to eject previous lessee.)
2. ('18) 5 AIR 1918 Bom 79 (79) : 43 Bom 28 : 47 Ind Cas 198 (DB), *Vishveshvar* v. *Mahableshvar.* (Transferee can enforce forfeiture though breach occurred before transfer.)
3. ('69) 12 Suth W R 122 (123) (DB), *Wilson* v. *Government.*
(1694) 83 E R 743 : 3 Lev 387 : 1 Salk 246, *Smartle* v. *Williams.*
4. ('20) 7 AIR 1920 Mad 838 (840) : 42 Mad 603 : 51 Ind Cas 286 (FB), *Kannyan* v. *Alirutti.* (Sheshagiri Ayyar, J., dissenting.)
5. *('20) 7 AIR 1920 Mad 838 (841) : 42 Mad 603 : 51 Ind Cas 286 (FB), *Kannyan* v. *Alikutti.*
('15) 2 AIR 1915 Mad 813 (814) : 38 Mad 445:20 Ind Cas 930 (DB), *Korapalu* v. *Narayana.*
[But see ('80) 5 Cal 902 (905) : 6 Cal L R 421 (FB), *Iswar Chunder* v. *Ram Krishna.* (Assignment does not necessarily effect severance of tenant.)]
6. ('36) 23 A I R 1936 Bom 88 (91, 94) : 60 Bom 394 : 161 Ind Cas 57 (DB), *Abdul Rehman* v. *Phiroze Cursetji.* (On assigment only rights running with the land pass.)
7. (1587) 76 E R 676 (677, 679) : 3 Co Rep 226 : Moore (KB) 351, *Walker's Case.*
(1857) 156 E R 1430 (1435) : 1 H & N 817 : 26 L J Ex 117 : 28 L T (O S) 231 : 5 W R (Eng) 351 : 108 R R 842, *Martyn* v. *Williams.*
8. ('43) 30 AIR 1943 Cal 160 (162) : ILR (1942) 2 Cal 546 : 204 Ind Cas 349 (DB) *Pashupati* v. *Durjodhan* [Transferee by operation of law.]
†('36) 23 AIR 1936 Bom 88 (91, 94) : 60 Bom 394 : 161 Ind Cas 57 (DB), *Abdul Rehman* v. *Phiroze Cursetji.*
('70) 14 Suth W R 83 (83) (DB), *Gour Singh* v. *Hubeel Hossein.* (Assignment by landlord—His lessee cannot put an end to the obligation to pay rent, if, after becoming aware of the arrangement, he made no objection.)
('94) 1894 Bom P J 76 (DB), *Govind* v. *Vaikunt.* (Payment of rent to assignee discharges lessee.)
(1902) 102 E R 490 (492) : 2 East 575 : 6 R R 511, *Stevenson* v. *Lambard.* (An action of covenant lies against the assignee of a lessee for a part of the rent due after assignment.)
[*See also* ('01) 3 Bom L R 679 (680) (DB), *Ramchandra* v. *Shaikh Hussan.* (Lessor cannot accept *surrender* effected by the lessee with notice of the transfer.)
('30) 17 AIR 1930 All 105 (105) : 124 Ind Cas 32, *Nathu* v. *Ganpat Singh.* (Tenant of exproprietary holding cannot evade payment of rent to assignee of person with whom he enters into an agreement to pay rent.)]
9. (1818) 20 R R 368 (371) : 2 Burn & Ald 105 : 20 R R 368, *Twynam* v. *Pickard.*
9a. (1495) 1 Ch 225 (1945) 2 All E R 271*n* : 61 T L R 314 *Lewin* v. *American & Colonical Distributors Ltd.*

held that the covenant was one running with the land as touching and concerning the thing demised and the assignee of the reversion was entitled to enforce it against the assignee of the lessee.[9a]

A purely *personal* right of the lessor against the lessee under a contract cannot be said to be a right "as to the property" and therefore will not pass to the transferee.[10]

As to covenants running with the land, see Notes on section 40.

6. **"If the lessee so elects, be subject to all the liabilities."**—An assignee of property will under this section, be subject to the liabilities of the transferor as to the property only *if the lessee so elects it*. This is in accordance with the principle referred to in Note 2 that a man cannot assign his obiigations without the consent or authority of those to whom the duties are owing.

But once the lessee does make his election in would be *final*. He cannot thereafter turn round and charge the original lessor in respect of his liabilities.[1]

7. **Notice.**—It is not incumbent either on the transferor or on the transferee to give the lessee notice of the tranfer. The section provides no penalty for want of such notice except the loss of rent which might be paid by the lessee to the original lessor in ignorance of the transfer.[1] But where the lessee knows that his original lessor has transferred his interests to another his paying rent to the original lessor is not valid. It is immaterial from whom the lessee receives such notice. The essential thing is that the transfer is brought to his knowledge.[2]

No attornment is necessary under this Act.[3] In the undermentioned case,[4] decided before the Act, it was held that attornment was necessary.

8. *Rent paid in advance.*—See Notes on Section 50.

9. **Arrears of rent.**—A transferee is not entitled to arrears of rent due *before* the date of the transfer. Under the English law rent in arrears is no part of the reversion but is a mere chose in action and therefore does not pass with the transfer of the reversion.[1] But such may be specifically contracted to be transferred to the assignee and in such a case the latter would be entitled to it, not, however, by virtue of the transfer of the property, but by virtue of the *contract*.[2] In the undermentioned case[3] A transferred to B his property "together with the arrears of past years' due" by the tenants of such property. It was held that the words "arrears of past years' due" did not pass to the purchases *decree* for arrears of rent held by the vendors.

10. **Apportionment of rent.**—The lessor cannot by his transfer increase the burden of the obligations of the lessee under his lease. An apportionment of the rent made by the lessor and his transferee without the consent of the lessee is, according to the English law, not binding on the latter.[1] In the absence of such consent,

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10. See (1802) 102 E R 49 (492) : 2 East 575 : 6 R R 511, *Stevenson* v. *Lambard*. (1887) 57 L T 527 (530) : 36 W R (Eng) Dig 111, *Gower* v. *Post Master General*. (Covenant to pay collateral sum of money —Covenant not running with the land—Assignee not liable to be charged.)

Section 109—Note 6

1. ('34) 21 AIR 1934 Mad 658 (662) : 152 Ind Cas 201, *Iswara* v. *Ramappa*.

Section 109—Note 7

1. †('23) 10 AIR 1923 Lah 389 (389) : 72 Ind Cas 86, *Bhola Nath* v. *Supper*. ('98) 1898 Bom P J 383 (DB), *Antaji* v. *Sakhya*. (The lessee shall not be liable to pay rent over again to the transferee.) (1864) 1864 Suth W R F B 30 (31) (FB), *Attapyee Mowlah* v. *Sukhawut Ally*. (Do.)
2. *('13) 19 Ind Cas 865 (868) (DB) (Cal), *Peary Lal* v. *Madhoji Jiban*. ('03) 7 Cal W N 454 (456) (DB), *Nobin Chandra* v. *Surrendra Nath*. (Case under Bengal Tenancy Act (1885), S. 72.) ('12) 14 Ind Cas 801 (802) (Low Bur), *Subramanian Chetty* v. *Mg. Po Thet*.
3. ('39) 26 AIR 1939 Lah 49 (50) : 182 Ind Cas 533, *Daulat Ram* v. *Haveli Shah*.
4. ('70) 13 Suth W R 228 (229) (DB), *Ram Lall* v. *Chunder Bullee Debea*.

Section 109—Note 9

1. (1841) 151 E R 1086 (1086) : 8 M & W 379 : 10 L J Ex 304 : 9 Dowl P C 770 : 58 R R 744, *Sharp* v. *Key*.
2. ('75) 7 N W P H C R 88 (91) (DB), *Balam Das* v. *Dwarka Das*.
3. ('75) 7 N W P H C R 88 (91) (DB), *Balam Das* v. *Dwarka Das*.

Section 109—Note 10

1. †(1822) 106 E R 1411 (1414) : 5 B & Ald 876 : 1 Dowl & Ry 291 : 24 R R 601, *Bliss* v. *Collins*. (1882) 52 L J Q B 340 (342) : 10 Q B D 48 (51) : 31 W R (Eng) 506 : 47 L T 657, *Swansea Corporation* v. *Thomas*.

it can be done only through Court. This view was followed in this country also before the Act was passed.[2] The last paragraph of the section has given legislative effect to this view.

Where the lessor, the transferee and the lessee have agreed as to the amount of rent payable to the transferee, the lessor or the transferee can sue for the rent payable to him without impleadig the other.[3]

Although there is no express provision in the Act for apportionment of rent payable by the assignee of a portion of the land from the lessee, the principle of apportionment of rent contained in the last paragraph of this section can be applied in such a case.[4]

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110. Where the time limited by a lease of immovable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Exclusion of day on which commences.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Duration of lease for year.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

Option to determine lease.

Synopsis

1a. Oral lease—Applicability of the section.
1. Commencement of lease.
2. "Particular day."
3. Second paragraph.
4. Third paragraph.

1a. Oral lease — Applicability of the section.—In the undermentioned case,[1] Rau, J., of the Calcutta High Court expressed the view that this section applied whether the lease was a written or oral one. But in the same case, Mukherjea, J., expressed a contrary view, viz., that the section only applied to *written* leases. The view expressed by Rau, J., has been approved in a later decision of the same High Court.[2] But where the oral lease is *invalid* as being for a period exceeding one year and a tenancy from month to month is held to arise by implication under S. 106, the invalid oral lease cannot be relied upon for saying that the time limited by the lease was expressed as commencing from a particular day.[3]

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2. ('72) 18 Suth W R 508 (509) (DB), *Tara Monee* v. *Phuchanun.*
('80) 5 Cal 902 (905) : 6 Cal L R 421 (FB), *Iswar Chunder* v. *Ram Krishna.*
3. ('42) 29 AIR 1942 Pat 120 (126) : 196 Ind Cas 837 (DB), *Bhudeb Chandra* v. *Bhikshakar Pattanaik.*
4. ('44) 31 AIR 1944 Pat 129 (133, 134) : 214 Ind Cas 84 (DB), *Madhabilata Debi* v. *Butto Kristo Roy.* (A transferee of a specific portion of a leasehold holding is not liable for the entire rent but only that portion of the rent which could be apportioned to the area in his exclusive possession.)

Section 110—Note 1a

1. ('44) 31 AIR 1944 Cal 84 (85, 87) : 211 Ind Cas 503 (DB), *Calcutta Landing and Shipping Co., Ltd.* v. *Victor Oil Co., Ltd.* (Per Rau, J. :—The word 'expressed' does not necessarily imply expression in writing and therefore, it means 'expressed' either in the registered instrument or in the oral agreement by which the lease is made.)
2. ('46) 33 AIR 1946 Cal 460 (461) : 223 Ind Cas 466 *Kedar Nath* v. *Ramendra Nath.*
('47) 34 AIR 1947 Cal 351 (352) *Ram Mohan* v. *Lalit Chandra*

1. Commencement of lease.—The first paragraph of the section deals with the date of commencement of a lease. The word "from" as a general rule excludes the day from which the time is to be reckoned except where the context requires a contrary rule to be adopted.[1] This general rule is applicable whenever time is to be computed from a day specified, whether such time is fixed for the performance of a contract or is prescribed by law for the doing of an act or for the institution of proceedings in a Court of law. This principle is found embodied in S. 9 of the General Clauses Act, 1897, and S. 12 of the Limitation Act, 1908. Section 9, sub-s. (1) of the General Clauses Act runs as follows :

> "In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from," and, for the purpose of including the last in a series of days or any other period of time, to use the word 'to'."

And section 12, sub-s. (1) of the Limitation Act runs as follows :

> "In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded."

The first sentence of the first paragraph of this section is an application of the said general principle to contracts of lease. It contemplates that a time or period should be limited by the lease[1b] and the period must be expressed to commence "from" a particular date. When both these conditions are satisfied the rule of interpretation laid down in the paragraph applies[1a] and in computing the period that day is to be excluded.[2] Where a lease of certain premises dated 29th June 1921 was expressed to be "from 1st June 1921 for the term of four years" it was accordingly held by their Lordships of the Privy Council that the 1st June should be excluded in computing the period of four years.[3] Where a lease deed-demised certain premises "for the term of five years *computed* from the first day of December 1924," it was held that the word "computed" must be regarded as having the same meaning as the word "beginning" and that the lease must be regarded, for the purposes of the first paragraph of the section, as a lease expressed to begin "from" a certain day.[4] A lease expressed to be "from henceforth" is a lease from the day of its execution.[5]

Where no day of commencement is *named* in the lease, the section provides that the time limited begins from the making of the lease[5a] and this principal has been

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Section 110—Note 1

1. Wharton, *Law Lexicon,* 14th Edn., 1938 *sub voce* 'from.'

[*See also* ('44) 31 AIR 1944 Cal 84 (86) : 211 Ind Cas 503 (DB), *Calcutta Landing and Shipping Co., Ltd.* v. *Victor Oil Co., Ltd.* (Per Rau, J. :—(*Obiter*) The rule laid down in this section is not inflexible, and the section must be read as qualified by some such phrase as "unless the context otherwise requires.")]

1a. †('44) 31 AIR 1944 Cal 84 (88) : 211 Ind Cas 503 (DB), *Calcutta Landing and Shipping Co., Ltd.* v. *Victor Oil Co., Ltd.* (Per Mukherjea, J.)

('43) 30 AIR 1943 Bom 306 (310, 311) : ILR (1943) Bom 553 : 213 Ind Cas 48 (DB), *Utility Articles Manufacturing Co.,* v. *Motilal Bombay Mills, Ltd.*

('46) 33 AIR 1946 Cal 460 (461) : 223 Ind Cas 466 *Kedar Nath* v. *Ramendra Nath.*

('46) 50 Cal W N 461 (463) *Usharani Debi* v. *Research Industries Ltd.* [Section does not apply to monthly tenancy.]

('47) 34 AIR 1947 Cal 351 (352) *Ram Mohan* v. *Lalit Chandra.* [Tenancy from month to month....Neither para 1 nor para 2 of this section applies.]

See also cases under F. N. (9)

2. ('44) 31 AIR 1944 Cal 84 (88) : 211 Ind Cas 503 (DB), *Calcutta Landing and Shipping Co., Ltd.* v. *Victor Oil Co., Ltd.*

('37) 24 AIR 1937 Nag 139 (140) : I L R (1937) Nag 214 : 170 Ind Cas 790, *Sheikh Nuroo* v. *Meghraj Ramkaran.*

('34) 21 AIR 1934 Cal 837 (837) : 153 Ind Cas 673, *Susil Chunder* v. *Birendrajit Shah.* (AIR 1932 P C 279 : 60 Cal 380 : 59 Ind App 414 (PC followed.)

3. *('32) 19 AIR 1932 P C 279 (280) : 60 Cal 380 : 59 Ind App 414 : 141 Ind Cas 514 (PC), *Benoy Krishna Das* v. *Salsiccioni.*

4. ('38) 42 Cal W N 1115 (1119), *Charu Chandra* v. *Bankim Chandra.*

5. (1610) 79 E R 222 (222) : Cro Jac 258, *Llewellny* v. *Williams.*

5a. ('49) 36 AIR 1949 Ajmer. 38 (39) *Sunder Singh* v. *Arjun Singh.* [Where no day of commencement is specified in the lease, the day on which the lease is made cannot be excluded.]

applied even to agricultural leases[6] to which the section in terms does not apply. It has been held in the undermentioned cases[7] that even in cases where no day for commencement of the lease is *named,* it may commence on another day, if the intention of the parties *implied* from the circumstances, is to make the lease commence on that day. This view does not give full effect to the words "expressed" and "named" used in the section and, it is submitted, is not correct. Thus, where a tenancy from month to month arises by implication under S. 106 and there is no express contract of tenancy, the date on which the tenant entered into possession cannot be treated as the date from which the lease is "expressed" to commence.[7a]

Where there is no evidence as to when the lease was granted and when it was intended to commence, the presumption will be that the tenancy expires on the last day of each month.[8]

It has been held that this paragraph is not applicable to a periodical tenancy such as a tenancy from year to year or from month to month as under such a tenancy time is limited by the notice to quit and not by the lease.[9]

2. **"Particular day."**—The particular day from which a lease commences to run may be prior to, the same as, or subsequent to, the day on which the lease is effected. In the Privy Council decision of *Benoy Krishna Das* v. *Salsiccioni*[1] the lease deed of certain premises dated 29th June 1921 provided that lease was to be "from *1st June 1921* for the term of four years." In the undermentioned cases[2] the lease was expressed to commence some time after the date of the lease deed.

Where a lease deed was executed on a particular date providing for the commencement of the lease from a prior date, it was held in *Shaw* v. *Kay*[3] that the tenant is not liable for acts done after the commencement of the term but before the time of the execution of the lease deed inasmuch as the *habendum* of lease merely expressed the duration of the tenant's interest, the operation as a grant being merely prospective.

[See also ('44) 31 AIR 1944 Mad 518 (524) : ILR (1945) Mad 355 (DB), *Raja of Vizianagaram* v. *Maharaja of Jaypore.* (Where the parties to an agreement to grant a lease intend that the lease is to run from the date of its execution, such agreement is a concluded one even in the absence of an express stipulation for the date of the commencement of the lease—Such agreement can be specifically enforced as not being void for uncertainly as the provisions of S. 110 can be applied to such argeement. AIR 1919 Cal 837 relied on.)]

6. ('48) 35 AIR 1948 Pat 446 (447) (DB), *Jangal Singh* v. *Mukund Kumar.* [*Agricultural lease—Time of commencement of lease not specified—Lease becomes operative on day it was made—Falsify of recital of receipt of premium in lease deed, cannot lead to inference that commencement was postponed.*]

('19) 6 AIR 1919 Cal 837 (838) : 50 Ind Cas 177 (DB), *Kailas Chandra* v. *Bijoy Kanta.* (Agricultural lease.)

('28) 15 AIR 1928 Cal 392 (396) : 55 Cal 435 : 110 Ind Cas 368 (DB), *Dinanath Kundu* v. *Janki Nath.* (Do.)

7. ('07) 30 Mad 109 (112) : 16 Mad L Jour 533 (DB), *Arunachella Chettiar* v. *Remiah Naidu.*

('38) 25 AIR 1938 Cal 358 (359) : ILR (1938) 2 Cal 134 : 177 Ind Cas 880, *Deb Das Lala* v. *Abdul Gani.*

7a. ('47) 34 AIR 1947 Cal 351 (352) *Ram Mohan* v. *Lalit Chandra.*

('44) 31 AIR 1944 Cal 84 (85, 87) : 211 Ind Cas 503 (DB), *Calcutta Landing and Shipping Co., Ltd.* v. *Victor Oil Co., Ltd.*

8. ('08) 8 Cal L Jour 34 (37), *Rakhal Chandra* v. *Secy. of State.*

('36) 23 AIR 1936 Oudh 306 (307) : 12 Luck 241 : 162 I.C. 712 (DB), *Ramji Lal* v. *Secy. of State.*

9. ('46) 50 Cal W N 461 (463) *Usharani Debi* v. *Research Industries Ltd.* [S. 110 does not apply to monthly tenancy as in such a case it cannot be said that time is limited.]

('43) 30 AIR 1943 Bom 306 (310) : ILR (1943) Bom 553 : 213 Ind Cas 48 (DB), *Utility Articles Manufacturing Co.* v. *Motilal Bombay Mills, Ltd.* (Per Kania, J.:— The words 'time limited' are important and clearly indicate that every lease which is included under S. 105 is not necessarily covered by S. 110.)

('45) 32 AIR 1945 Pat 385 (385) : 24 Pat 449 (DB), *Firm Ganesh Das* v. *Jamuna Das.* [Tenancy from month to month—It is letting for a time determinable by notice to quit—Notice expiring with last day of month is valid.]

Section 110—Note 2

1. ('32) 19 AIR 1932 P C 279 (280) : 60 Cal 380 : 59 Ind App 414 : 141 Ind Cas 514 (PC).

2. (1863) 1 Mad H C R 153 (157) (DB), *Pitchakutti Chetti* v. *Kamala Nayakkan.*

('13) 18 Ind Cas 496 (497) (DB) (Lah), *Mihan Khan* v. *Muhammad Bakhsh.*

3. (1847) 154 E R 175 (176) : 17 L J Ex 17 : 1 Ex 412.

3. **Second paragraph.**—In order that this part of the section may be applicable, two conditions must be fulfilled. The time limited by the lease must be a year, or a number of years, and there must be no *express* agreement to the contrary.[1] Where there is an express agreement to the contrary the terms of the agreement prevail.[2] Where a lease was expressed to be for four years commencing from the first days of June 1921 but the rent for each month was payable before the 7th of the next month, it was held by their Lordships of the Privy Council that this was not "an express agreement to the contrary" as contemplated in this section; and that, therefore, the lease lasted up to the midnight of the 1st day of June 1925.[3] See also the undermentioned cases.[4]

The second paragraph is merely a consequence of the first paragraph, and as was pointed out by Ameer Ali, J., in the undermentioned case,[5] is somewhat redundant. He said:

> "The effect of it, in my opinion, is merely to attempt to render certain what in England would have been a subject-matter of some doubt, and to lay down the artificial rule of construction that where a lease or any document is said to commence from a certain date, it means from the end of that date, and will have another day added on at the end. In other words, the end of the 1st December (as in this case) 1924 to the end of 1st December 1929."

Where the time limited is a *month* or week or a number of *months* or weeks the same principle, it is conceived, will apply, though the second paragraph refers only to leases for a *year* or a number of *years*. Where a tenancy for four weeks began "from Monday, the 8th March 1920," it was held in the undermentioned case[6] that the lease was up to the midnight of the fourth Monday from the 8th March 1920.

4. **Third paragraph.**—The rule in this paragraph is based on the general principal that a lease is to be interpreted, as far as possible in favour of a lessee rather than in favour of a lessor. Thus, where a house was leased "for 7, 14, or 21 years" it was held that it was the lessee who could choose the term of the tenancy from the three periods mentioned.[1]

Where a lease mentions the person who should exercise the option, the terms of the lease, of course, will prevail.[2] Where a lease was made for "21 years, determinable, nevertheless, at the expiration of seven or fourteen years, if the said *parties* thereto shall so think fit," it was held that the lease would terminate before 21 years only if *both* the parties consented to its termination before that date.[3]

Section 110—Note 3

1. ('47) 34 AIR 1947 Cal 351 (352), *Ram Mohan* v. *Lalit Chandra*. [Tenancy from month to month arising under S. 106—S. 11c para 2 does not apply as the time limited by the lease is not one year or more.]
('32) 19 AIR 1932 P C 279 (280) : 60 Cal 380 : 59 Ind App 414 : 141 Ind Cas 514 (PC), *Benoy Krishna Das* v. *Salsiccioni*.
2. ('47) 34 AIR 1947 Cal 68 (70) : ILR (1946) 2 Cal 599 : 226 Ind Cas 426 (DB) *Ganeshi Lal* v. *Snehalata Dassi*. [Lease for years, commencing on 1-6-1939—Stipulation in document that lease would end with May, 1943—Stipulation held constituted express agreement to contrary within para (2).]
('38) 25 AIR 1938 Cal 358 (359) : ILR (1938) 2 Cal 134 : 177 I. C. 880, *Debdas Lala* v. *Abdul Gani*.
3. ('32) 19 AIR 1932 P C 279 (280) : 60 Cal 380 : 59 Ind App 414 : 141 Ind Cas 514 (PC), *Benoy Krishna Das* v. *Salsiccioni*.
4. ('40) 27 AIR 1940 All 444 (445) : 191 Ind Cas 223, *Rahmat Ullah* v. *Md. Husain*. (Time limited by lease being number of years—Lease must be deemed to last during whole anniversary of day from which time commences.)
(1839) 48 R R 729 (740) : 8 L J (N S) Q B 164 : 112 E R 1446, *Ackland* v. *Lutley*. (The general understanding is that terms for years last during the whole anniversary of the day from which they are granted.)
5. ('38) 42 Cal W N 1115 (1118), *Charu Chandra* v. *Bankim Chandra*.
6. (1922) 38 T L R 619 (619), *Savary* v. *Bayley*.

Section 110—Note 4

1. (1803) 3 B & P 399 (404) : 7 R R 797 (802), *Dann* v. *Spurrier*.
(1807) 9 East 15 (16) : 9 R R 501 (502), *Doe d. Webb* v. *Dixon*.
(1872) 41 L J Ch 734 (735, 736) : L R 14 Eq 85 : 20 W R (Eng) 602, *Powell* v. *Smith*.
2. (1802) 8 Ves 34 (35) : 149 R R 666 (667), *Russell* v. *Coggins*. (Lease to terminate when lessor wanted premises for building.)
3. (1864) 3 H & C 458 (461) : 11 L T

Where the option is exercisable only on certain conditions, such conditions must be strictly fulfilled before the option is exercised.[4]

This paragraph is applicable also to cases where the period of a lease is limited conditionally on the happening of an event of where the lease is granted for a definite purpose, (eg) the holding of an exhibition.[5]

Determination of lease. **111.** A lease of immovable property determines—

(*a*) by efflux of the time limited thereby :

(*b*) where such time is limited conditionally on the harppening of some event—by the happening of such event :

(*c*) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event :

(*d*) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right :

(*e*) by express surrender ; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them :

(*f*) by implied surrender :

(*g*) by forfeiture ; that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter [a](***) : or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself ;[b] [or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event] ; and in[c] [any of these cases] the lessor or his transferee [d][gives notice in writing to the lessee of] his intention to determine the lease :

(*h*) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

(NS) 317 : 13 W R (Eng) 145 : 34 L J Ex 6 : 159 E R 610 : 140 R R 555, *Fowel* v. *Tranter*.

4. (1915) 84 L J K B 154 (157) : 1915 App Cas 428 : 112 L T 89, *Inland Revenue Commissioners* v. *Southend-on-Sea Estate Co., Ltd.* (Option to put an end to lease if landlord required land for building purposes—There must be intention to build before option can be exercised.)

(1917) 33 T L R 108 (109) : (1917) 1 K B 332 : 86 L J K B 319 : 115 L T 920, *Kirklinton* v. *Wood*.

(1917) 86 L J Ch 402 : (402) : (1917) 1 Ch 606 : 117 L T 8, *Burch* v. *Farrow's Bank Ltd.* (Option exercisable on performance of all covenants in the lease and the payment of rent.)

('47) 1947 All W R (H. C.) 284 (286), *Krishna Arpan Fund* v. *District Board meerut*. [In such a case, if there is an express Condition that the lessor must not eject the lessee so long as the lessee pays rent and the land is required for the propose for which it was leased but that the lessee can leave whenever he thinks fit the lessor cannot claim to terminate the lease at his option at any time, on the ground of the doctrine of mutuality.]

Illustration to clause (f).

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

a. The words "or the lease shall become void" were *omitted* by Section 57 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).
b. These words were *inserted, ibid.*
c. These words were *substituted* for the words "either case," *ibid.*
d. These words were *substituted* for the words "does some act showing," *ibid.*

Synopsis

1. Scope of the section.
2. Clause (a) — Determination by efflux of time.
3. Renewal of lease.
4. Clause (b) — Term limited conditionally.
5. Clause (c) — Cesser of lessor's interest.
6. Death of lessor and lessee.
7. Clause (d) — Merger.
8. Surrender — General.
9. Express surrender—Clause (e).
10. Clause (f)—Implied surrender.
11. Clause (g) — Forfeiture — General.
12. Forfeiture—Permanent lease.
13. Forfeiture for breach of condition.
14. Forfeiture for denial of title.
15. Forfeiture on insolvency of lessee.
16. Notice of intention to determine lease on forfeiture.
17. Tenant cannot deny his landlord's title—Estoppel.
18. Re entry on forfeiture under clause (g) need not be enforced by suit.
19. Who can enforce forfeiture.
20. Waiver or forfeiture. See Notes on Section 112.
21. Relief against forfeiture. See Notes on Sections 114 and 114A.
22. Forfeiture of service tenures.
23. Notice to quit or determine the lease—Clause (h).
23a. Lease and Rent Control legislation.
24. Tenancy at will.
25. Leases not governed by the Act.
26. Joint lessors—Termination of lease.
27. Possession after determination of tenancy.

TOPIC INDICATOR

Agricultural leases. See Note 1.
Contingent term. See Note 4.
Covenant for renewal—Construction. See Note 3.
Disclaimer—What amounts to. See Note 14.
Claim to permanent tenancy whether disclaimer. See Note 14.
Disclaimer must be before suit for ejectment. See Note 14.
Leases before the Act—Merger. See Note 7.
Merger of interests of lessor and lessee in the same right. See Note 7.
The whole of the property. See Note 7.
Surrender by operation of law. See Note 10.
Acceptance of new lease. See Note 10.
Relinquishment of possession. See Note 10.
Surrender does not affect derivative interests. See Note 8 and S. 115, Note 1.

1. Scope of the section.—Section 110 deals with the *commencement* and *duration* of a lease. This section deals with the *determination* of leases. It applies only to leases created by act of parties and does not apply, for instance, to a lease created by *devise*.[1] Nor does it apply in terms to agricultural leases which are exempted from its operation by S. 117,[2] or to leases executed before the Act was passed,[3] or to leases executed in Provinces to which the Act is not extended.[4] In such cases, the principles on which the section is based have generally been applied as being in consonance with justice, equity and good conscience.

So long as a tenancy is not determined in one of the ways known to law, a tenant cannot be ejected as a trespasser[5] and a suit on title does not lie against him.[6]

Section 111—Note 1

1. ('24) 11 AIR 1924 Oudh 305 (305, 306) : 27 Oudh Cas 1 : 79 Ind Cas 695, *Shankardayal* v. *Binayak Prasad.*
2. ('37) 24 AIR 1937 Cal 669 (669) : ILR (1937) 1 Cal 679 : 173 Ind Cas 590 (DB), *Sasi Kumar* v. *Golap Banu.* (Lease held governed entirely by the provisions of Bengal Tenancy Act.)
See also Note 25.
3. ('38) 25 AIR 1938 Cal 128 (129) (DB), *Chandra Singh* v. *Sarat Chandra.*
4. See Note 25.
5. ('82) 6 Bom 70 (72) (DB), *Pandurang Sakharam* v. *Yedneswar Sitaram.*
†('28) 112 I. C. 257 (258) (DB) (Mad), *Kadiyam Rayudu* v. *Kamarsu Veeraraju.*
('25) 12 AIR 1925 Mad 881 ,882, 883) : 87 Ind Cas 669 (DB), *Gopi Nath Choudhari* v. *Kristno Chowdhari.* (In the case of an anomalous mortgage of agricultural land, where the mortgagee who was entitled to remain in possession only during the mortgage term, continues to be in possession

The determination of a lease determines also, with one exception, all interests derived from the lessee.[7] The exception is a determination by *surrender*. A surrender does not, as will be seen in Note 8, affect the rights of a third person who has derived them from the lessee. So far as such person is concerned, the lease is regarded in law as continuing for his benefit.

A lease for term is not determined merely by the lessor unlawfully entering on the leased property before the expiry of the term. Such entry may give the lessee other remedies. (See S. 108, cl. (c), Note 8) ; but will not *put an end* to the lease.[8]

2. **Clause (a)—Determination by efflux of time.**—The question of the determination of a tenancy by efflux of time will arise only in those cases where the lease is for a fixed period.[1a] No such question can arise, for instance, in the case of a *perpetual* lease ; nor can it arise in a lease from year to year, for, as has been seen in the notes on S. 107, such a tenancy does not terminate at the end of each year, though it is terminable by a notice to quit at the end of any year.[1]

A lease for a term of years *prima facie* implies that the lessee's right to the property demised ends with the term.[2] It does not *prima facie* import any right of

after its expiry, he becomes an yearly tenant by implied tenancy and then cannot be ejected without proper notice to quit.)

†('19) 6 AIR 1919 Mad 1135 (1136) : 43 Ind Cas 977 (DB), *Chandrasekharaswami* v. *Nainar Ammal.*

('26) 13 AIR 1926 Nag 253 (255) : 92 Ind Cas 58, *Vithoba* v. *Sadasheo.* (The mere ejectment of a tenant does not necessarily determine the tenancy, unless there is evidence of acquiescence on his part.)

('76) 25 Suth W R 319 (319) (DB), *Haradhun Mudduck* v. *Dinobundhoo Mojoomdar.*

†('76) 25 Suth W R 56 (56) (DB), *Narain Mundul* v. *Bookto Mahato.*

('82) 11 Cal L R 387 (388) (DB), *Chundr Kumar Guha* v. *Mongul Mollah.*

('24) 11 AIR 1924 Mad 907 (908) : 82 Ind Cas 623 (DB), *B. Subbarayudu* v. *Narasimha Rao.*

6. ('03) 13 Mad L Jour 475 (476) (DB), *Nagasamy Aiyar* v. *Perumal Aiyar.*

7. ('26) 13 AIR 1926 Nag 62 (63) : 89 Ind Cas 672, *Govindrao* v. *Sarjabai.* (Sub-lease, though granted with landlord's consent does not survive after determination of tenancy.)

('27) 14 AIR 1927 Oudh 339 (340) : 2 Luck 612 : 104 Ind Cas 193, *Jodha* v. *Darbari Lal.* (The tenancy of a sub-tenant comes to an end on the death of the principal tenant and it is not necessary for the landlord to issue a notice of ejectment against the sub-tenant.)

('32) 19 AIR 1932 Nag 107 (109) : 28 Nag L R 93 : 139 Ind Cas 369, *Baldeoprasad* v. *Premnarain.*

†('17) 4 AIR 1917 Cal 236 (241) : 34 Ind Cas 833 (DB), *Dwarka Nath* v. *Mathura Nath.* (Underlease determines on forfeiture of lease.)

('24) 11 AIR 1924 Mad 776 (777) : 84 Ind Cas 625 (DB), *Gopala Kuduva* v. *Hamza Sahib.*

('66) 6 Suth W R Act X Rul 88 (88) (DB). *Bomeezoonissa Saheba* v. *Mr. N. Joachim.* (Underlease determines on forfeiture of lease by lessee's default.)

Also see S. 106 Note 29 and S. 115 Note 1.

[See however ('25) 12 A I R 1925 All 580 (582, 583) : 47 All 589:88 Ind Cas 224 (DB), *Bahadur v. Motichand.* (Mortgage by tenant who is expressly authorised by lease to mortgage—Ejectment of lessee does not extinguish mortgage unless mortgagee has had opportunity to prevent that extinction —Rule applies to agricultural leases—Case under Agra Tenancy Act.)]

8. ('27) 14 AIR 1927 Lah 1 (4) : 7 Lah 423 : 98 Ind Cas 584 (DB), *Obedur Rahman* v. *Durbari Lal.*

Section 111—Note 2

('43) 45 Pun L R 454 (456) (DB), *Bhagat Ram* v. *Amar Nath.* [It cannot be said that a lease for less than one year is a lease for a definite period, when no period is specified. Such a lease is not determined by efflux of time.]

1. ('70) 13 Suth W R 190 (190) (DB), *Maloddee Noshyo* v. *Bullubee Kant Dhur.*

†('02) 12 Mad L Jour 194 (196) (DB), *Muthusami Pillai* v. *Srinivasier.*

('17) 4 AIR 1917 Nag 21 (22) : 14 Nag L R 3 : 43 Ind Cas 392, *Sheomangal* v. *Seth Nanhelal.*

('26) 13 AIR 1926 Nag 201 (202) : 90 Ind Cas 43, *Balkrishna* v. *Raghunath.*

Also see S. 106, Note 16 and S. 107, Note 4.

2. ('44) 31 AIR 1944 Lah 1 (6) : 211 Ind Cas 145 (DB), *Suraj Bhan* v, *Hafiz Abdul.* [A lease for a fixed term expires on the expiration of the term and the landlord is automatically entitled to eject the tenants. There is no necessity for inserting a provision to that effect in the lease deed itself.]

†('15) 2 AIR 1913 P C 59 (66) : 39 Bom 625 : 42 Ind App 229 : 30 Ind Cas 303 (PC), *Secretary of State for India* v. *Bai Rajbai.*

('09) 31 All 318 (322) : 1 Ind Cas 208 (209) (DB), *Khunni Lal* v. *Madan Mohan Lal.*

('73) 1873 Pun Re No. 27, page 45 (46), *Mohomed Bux* v. *Ouliya.*

†('33) 20 AIR 1933 Lah 61 (64) : 14 Lah 137 : 142 Ind Cas 754 (DB), *Sunder Singh* v. *Ram Saran Das.*

renewal.[3] No further act either by the lessee such as a notice to quit[4] is necessary to determine the lease.

Where, however, such a lease provides expressly that after the expiry of the term the tenancy is terminable by a notice, the lease is not determined until such notice, as has been agreed upon, is given.[5]

3. Renewal of lease.—A covenant for renewal in a lease will, as a general rule, be construed as a covenant for a *single* renewal and as a *perpetual* renewal.[1] The reason is that the leaning of the Courts is against perpetual renewals and, therefore, in order to establish this construction the intention should be unequivocally expressed in the lease deed.[2] Where, however, there are clear expressions indicative of such an intention, Courts would give effect to it. Thus, where a covenant for renewal states that the renewal was to be on the same covenants, "including this covenant" the covenant will be held to be one for perpetual renewal.[3]

Where a lessee has an option to ask for a renewal but does not ask for it before the expiry of the term and merely continues in possession he becomes merely a tenant from year to year after the termination of the original tenancy.[4] But the

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3. ('15) 2 AIR 1915 P C 59 (66) : 39 Bom 625 : 42 Ind App 229 : 30 Ind Cas 303 (PC), *Secretary of State for India* v. *Bai Raj Bai.*
4. ('12) 13 Ind Cas 59 (60) (All), *Gokul Chand* v. *Shib Charan.*
†('31) 18 AIR 1931 All 649 (650) : 136 Ind Cas 273 (DB), *Bishen Sarup* v. *Abdul Samad.*
('30) 17 AIR 1930 Lah 386 (388) : 120 Ind Cas 166 (DB), *Asa Ram* v. *Kishan Chand.*
*('40) 27 AIR 1940 Lah 410 (412) : 191 Ind Cas 289 (DB), *Banwari Lal* v. *Mt. Hussaini.*
('10) 7 Ind Cas 8 (9) (DB) (Mad), *Nandikolla Gopalan* v. *Manyam Mahalakshmi.*
('26) 13 AIR 1926 Nag 201 (202) : 90 Ind Cas 43, *Balkrishna* v. *Raghunath.* (No notice necessary in case of lease for one year only.)
†('32) 19 AIR 1932 All 314 (315) : 139 Ind Cas 828 (DB), *Md. Fazihzaman* v. *Anwar Hussain.* (In case of lease for a fixed period notice must be presumed by implication as given when it was executed.)
('33) 20 AIR 1933 All 756 (758) : 146 Ind Cas 762 (DB), *Kundan Lal* v. *Deepchand.*
('75) 23 Suth W R 312 (313) (DB), *Shaikh Golam Mehdee* v. *Amjad Ali.*

Also see Section 106, Note 3.

5. ('14) 1 AIR 1914 Mad 301 (303) : 23 Ind Cas 572, *Ramasami Naidu* v. *Venkataramanjulu Naidu.*

Section 111—Note 3

1. ('39) 26 AIR 1939 Cal 77 (78) : 179 Ind Cas 813, *Srish Chandra* v. *Doa Muhammad.*
('83) 7 Bom 109 (115), *In re Purmanandas Jeewandas.*
*('12) 17 Ind Cas 180 (183) (DB) (Cal), *Secretary of State* v. *Forbes.* (No legal presumption against a right of perpetual renewal—Burden of strict proof on person claiming such a right.)
('26) 13 AIR 1926 Cal 1065 (1067) : 53 Cal 590 : 95 Ind Cas 831 (DB), *Jogeshchandra Roy* v. *Anand Charan.* (Lease—Clause for renewal—No right of renewal can be claimed for the renewed lease.)
†('37) 24 AIR 1937 All 328 (331) : 169 Ind Cas 145 (DB), *Sewak Ram* v. *Municipal Board, Meerut.*
(1898) 67 L J Q B 296 (300) : 78 L T 165, *Lewis* v. *Stephenson.*
2. (39) 26 AIR 1939 Cal 77 (78) : 179 Ind Cas 813, *Srish Chandra* v. *Doa Muhammad.* (Lease for 3 years—Right given to take new settlement, at end of period, of lands covered by lease as well as any excess lands which would come into his possession—*Held*, parties intended one renewal and not a perpetual renewal.)
('37) 24 AIR 1937 All 328 (331) : 169 Ind Cas 145 (DB), *Sewak Ram* v. *Municipal, Board, Meerut.*
(1796) 30 E R 1019 (1020) : 3 Ves 295 : 3 R R 96, *Baynham* v. *Guys Hospital.*
(1884) 54 L J Q B 6 (9) : 9 App Cas 844 : 52 L T 222 : 23 W R (Eng) 325, *Swinburne* v. *Miburn.* (A covenant for perpetual renewal will not be inferred from equivocal expressions—But there is no *legal* presumption against a right of perpetual renewal.)
3. (1857) 70 E R 19 (23) : 4 K & J 45 : 3 Jur 1294 : 116 R R 255 : 6 W R (Eng) 144 : 27 L J Ch 86, *Hare* v. *Burgess.*
(1914) 84 L J Ch 203 (208) : (1914) 2 Ch 705 : 78 J P 380 : 59 S J 43 : 30 T L R 666, *Wynn* v. *Conway Corporation.*
(1944) 1 Ch 328 (1944) 1 All E R 670 : 113 L J C H 223, *Green* v. *Palmer.* [By an agreement in writing the owner of a furnished house let it to a tenant at a weekly rent for six months certain with an option to the tenant to continue the tenancy at the expiration of the term on the same terms & conditions "including this clause" on giving notice in writing. The tenant twice renewed the tenancy & then held over, claiming a right of perpetual renewal :—*Held* : under the agreement the tenant was entitled, on exercising the option contained in the original tenancy agreement, to a tenancy for six months with a right to renew for one further period of six months & no more.]
4. ('44) 31 AIR 1944 Bom 210 (213), *Bhikaji Vishnu* v. *Ramchandra Krishna.*
('20) 7 AIR 1920 Bom 215 (215) : 55 Ind Cas 610 (DB), *Manilal* v. *Nandlal.*

right to exercise the option and ask for a renewal does not necessarily cease with the expiry of the term. If the covenant itself requires the lessee to exercise his option *before the expiry of the term* he will lose his right if he does not exercise it within time.[5] But if there is no such restriction, he can, as long as he continues as a tenant (though as one from year to year) exercise his option and call upon the lessor to renew it. Thus, where a lease is for 3 years with an agreement to grant a further lease for 5, 7, 14 or 21 years, the lessee will be entitled, even after the expiry of the 3 years and while continuing in possession as a tenant from year to year, to call upon the lessor to renew the lease for 5, 7, 14 or 21 years.[6] But the lessor may, at any time, call upon the lessee to exercise his option and may, in default, determine the lease.[7]

A covenant for renewal which the lessee can claim only on the performance of certain conditions precedent, such as regular payment of rent, cannot be enforced by the lessee unless such conditions are performed.[8]

Where the option for renewal does not state the terms of the renewal, the general rule is that the new lease would be for the same period and on the same terms as the original lease in respect of all essential conditions except as to the covenant for renewal itself.[9]

But a covenant in a lease relating to renewal, according to which the renewal which might be made was entirely subject to the pleasure of the lessor, has been held not in essence a covenant for renewal with the lessee. That being so, in such

5. †('18) 5 AIR 1918 Cal 59 (61) : 51 Ind Cas 690 (DB), *Ram Lal* v. *Secretary of State.* (Lessee required to give notice of intention to take renewal before expiry of term—Absence of notice in time—Lessee loses his rights.)
('29) 16 AIR 1929 Cal 407 (407) : 119 Ind Cas 144 (DB), *Banshidhar Durga Das* v. *Ishan Chandra.* (Where lessee does not exercise his option of renewal when term expires or within reasonable time, lease terminates.)
6. †('05) 27 All 696 (699) : 1905 All W N 154, *Jaggilal* v. *Cooper.* (Nothing in the lease to indicate that notice of intention to renew was to be given before its expiration —*Held* that the time was not the essence of the contract—Lessee entitled to ask for renewal within reasonable time after expiration.)
(1866) 55 E R 870 (872) : 35 Beav 197 : L R I E Q 474 : 13 L T (N S) 623 : 147 R R 110, *Moss* v. *Barton.*
(1866) 36 L J Ch 81 (83) : L R 2 Ch 67 : 15 W R (Eng) 92 : 15 L T (N S) 378 : 147 R R 159, *Buckland* v. *Papillor.*
[*See also* ('38) 25 AIR 1938 Cal 724 (726) (DB), *Prodyot Coomar Tagore* v. *Maynuddin Mia.* (Where the execution of a fresh *kabuliat* by the tenant is dependent upon a fresh assessment, it is for the landlord to make a fresh assessment and then call upon the tenant to exercise his option. *Moss* v. *Barton,* (1866) 55 E R 870 followed.)]
7. ('38) 25 AIR 1938 Cal 724 (726) (DB), *Prodyot Commar Tagore* v. *Maynuddin Mia.*
(1854) 52 E R 69 (70) : 18 Beav 174 : 23 L J Ch 818 : 104 R R 419 : 2 W R (Eng) 206, *Hersey* v. *Giblell.*
8. †(1910) 26 T L R 375 (376) : 1910 A C 335 : 79 L G P C 86 : 102 L T 380, *Grevilic* v. *Parkar.* (Performance of all covenants in the lease made condition precedent to the lessee's right to a renewal of lease.)
(1876) 45 L J Ch 522 (524) : 2 Ch D 310 : 34 L T 779 : 24 W R (Eng) 657, *Finch* v. *Underwood.* (Keeping premises in repair was a condition precedent for renewal.)
(1856) 69 E R 827 (830) : 2 K & J 374, *Job* v. *Barrister.*
(1881) 29 WR (Eng) Dig 113 (114) : 18 Ch D 238 : 44 L T 742, *Bastin* v. *Bidwell.*
[*See also* (1882) 52 L J Ch 191 (197) : 22 Ch D 640 : 31 WR (Eng) 471 : 47 LT 650, *Nicholson* v. *Smith.*]
9. ('39) 26 AIR 1939 Cal 77 (78) : 179 Ind Cas 813, *Srish Chandra* v. *Doa Mohamed.*
('38) 25 AIR 1938 Cal 724 (727) (DB), *Prodyot Coomar Tagore* v. *Maynuddin Mia.* (17 Ind Cas 180 followed.)
*('12) 17 Ind Cas 180 (183) (Cal), *Secy. of State* v. *Forbes.*
*('17) 4 AIR 1917 Cal 509 (510) : 33 Ind Cas 448 (DB), *Lanimia* v. *Muhammad Easin.*
('21) 8 AIR 1921 Cal 574 (576) : 64 Ind Cas 824 (DB), *Guruprasanna* v. *Madhusudan.*
('17) 4 AIR 1917 Cal 526 (526) : 33 Ind Cas 450, *Rasul Gazi* v. *Abdul Jalil Khan.*
('20) 7 AIR 1920 Cal 96 (97) : 55 Ind Cas 375, *Epasan Ali* v. *Ram Kumar De.*
[*See also* ('14) 1 AIR 1914 Low Bur 241 (243) : 8 Low Bur Rul 64 : 24 Ind Cas 911 (DB), *Secretary of State* v. *Ma Dwe.* (Covenant for renewal will not include the covenant for renewal itself.)]
[*But see* ('09) 4 Ind Cas 435 (436) (DB) (Cal), *Surendra Nath Sen* v. *Dinabandhu Naik.* (A covenant in a lease for a renewal of the settlement after the expiry of the present terms without specifying the terms or the period of years, and the amount of rent is vague and not enforceable.)
('18) 5 AIR 1918 Cal 391 (392) : 39 Ind Cas 137 (DB), *Azimuddin Choudhuri* v. *Peer Mohomed.* (If term and rent of new

a case, there can be no question that the new lease should be for a period similar to that for which the original lease was granted.[9a]

A covenant "that the lease shall, and may, be renewed" under certain circumstances means the lease as a *whole*. Where, before the expiry of the original lease, the lessee parted with a portion of his interest in favour of a third person, it was held that he could not claim a renewal of the lease in respect of the portion in his hands.[10]

A covenant for renewal in a lease by a Hindu widow having only a limited estate has been held to be not binding on the estate after her death.[11]

As to whether a covenant for renewal is one that "runs with the land," see Note 25 on section 40.

See also the undermentioned cases.[12]

See also Notes 35 and 36 on S. 105.

4. **Clause (b)—Term limited conditionally.**—A term may be limited conditionally, e. g., for forty years if the lessee or some other person named therein shall so long live. In such cases the lease would be determined at the end of forty years or on the death of the person or persons named, whichever should first happen.[1] On the happening of the event, the lessor may re-enter or maintain an ejectment without any proviso for re-entry.[2] A lease for 100 years if A and B shall so long live is determined by the death of one of them.[3] A lease "for the duration of the war" will be determined when peace is declared.[4] In the undermentioned case,[5] it was observed that a service tenancy under which the tenant holds the land on condition that if he refuses to render service the lease will determine, may fall within clause (b).

A lease granted for a definite purpose, ((eg) the holding of an exhibition,) will come under this clause (6). In such a case, the mere fact that the lessee is given a right under the lease to leave the land whenever he thinks fit will not entitle the lessor, on the doctrine of mutuality, to terminate the lease, at his option at any time.[7]

5. **Clause (c)—Cesser of lessor's interest.**—As a general rule, a person cannot grant to another a larger interest in property than he himself possesses : *Namo*

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settlement is uncertain, there is no contract which the tenant can enforce and the tenant holding over can be ejected without notice to quit.)]

('47) 34 AIR 1947 Cal 378 (381, 382) : ILR (1946) 2 Cal 80 (DB), *Narendra Nath* v. *Rampal Singh.*

10. *('28) 15 AIR 1928 P C 258 (260) : 51 Mad 885 : 55 Ind App 423 : 111 Ind Cas 404 (PC), *Secretary of State* v. *Volkart Brothers.* (Reversing AIR 1927 Mad 513 (516) : 50 Mad 595.)

11. ('37) 24 AIR 1937 All 328 (331) : 169 Ind Cas 145 (DB), *Sewak Ram* v. *Municipal Board, Meerut.*

12. ('19) 6 AIR 1919 Cal 972 (973) : 45 Ind Cas 983 (DB), *Secretary of State* v. *Sibaprosad Jona.* (The grantee under a settlement by Government executed a kabuliyat containing a clause : "If I agree to the enhanced rent to be fixed at the time of the next settlement, Government shall have power to settle the lands with me or if I do not agree, then with others"—*Held* that the clause in the lease was a covenant for renewal on the same terms as the old lease except as to the amount of rent and the covenant for renewal.)

('19) 6 AIR 1919 Cal 620 (622) : 45 Ind Cas 939 (DB), *Secretary of State* v. *Digambar Nanda.* (A lease granted by Government contained the following clause : "If you (the lessee) agree to pay the enhanced rent fixed at the time of resettlement in future the Government will have the right to settle with you"—*Held* that the clause embodied a covenant for renewal subject to any higher rent which might to fixed at the settlement.)

('29) 16 AIR 1929 Cal 50 (54, 55) : 55 Cal 841 : 109 Ind Cas 298 (DB), *Mahendra Nath* v. *Kailash Nath.* (Covenant for renewal of lease does not operate as present demise but is only a contract enforceable by specific performance.)

Section 111—Note 4

1. Woodfall, *Landlord and Tenant,,* 22nd Edition, page 363.
2. Woodfall, *Landlord and Tenant,* 22nd Edition, page 364.
3. (1610) 77 E R 1476 (1476) : 13 Co Rep 66 : 1 Browne 180, *Hyghes' and Crowther's case.*
4. (1916) 33 T L R 114 (115), *Great Northern Railway* v. *Arnold.*
5. ('17) 4 AIR 1917 Cal 116 (117) : 60 Ind Cas 348 (DB), *Ram Nath Sil* v. *Siba Sundari.*

('47) 1947 All ILR (H. C.) 284 286, *Krishna Arpan Fund, Meerut* v. *District Board Meerut.*

('47) 1947 All W R (H. C.) 284 (286), *Krishna Arpan Fund, Meerut* v. *District Board, Meerut.*

plus juris ad alium transferre potest quam ipse haberet. It follows that where the interest of the lessor in the property terminates or his power to dispose of the same extends only to the happening of any event, the lease will terminate on the happening of such event. Thus, a lease by an owner for life will be determined on the death of the lessor.[1] Where a mortgagee grants a lease, the lease will determine on the redemption of the mortgage.[2] In the case of agricultural leases it has been held in some cases that a lease in the course of management, by the mortgagee does not terminate on redemption. See section 76, Note 6.

A sub-lease by a lessee for a term of years will be determined by the expiry of the period of the head lease.[3]

A Hindu widow or other limited owner in Hindu law is not a mere tenant for life. A lease by her does not necessarily terminate with her death. The reversioners may, at their option, treat it as valid for the full term leased or may treat it as determined on the death of the limited owner.[4] In the latter case the tenancy will be determined without any further act being necessary to determine it.[5]

6. Death of lessor and lessee.—The death of the lessor does not determine the lease, except in cases where his own interest ceases on his death or it is provided in the lease that the lease shall terminate on his death.[1]

A lease being a transfer of an interest in immovable property, is a heritable right.[2] The death of a lessee does not, therefore, terminate the lease but the interest survives to his legal representatives[3] except where the lease is *for the life* of the lessee.[4] Similarly, the death of one of the joint lessees will not determine the lease until both of them are dead without leaving any legal representative.[4a]

A lease whereby the lessee is given the right to hold the land as long as he pleases is generally regarded as a lease for the life of the lessee and according to this

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Section 111—Note 5

1.†(1900) 27 Cal 156 (162) : 26 Ind App 216 (PC), *Beni Pershad* v. *Dudhnath.*
('19) 6 AIR 1919 Oudh 278 (283) : 49 Ind Cas 80 (DB), *Deputy Commissioner, Partap Garh* v. *Kishan Dayal.*
(1778) 99 E R 36 (38, 39) : 1 Doug (KB) 50, *Doe d. Simpson* v. *Butcher.*
[*See also* ('12) 13 Ind Cas 686 (687) (Cal), *Prahlad Chandra* v. *Behari Lal.* (A permanent lease of lands by a shebait will enable the grantee to hold for the life of the grantor.)]

2. ('11) 11 Ind Cas 817 (818) (All), *Collector of Basti* v. *Sarnam Gharak.*
†('21) 8 AIR 1921 Mad 393 (393) : 69 Ind Cas 651 (DB), *Alagiriswami Mudali* v. *Akkulu Naidu.*
†('10) 1 Upp Bur Rul 14 : 8 Ind Cas 466 (467), *Nga Nyan Gyi* v. *Nga Kyaw Nya.*
('06) 1906 All W N 241 (241), *Ram Chand* v. *Raj Hans.*
Also see S. 76, Note 6.

3. ('15) 2 AIR 1915 Cal 64 (65) : 24 Ind Cas 183 (DB), *Durgi Nikarini* v. *Gobardhan Bose.*

4. †('07) 34 Cal 329 (333) : 34 Ind App 87 (PC), *Bijoy Gopal* v. *Krishna Mahishi.*
('01) 28 Cal 532 (539) : 5 Cal W N 279 (DB), *Sadai Naik* v. *Serai Naik.*
Also see S. 105 ,Note 20.

5. ('23) 10 AIR 1923 Pat 130 (131) : 2 Pat 171 : 70 Ind Cas 290 (DB), *Raghubar Singh* v. *Jethu Mahton.* (Reversioner can sue in ejectment without giving notice.)

Section 111—Note 6

1. ('29) 16 AIR 1929 Nag 23 (26) : 110 Ind Cas 487, *Biju Bapu* v. *Munna Lal.*
('83) 5 All 191 (194) : 1882 All W N 216 (DB), *Badrinath* v. *Bhajan Lall.*

2. †('40) 27 AIR 1940 Cal 89 (91) : ILR (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwar ali Bepari* v. *Jamini Lal.*
('28) 112 Ind Cas 651 (652) (Lah), *Muhammad Budha* v. *Ghulam Qadir.*
('42) 29 AIR 1942 Oudh 325 (326) : 17 Luck 712 : 200 Ind Cas 311, *Kapurthala Estate* v. *Sheo Shankar.*
[*But see* ('20) 56 Ind Cas 656 (656) (All), *Hardut Singh* v. *Jaikaran Singh.* (Lease described as *instimrari* which contains no specific clauses referring to succession and transfer is good only for lifetime of lessee.)]

3. ('29) 16 AIR 1929 Nag 23 (26) : 110 Ind Cas 487, *Biju Bapu* v. *Munnalal.* (Following 3 Cal 210 : 4 Ind App 223 (PC).]
†(1844) 3 M. I. A. 261 (275) : 6 Suth W R P C 48 (PC), *Tej Chund* v. *Sree Kanth.*
('82) 5 All 191 (194) : 1882 All W N 216 (DB), *Badrinath* v. *Bhajan Lall.*
†('40) 27 AIR 1940 Cal 89 (91) : I L R (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali Bepari* v. *Jamini Lal.*
('27) 14 AIR 1927 Lah 423 (423) : 101 Ind Cas 166, *Bhola Nath* v. *Mohomed.*
('28) 112 Ind Cas 651 (653) (Lah), *Muhammad Budha* v. *Ghulam Qadir.*
('12) 13 Ind Cas 377 (382) (DB), *Hediot Khasia* v. *Ka Ran Khasiani.*
('28) 15 AIR 1928 Lah 937 (938) : 113 Ind Cas 543, *Ralia* v. *Bodh Raj.*
Also see S. 105, Note 72.

4. ('71) 16 Suth W R 147 (147, 148) (DB), *Danoollab* v. *Amanutoollab.*

4a. ('25) 12 AIR 1925 Pat 228 (236) : 82 Ind Cas 204, *Gopal Ojha* v. *Ramadhar Singh.* (Istimrari Mukarrai lease.)

view, determinable by his death.[5] There is, however, a conflict of opinion on this point. (See S. 105, Note 27.) So also, as a general rule, a lease for an indefinite period.[6] A lease for five years with an agreement that the lessor would continue to give the land at the same rent, should the tenant require the land, is a lease for the life of the tenant. Where the tenant is a company the lease would last for the life of the company.[7] A lease to a company for a specific purpose would come to an end when the company becomes defunt.[8]

A lease for 100 years, if A and B shall so long live, terminates if one of them dies.[9]

As to the effect of the death of a lessee, intestate and without leaving any heirs, see section 105, Notes 6 and 42.

7. **Clause (d)—Merger.**—In England, at Common law, where a term of years and the free-hold in the property became vested in the same person in the same right and no other estate intervened between them, the term was swallowed up and merged in the free-hold estate.[1] In equity, however, merger was a question of intention of the parties. There was no merger if there was an intention to keep both the estates separate and alive.[2] It is now enacted by S. 185 of the English Law of Property Act, 1925, that " there is no merger by operation of law only of any estate the benificial interest in which would not be deemed to be merged or extinguished in equity." In other words the same rule now applies whether at law or in equity, namely, that merger is a question of intention of the parties.[3]

Before the passing of this Act the English doctrine of merger was generally held not applicable to the mofussil in this country[4] and in any case, it was regarded a matter of intention of the parties.[5]

Clause (d) of this section is a departure in this respect, from the present English law. It provides that, independent of any question of intention, where the interests of the lessor and the lessee become united in the same person at the same time in the same right there is a merger and the lease is extinguished.[6]

In cases outside the Act, it has been held that merger is a matter of intention

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5. †('80) 4 Bom 424 (425) (DB), *Vaman Shripad* v. *Maki.*
('77) 1877 Bom P J 177 (DB), *Suleman* v. *Asmad.*
('74) 1874 Bom P J 279 (279) (DB), *Gopalrao* v. *Bhavanrao.*

6. ('27) 14 AIR 1927 Cal 179 (181) : 99 Ind Cas 200 (DB), *Ashutosh Lahiri* v. *Chandi Charam.* (AIR 1926 Cal 558 : 53 Cal 95 distinguished.)
[*See also* ('83) 1883 Bom P J 310 (310) (DB), *Kalapa* v. *San Kalapa.*]
Also see S. 105, Note 26.

7. ('31) 18 AIR 1931 Bom 178 (180, 181) : 130 Ind Cas 598 (DB), *Indian Cotton Co. Ltd.* v. *Raghunath Hari.*

8. ('23) 10 AIR 1923 Nag 243 (245, 246) : 73 Ind Cas 24, *Govardhan Das* v. *Waned-khan.*

9. (1592) 77 E R 61 (62) : 5 Co Rep 9 *Brudnel's Case.*

Section 111—Note 7

1. William and Eastwood, *Principles of the Law of Real Property,* 1933 Edn., page 132.

2. William and Eastwood, *Principles of the Law of Real Property,* 1933 Edn., page 133.
(1857) 53 E R 225 (226) : 23 Beav 571 : 3 Jur (N S) 1013 : 5 W R (Eng) 485 : 29 L T (O S) 244 : 113 R R 275, *Gunter* v. *Gunter.*

3. William and Eastwood, *Principles of the Law of Real Property,* 1933 Edn., page 133, 134.

4. ('68) 10 Suth W R 15 (17, 20) (SB), *Woomesh Chunder* v. *Raj Narain.*
('76) 25 Suth W R 503 (503) (DB), *Thomas Savi* v. *Punchanun Roy.*
('27) 14 AIR 1927 Pat 172 (175) : 102 Ind Cas 386 (DB), *Gopi Singh* v. *Jagdeo Singh.*
('38) 25 AIR 1938 Cal 128 (129) (DB), *Chandra Singh* v. *Sarat Chandra.*

5. ('14) 1 AIR 1914 Cal 489 (490) : 23 Ind Cas 612, *Abdul Karim* v. *Ahammad Ali.*

6. ('47) 34 AIR 1947 Pat 263 (264) : 227 Ind Cas 376 (DB), *Ram Narain Das* v. *G. G. in Council.* [Suit for possession against third person, a trespasser—lessor in whom lessee's interest merges can maintain such suit.]
('39) 26 AIR 1939 Cal 692 (695) : ILR (1939) 2 Cal 551 : 188 Ind Cas 17 (DB), *Suraj Chandra* v. *Behari Lal.*
('10) 7 Ind Cas 346 (347) (Cal), *Ganada Dasi* v. *Adhiraj Bijay Chand.* (When a zemindar purchases a patni right, the right so purchased, merges in the superior zemindari right.)
('28) 15 AIR 1928 Pat 273 (274) : 107 Ind Cas 819 (DB), *Hriday Narain Singh* v. *Kalicharan Singh.*
('01) 28 Cal 744 (745) (DB), *Promotho Nath Mitter* v. *Kali Prasunna.*

of the parties and not a thing which occurs *ipso jure* upon the acquisition of a superior with inferior right.[7]

It has been held that by virtue of S. 2, clause (c) this clause will not apply where a lease is created before the Act, even though the union of interests is after the Act, and that the question of merger in such cases must be decided with reference to the rule of intention.[8]

There is no merger unless the interests united are co-extensive.[9] It is necessary that the interests of the lessor and the lessee in the *whole* of the property should become vested in the same person in the same right.[10] Thus, a lessee of the entire interest in certain properties acquiring one-eight interest in the proprietary rights thereof does not cause merger.[11] In other words, the purchase by the tenant of a

7. *('22) 9 AIR 1922 PC 94 (95) : 48 Ind App 485 : 66 Ind Cas 551 (PC), *Dulhin Lacchanbati* v. *Bodhnath Tiwari.*
('15) 2 AIR 1915 Cal 452 (454) : 28 Ind Cas 314 (DB), *Amaloo* v. *Sheikh Muksud Ali.*
('19) 6 AIR 1919 Cal 642 (644) : 51 Ind Cas 389 (DB), *Ram Bishen Dutt* v. *Haripada Mukerjee.*
('22) 9 AIR 1922 Cal 284 (285) : 65 Ind Cas 469 (DB), *Manmotha Paul* v. *Mahendra Nath.* (A tenure does not necessarily merge in the proprietary right upon the union of the two interests.)
('39) 26 AIR 1939 Cal 692 (696) : ILR (1939) 2 Cal 551 : 188 Ind Cas 17 (DB), *Suraj Chandra* v. *Behari Lal.* (Lessee purchasing equity of redemption belonging to lessor—In absence of evidence to contrary, inference is that lessee has not intended to merge his two interests.)
('23) 10 AIR 1923 Cal (373) : 76 Ind Cas 382 (DB), *Jogendra Krishna Roy* v. *Shafar Ali.* (Occupancy tenant taking permanent lease—No merger takes place.)
('07) 3 Nag L R 142 (144), *Yesaji* v. *Ram Krishna.*
('11) 7 Nag L R 154 (158) : 12 Ind Cas 734 (736), *Kashi* v. *Durga.*
('09) 2 Ind Cas 654 (655) (DB) (Cal), *Lal Mahomad Sarkar* v. *Jagir Sheikh Mallick.* (It is doubtful whether the doctrine of merger applies to lands in the mofussil.)
[*See also* ('14) 1 AIR 1914 Cal 618 (620) : 22 Ind Cas 966 (DB), *Hirendra Nath* v. *Hari Mohan.* (Mukarrari kept alive as separate tenure from patni—No merger.)]
[*But see* ('25) 12 AIR 1925 Nag 406 (407) : 89 Ind Cas 780, *Kisan* v. *Manwar Sahib.* (Agricultural leases—Union of interests—Merger takes place without reference to intention—Principle of S. 111 applies.)]

8. ('45) 32 AIR 1945 Cal 24 (27) : ILR (1945) 1 Cal 556 : 221 Ind Cas 490 (DB), *Lakshman Chandra* v. *Birendra Kumar.* [Patni created prior to T. P. Act—Union of interests after the Act—S. 111 (d) does not apply—No presumption of merger by operation of law—It depends on intention of parties in each case.]
[AIR 1922 PC 94 : Ind App 485 (PC) and AIR 1938 Cal 128, relied on.]
('44) 31 AIR 1944 Cal 282 (283) 216 Ind Cas 239 (DB), *Joy Gopal* v. *Udoy Chand.* (*Prima facie* there would be merger unless it is proved that the intention of the holder was to keep the two interests separate. It would be necessary to consider the conduct of the parties for the purpose of arriving at a decision as to what the intention of the holder really was.)
('36) 163 Ind Cas 829 (830, 831) (Cal), *Bijoy Singh* v. *Sarat Chandra.* (AIR 1914 Cal 618 follow ; AIR 1922 PC 94 : 48 Ind App 485 (PC) explained ; 36 Cal 802 dissented.)
('14) 1 AIR 1914 Cal 618 (621, 622) : 22 Ind Cas 966 (DB), *Hirendra Nath* v. *Hari Mohun.*
[But see ('09) 36 Cal 802 (806) : 3 Ind 994 (995) (DB), *Ulfat Hussein* v. *Gayani Doss.*
('14) AIR 1914 Cal 389 (90) : 23 Ind Cas 612, *Abdur Karim* v. *Ahammad Ali.* (36 Cal 802 relied on.)]

9. ('22) 9 AIR 1922 Cal 284 (285) : 65 Ind Cas 469 (DB), *Monmotha Paul* v. *Mohendra Nath.*
('11) 7 Nag L R 154 (158) : 12 Ind Cas 734 (736), *Kashi* v. *Durga.* (Tenant taking a mortgage of the property—No merger.)
[*See also* ('44) 31 AIR 1944 Cal 282 (283) 216 Ind Cas 239 (DB), *Joy Gopal* v. *Udoy Chand.* (Case before T. P. Act.)]

10. ('19) 6 AIR 1919 Pat 390 (391) : 53 Ind Cas 16 (DB), *Nathuni Prasad* v. *Anwar Karim.* (Mortgagor who was proprietor in respect of eight annas share in the village inheriting merely two annas share in the mukarrari—No merger.)
('36) 23 AIR 1936 Pat 63 (64) : 169 Ind Cas 1066, *Baijnath Prasad* v. *Muneshwar Singh.* (Cosharer landlord purchasing holding from occupancy tenant—No merger occurs.)
('35) 22 AIR 1935 Lah 522 (523) : 157 Ind Cas 997, *Paras Ram* v. *Dharam Chand.* (Lessee mortgaging and then acquiring lessor's rights—No merger.)
('35) 12 AIR 1925 Pat 530 (532, 533) : 88 Ind Cas 495 (DB), *Farmeshwar Singh* v. *Sureba Kuer.* (Where a cosharer landlord purchases the interest of a tenant then unless the purchase is made on behalf of all the cosharers the interests of the lessor and the lessee do not become merged in the purchaser.)

11. ('37) 24 AIR 1937 Mad 398 (399) : 171 Ind Cas 634, *Ramakrishna Rao* v. *Subba Rao.* (AIR 1931 P C 63 : 6 Luck 197 : 58 Ind App 75 (P C) distinguished.)

fractional share of the property does not cause a merger.[12] So also, the taking by the tenant of a usufructuary mortgage of the holding deos not effect a merger.[13]

Where a merger takes place, subordinate interests derived from the lessee will also come to an end unless the holder of such subordinate interest can show some equity in his favour.[14]

8. Surrender—General.—A surrender is the yielding up of an estate for life or years to him who has the immediate estate in reversion or remainder wherein the estate for life or years may merge by mutual agreement.[1] It must be made only to the *lessor*. Where there are more lessors than one, it must be made to *all* of them.[2] Where, to the knowledge of the lessee, the lessor has transferred the property to x, the lessee cannot thereafter validly make a surrender to Y.[3] A tenant of one co-owner cannot make a valid surrender to another co-owner.[4]

A surrender by one of several joint lessees is valid only as to his share.[5] It does not avoid the lease.[6]

Surrender does not affect derivative interests.

It has been seen in Note 1 that the general rule is that the determination of the lease puts an end to all derivative interests from the lessee, but that the exception to the rule is a determination by surrender. A surrender cannot be made so as to prejudice the rights of a third person.[7] This is on the principle that a person

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12. ('31) 18 AIR 1931 PC 63 (64) : 6 Luck 197 : 58 Ind App 75 : 131 Ind Cas 334, *Faqir Baksh* v. *Murlidhar.*
('24) 11 AIR 1924 All 460 (460) : 84 Ind Cas 639, *Mata Ghulam* v. *Sheo Mangal.*
('28) 15 AIR 1928 All 164 (165) : 50 All 479 : 107 I.C. 562 (DB), *Mt. Kesar Kuar* v. *Kallu Ram.*
('29) 16 AIR 1929 All 258 (258) : 114 Ind Cas 870, *Niader* v. *Mahomed Ahmed.*
('01) 1901 All W N 53 (54) (DB), *Mahabir Singh* v. *Ashanullah.* (Purchase by tenant of a fractional share in village—He does not become proprietor of the land of which he is a tenant.)
[*See also* ('15) 2 AIR 1915 Cal 452 (453) : 28 Ind Cas 314 (DB), *Amaloo* v. *Muksud Ali.* (Two leases by two lessors of same land but not conterminous—Lessors have different rights—No merger results.)]

13. ('19) 52 Ind Cas 236 (236) (All), *Tej Prasad* v. *Ram Jas Pande.* (When a non-occupancy tenant of a holding obtains a mortgage of the holding, his tenancy is in absence during the existence of the mortgage.)
('02) 24 All 487 (491) : 1902 All W N 157 (DB), *Kallu* v. *Diwan.* (Do.)

14. ('06) 2 Nag L R 29 (30), *Sakharam* v. *Madhorao.* (Sub-tenancy is extinguished.)

Section 111—Note 8

1. Woodfall, *Landlord and Tenant,* 22nd Edn., page 364.
('96) 9 C P L R 122 (123), *Birdhichand* v. *Kashiram.*

2. ('14) 1 AIR 1914 Nag 84 (86) : 10 Nag L R 116 : 134 Ind Cas 286, *Rindu* v. *Raghunath.*
('21) 8 AIR 1921 Pat 341 (343) : 58 Ind Cas 955, *Babu Ram Prasad* v. *Gopal Chand.* (A tenant is not entitled to make a surrender of the holding to the part proprietors.)

3. ('01) 3 Bom L R 679 (680) (DB), *Ramchandra* v. *Shaikh Hussan.*

4. ('18) 5 AIR 1918 Mad 1152 (1152) : 39 Ind Cas 91 (DB), *Kunni Kathial* v. *Kunhi Sooppi.*

5. ('23) 10 AIR 1923 Rang 151 (152) : 1 Rang 19 : 74 Ind Cas 58 (DB), *Maung Kyau Dun Zan* v. *Ma Sein.* (A joint tenant would only be entitled to surrender for other joint tenants if it is for the benefit of them all.)
('11) 11 Ind Cas 382 (382) (DB) (Cal), *Kubir Munshi* v. *Baikunta Chandra.* (8 Cal W N 315 followed.)
('31) 18 AIR 1931 Nag 159 (160) : 27 Nag L R 116 : 134 Ind Cas 286, *Rindu* v. *Vithoba.* (The surrender of an unascertained and undefined portion of a holding by some of the tenants in favour of the landlord is valid and binding on the parties to it.)

6. ('68) 9 Suth W R 147 (149) (DB), *Mohima Chunder* v. *Pitambur Shaha.*

7. ('99) 12 C P L R 134 (136), *Bhagwangir* v. *Narain Babajee.* (A surrender by a tenant to the malguzar is absolutely void against previous alienations whether properly or improperly made.)
('71) 3 N W P H C R 63 (65), *Hoolassee Ram* v. *Purusottam Lal.* (Landlord procuring relinquishment of holding to defeat under-lease—He is still bound by the under lease.)
('36) 23 AIR 1936 Nag 171 (174) : 166 Ind Cas 686, *Kanchedilal* v. *Jabbarsha.* (Mortgage by tenant—Tenant surrendering land only to benefit landlord at expense of mortgagee—Tenancy continues to preserve rights of mortgagee.)
('06) 2 Nag L R 29 (30, 31) *Sakaram Sonar* v. *Madho Rao.*
('26) 13 AIR 1926 Nag 62 (63) : 89 Ind Cas 872, *Govindrao* v. *Sarjabai.*
(1902) 71 L J K B 693 (696, 697) : (1902) 2 K B 304 : 51 W R (Eng) 46 : 87 L T 97, *Walter* v. *Yalden.*
('25) 12 AIR 1925 Cal 1238 (1240) : 85 Ind Cas 757 (DB), *Jogeshandra Roy* v. *Tazar Ali.*
See however.

cannot derogate from his own grant and also on the principle that two persons cannot enter into any agreement affecting the rights of a third party.[8] In *Doe dem Beadon* v. *Pyke*[9] Lord Ellenborough said :

> "We consider it as clear law, that though a surrender operates between the parties as an extinguishment of the interest which is surrendered, it does not so operate as to third persons, who at the time of the surrender, had rights, which such extinguishment would destroy, and that as to them, the surrender operates only as a grant, subject to their right, and the interest surrendered, still has, for the preservation of their right, continuance."

Thus, as is provided for in S. 115 a surrender does not affect the rights of a sub-lessee.[10] Where a valid mortgage has been executed by the lessee, the rights of the mortgagee are not affected by the surrender.[10a] Where such mortgage is a usufructuary one, the mortgagee is entitled to remain in possession until redemption.[11] Where the lessor has mortgaged the land and the right to receive the rent, he cannot, on the same principle, accept a surrender of the lease without the concurrence of the mortgagee.[12]

See also the undermentioned case.[13]

9. Express surrender—Clause (e).—To constitute an express surrender, there must be *mutual agreement* between the lessor and the lessee in pursuance of which the lessee *yields up his iterest* to the lessor. The requirement of mutual agreement implies that there is a yielding up or relinquishment by the lessee on the one hand and the *acceptance* of it by the lessor on the other. A mere relinquishment or abandonment by the lessee of the holding without acceptance on the part of the lessor is not a surrender.[1] The lessee cannot by merely giving notice of relinquishment get rid of his obligations under the lease. The mere fact that the lessor has received the notice cannot be construed as an assent on his part to the relinquishment.[2] Where, however, the lessor accepts the relinquishment it may amount to an *implied* surren-

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('47) 34 AIR (1947) All 240 (242), *Fagira* v. *jiwan Singh.* [*N* executing simple mortgage of his proprietary share in village in *A's* favour and subsequently granting a permanent lease of sir plots in favour of *B* without *A's* consent—Terms of lease onerous and rendering mortgage security insufficient —*A* obtaining decree for sale on his mortgage against *N* and *B* and purchasing *N's* share in execution—N relinquishing his exproprietary tenancy rights in sir plots to *A*—Lease held not binding on *A*—On determination of exproprietary tenancy by relinquishment *B's* sub-tenancy came to end and *A* became entitled to possession.]

8. Broom, *A Selection of Legal Maxims,* 6th Edn., pages 166, 653.

9. (1816) 17 R R 296 (299) : 5 M & S 146 : 105 E R 1005.

10. ('17) 4 AIR 1917 Cal 236 (241) : 34 Ind Cas 833 (DB), *Dwarikanath* v. *Mathuranath.*

('96) 18 All 354 (357) : 1896 All W N 109 (110) (DB), *Badri Prasad* v. *Sheodhan.*

('68) 10 Suth W R 384 (384, 385), *Heeramonee* v. *Gunga Narain Roy.*

10a. ('14) 1 AIR 1914 Nag 38 (40) : 10 Nag L R 129 : 26 Ind Cas 810, *Tikaram* v. *Ghasiram.*

11. ('69) 1 N W P H C R 41 (42) (DB), *Sheounbur Rai* v. *Sheobhung Rai.*

('11) 33 All 335 (336) : 9 Ind Cas 217 (217) (DB), *Chhote Lal* v. *Sheopal Singh.* (An occupancy tenant, after mortgaging his holding with possession, has no power to relinquish it in favour of the zamindar.)

('23) 10 AIR 1923 All 295 (295) : 71 Ind Cas 991 (DB), *Rama Khelawan* v. *Brij Lal.*

('11) 10 Ind Cas 307 (308) (DB) (Cal), *Issur Behara* v. *Kashi Nath Panda.*

('70) 5 Mad H C R 120 (123) (DB), *Venkataramanier* v. *Ananda Chetty.*

[*See also* ('08) 4 Nag L R 57 (59), *Bali Ram* v. *Ram Rao Mahratta.* (On surrender, mortgagee cannot in equity, be allowed both to remain in possession under the mortgage and to repudiate the liability to be redeemed.)]

12. ('30) 17 AIR 1930 Bom 329 (330) : 125 Ind Cas 689 (DB), *Havu Ravlu* v. *Ganapati Venkataraman.*

(1906) 75 L J K B 38 (41) : (1906) 1 K B 123 : 94 L T 287 : 54 W R (Eng) 105 : 22 T L R 206, *Robbins* v. *Whyte.*

Also see Note 19 and S. 109, Note 4.

13. ('17) 4 AIR 1917 Nag 86 (87, 88) : 14 Nag L R 107 : 46 Ind Cas 244, *Sarjerao* v. *Tukaram.* (Implied surrender under S. 35 (4), C. P. Tenancy Act, is equivalent to forfeiture and will extinguish interests derived from lessee.)

Section 111—Note 9

1. ('16) 3 AIR 1916 Cal 454 (455) : 33 Ind Cas 98, *Sakayat Mollah* v. *Alam Moliah.*

2. ('92) 15 Mad 67 (68) : 2 Mad L Jour 13 (DB), *Krishna* v. *Lakshminaranappa.*

('83) 9 Cal 671 (677) : 12 Cal L R 343 (DB), *Judoonath Ghose* v. *Schoene Kilburn & Co.*

(83) 20 Suth W R 383 (383) (DB), *Heera Lall Pal* v. *Neel Monee Pal.*

der.[3] It has been held in the undermentioned case[4] that this clause does not apply to cases where the lease contains an express clause that the lessee should not surrender before the expiry of the term. This view does not appear to be correct. The lessee cannot, of course, insist on the lessor accepting the surrender before the expiry of the term, but if the lessor agrees to accept the surrender, there does not seem to be any reason why the clause should not apply.

The requirement as to the yielding up of the lessee's interest implies that the lessee must give up possession of the holding. A relinquishment without giving up possession is not a valid surrender.[5] Where a lease provided that the lessee may surrender any portion, or the whole of the property, and the lessee, by a written notice purported to surrender a portion of the property, but nevertheless continued in possession of a part of such portion, it was held that the surrender was not valid in law could be treated as valid to the extent to which possession was given up.[6] Where a lease for 999 years provided for the surrender of the lease by six months' notice by the lessee, and the lessee gave such notice and vacated the land demised, it was held by their Lordships of the Privy Council that the surrender was properly made.[7]

A surrender need not be in writing[8]nor need it be in any particular form of words. But where the original lease is by a registered instrument, a surrender of a portion of the lease with an abatement of rent can be effected only by a registered instrument, inasmuch as such surrender effects a variation of the contract of tenancy embodied in a registered instrument.[9]

A conditional surrender will operate only on the performance of the condition.[10]

10. Clause (f)—Implied surrender.—This kind of surrender is, in English law, known as surrender by operation of law. It is applied to cases where the owner of a particular estate (e. g., a lease) has been a party to some act having some other object than that of a surrender, but which cannot be effected whilst the particular

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3. See Note 10.
4. ('09) 2 Ind Cas 633 (633) (DB) (Cal), *Maharaja Sir Jotindra Mohun Togore* v. *Ali.*
5. *See* ('32) 19 AIR 1932 Oudh 79 (80) : 7 Luck 425 : 136 Ind Cas 333 (DB), *Amar Nath* v. *Har Prasad.* (Relinquishment of holding merely in writing is ineffectual in law, if there has been no surrender of possession.)]
6. ('99) 26 Cal 29 (37, 38) : 25 Ind App 210 (PC), *Ramchurn Singh* v. *Raniganj Coal Association.*
7. ('18) 5 AIR 1918 P C 125 (128) : 46 Cal 552 : 45 Ind App 275 : 52 Ind Cas 909 (PC), *Durga Prashad Singh* v. *Tata Iron Steel Co., Ltd.*
8. ('19) 6 AIR 1919 Pat 13 (14) : 49 Ind Cas 504 (DB), *Jagadamba* v. *A. V. Sham.*
('90) 13 Mad 124 (127) (DB), *Narasimma* v. *Lakshmana.*
('21) 63 Ind Cas 483 (484) (DB) (Cal), *Gopal Chandra Das* v. *Harendra Nath Datta.*
('13) 19 Ind Cas 124 (125) (DB) (Cal), *Jangli Rai* v. *Ghura Rai.* (It need not be by a registered deed.)
('19) 6 AIR 1919 Cal 840 (840) : 53 Ind Cas 17 (DB), *Abdul Majid* v. *Hari Charan Haldar.* (Registered instrument not necessary.)
('19) 6 AIR 1919 Cal 694 (695) : 44 Ind Cas 297 (DB), *Bengal Coal Co.* v. *Monoranjan.* (Surrender can be inferred from acts of parties.)
('18) 5 AIR 1918 Cal 233 (233) : 46 Ind Cas 100 (DB), *Brojonath Sarma* v. *Mohewar Gahani.*
('20) 7 AIR 1920 Cal 858 (858) : 59 Ind Cas 788 (DB), *Sari Debi* v. *Sailabala Dasi.*
('02) 25 All 77 (79) : 1902 All W N 201, *Waris Khan* v. *Daulat Khan.*
[*See also* ('01) 28 Cal 256 (259) : 5 Cal W N 351 (DB), *Khankar Abdul Rahman* v. *Ali Hafez.* (Overruled on another point in AIR 1917 P C 207 : 45 Cal 320 : 44 Ind App 236 : 9 Low Bur Rul 114 (PC).]
Also see S. 9, Note 12.
[*But see* ('36) 23 AIR 1936 Cal 774 (779, 780) : 167 Ind Cas 124 (DB), *Secy. of State* v. *Krishna Prasad.* (Surrender must be by registered document where value of interest is more than Rs. 100.)]
9. ('21) 63 Ind Cas 483 (484) (DB) (Cal), *Gopal Chandra Das* v. *Harendra Nath Datta.*
('25) 12 AIR 1925 Nag 459 (460) : 87 Ind Cas 29, *Narbadji* v. *Gopal.*
10. ('33) 20 AIR 1933 Pat 446 (448) : 144 Ind Cas 946, *Jagatbandhu* v. *Shayam Chand.*
[*See also* Appeal No. 1182 of 1945, D/-27 2-47 (Pat), *Ram Singh* v. *Nasebuddin.* [Intention of the parties must be the guiding factor in deciding whether a surrender in favour of the landlord is good or bad. Where the intention of the parties is to effect a surrender on payment of a certain consideration the title will pass by the surrender even if a portion of the consideration has not been paid : AIR 1933 Pat 446, *Rel. on.*]

estate continues, and the validity of which act he is, by law, estopped from disputing.[1] The surrender, in such a case, is an act of the law and takes place independently of, and even in spite of, the intention of the parties.[2]

By acceptance of a new lease.

The illustration to the section is an instance of implied surrender. The acceptance of a new lease during the continuance of the old lease operates as a surrender in law, of the old lease.[3] The reason is, as pointed out by Parke, B., in *Lyon* v. *Reed*,[4] that :

> "If the lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease ; and, as the lessor could not do this until the prior lease had been surrender, the law says that the acceptance of such new lease is, of itself, a surrender of the former."

But, for this principle to apply, it is necessary that there must be an *incompatibility* between the enjoyment under the prior and that under the subsequent lease.[5] Thus, the subsequent grant, to the lessee of land for cultivation of coffee, of mining rights in such land does not imply a surrender of the lease for coffee cultivation.[6] The execution of a *kabuliat* by the tenant merely recognising an already existing right is not implied surrender of the old tenancy and the creation of a new one.[7] Such confirmatory *pattas* are very common in this country.[8] But the excution of rent deed by a permanent tenant in favour of his landlord embodying conditions inconsistent with his permanent tenancy has been held to amount to surrender of the permanent tenancy.[8a]

It is also necessary, for the new lease to operate as a surrender of the old one, that the new lease is operative. If the new lease is void or voidable[9] or does not pass an interest according to the contract or intention of the parties,[10] it does not

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Section 111—Note 10

1. Woodfall, *Landlord and Tenant,* 22nd Edn., page 370.
2. (1825) 28 R R 505 (514) : 4 L J K B 71 *Johnstone* v. *Hudlestone.*
3. ('48) 35 AIR 1948 Pat 407 (408), *Santi Lal* v. *Jogendra Nath.*
('39) 26 AIR 1939 Pat 598 (601) : 18 Pat 317 : 183 Ind Cas 56 (DB), *Upendra Singh* v. *Meghnath Singh.*
(1843) 134 E R 1063 (1066) : 13 LJCP 11 : 64 R R 838, *Dodd* v. *Acklom.* (Even if the new lease is an oral one and the old lease is one by deed.)
('34) 21 AIR 1934 All 787 (789) : 152 Ind Cas 180 (DB), *Tiku Ram* v. *Sri Thakur Dooji Maharaj.*
(1900) 1 Q B 426 (428) : 69 L J Q B 257 : 82 L T 149 : 48 W R (Eng) 392, *Fenner* v. *Blake.*
('47) 34 AIR 1947 Nag 188 (190) : ILR (1946) Nag 991 : 229 Ind Cas 138 *Pusaram Maniklal* v. *Deorao Gopalrao.* [Delivery of possession by lessee before expiry of lease and release to same lessee—Delivery of possession is legal whether regarded as surrender before expiry of first lease or as transaction having effect from expiry of first lease.]
4. (1844) 67 R R 593 (609) : 13 L J Ex 377 : 153 E R 118.
5. Woodfall, *Landlord and Tenant,* 22nd Edn., pages 368, 369.
('25) 12 AIR 1925 Mad 1277 (1277, 1278) : 48 Mad 815 : 90 Ind Cas 729 (DB), *Manavedan Thirumalpad Avergal* v. *Parry Co.*
6. ('25) 12 AIR 1925 Mad 1277 (1277, 1278) : 48 Mad 815 : 90 Ind Cas 729 (DB), *Manavedan Thirumalpad Avergal* v. *Parry Co.*
7. ('04) 32 Cal 51 (60) : 31 Ind App 149 (PC), *Nilratan Mandal* v. *Ismail Khan Mahomed.*
('04) 32 Cal 41 (50) : 31 Ind App 144 (PC), *Upendra Krishna Mandal* v. *Ismail Khan Mahomed.*
[*See also* ('69) 1 N W P H C R 149 (149) (DB), *Dirgani Singh* v. *Foorsut.* (A tenant with a right of occupancy does not lose that right merely by making an arrangement to pay a certain rent for his holding for a certain number of years.)]
8. ('73) 19 Suth W R 353 (355) (PC), *Ram Chunder Dutt* v. *Jugheschunder Dutt.*
8a. ('44) 31 AIR 1944 Lah 1 (5, 6) : 211 Ind Cas 145 (DB), *Suraj Bhan* v. *Hafiz Abdul.*
('44) 31 AIR 1944 Lah 9 (10) : 211 Ind Cas 366 (DB), *Mohammad Yusaf* v. *Hafiz Abdul Khaliq.* [AIR 1944 Lah 1 : FDN]
9. Woodfall, *Landlord and Tenant,* 22nd Edn., page 369.
('24) 11 AIR 1924 Cal 355 (356) : 71 Ind Cas 976 (DB), *Jamini Mohan* v. *Debendra Narain.*
('10) 7 Ind Cas 253 (254) (DB) (Mad), *Chirakkal Koviiagath* v. *Saidammadath Aya Komba.*
(1805) 102 E R 1219 (1226) : 6 East 86 : 2 Smith 166 : 8 R R 413, *Roe* v. *Archbishop of York.*
10. (1846-48) 17 L J Q B 151 (153) : 11 Q B 702 : 75 R R 600, *Doe* v. *Courtenay.*
('24) 11 AIR 1924 Cal 355 (356) : 71 Ind Cas 976 (DB), *Jamini Mohan* v. *Debendra Narain.*

operate as an implied surrender of the old lease. The reason is, that, in such cases, a condition is implied by law making void the surrender in case the new lease is inoperative.[11] Thus, a fresh lease by a Hindu widow for a fixed rent to the lessee under an earlier lease for a variable rent by the last male owner, does not operate as a surrender of the old lease inasmuch as her lease is a transaction voidable at the option of the reversioners.[12]

Where there is no actual demise by way of a new lease, a mere agreement to grant a new lease in the future[13] or an agreement for a change in the rent payable[14] or the acceptance of payment of rent from a person who has acquird an interest in the lease under an agreement with the tenant with the assent of the landlord,[15] does not operate as an implied surrender.

The taking of a new lease of a *part* of the lands covered by the old lease operates as an implied surrender of the old lease as to that part only. The lease for the residue will stand good and untouched.[16]

Though the taking of a new lease will be an implied surrender of the old lease, it will not affect the validity of the acts done under the old lease.[16a]

Relinquishment by tenant.

A mere non-payment of rent does not constitute an implied surrender.[17] So also a mere relinquishment of the tenancy does not operate as a surrender, but if it is accepted by the lessor by taking over possession, it amounts to an implied surrender.[18] If the key of the premises is handed over to the lessor and is accepted by him as a symbol of possession, there is an implied surrender.[19] But if it is not accepted, as a token of relinquishment of possession there is no implied surrender. Thus, where

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11. (1846-48) 17 L J Q B 151 (153) : 11 Q B 702 : 75 R R 600, *Doe* v. *Courtenay.*
12. ('24) 11 AIR 1924 Cal 355 (356) : 71 Ind Cas 976 (DB), *Jamini Mohan Sarkar* v. *Debendra Narain Singh.*
13. Woodfall, *Landlord and Tenant,* 22nd Edition, page 367.
14. (1844) 13 L J Q B 239 (240) : 5 Q B 841 : 64 R R 664, *Doe* v. *Gee Kie.*
15. (10) 6 Ind Cas 766 (770) (DB) (Mad), *Chengiah* v. *Thimma Nayanim.*
16. Woodfall, *Landlord and Tenant,* 22nd Edn., page 370.
(1844) 67 R R 614 (638) : 14 L J Ex 233, *Earl of Carnarvon* v. *Villebois.*
16a. ('38) 25 AIR 1938 Nag 377 (384) : ILR (1939) Nag 432 : 181 Ind Cas 126 (DB), *Mulji Sickka & Co.* v. *Nurmohammad.*
17. ('96) 18 All 290 (294) : 1896 All W N 56 (DB), *Mazhar Rai* v. *Ramgat Singh.*
[*See also* ('33) 20 AIR 1933 Cal 477 (479) : 144 Ind Cas 889 (DB), *Hemanta Kumari* v. *Sefatulla Bishwas.* (Mere fact that rent was not being amicably paid, is no indication that there was intention on lessee's part to abandon the tenancy.)
('79) 4 Cal 314 (318) : 3 Cal L R 119 (DB), *Rungo Lall Mundul* v. *Abdul Guffoor.* (Mere nonpayment of rent, though for many years, is not enough to show that the relationship has ceased to exist.)]
18. ('39) 26 AIR 1939 Oudh 257 (267) : 14 Luck 723 : 183 Ind Cas 821 (DB), *Amar Krishna* v. *Nazir Hasan.*
('08) 7 Cal L Jour 309 (311) (DB), *Hanuman Prasad Singh* v. *Deo Charan Singh.*
[*See also* ('83) 6 Mad 322 (325) (FB), *Dinabandhu* v. *Lokanadhaswami.* (A tenancy is not determined by the mere fact that the tenant has allowed the land to remain uncultivated, though it may under certain circumstances amount to evidence of intention to abandon the holding.)
('82) 10 Cal L R 15 (18, 19) (DB), *Boidonath* v. *Anpurna Dabee.* (Tenants deserting the demised land and paying no rent—Landlord has right to take possession of land and to treat desertion as relinquishment—Tenant forfeits his rights—Landlord is justified in inducting another tenant. 3 Suth W R 153 and 1 C I R 293 relied on.)
(1864) 1864 Suth W R Gap No. 270 (271) (DB), *Chundermonee Nya Bhoosun* v. *Sumbhoo Chunder Chuckerbutty.* (Voluntary abandonment for long period is tantamount to express relinquishment.)
('75) 24 Suth W R 344 (344, 345), *Ram Chung* v. *Gora Chand Chung.* (Ryot, without giving notice, going away from land he occupied and neither cultivating it nor paying rent—Landlord is justified in assuming that he has relinquished it.)
('26) 93 Ind Cas 86 (87) (DB) (Cal), *Prosanna Kumar De* v. *Ananda Chandra Bhattacharjee.* (Sale and delivery of possession of his holding by tenant amounts to abandonment.)
('95) 8 C P L R 45 (47), *Balkrishna* v. *Krishna Rao.* (Tenant quitting occupation and ceasing to cultivate or hold land after selling it—He abandons the land.)
('66) 6 Suth W R 67 (68) (DB), *Muneerudden* v. *Mahomed Ali.* (When cultivating ryot goes away from the land and neither cultivates it nor pays rent, he has wholly relinquished the land.)
(1865) 2 Suth W R 137 (138) (DB), *Shooden Kurmarkar* v. *Ram Churn Pai.* (Do.)]
19. (1892) 9 T L R 77 (77), *Smith* v. *Roberts.*
(1814) 15 R R 579 (580) : 5 Taunt 518, *Whitehead* v. *Clifford.*

keys are left in the office of the lessor who is unable to return them to the lessee not being able to find him, there is no surrender.[20]

Tenant becoming a servant.

Where the lessee of a ferry finding his lease unprofitable accepted the position of a servant under the lessor for looking after the ferry for him, it was held that there was an implied surrender of the lease.[21]

11. Clause (g)—Forfeiture—General.—The word "forfeiture" implies the loss of a legal right by reason of some breach of obligation.[1] Clause (g) provides that a lease will determine by forfeiture in three cases—

(1) on breach of an express condition where a right of re-entry is provided for on such breach;
(2) on denial of the lessor's title by the lessee; and
(3) on the insolvency of the lessee where the lease provides, on such contingency, for a right of re-entry.

It may be noted that there can be no forfeiture in the first and third cases unless a *right of re-entry* is provided for. This qualification is not necessary in the second case.

It is also necessary before a lease can determine in any of these three cases that the lessor must give a notice in writing to the lessee of his intention to determine the lease. Under the clause as it stood prior to the amendment of 1929, a notice in writing was not necessary, but the lessor was to do *some act* showing his intention to determine the lease. The reason is that a determination by forfeiture of a lease being the result of the wrongful act or omission of the lessee, it should not be at his option to determine the lease by his own wrongful act, the general principle being that no man can be allowed to take advantage of his own wrong.[2]

The law "abhors a forfeiture"[3] and the Courts both in England and in India lean strongly against forfeiture,[4] so that if the plaintiff comes to a Court relying on forfeiture, he must prove his right strictly;[5] this clause should not be extended to

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20. (1885) 1 TLR 267 (268), *Smith* v *Black More.*
[*See also* (1850) 137 E R 1040 (1045, 1046) : 19 L J C P 323 : 82 R R 478, *Cannan* v. *Hartley.* (Merely leaving keys with lessor does not amount to surrender unless lessor accepts them as symboi of possession.)]
21. (1827) 108 E R 610 (612) : 5 L J K B 282 : 30 R R 504, *Peter* v. *Kendal.*

Section 111—Note 11

1. ('06) 30 Bom 466 (472) : 8 Bom L R 360 (DB), *Amolak* v. *Dhondi.*
2. Woodfall, *Landlord and Tenant,* 22nd Edition, pages 389, 390.
3. (1845) 66 R R 611 (615) : 6 Q B 953 : 14 L J Q B 189 : 9 Jur 508, *Doe d. Muston* v. *Gladwin.*
4. ('45) 32 AIR 1945 All 293 (297) : ILR (1945) All 248 (DB), *Shiam Behari* v. *Madan Singh.*
(1864) 1864 Suth W R Gap No. Act X Rul, 31 (32) (DB), *Alumchunder Shaw* v. *Messrs. William Moran.* (Cases of forfeiture are not favoured when no injury has resulted, or where a money-compensation is a sufficient remedy.)
('34) 21 AIR 1934 All 103 (105) : 149 Ind Cas 517, *Madho Lal* v. *Lal Bahadur Singh.* (Doctrine must be applied with the utmost possible precaution.)
('19) 6 AIR 1919 Mad 897 (899) : 46 Ind Cas 62 (DB), *Rama Iyengar* v. *Anga Gurusami Chetti.* (Do.)
('16) 3 AIR 1916 Mad 652 (653) : 31 Ind Cas 184 (DB), *Raman Nayar* v. *Kannoth.* (Assertions of title as owner by a person having rights in land of a very substantial kind should not be treated as denial of landlord's title so as to work a forfeiture of the tenant's right.)
5. ('45) 32 AIR 1945 All 293 (298) : ILR (1945) All 248 (DB), *Shiam Behari* v. *Madan Singh.*
('03) 5 Bom L R 1016 (1019) (DB), *Chhabildas* v. *Krishnarao.*
('14) 1 AIR 1914 Cal 850 (851) : 24 Ind Cas 354 (DB), *Nabakumar Datta* v. *Trailokya Nath Bose.*
('25) 12 AIR 1925 Cal 1212 (1213, 1214) : 87 Ind Cas 657 (DB), *Golam Rabbani* v. *Tara Nath.*
('75) 23 Suth W R 10 (11), *Ram Nursingh* v. *Dwarkanath.* (It is not proper to extend a condition of forfeiture beyond the words in which it is expressed.)
('81) 7 Cal 470 (473) : 9 Cal L R 260 (DB), *Reasut Hossein* v. *Charawar Singh.*
('26) 13 AIR 1926 Mad 1202 (1202) : 50 Mad 331 : 98 Ind Cas 1070, *David Cutinha* v. *Salvadora Minazes.* (It is an axiom of law that a forfeiture clause should be very strictly construed.)
('33) 20 AIR 1933 Cal 890 (891) : 60 Cal 1110 : 147 Ind Cas 1220, *Nripendra Bhooshan* v. *Jogendra Nath.* (Covenants, the breach of which entails a forfeiture, must always be strictly construed.)

cases not strictly covered by it.[6]

But, though the law abhors a forfeiture, a covenant or condition entailing a forfeiture on breach thereof must, according to English cases,[7] be construed fairly according to the intention of the parties. In *Goodtitle* v. *Salville*,[8] Lord Ellenborough, C. J., said :

> "In the construction of covenants of this sort, they are neither entitled to favour nor disfavour, whether they are to create a forfeiture or to continue an estate ; but we are to put the fair construction upon them, according to the apparent intention of the contracting parties."

In the undermentioned cases,[9] however, it has been held that covenants, the breach of which entails forfeiture, are always to be strictly construed *against the lessor*. This does not appear to be in consonance with the English law.

Before this clause can be applied it must be established that there was a lease. Where this is not established, no question of forfeiture under this clause can arise.[10]

Where all the conditions of this clause are satisfied, the lease is determined and the lessor is entitled to eject the lessee, unless the forfeiture has been waived or relieved against. It has, however, been observed in the undermentioned case[11] that ejectment is a matter of *discretion* of the Court in such a case. It is submitted that this is not correct unless the decision can be assumed to mean a discretion to grant relief against the forfeiture.

A lease cannot be determined in *part*, by forfeiture.[12]

This clause provides for forfeiture only in the three contingencies specified therein. Waste by the lessee is not one of these contingencies. (See S. 108, cl. (o), Note 8.) But under the custom governing certain agricultural leases, as for instance the *kanom* in Malabar, wilful and extensive waste by the *kanomdar* is a ground of forfeiture.[13]

A *wakf* created by a tenant is not such a dealing with the property as to entail a forfeiture of tenancy.[14]

12. Forfeiture—Permanent lease.—A permanent lease is liable, like any

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[See also Marsh 474 (475), *Lall Lukchmee Pershad* v. *Bhoodhan Singh*.]

6. (19) 6 AIR 1919 Mad 866 (867) : 48 Ind Cas 301 (DB), *Venkatachariar* v. *Narasimha Aiyangar*.

(1808) 33 E R 752 (755) : 15 Ves 258 : 10 R R 74, *Church* v. *Brown*.

7. Woodfall, *Landlord and Tenant*, 22nd Edn., page 384.

(1845) 66 R R 611 (615, 616) : 6 Q B 953 : 9 Jur 508 : 14 L J Q B 189, *Doe d. Muston* v. *Gladwin*.

(1858) 10 E R 1459 (1468) : 6 H L C 672 : 27 L J Q B 321 : 108 R R 252 : 6 W R (Eng) 523 : 5 E & B 648 : 4 Jur (N S) 903, *Croft* v. *Lumley*.

(1828) 173 E R 1126 (1127) : Mood & M 189 : 31 R R 729, *Doe d. Davis* v. *Elsam*.

8. (1812) 104 E R 1022 (1025) : 16 East 87 : 14 R R 305.

9. ('25) 12 AIR 1925 Mad 57 (58) : 81 Ind Cas 1006, *Venkatramana Bhatta* v. *Krishna Bhatta*. (Lease prohibiting alienation—Lessee transferring part—Right of re-entry does not accrue.)

('37) 24 AIR 1937 Cal 636 (637) : 173 Ind Cas 578 (DB), *Keshab Chandra* v. *Gopal Chandra*. (Do.)

('35) 22 AIR 1935 Mad 163 (165) : 58 Mad 378 : 154 Ind Cas 445 (DB), *Raman Menon* v. *Malabar Forest & Rubber Co., Ltd.* (Lease taken benami—Clause for forfeiture that on lessee becoming bankrupt lease should *ipso facto* cease—*Held* on construction of clause that it could not necessarily refer only to insolvency of real lessee.)

10. ('43) 30 AIR 1943 Oudh 105 (106) : 203 Ind Cas 361, *Mahmood Azim* v. *Pateshwari Prasad*.

(1907) 10 Oudh Cas 31 (33) (DB), *Ram Charan* v. *Babu Sheo Dayal*. (Tenant transferring his *abadi* site which he was not entitled to transfer under the *wazib-ul-arz* —*Held*, there was no forfeiture under S. 111 (g) as the tenant was not a lessee of the *abadi* site.)

('36) 23 AIR 1936 All 385 (386) : 160 Ind Cas 866 (DB), *Kanhaya Lal* v. *Abdullah*.

11. ('28) 15 AIR 1928 All 716 (717) : 110 Ind Cas 872, *Bhagwati Prasad* v. *Peglar*.

12. ('36) 23 AIR 1936 Mad 252 (255) : 168 Ind Cas 1005, *Soorayya* v. *Sooranna*.

('82) 4 All 174 (176) : 1881 All W N 140 (DB), *Bholai* v. *Rajah of Bansi*.

13. ('99) 9 Mad L Jour 306 (308, 309), *Mallarkandi* v. *Narayana*. (Where a *kanom* is so forfeited on the ground of waste, the Kanomdar does not lose his right to recover the Kanom amount or any renewal fees he might have paid to the owner of the land.)

14. ('47) 34 AIR 1947 All 49 (50) : 224 Ind Cas 290 *Mohd. Sheriff* v. *Waqi Banam-i-Khuda*.

other lease, to be forfeited on breach of a condition which provides that on breach thereof the lessor may re-enter[1] or on the ground of denial of title.[2]

13. Forfeiture for breach of condition.—Under the English law, a lease may be determined for a forfeiture incurred either by—

(1) breach of a *condition* in the lease or,

(2) breach of a *covenant* in case, and, in case only, the lease contains a proviso for re-entry for a breach of such covenant.[1]

A breach of a *condition* will, under the English law, entail a forfeiture even though there is no express clause for re-entry.[2] In this country before the Act was passed, it was held that there was no forfeiture, even in the case of a *condition*, unless there was a proviso for re-entry on its breach.[3]

This clause also not recognise the above distinction in English law. It speaks only of *conditions* and not of *covenants* and further provides that there would be a forfeiture only if the condition provides that on breach thereof the lessor may re-enter.. It has, however, been regarded generally as not limited to "conditions" in the strict sense in which the word is used in the English law, but as applying to all cases whether conditions or covenants, if there is a proviso for re-entry on breach thereof. The proviso for re-entry indeed converts, what would otherwise be a mere covenant, into a condition.

Even in cases not governed by the Act, it has been held as a general principal, that unless there is a proviso for re-entry, a breach of a condition or covenant will not not entail a forfeiture.[4]

Section 111—Note 12

1. ('83) 7 Bom 256 (260) (DB), *Venkatraya* v. *Shivram Bhat.* (Condition against alienation.)
('83) 7 Bom 262 (265) (DB), *Tamaya* v. *Timapa.* (Do.)
('17) 4 AIR 1917 Cal 236 (239) : 34 Ind Cas 833 (DB), *Dwarka Nath* v. *Mathura Nath.*
[*See* ('09) 36 Cal 1003 (1015) : 36 Ind App 148 : 4 Ind Cas 449 (45[illegible] PC), *Abhiram Goswami Mohant* v. *Shyama Charan Nandi*- (24 Cal 440 (447) approved.)]
[*See also* ('42) 29 AIR 1942 Oudh 374 (377, 378) : 17 Luck 805 : 199 Ind Cas 776 (DB), *Bhairo Singh* v. *Ambika Baksh Singh.* (A condition against non-transferability in a perpetual lease is not illegal or void and is binding on the parties.)]

2. ('45) 32 AIR 1945 All 285 (286) : ILR (1945) All 222 : *Mohd. Hafiz Ullah* v. *United Provinces* [24 Cal 440, 36 Cal 1003 : 36 Ind App 148 (PC) and AIR 1934 All 103 ; Rel on.]
('33) 20 AIR 1933 Bom 97 (99) : 57 Bom 194 : 142 Ind Cas 481 (DB), *Venkatesh Krishna* v. *Bhujahalli Annappa.*
('30) 17 AIR 1930 All 479 (481) : 130 Ind Cas 638 (DB), *Ramji Lal* v. *Shib Charan Das.*
*('97) 24 Cal 440 (448) : 1 Cal W N 321, *Kally Dass Ahiri* v. *Monmohini Dassee.*
('33) 20 AIR 1933 Lah 221 (222) : 13 Lah 796 : 141 Ind Cas 825 (DB), *Mela Ram* v. *Sandhi Khan.*
('10) 6 Ind Cas 1010 (1010) (Lah), *Jalal Din* v. *Ramzan.*
('17) 4 AIR 1917 Cal 86 (87) : 42 Ind Cas 673 (DB), *Annada Charan* v. *Mohitu Chandra.*
('98) 2 Cal W N 292 (294) (SB), *Sreemutty Monmohini Dassi* v. *Kalidas Ahiri* (24 Cal 440 affirmed.)
('19) 6 AIR 1919 Mad 266 (268) : 51 Ind Cas 709 (DB), *Vencatachariar* v. *Rangaswami Aiyangar.* (Denial of derivative title will work forfeiture as much as denial of original landlord's title.)
('19) 6 AIR 1919 Mad 897 (899) : 46 Ind Cas 62 (DB), *Rama Iyangar* v. *Guruswami.* (Disclaimer of title even of heirs or assignees of landlord works forfeiture.)
('16) 3 AIR 1916 Pat 417 (418) : 1 Pat L Jour 157 : 35 Ind Cas 544, *Bidya Nath* v. *Khikhinda.*

Section 111—Note 13

1. Woodfall, *Landlord and Tenant,* 22nd Edn., page 382.
2. (1828) 6 L J (O S) K B 185 (186, 187) : 8 B & C 308 : 1 Man & Ry 694 : 32 R R 393, *Doe d. Hennikar* v. *Watt.*
3. (1864) 1864 Suth W R (F B) 8 (9) (F B), *Gordon Stuart & Co.* v. *Taylor.*
(1865) 2 Suth W R Act X Rul 101 (102) (DB), *Augur Singh* v. *Mohinee Dutt Singh.*
4. ('08) 1908 Pun Re No. 53, p. 264 (264) : 1908 Pun W R No. 106, *Miran Baksh* v. *Aziz Baksh.*
('14) 1 AIR 1914 Lah 472 (472) : 1914 Pun Re No. 33 : 23 I. C. 395, *Allgh Ditta* v. *Faraz Bibi.*
('29) 16 AIR 1929 Oudh 529 (532, 533) : 4 Luck 649 : 118 Ind Cas 841 (DB), *Ambika Prasad* v. *Beni Madho.*
('18) 5 AIR 1918 Oudh 300 (301) : 46 Ind Cas 73, *Deputy Commissioner, Sitapur* v. *Muhammad Amir.*
('20) 55 Ind Cas 518 (519) (DB) (Oudh), *Fateh Bahadur Singh* v. *Nagendra Bahadur Singh.*
†('12) 15 Oudh Cas 91 (95) : 15 Ind Cas 385 (387) (DB), *Alimohammad Khan* v. *Chhedan.*

A forfeiture for breach of a condition will take place under this section only—

(a) if the condition is *express*, and

(b) the condition provides that the lessor may re-enter on breach thereof.[5]

Under the section as it stood prior to its amendment in 1929, the words "or the lease shall become void" occurred after the words "on breach thereof the lessor may re-enter." This was based on a distinction which had, at one time, been recognised in England between a clause for re-entry and a clause of nulity, namely, that a forfeiture in the former case could be relieved against but a forfeiture in the latter case could not.[6] Even in England, such a distinction was not recognised in later cases.[7] A lease providing that on breach of a condition, it shall become void was held only to be a *viodable* transaction[8] the reason being that the lessee could not be allowed to free himself, by reason of his own wrongful act, from his obligation.[9] Further, S. 114 provided for relief against forfeiture irrespective of the fact whether there was a clause for re-entry or a clause for nullity on breach of the condition. The words "or the lease shall become void" have been removed by the amendment of the section in 1929 as they served no useful purpose.

The condition, in order to effect a forfeiture, must be a *valid* one. In *Maharajah of Iepore* v. *Rukmini*,[10] it was held by their Lordships of the privy Council that the breach of a condition of attendance by the lessee on the lessor on ceremonial occasions did not a operate to cause a forfeiture.

What is meant by an "express condition" is, not that the wording of it should be in any particular form, but that the condition can be gathered from the words of the instrument, giving to them their ordinary meaning so that the Court may be certain that such condition was part of the stipulation between the parties and was understood to be so by them.[11]

Condition against alienation.

Section 10 provides that a condition against alienation in a lease is valid *if it is for the benefit of the lessor* or those claiming under him. Under this clause it has been held that even a valid condition against alienation will not operate to cause a forfeiture or render the alienation in breach of it inoperative, unless there is a proviso for re-entry by the lessor for the breach of the condition.[12] But it may

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5. ('14) 1 AIR 1914 Cal 850 (851) : 24 Ind Cas 354 (DB), *Nabakumar Datta* v. *Trailokya Nath Bose*. (Statement in a lease that if the lessee fails to dwell upon the land then he shall have no interest or connection with the land is not an express condition.)
('19) 6 AIR 1919 Cal 1028 (1029) : 46 Ind Cas 507 (DB), *Khirode Chandra* v. *Midnapore Zemindary Co., Ltd.* (No provision for re-entry—No forfeiture.)
(1889) 1889 Bom P J 249, Reprint p. 295 (296), *Rahimanbhai* v. *Shekh Sadodin*. (No right of re-entry attached to breach of covenant not to sell—No forfeiture.)

6. ('22) 9 AIR 1922 Pat 528 (529) : 1 Pat 363 : 69 Ind Cas 886 (DB), *Hiranandhan Ojha* v. *Ramdhar Singh*.

7. ('22) 9 AIR 1922 Pat 528 (528, 529 : 1 Pat 363 : 69 Ind Cas 886 (DB), *Hiranandhan Ojha* v. *Ramdhar Singh*.

8. (1841) 66 E R 969 (977) : 90 R R 879 : 1 Hare 109 : 11 L J Ch 132 : 5 Jur 1106, *Bowser* v. *Colby*.
(1836) 150 E R 490 (493) : 1 M & W 402 : Tyr & G 769 : 5 L J (N S) Eq 185 : 46 R R 326, *Doe d. Nash* v. *Birch*.
(1877) 47 L J P C 8 (16) : 3 App Cas 115 : 37 L T 727, *Davenport* v. *The Queen*.

9. (1821) 106 E R 984 (986) : 4 B & Ald 401 : Gow N P 220 : 23 R R 318, *Doe d. Bryan* v. *Bancks*.

10. ('19) 6 AIR 1919 P C 1 (5) : 46 Ind App 109 : 42 Mad 589 : 50 Ind Cas 631 (PC).

11. ('10) 8 Ind Cas 309 (310) (DB) (Mad), *Mussa Kutti* v. *Rangachariar*.

12. ('11) 10 Ind Cas 489 (490) (Cal), *Akram Ali* v. *Durga Prosanna*. (A covenant against alienation in a permanent lease is inoperative when no right of re-entry is reserved. Following 36 Cal 745.)
('06) 28 All 400 (401) : 3 All L Jour 196 (DB), *Netrapal Singh* v. *Kalyan Das*.
('05) 9 Cal W N 56 (59, 60), *Nadhu Mandal* v. *Kartick Mandal*.
('19) 6 AIR 1919 Cal 405 (405) : 52 Ind Cas 19, *Nishi Kanta Dutta* v. *Shasi Kanta*.
*('90) 17 Cal 826 (827) (DB), *Nil Madhab Sikdar* v. *Narattam Sikdar*.
†('03) 26 Mad 157 (161, 162) : 12 Mad L Jour 189 (DB), *Parameshri* v. *Vittappa Shanbaga*.
('17) 16 Suth W R 103 (104) (DB), *Mahomed Faez* v. *Shib Doolaree*.
('20) 7 AIR 1920 Mad 1006 (1008) : 43 Mad 503 : 61 I. C 658 (SB), *Udipi Seshagiri* v. *Seshamma*.
('29) 16 AIR 1929 Cal 228 (229) : 116 Ind

be questioned whether this view is consistent with S. 10 which expressly recognises the validity of conditions restraining alienation inserted in leases for the benefit of the lessor. (See S. 10 Note 13.) This clause has no application to tenures, one of the incidents of which is that it is transferable, or to tenures, one of the incidents of which is that it is not transferable. An alienation will not cause a forfeiture in the former case[13] while in the latter, a transfer will put an end to the tenure though no right of re-entry is reserved.[14]

A Condition against alienation means a condition against alienation by *act of parties* and not one by operation of law or in execution of a decree.[15]

A condition against alienation is not broken by an alienation of a *part* of demised premises[16] or by an alienation by only one of several lessees,[17] through, where the share of each tenant is specified, the landlord may re-enter on the share of the person alienating but not on the share of the others.[18] But where he entire demised land's transferred by the tenant by separate alienations, in parts, of the demised property, it has been held that in such a case the condition against alienation is broken and would work as a forfeiture of the lease.[18a] A condition against an assignment is not broken by a sub-dimise of the lease by way of mortgage.[19] A condition against sub-letting is not broken by the letting of *lodgings*[19a] or by letting part of the premises.[19b] Nor is a condition against alienation broken by an alienation which is not valid and operative.[20] A conditoin against alienation to "any person or persons" is not broken by

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Cas 153 (DB), *Khetra Nath* v. *Baharali*. (Where a lessor does not reserve to himself right of re-entry on breach of a covenant against alienation, the lessor cannot sue the holder of the lease-hold for recovery of possession on the breach of the condition.)

('21) 8 AIR 1921 Cal 474 (476) : 47 Cal 979 : 60 Ind Cas 984 (DB), *Jogesh Chandra Ray* v. *Mokbul Ali*.

[*See also* ('09) 36 Cal 745 (748) : 2 Ind Cas 416 (416) (DB), *Basarat* v. *Manisulla*.

('17) 4 AIR 1917 Cal 609 (609) : 40 Ind Cas 444, *Annoda Charan* v. *Dasarath Haldar*. (Covenant by the tenant not to transfer his interest cannot restrain the latter from transferring the same, unless proper conditions are put in for enforcing the rights of the landlord on a breach of the covenant.)]

Also see S. 10 Note 17 and S. 108 (j) Note 1.

[*But see* ('97) 21 Bom 195 (197) (DB), *Madar Saheb* v. *Sannabawa Gajaransha*. (*Obiter*—Condition against alienation does not require express right of re-entry in the event of breach.)]

13. ('25) 12 AIR 1925 Mad 914 (914) : 86 Ind Cas 294, *Krishnan Nambudripad* v. *Kunkan Nair*. (Karam kozhu tenure. AIR 1922 Mad 290 and AIR 1922 Mad 274 : 45 Mad 394 (FB) followed.)

14. ('13) 36 Mad 380 (382) : 12 Ind Cas 1007 (1008) (DB), *Achutha Menon* v. *Sankaran Nair*. (Karamkari tenure.)

('21) 8 AIR 1921 Oudh 13 (13) : 61 Ind Cas 945, *Jagmohan* v. *Deputy Commissioner, Partabgrah*.

15. ('90) 12 All 192 (197) : 1890 All W N 71 (DB), *Re West Hopetown Tea Co*. (Covenant not to assign.)

('93) 20 Cal 273 (278) (DB), *Golak Nath* v. *Mathura Nath*. (Sale in execution.)

('22) 9 AIR 1922 Cal 96 (97) : 70 Ind Cas 81 (DB), *Monmatha Nath* v. *Chunilal*. (A condition in a lease restraining transfer is not applicable to a case of involuntary transfer.)

†(1798) 101 E R 1264 (1267) : 8 T R 57 : 4 R R 586, *Doe d. Mitchinson* v. *Carter*. (Sale *in invitum*.)

(1815) 105 E R 644 (646) : 3 M & S 353 (369) : 16 R R 293, *Doe d. Goodbehere* v. *Bevan*.

16. ('37) 24 AIR 1937 Cal 636 (637) : 173 I. C. 578 (DB), *Keshab Chandra* v. *Gopal Chandra*.

('97) 24 Cal 152 (154) (DB), *Bansi Das* v. *Jagdip Narain*. (20 Cal 590 followed.)

('32) 19 AIR 1932 Cal 787 (788) : 60 Cal 47 : 139 Ind Cas 239 (DB), *Swarnamoyee Debya* v. *Ajeraddi*. (Usufructuary mortgage of part of holding.)

('26) 13 AIR 1926 Mad 1202 (1202) : 50 Mad 331 : 98 Ind Cas 1070, *David Cutinha* v. *Salvadora*.

('25) 12 AIR 1925 Mad 57 (58) : 81 Ind Cas 1006, *Venkataramana Bhatta* v. *Krishna Bhatta*.

17. ('14) 1 AIR 1914 All 305 (306) : 24 Ind Cas 79, *Kundanlal* v. *Kallu*.

18. ('36) 23 AIR 1936 Pat 450 (455) : 15 Pat 680 : 164 Ind Cas 358 (DB), *Panchani Singh* v. *Promotha Nath*.

('47) 34 AIR 1947 Mad 441 (442), *Veda Bhat* v. *Mahalaxmi Amma*.

19. ('28) 15 AIR 1928 Cal 681 (683) : 114 Ind Cas 786 (DB), *Bejoy Lal* v. *Benarsidas*. (AIR 1928 Cal 99 : 54 Cal 948 reversed. On facts, it was held that the assignment in the present case by way of mortgage was an absolute one.)

19a. (1814) 171 E R 24 (25) : 4 Camp 73 (77) : 15 R R 728, *Doe d. Pitt* v. *Laming*.

19b. (1906) 22 T L R 233 (233), *Wilson* v. *Rosenthal*.

20. ('38) 25 AIR 1938 P C 20 (22) : 65 Ind App 45 : 17 Pat 69 : 32 Sind L R 276 : 172 Ind Cas 443 (PC), *Secretary of State* v. *Kuchwar Lime and Stone Co., Ltd*. (Alienation inoperative for want of registration.)

('36) 23 AIR 1936 Pat 372 (377) : 15 Pat 460 : 163 Ind Cas 501 (DB), *Kuchwar Lime*

an alienation by one lessee of his share in favour of his co-lessee.[20a] For an instance of a restrictive condition against assignment, see the undermentioned case.[20b]

Non-payment of rent.

The due payment of rent may be an express condition in the lease, a breach of which may cause a forfeiture.[21] There must, in this case also, as in the case of other conditions causing a forfeiture, be a provision for re-entry on breach of such conditions.[22] Under the English common law, it was necessary for the lessor before he could claim forfeiture for non-payment of rent, to demand the rent on the exact day on which the forfeiture accrued at the proper place of payment and at a covenant hour before sunset.[23] This rule does not apply in this country.[24]

Breach of condition by lessor.

The act does not provide for the determination of a lease for a term by the *lessee* for breach of a condition by the lessor. The lessee cannot therefore avoid a lease for a branch of a covenant by the lessor, e.g., to have a latrine constructed, a well sunk, and a room upstirs built.[25]

14. Forfeiture for denial of title.—The law as to forfeiture of a lease by denial of the lessor's title is not the ancient law of India but has been adopted from the law of England[1] and was applied even before the enactment of this Act[2] on the ground that the rules of forfeiture in England were in consonance with justice, equity and good conscience.[3]

Under the English law, it is only a tenancy for a *term of year* that is *forfeited* by a denial or disclaimer by the tenant of the landlord's title. A disclaimer of the landlord's title in the case of a tenancy *from year to year* operates to put an end to the tenancy, not by forfeiture, but as evidence of an election to put an end to the tenancy and supersede the necessity of a notice to quit.[4] This Act, while importing general doctrine of English law of forfeiture by denial of title by the tenant does not re-

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and Stone Company, Ltd. v. *Secretary of State.*

20a. ('27) 14 AIR 1927 Mad 261 (263) : 99 Ind Cas 700, *Koragaiva* v. *Jakri Beary.* (But alienation in favour of lessee's daughter would come within the clause.)

20b. ('42) 29 AIR 1942 Cal 452 (454) : 202 Ind Cas 477 (DB), *Chandi Charan* v. *Tara Nath.* (Stipulation in lease that if lessee or his successors transferred the lands, the lessee or transferee would be liable to pay landlord one-fourth of consideration—Otherwise, transfer not valid and landlord would be entitled to possession and title under lease would be extinguished—Terms to be operative between parties and their representatives—Transfer by assignee from original tenant's heirs—Treating condition as a restrictive condition against alienation, it was perfectly valid and binding upon the persons deriving title through or from the original parties—Apart from it, stipulation amounted to a covenant running with the land.)

21. ('47) 34 AIR 1947 Cal 441 (442) (DB), *Sm. Rajabala* v. *Sukumari Debi.*
('35) 156 Ind Cas 351 (352) (All), *Narain Das* v. *Permanand.*

22. ('47) 34 AIR 1947 Cal 441 (442) (DB), *Sm. Rajabala* v. *Sukumari Debi.*
('72) 18 Suth W R 244 (244) (DB), *Ruhmoonissa* v. *Soopun Jan.*
('35) 22 AIR 1935 Lah 863 (865) : 159 Ind Cas 1019 (DB), *Bhagwan Das* v. *Ghulam Mohammad.* (No clause for re-entry—Lesor's only remedy is to sue for arrears of rent.)

('21) 8 AIR 1921 Nag 10 (11) : 17 Nag L R 205 : 62 Ind Cas 850, *Mahadeo* v. *Jainarayan.*

23. (1826) 172 E R 111 (111) : 2 C & P 245, *Doe d. Chandless* v. *Robson.*
('67) 2 Agra Ext O. C. J. 1 (11), *Great Eastern Hotel Co.* v. *Collector of Allahabad.*

24. ('67) 2 Agra Ext O. C. J. 1 (11, 12), *Great Eastern Hotel Co.* v. *Collector of Allahabad.*

25. ('25) 12 AIR 1925 Mad 833 (834) : 87 Ind Cas 10, *Govindaswami* v. *Palaniappa.*

Section 111—Note 14

1.* ('19) 6 AIR 1919 P C 1 (3) : 46 App 109 : 42 Mad 589 : 50 Ind Cas 631 (P C), *Maharaja of Jaypore* v. *Rukmani.*
('24) 11 AIR 1924 Lah 281 (283) : 70 Ind Cas 349, *Chiragh Din* v. *Muhammad Usman.* (Principle enunciated in S. 111 (g) applies in the Punjab.)

2. ('19) 6 AIR 1919 P C 1 (3) : 46 Ind App 109 : 42 Mad 589 : 50 Ind Cas 631 (PC), *Maharaja of Jaypore* v. *Rukmani.*
(1865) 2 Mad H C R 109 (110) (DB), *Mayavanjari Coumaren* v. *Nimini Mayuran.*
(1863) 1 Mad HCR 445 (446) (DB), *Ramen Nayar* v. *Kandapuni Nayar.* (The holder on kanom in Malabar who denied his jenmi's title entirely forfeited his right to hold for twelve years.)
('81) 6 Cal 436 (439) (DB), *Mozhuruddin* v. *Govind Chunder Nundi.*

3. ('19) 6 AIR 1919 P C 1 (4) : 46 Ind App 109 : 42 Mad 589 : 50 Ind Cas 631 (P C), *Maharaja of Jaypore* v. *Rukmani.*

4. ('19) 6 AIR 1919 P C 1 (4, 5) : 46 Ind

cognise the above distinction between a lease for a *term of years* and other leases, as regards forfeiture.[5]

The landlord's right of forfeiture arising from disclaimer of title is no part of the contract of tenancy but is a right which the law implies in all cases from the relation of landlord and tenant.[6]

In order to constitute a disclaimer of title there must be a direct repudiation of the relation of landlord and tenant or a distinct claim to hold the estate on a ground wholly inconsistent with the existence of such relation, which, by necessary implication is a repudiation of it.[7] A disclaimer is thus a renunciation by the party of his character of tenant either by setting up a title in another, or by claiming title in himself[7a] and the denial must be by clear and unambiguous words,[8] and to the knowledge of the landlord.[9] Thus, a statement by a tenant to the landlord "you are not my landlord. I am nobody's tenant" is a disclaimer of title.[10] In case of leases to which the provisions of this Act do not apply, it has been that a disclaimer of landlord's title unless it is a judicial proceeding or other public document, which is covered by the term "record" in English law, is not enough to work a forfeiture.[10a]

Disputing terms of tenancy.

App 109 : 42 Mad 589 : 50 Ind Cas 631 (PC), *Maharaja of Jaypore* v. *Rukmani.*

5. †('19) 6 AIR 1919 Mad 897 (900) : 46 Ind Cas 62 (DB), *Rama Iyengar* v. *Gurusami Chetti.*

6. ('96) 20 Bom 354 (361) (FB), *Venkaji Krishna* v. *Lakshman.*

7. *(1836) 150 E R 614 (617) : 1 M & W 695 : Tyr & Gr 1065 : 2 Gale 154 : 5 L J (M S) Ex 253 : 46 R R 464, *Doe d. Gray* v. *Stanion.* (Per Baron Parke.)

('16) 3 AIR 1916 Mad 749 (750) : 31 Ind Cas 220 (DB), *Oydal Kurup* v. *Narayanan Nambudri.* (5 L J Ex 253 and 9 Cal W N 928 relied on.)

†('19) 6 AIR 1919 Mad 897 (900) : 46 Ind Cas 62 (DB), *Rama Iyengar* v. *Gurusami Chetti* (*Doe d. Gray* v. *Stanion,* (1836) 1 M & W 695 relied on.)

('19) 6 AIR 1919 Mad 1106 (1107, 1108) : 41 Mad 629 : 45 Ind Cas 743 (DB), *Komulukutti* v. *Muhammad.*

7a. Woodfall, *Landlord and Tenant,* 22nd Edn., page 463.

8. ('45) 32 AIR 1945 All 293 (297) : ILR (1945) All 248 (DB), *Shiam Behari* v. *Madan Singh.*

('45) 47 Pun LR 87 (88), *Sham Lal* v. *Mt. Gindori.*

*('19) 6 AIR 1919 P C 1 (4) : 46 Ind App 109 : 42 Mad 589 : 50 Ind Cas 631 (PC), *Maharaja of Jaypore* v. *Rukmani.*

†('13) 35 All 145 (148) : 18 Ind Cas 728 (729) (DB), *Prag Narain* v. *Kadir Baksh.* (The execution of a mortgage by the tenant is not a clear denial of title.)

('20) 7 AIR 1920 Mad 256 (256) : 43 Mad 480 : 56 Ind Cas 13 (DB), *Raman Nair* v. *Moriyamma.*

('23) 71 Ind Cas 270 (271) (DB) (Mad), *Sreedharam Valia Rajah* v. *Parakkat.*

†('19) 6 AIR 1919 Mad 1106 (1108) : 41 Mad 629 : 45 Ind Cas 743 (DB), *Komulu Kutti* v. *Muhammad.*

('24) 11 AIR 1924 Lah 281 (284) : 70 Ind Cas 349, *Chiragh Din* v. *Muhammad Usman.*

('23) 10 AIR 1923 Lah 454 (455) : 4 Lah 160 : 73 Ind Cas 791 (DB), *Zia-ud-Din* v. *Fakir-ud-Din Ahmad Khan.* (Description of tenant as owner in a memorandum of appeal in land acquisition proceedings does not constitute disclaimer.)

('27) 14 AIR 1927 All 806 (807) : 100 Ind Cas 646, *Sardar Singh* v. *Man Singh.*

('16) 3 AIR 1916 Nag 15 (16) : 13 Nag L R 11 : 39 Ind Cas 15, *Bhivaji* v. *Tukaram.*

('34) 21 AIR 1934 Lah 289 (290) : 15 Lah 683 : 151 Ind Cas 209, *Mahomed Mahmud Khan* v. *Laja Mal.* (The mortgaging of premises by a tenant does not amount to an unequivocal and unambiguous denial of the landlord's title.)

('27) 14 AIR 1927 Nag 50 (51, 52) : 98 Ind Cas 16, *Ganesh* v. *G. S. Khaparde.*

†('35) 22 AIR 1935 Bom 41 (42) : 59 Bom 194 : 155 Ind Cas 516 (DB), *Rachotappa* v. *Konher Anna Rao.*

9. †('20) 7 AIR 1920 Mad 256 (256) : 43 Mad 480 : 56 Ind Cas 13 (DB), *Raman Nair* v. *Moriyamma.*

†('32) 19 AIR 1932 Bom 599 (602) : 140 Ind Cas 567 (DB), *Narayan Vithal* v. *Mangesh Vithal.*

('35) 22 AIR 1935 Bom 41 (42) : 59 Bom 194 : 155 Ind Cas 516 (DB), *Rachotappa* v. *Konher Anna Rao.*

†('19) 6 AIR 1919 Mad 1106 (1108) : 41 Mad 629 : 45 Ind Cas 743 (DB), *Komulu Kutti* v. *Muhammad.*

('23) 71 Ind Cas 270 (271) (DB) (Mad), *Sreedharam Valia Rajah* v. *Parakkat.*

('85) 9 Bom 419 (421) (DB), *Gangabai* v. *Kalapa Dari Mukrya.*

('34) 21 AIR 1934 Lah 289 (290) : 15 Lah 683 : 151 Ind Cas 209, *Mahomed Mohmud Khan* v. *Laja Mal.*

10. (1840) 173 E R 1047 (1049) : 9 Car & P 773, *Doe d. Bennett* v. *Long.*

('34) 21 AIR 1934 All 103 (104) : 149 Ind Cas 517, *Madho Lal* v. *Lal Bahadur Singh.*

('46) 33 AIR 1946 Lah 330, 337) : ILR (1947) Lah 235 : 226 Ind Cas 583 (FB), *Mt. Gindori* v. *Sham Lal.* [AIR 1919 P C 1 : 42 Mad 589 : 46 Ind App 109 (PC) applied.]

('45) 47 Pun L R 87 (88), *Sham Lal* v. *Mt. Gindori.* [Case from Punjab—The rule of English law is that a tenant will forfeit

In England it was held in *Vivian* v. *Moat*[11] that a denial by the tenant of his landlord's right "to raise the rent" coupled with an offer to pay "customary-rent" was a repudiation of the landlord's title. This view has not been followed in India,[12] and it has been held that where tenant admits a tenancy but disputes the terms of the tenancy or sets up a more favourable tenancy such as a permanent tenancy, it is not such a repudiation of the tenancy as would cause forfeiture.[13]

Requiring further information or putting the landlord to proof of his title.

Where a person claiming to be the landlord is not the original lessor but is one who claims under a derivative title from him and the lessee without repudiating his character as tenant states that the original lessor's title is really vested in another person[13a] or where he puts the claimant to proof of his title[14] or where he merely re-

his holding if he denies his landlord's title in clear, unmistakable terms, whether by matter of record, or by certain matters *in pais*. Forfeiture by matter *in pais* occurs, according to English law, when a tenant purports to make a tortious conveyance, and this part of the rule was never applicable in India.]

('46) 33 AIR 1946 Mad 57 (58) : 222 Ind Cas 646 *Ramchandra Prabhu* v. *Mahadevi* [*See however.* In cases to which the T. P. Act does not apply, it is not necessary to entail a forfeiture that the denial of the landlord's title should be embodied in a judicial proceeding. A denial of landlord's title contained in a notice sent by the tenant in reply to the landlord's notice is sufficient to entail forfeiture of the tenancy. 34 Mad 161, Approved ; AIR 1919 P C 1 : 42 Mad 589 : 46 Ind App 109 (P C), *Expl.*]

11. (1881) 50 L J Ch 331 (332) : 16 Ch D 730 : 29 W R (Eng) 504 : 44 L T 210.

12. ('19) 6 AIR 1919 P C 1 (4) : 46 Ind App 109 : 42 Mad 589 : 50 Ind Cas 631 (P C), *Maharaja of Jeypore* v. *Rukmani.*

13. ('20) 7 AIR 1920 Bom 53 (53, 54) : 58 Ind Cas 226, *Gol Daji* v. *Dod Laxman.* (An assertion by an annual tenant that he is a permanent tenant is not a denial of the landlord's title. Such a tenant is therefore entitled to notice before he can be evicted.)

('93) 1893 Bom P J 292 (DB), *Krishna* v. *Ladu.* (The setting up of a permanent lease does not constitute such a denial of title as to relieve the owner from giving notice to the tenant.)

†('86) 13 Cal 248 (253, 254) (DB), *Kali Krishna Tagore* v. *Golan Ally.*

('86) 13 Cal 3 (6) (DB), *Kali Kishan Tagore* v. *Golan Ali.* (*Vivian* v. *Moat,* (1881) 44 L T 210, does not apply to this country.)

†('96) 1896 Bom P J 451, *Ramchandra* v. *Kashinath.* (Setting up by the defendant of a right in himself to hold the lands on mirasi tenure on payment of the annual assessment was not such a disclaimer as to entitle the landlord to forfeit the tenancy and to sue without determining it by notice.)

†('94) 17 Mad 218 (220) : 3 Mad L Jour 287 (DB), *Unhamma Devi* v. *Vaikunta.* (*Vivian* v. *Moat,* (1881) 44 L T 210, not followed.)

('26) 13 AIR 1926 Cal 1181 (1182) : 96 Ind Cas 586 (DB), *Rajendra Kumar Das* v. *Sarat Chandra Das.* (An assertion by occupancy tenants of a higher right than what they actually have, will not cause a forfeiture of their rights as occupancy raiyats.)

('16) 3 AIR 1916 Nag 15 (16) : 13 Nag L R 11 : 39 Ind Cas 15, *Bhivaji* v. *Tukaram.* (Claim to hold as an ante-ijara tenant does not amount to a repudiation of the title.)

†('39) 26 AIR 1939 Oudh 257 (267, 268) : 14 Luck 723 : 183 Ind Cas 821 (DB), *Amar Krishna* v. *Nazir Hasan.* (Assertion that they were holding under heritable and transferable lease, does not amount to disclaimer of landlord's title.)

('89) 12 Mad 353 (354, 355) : 13 Ind Jur 256 (DB), *Subba* v. *Nagappa.* (Setting up permanent tenancy is not denial of title. *Vinian* v. *Moat.* (1881) 44 L T 210 ; 1 Mad H C R 13 ; 13 Cal 96 ; 13 Cal 248 ; 8 Bom 828 referred.)

('04) 27 Mad 23 (24) (DB), *Chinna Narayudu* v. *Hanschendana Deo.* (An assertion by the tenant of his alleged title as a permanent tenant and his denial of the landlord's title to give a lease of the land to a third party, is not a denial of title.)

†('16) 3 AIR 1916 Mad 249 (259) : 29 Ind Cas 365 (DB), *Maharaja of Jeypore* v. *Sri Rukmini Pattamahadevi Garu.*

('96) 6 Mad L Jour 59 (61) (DB), *Vengu Padiyachi Ragava Chetty.* (The setting up of an occupancy right by a tenant is not a disclaimer of title.)

('21) 8 AIR 1921 Bom 395 (396) : 45 Bom 303 : 59 Ind Cas 278 (DB), *Ram Ranchod* v. *Sayad Abdul Rahim.* (The setting up of a permanent tenancy by a yearly tenant is not tantamount to disclaimer of the landlord's title ; such a tenant is therefore entitled to a notice to quit before he can be evicted by the landlord.)

('86) 10 Bom 669 (672) (DB), *Purshottam* v. *Dattatraya.*

[*See also* ('91) 15 Bom 407 (413, 414) (DB), *Vithu* v. *Dhondi.* (*Quære*—Setting up permanent tenancy right if a disclaimer of title.)]

[*But see* ('84) 8 Bom 228 (230) (DB), *Baba* v. *Vishwanath.* (Setting up permanent tenancy—Setting up a right to hold at a customary rent in answer to a claim for increased rent is a repudiation of the landlord's title which absolves the landlord from his obligation to give notice to quit.]

13a. ('26) 13 AIR 1926 Cal 1205 (1206) : 96 Ind Cas 1056 (DB), *Abdulla* v. *Mohammad Muslim.*

quires further information *bona fide* before he pays the rent to anybody[15] there is no disclaimer of title. Where there is no renunciation of the lease the lessee, being unable to get possession of a part of the property claimed by a third person executed a lease to him in respect of that part, there is no denial of title.[16]

Denial of extent of interest of landlord.

An admission in good faith by a tenant, of the superior title of a third person to a portion of the lands included in the tenancy without denying the landlord's title to receive the entire rent is not such a denial as would entail a forfeiture.[17]

Denial in suit to which lessor is not a party.

A setting up, in a suit to which the landlord is not a party, of the title of a third person, without any denial of Payment of rent to him before suit is not such a denial as would entail a forfeiture.[18]

Setting up title of cosharer landlord.

The setting up of the title of a cosharer landlord is not a denial of the whole title and does not work a forfeiture.[19]

Denying execution of kabuliat.

A denial of execution of a *kabuliat* is not a denial of title.[20]

Non-payment of rent.

A mere non-payment of rent[21] or a refusal to pay rent[22] or the payment of rent to a third person[23] is not, in the absence of a renunciation of the relation of landlord and tenant, a denial of title, and will not put an end to the tenancy or constitute

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('72) 18 Suth W R 465 (466) (DB), *Doorga Kripa Roy* v. *Janoo Lathak.* (The fact of a tenant having stated in a former suit that he had a good title as against a person alleging himself to be the assignee of the original landlord, does not constitute a forfeiture of the tenure in favour of the landlord.)

†('19) 6 AIR 1919 Mad 897 (900, 901) : 46 Ind Cas 62 (DB), *Rama Iyengar* v. *Guruswami Chetti.* (But the tenant must act *bona fide,* seeking to clear a doubt whether the plaintiff is the real landlord or somebody else.)

('19) 6 AIR 1919 Mad 266 (268) : 51 Ind Cas 709 (DB), *Venkatachariar* v. *Rangasami.* (AIR 1919 Mad 897 followed.)

14. ('08) 12 Cal W N 525 (527, 528) (DB), *Mathewson* v. *Jadu Mahto.*

†('20) 7 AIR 1920 Cal 734 (734) : 57 Ind Cas 956 (DB), *Mehdiali Khan Panee* v. *Basiruddin.*

('25) 12 AIR 1925 Cal 1212 (1213) : 87 Ind Cas 657 (DB), *Golam Rabbani* v. *Taranath Deb.*

†('05) 2 Cal L Jour 389 (391) (DB), *Mallika Dasi* v. *Makham Lal.*

('28) 15 AIR 1928 Cal 312 (315) : 115 Ind Cas 13 (DB), *Hatimullah* v. *Mahomed Abju.*

15. ('24) 11 AIR 1924 Bom 454 (455) : 48 Bom 541 : 83 Ind Cas 45 (DB), *Rukmini* v. *Rayaji.*

†('28) 15 AIR 1928 Cal 312 (315) : 113 Ind Cas 13 (DB), *Hatimullah* v. *Mahomed Abju.*

16. ('08) 7 Cal L Jour 648 (651) (DB), *Farman Bibi* v. *Tasha.*

17. ('15) 2 AIR 1915 Mad 85 (86) : 25 Ind Cas 944 (DB), *Abbakka Shetthi* v. *Seshamma.*

18. ('15) 2 AIR 1915 Mad 85 (86) : 25 Ind Cas 944 (DB), *Abbakka Shetthi* v. *Seshamma.*

19. ('15) 2 AIR 1915 Cal 660 (661) : 26 Ind Cas 619 (DB), *Neamatulla* v. *Bajiulla.*

20. ('26) 13 AIR 1926 Cal 1205 (1206) : 96 Ind Cas 1056 (DB), *Abdulla* v. *Mahomed Muslim.*

21. ('45) 32 AIR 1945 All 293 (297) : ILR (1945) All 248 (DB), *Shiam Behari* v. *Madan Singh.*

('12) 15 Ind Cas 338 (339) (All), *Anrup Misir* v. *Kedar Pande.*

('12) 17 Ind Cas 523 (524) (All), *Deokinandan* v. *Bindeshwari.* (But non-payment of rent continued for a very long perior might raise an inference that landlord has been ousted or has transferred his rights to the tenants.)

('16) 3 AIR 1916 Nag 15 (16) : 13 Nag L R 11 : 39 Ind Cas 15, *Bhivaji* v. *Tukaram.*

('23) 10 AIR 1923 Pat 201 (203) : 71 Ind Cas 570 (DB), *Ram Lochan* v. *Kamakhya Narain.*

†('13) 35 All 145 (148) : 18 Ind Cas 728 (728) (DB), *Prag Narain* v. *Kadir Baksh.*

('75) 1975 Bom P J 364 (364) (DB), *Raoji* v. *Jagoji.* (Refusal to pay rent under belief that rent was already paid—No forfeiture.)

('24) 11 AIR 1924 Cal 647 (647) : 77 Ind Cas 551 (DB), *Monmatha Kumar* v. *Josada Lal.*

†('13) 19 Ind Cas 119 (120) (All), *Abdul Karim* v. *Chunni Bibi.*

22. ('45) 32 AIR 1945 All 293 (297) : ILR (1945) All 248 (DB), *Shiam Behari* v. *Madan Singh.*

('31) 18 AIR 1931 Nag 105 (105) : 122 Ind Cas 271 (272), *Haidar* v. *Jankiram.*

(1840) 133 E R 278 (281) : 9 L J (NS) C P 229 : 56 R R 313, *Doe d. Williams and Jeffery* v. *Cooper.*

23. ('47) 1947 Rang L R 394 (396), *Cheru* v. *S. Rahman.*

('14) 1 AIR 1924 Cal 645 (646) : 22 Ind Cas 796 (DB), *Shyama Charan* v. *Rani Prosad.*

the possession of the tenant adverse to the landlord.[24] (See also S. 105, Note 79.) Coupled with other circumstances it may, however, constitute a denial of title.[25]

Renunciation of tenancy.

A mere renunciation of tenancy is not a disclaimer of title unless there is a repudiation of the character of landlord and tenant by setting up a title in another or by claiming title in himself.[26]

Alienation of lease interest.

An alienation by the lessee by way of a sale or a mortgage is not necessarily a denial of title of the landlord[27] though it may be evidence of such denial.

Denial by a joint tenant.

A denial of title by some only of several joint tenants does not work a forfeiture of the tenancy.[28]

Denial of title after assignment of lease.

The denial of title by the lessee, after an assigment by him of the lease to another cannot work a forfeiture of the assignee's interest.[29]

Denial of title must have before suit for ejectment.

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24. †('14) 1 AIR 1914 Cal 645 (646) : 22 Ind Cas 796 (DB), *Shyama Charan* v. *Ram Prosad.*
('11) 9 Ind Cas 119 (120) (Cal), *Ram Newaz* v. *Shashi Bhusan.* (Mere non-payment of rent.)
('13) 19 Ind Cas 119 (120) (All), *Abdul Karim* v. *Chunni Bibi.* (Do.)
('33) 20 AIR 1933 Lah 776 (777) : 146 Ind Cas 726, *Mohammad* v. *Makhu.* (Do.)
('35) 22 AIR 1935 Lah 441 (443), *Amru* v. *Santa.* (Do.)
('13) 19 Ind Cas 64 (65) (DB) (Cal), *Chintamoni* v. *Jogeshur.* (Do.)
('20) 7 AIR 1920 Lah 217 (217) : 57 Ind Cas 269, *Des Raj* v. *Jaimal Singh.* (Do.)
('07) 6 Cal L Jour 72 (74) (DB), *Rama Charan Chowdhry* v. *Administrator General of Bengal.* (Do.)
('88) 1888 Pun Re No. 18 Page 47 (48), *Tota* v. *Sakotia.* (Do.)
†('32) 19 AIR 1932 Lah 586 (587) : 13 Lah 432 : 140 Ind Cas 474 (DB), *Sohawa Singh* v. *Kesar Singh.* (Do.)
('36) 23 AIR 1936 Lah 461 (462) : 163 Ind Cas 592, *Girdhari Ram* v. *Qasim.* (Do.)
('28) 15 AIR 1928 Lah 937 (938) : 113 Ind Cas 543, *Ralia* v. *Bodh Raj.* (Do.)
†('08) 7 Cal L Jour 202 (214) (DB), *Rameshar Koer* v. *Gobardhan Lal.* (Do.)
('98) 1898 Bom P J 355 (DB), *Mahadeo Vithal* v. *Vishnu Bhat.* (Do.)
('05) 9 Cal W N 122 (122) (DB), *Apurba Krishna Roy* v. *Ashutosh Dutt.* (Do.)
('16) 3 AIR 1916 Lah 353 (355) : 1915 Pun Re No. 97 : 32 Ind Cas 35 (DB), *Umar Baksh* v. *Baldeo Singh.* (Do.)
('25) 12 AIR 1925 Nag 452 (453) : 89 Ind Cas 741, *Khubchand* v. *Mulloo.* (Do.)
†('02) 15 C P L R 9 (10), *Tikaram* v. *Budhu.* (Do.)
('79) 2 All 517 (520) : 4 Ind Jur 650 (FB), *Prem Sukh Das* v. *Bhupia.* (Do.)
(1862-64) 1862-64 Suth W R (Sp. No.) 34 (34) (FB), *Umrithnauuth* v. *Koonj Behary.*

25. (1841) 173 E R 1047 (1049) : 9 C & P 773, *Doe d. Bennet* v. *Long.* (Refusal to pay rent coupled with statement "you are not my landlord, I am nobody's tenant" would amount to a disclaimer of title.)
('16) 3 AIR 1916 Lah 353 (355) : 1915 Pun Re No. 97 : 32 Ind Cas 35 (DB), *Umar Baksh* v. *Baldeo Singh.* (Rent not paid for 30 years—No serious attempt to recover it—Lastly lessee's denial on oath that he ever intended to pay rent—These factors held established adverse possession.)

26. ('14) 1 AIR 1914 Cal 51 (52) : 20 Ind Cas 823 (DB), *Protap Narain* v. *Biraj Dasi.* (*Doe d. Williams* v. *Cooper,* (1841) 1 Man & Gran 135 and *Doe d. Wyatt* v. *Stagg,* 5 Bing (N C) 564 followed.)
(1861) 142 E R 664 (667) : 10 C B (N S) 788 : 31 L J C P 66 : 8 Jur (N S) 387 : 58 J P 215 : 128 R R 932, *Jones* v. *Mills.*
[*See* ('43) 30 AIR 1943 All 279 (280) : 208 Ind Cas 422, *Anand Sarup* v. *Taiyab Hasan.* (Forfeiture comes into existence when the lessee fails to admit in a suit against him by the landlord that he is holding the property *as such* from the lessor.)]

27. ('16) 3 AIR 1916 Nag 15 (16) : 13 Nag L R 11 : 39 Ind Cas 15. *Bhiwaji* v. *Tukaram.*
†('13) 35 All 145 (148) : 18 Ind Cas 728 (729) (DB), *Prag Narain* v. *Kadir Baksh.*
('34) 21 AIR 1934 Lah 289 (290) : 15 Lah 683 : 151 Ind Cas 209, *Mahomed Mahmud Khan* v. *Laja Mal.*
('91) 1891 Bom P J 133 Reprint p. 67 (70) (DB), *Nagardas* v. *Hari.* (On a transfer by a tenant of his right to cultivate land to another without any change of possession, nor mutation of name, nor refusal to pay rent nor distinct repudiation of the landlord's title as superior holder, the landlord was not entitled to a forfeiture but only to a declaration that he was not bound by the alienation.)

28. ('35) 22 AIR 1935 Cal 393 (394) : 156 Ind Cas 563, *Gani Mia* v. *Vajid Ali.*
†('12) 39 Cal 903 (905) : 15 Ind Cas 620 (621) (DB), *Birendra Kishore* v. *Bhubaneswari.*
('09) 4 Ind Cas 875 (876) (DB) (Mad), *Imbichi Kandan* v. *Kozhikot Kozhake.*
('08) 7 Cal L Jour 648 (651) (DB), *Farman Bibi* v. *Tasha Haddal Hassan.*

29. ('18) 5 AIR 1918 Bom 132 (132, 134) : 42 Bom 734 : 47 Ind Cas 635 (DB), *Gopal Jayvant* v. *Shriniwas.*

In a suit for ejectment field by the lessor, a denial of the landlord's title in the written statement field by the lessee is not a denial of title of which advantage can be taken if that suit itself, because the forfeiture must have occurred *before* the consequence of which the suit was dismissed, can be taken advantage of by the lessor suit was instituted.[30] But a denial in a previous suit instituted by the landlord in order to maintain a subsequent suit for ejectment.[31] Where the plaint in an ejectment suit alleges a denial of title by the defendant before suit and this is not denied in the written statement, it has been held in the undermentioned case by the Lahore High Court[32] that the implied admisssion of a denial of title before suit is not such a clear and unambiguous denial before suit as would entitle the plaintiff to maintain the suit. A contrary view was expressed by the same Court in an earlier case.[33]

30. (1945) 47 Pun L R 87 (88), *Sham Lal* v. *Mt. Gindori.*
*('19) 6 AIR 1919 P C 1 (4) : 46 Ind App 109 : 42 Mad 589 : 50 Ind Cas 631 (PC), *Maharaja of Jeypore* v. *Rukmini Pattamahadevi.*
('94) 18 Bom 110 (114) (DB), *Dodhu* v. *Madhaorao Narayan.*
('89) 1889 All W N 154 (155) (DB), *Mazhar Husain* v. *Rahmat Ullah.*
†('01) 28 Cal 135 (138) : 5 Cal W N 263 (DB), *Nizamuddin* v. *Mamtazuddin.*
('01) 28 Cal 223 (227) (DB), *Madan Mohun Shaha* v. *Rajab Ali.*
('35) 22 AIR 1935 Lah 804 (805) : 159 Ind Cas 962 (DB), *Sarup Singh* v. *Puran Singh.*
†('24) 11 AIR 1924 Lah 281 (283) : 70 Ind Cas 349, *Chiragh Din* v. *Mohomed Usman Khan.*
†('96) 20 Bom 759 (763, 764) (DB), *Amba Bai* v. *Bhau.*
†('07) 31 Mad 261 (263) : 18 Mad L Jour 153 (DB), *Peria Karuppan* v. *Subramanian Chetti.*
('91) 1 Mad L Jour 659 (660) (DB), *Kunhunni Nair* v. *Konna Panikar.*
('10) 5 Ind Cas 336 (337) (All), *Chatter Singh* v. *Ishri Prasad.*
†('91) 15 Bom 407 (412) (DB), *Vithu* v. *Dhondi.*
('24) 11 AIR 1924 All 726 (727) : 79 Ind Cas 106, *Mukat Singh* v. *Misra Paras Ram.*
('86) 13 Cal 96 (98) (DB), *Prannath Shaha* v. *Madhu Khulu.*
('28) 110 Ind Cas 45 (46) (Lah), *Indar* v. *Achhru.*
('29) 113 Ind Cas 84 (86) (Lah), *Mohabbat* v. *Mamura.*
('31) 134 Ind Cas 1038 (1039) (DB) (Lah), *Gujar Singh* v. *Abdul Ghafoor.*
('26) 98 Ind Cas 1059 (1060) (Lah), *Karam Chand* v. *Akbar Khan.*
('23) 10 AIR 1923 Lah 409 (410) : 71 Ind Cas 779, *Kewal Ram* v. *Abdul Hai.*
†('09) 36 Cal 927 (930) : 2 Ind Cas 656 (658) (DB), *Partap Narain* v. *Maigh Lal Singh.*
('16) 3 AIR 1916 Pat 104 (106) : 37 Ind Cas 935, *Samundar Singh* v. *Mukh Lal.*
('31) 18 AIR 1931 Nag 105 (106) : 122 Ind Cas 271, *Haidar* v. *Jankiram.*
('36) 23 AIR 1936 Pat 275 (280) : 162 Ind Cas 797 (DB), *Darbar Saheb* v. *Bare Lal Kandarp Nath.*
('92) 15 Mad 123 (124) : 2 Mad L Jour 81 (DB), *Madavan* v. *Athi Nangiyar.*
('27) 14 AIR 1927 Nag 50 (51, 52) : 98 Ind Cas 16, *Ganesh* v. *G. S. Khaparde.* (Principle applied to agricultural lease.)
('28) 15 AIR 1928 Cal 713 (714) : 113 Ind Cas 561, *Jharu Mondal* v. *Mahatabaddin.*
[But see ('75) 1875 Bom P J 181 (181) (DB), *Rahim* v. *Kasam.*
('91) 1 Mad L Jour 218 (220) (DB), *Chidambaram Pillai* v. *Sabapathi Pillai.* (2 Mad H C R 109 and 9 Bom 527 followed.)
('07) 17 Mad L Jour 287 (287) (DB), *Kizhakkinyakath Abdulla Naha* v. *K. Moidin Kutti.* (1 Mad L Jour 218 followed.)
('84) 10 Cal 41 (45) : 12 Cal L R 414 (DB), *Ishan Chunder Chattopadhya* v. *Shama Churn Dutt.*]
31. ('43) 30 AIR 1943 All 279 (208) : 208 Ind Cas 422, *Anand Sarup* v. *Taiyab Hasan.* (Previous suit by lessor for declaration that they were owners of the land—Purchasers of demised land in execution of mortgage decree against lessee not admitting lessor's title and stating that their mortgagors were full owners—*Held* that the failure to admit that they were holding the land as iessee was such a denial as to incur a forfeiture.)
('78) 2 Cal L R 208 (208) (DB), *Dabee Misser* v. *Mungur Meagh.* (Suit for rent —Denial of title by tenant—Suit withdrawn and a suit for ejectment filed—*Held,* suit was maintainable as based on disclaimer of title in the former suit.)
†('18) 5 AIR 1918 Pat 174 (175) : 45 Ind Cas 642, *Mohamed Abdul Latif* v. *Habibur Rahman.*
('08) 35 Cal 807 (811) : 7 Cal L Jour 483 (DB), *Gopal Ram* v. *Dhakeswar Pershad.*
('12) 13 Ind Cas 688 (688) (Cal), *Ananda Prosad* v. *Sham Sunder.*
†('10) 5 Ind Cas 708 (709) (DB) (Cal), *Sheikh Miadhar* v. *Rajani Kata Ray.* (Where the defendant in a suit for rent by the plaintiff, his landlord, had denied his title and claimed to hold under a third party—*Held* that in a suit by the landlord for ejectment of the defendant as a trespasser, the defendant was debarred from pleading his tenancy and claiming to hold possession on that ground.)
('10) 8 Ind Cas 660 (661) (DB) (Cal), *Ekabar Sheikh* v. *Hara Bewah.*
32. ('23) 10 AIR 1923 Lah 409 (410) : 71 Ind Cas 779, *Kewal Ram* v. *Abdul Hai.*
33. ('20) 7 AIR 1920 Lah 66 (66) : 54 Ind Cas 263, *Khem Singh* v. *Ali Sher.*

Effect of denial of title.

The general principle is that a tenant denying the title of the landlord becomes liable to immediate eviction at the option of the landlord.[34] He cannot claim to be entitled in such a case to any notice to quit[35] or to any notice specified in the lease for determining the lease.[36] The reason is that by such denial, he must be deemed to waive his right to notice.[37] As was observed by Best, C. J., in *Doe* v. *Frowd*[38] "there can be no necessity for a notice to end that which he (i.e., the tenant) says has no existence."

15. Forfeiture on insolvency of lessee.—Under the second paragraph of s. 12 a condition in a lease making the lease cease on the lessee becoming insolvent is a valid condition. But there was no specific provision in this section for determination of the lease on breach of such a condition. The Special Committee in their report on the Amendment Bill of 1929 appear to have thought that such a condition did not operate to determine the lease under this clause, though the first part of cl. (g) seems to cover all kinds of conditions. Anyhow the Committee having thought it desirable to make an express provision on that point, this provision as to a condition against insolvency of the lessee was inserted in the section in 1929. In England also, a condition for re-entry on forfeiture on the insolvency of the lessee is a valid condi-

34. ('88) 12 Bom 352 (356) (DB), *Vishnu Chintaman* v. *Balaji.*
('81) 8 Cal L R 150 (151) (DB), *Shumsher Ali* v. *Doya Bibi.*
†('33) 20 AIR 1933 Lah 221 (222) : 13 Lah 796 : 141 Ind Cas 825 (DB), *Melaram* v. *Sandhi Khan.*
(1900) 4 Cal W N 42 (42) (DB), *Ananda Chandra Mondul* v. *Abrahim Soleman.*
('10) 6 I. C. 1010 (1010) (Lah), *Jalal Din* v. *Ramzan.*
('20) 7 AIR 1920 Lah 66 (67) : 54 Ind Cas 263, *Khem Singh* v. *Ali Sher.*
†('19) 6 AIR 1919 Mad 1106 (1106, 1107) : 45 Ind Cas 743 (DB), *Komalukutti* v. *Muhamad.* (Whether the lease is one for term or for life.)
(1865) 2 Suth W R Act X Rul 1 (2) (DB), *Mirza Nadir Beg* v. *Muddurram.*
('10) 8 Ind Cas 227 (228) (Lah), *Muhammad Baksh* v. *Faiz Bakhsh.*
('28) 108 Ind Cas 161 (162) (Lah), *Bhaga* v. *Budha.*
('90) 17 Cal 196 (198) (DB), *Debiruddi* v. *Abdur Rahim.* (Denial of title in a previous rent suit.)
('98) 2 Cal W N 292 (294) (SB), *Sreemutty Monmohini Dassi* v. *Kali Das Ahiri.*
[*See also* ('42) 29 AIR 1942 Cal 356 (356) : 201 Ind Cas 334, *Nimbar* v. *Turab Ulla.* (Case under Assam Act (VIII of 1869)—Denial of landlord's title—Landlord has option to put an end to lease—Unless intention to do so is shown by landlord tenancy subsists.)

35. †('96) 20 Bom 354 (362) (FB), *Venkaji Krishna* v. *Laxman Devji.* (This principle applies even to cases not falling within S. 117 of the Act.)
('88) 12 Bom 678 (682) (DB), *Agarchand Gumanchand* v. *Rakhma Hanmant.*
(1900) 24 Bom 426 (429) : 2 Bom L R 228 (DB), *Mahipat* v. *Lakshman.*
†('32) 19 AIR 1932 Lah 43 (44) : 134 Ind Cas 296, *Imam Din* v. *Natha Singh.*
('33) 20 AIR 1933 Lah 377 (378) : 145 Ind Cas 992, *Karam Chand* v. *Amar Nath.*
†('06) 33 Cal 339 (342) : 3 Cal L Jour 274 (DB), *Anandamoyi* v. *Lakshi Chandra Mitra.*
('10) 6 Ind Cas 600 (600) (DB) (Mad), *Murugesa Mudaly* v. *Subraya Gramany.*
†('10) 5 Ind Cas 924 (924) (DB) (Mad), *Thariyakath Kathijakutti* v. *Ithikamparambil.*
('86) 1886 Bom P J 314 (DB), *Samo* v. *Venkaji.*
('75) 1875 Bom P J 181 (181) (DB), *Rahim* v. *Kasam.*
('25) 12 AIR 1925 Bom 524 (525, 526) : 49 Bom 842 : 90 Ind Cas 614 (DB), *Vidyawardhak Sangh Co.* v. *Ayyappa.* (Even in cases where T. P. Act does not apply.)
('26) 13 AIR 1926 Mad 143 (144) : 91 Ind Cas 316, *Kalliani Amma* v. *Cochin Sirkar.*
('17) 4 AIR 1917 Cal 116 (117) : 40 Ind Cas 348 (DB), *Ram Nath Sil* v. *Siba Sundari.*
('74) 1874 Bom P J 82 (82) (DB), *Mahadaji* v. *Sona.* (A tenant who denies his landlord's title is liable to be treated as a transpasser and to be ejected without the customary notice to quit.)
('95) 1895 Bom P J 165 (DB), *Vyankaji* v. *Bala.*
('27) 14 AIR 1927 Sind 248 (250) : 104 Ind Cas 412 (DB), *Mulibai* v. *Vassibai.*
('14) 1 AIR 1914 Mad 81 (83) : 24 Ind Cas 803 (DB), *Abburi Venkataswami* v. *Nalluri Kristnamma.*
(1841) 173 E R 1047 (1049) : 9 C & P 773, *Doe d. Bennet* v. *Long.*
†('94) 17 All 45 (47) : 1894 All W N 196 (DB), *Haidri Begam* v. *Nathu.*
(84) 8 Bom 228 (230) (DB), *Baba* v. *Vishvanath.*
[See ('85) 9 Bom 527 (529) (DB), *Gopalrao Ganesh* v. *Kishor Kalidas.*]
Also see S. 106, Note 25.

36. ('11) 1911 Pun Re No. 76 : 13 Ind Cas 323 (324) : *Zia-ud-Din* v. *Gobind Ram.*

37. ('10) 5 Ind Cas 924 (924) (DB) (Mad), *Thariyakath Kathijakutti* v. *Ithikamparambil.*

38. (1828) 130 E R 883 (884) : 4 Bing 557 : 1 Moo & P 480 : 29 R R 624 : 6 L J C P 114.

tion.[1] Where, in a lease, there was a condition for re-entry on the insolvency of the lessee, and the lessee's interest was purchased in execution of a decree by X and thereafter the lessee became insolvent, it was held that the "lessee" for the purpose of the condition, was under the cirucmstances, really X and that as *be did* not become insolvent, no forfeiture took place.[2]

A disclaimer of a lease by the Official Assignee under S. 62 of the Presidency Towns Insolvency Act, 1909, puts an end to the lease and the lessor's interest becomes thereby accelerated without anything further being done.[3]

16. **Notice of intention to determine lease on forfeiture.**—Where a forfeiture is incurred, by reason of an act or omission on the part of the lessee, the lessor has an *option* to take advantage of it, for the lessee himself cannot take advantage of his own wrong, which would be the result if the lease were to terminate *ipso facto* on such act or omission.[1] The general rule therefore is that the lessor must do some act evidencing his intention to determine the lease.[2] This was embodied in the section as it stood before 1929 and it was necessary that the lessor should, for determining a lease by forfeiture do some act showing his intention to determine the lease.[3] Under the English law, the bringing of an action in ejectment is itself a sufficient

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Section 111—Note 15

1. (1787) 1 R R 445 (448) : 2 T R 133, *Roe. D. Hunter* v. *Galliers.*
(1884) 32 W R (Eng) Dig 107 (107) : 13 Q B D 454 : 51 L T 368, *Re Walkar ; Ex parte Gould.*
2. ('25) 12 AIR 1925 Cal 750 (751) : 88 Ind Cas 808, *Hazarimull* v. *Sadasukh Parruck & Co.*
3. ('36) 63 Cal 1123 (1134) : 40 Cal W N 846 (DB), *Satya Priya Ghasal* v. *Baria Baran Mukerji.*

Section 111—Note 16

1. ('20) 7 AIR 1920 P C 190 (192) (PC), *King* v. *Paulson.*
('35) 22 AIR 1935 Cal 609 (609) : 158 Ind Cas 380, *Raghupati* v. *Panchanani Dasi.*
2. *('19) 6 AIR 1919 P C 117 (119) (PC), *Quesnel Forka Gold Mining Co* v. *Ward.* (Case from British Columbia.)
('28) 15 AIR 1928 Lah 937 (938) : 113 Ind Cas 543, *Ralia* v. *Bodh Raj.*
('88) 1888 Pun Re No. 18 page 47 (48) (DB), *Tota* v. *Sakotia.*
('26) 13 AIR 1926 Cal 193 (203) : 85 Ind Cas 678 (DB), *Gopika Raman* v. *Atal Singh.*
('02) 12 Mad L Jour 194 (196) (DB), *Muthusami Pillai* v. *Srinivasier.*
('08) 31 Mad 403 (404) : 4 Mad L Tim 221 (DB), *Venkatramana Bhatta* v. *Gunda Raya.* (33 Cal 339 followed.)
('36) 23 AIR 1936 Mad 252 (255) : 168 Ind Cas 1005, *Soorayya* v. *Sooranna.*
('15) 2 AIR 1915 Mad 813 (815) : 38 Mad 445 : 20 Ind Cas 930 (DB), *Korapalu* v. *Narayana.* (In agricultural leases which are not governed by the T. P. Act, the lessor is not bound to do any act prior to instituting the suit showing his intention to take advantage of the forfeiture.)
('02) 25 Mad 587 (595) : 12 Mad L Jour 249 (DB), *Zamindar of Viziamagaram* v. *Suryanarayana.*
[*See also* ('32) 19 AIR 1932 Lah 43 (44) : 134 I. C. 296, *Imam Din* v. *Natha Singh.* (Though forfeiture may not result without some overt act on the part of the landlord, the repudiation of the landlord's title is sufficient to dispense with notice to quit.)]
3. ('44) 31 AIR 1944 Pat 77 (86) : 22 Pat 513 : 216 Ind Cas 111 (DB), *Krishna Prasad Singh* v. *Adyanath Ghatak.* (Lease executed before 1929—Amended section does not apply.)
('35) 22 AIR 1935 Mad 454 (456) : 157 Ind Cas 804 (DB), *Sripada Satyanarayana* v. *Venkataramamurthy.* (Orally informing the lessees that owing to their default the lease was forfeited is sufficient to constitute forfeiture.)
('30) 17 AIR 1930 Mad 272 (274) : 126 Ind Cas 284 (DB), *Malabar Timber Co.* v. *Prapravan Moidoo.* (Fresh demise to others is such an act.)
('16) 3 AIR 1916 Mad 497 (498) : 31 Ind Cas 211 (DB), *Sivarama Iyer* v. *Alagappa Chetty.* ("Some act showing intention to determine the lease"—Lawyer's notice sufficient.)
†('20) 7 AIR 1920 Cal 866 (868) : 60 Ind Cas 312 (DB), *Motilal Pal* v. *Chandra Kumar.*
('01) 24 Mad 246 (250, 251) : 10 Mad L Jour 415 (DB), *Srinivasa Ayyar* v. *Muthusami Pillai.*
('29) 117 Ind Cas 842 (845) (DB) (Cal), *Bejoy Chand Mahtab* v. *Gurupada Halaar.*
('10) 6 Ind Cas 264 (265) (DB) (Mad), *Mazhoor Pudukudi* v. *Paramban Moideen.*
('19) 6 AIR 1919 Cal 776 (777) : 53 Ind Cas 625, *Hari Kanta Das* v. *Bibi Nurannessa.*
†('18) 5 AIR 1918 Cal 969 (971) : 45 Cal 469 : 41 Ind Cas 952 (DB), *Naurang Singh* v. *Janardhan Kishore.*
('27) 14 AIR 1927 All 806 (807) : 100 Ind Cas 646, *Sardar Singh* v. *Man Singh.*
('25) 12 AIR 1925 All 346 (347) : 47 All 348 : 86 Ind Cas 174 (DB), *Shibcharan* v. *Kharka.*
('41) 28 AIR 1941 Cal 506 (509) : 197 Ind Cas 45, *Narendra Chandra* v. *Rajendra Chandra.*
('06) 33 Cal 339 (342) : 3 Cal L Jour 274 (DB), *Anandamoyee* v. *Lakhhi Chandra.*

act determining the lease.[4] There was, however, a difference of opinion in this country, one set of cases[5] holding that the act must have been done *before* the institution of the suit while another set of cases[6] held that the institution of the suit was a sufficient act in itself determining the tenancy. This difference of opinion has now been set at rest by the substitution in 1929 of the words "gives notice in writing to the lessee of" for the words "does some act showing" which occurred before. Under the present section, therefore, the lessor wishing to determine the lease for forfeiture must give a *notice in writing* to the lessee of his intention to determine the lease[7] and the service of such notice must be proved by legal evidence.[8]

It has, however, been held by the Rangoon High Court that "giving notice" is something less, in a legal sense, than "serving notice," and that a lessor sufficiently complies with the requirements of this clause if he sends to his lessee, by prepaid ordinary post, at his last known address, a letter in which he declares his intention to determine the lease, although the lessee never received it.[8a]

It has been held in the undermentioned cases[9] that in cases not governed by the Act, the necessity for an overt act showing the intention to determine the lease is not necessary.

('27) 14 AIR 1927 Oudh 544 (545) : 101 Ind Cas 771, *Mahommed Sayid* v. *Zahir-ud-Din.*

('22) 9 AIR 1922 Mad 349 (349) : 66 Ind Cas 48 (DB), *Thacharakavil* v. *Noor Mohamad Sait.* (A notice determining the lease is sufficient. Such notice need not be as required by S. 106.)

('26) 13 AIR 1926 Sind 71 (74) : 21 Sind L R 185 : 90 Ind Cas 1007 (DB), *Sidik Haji* v. *Mahomed Faruk.*

[*See also* ('18) 5 AIR 1918 Pat 174 (175) : 45 Ind Cas 642, *Muhamed Abdul Latif* v. *Habibur.*]

4. *See* ('32) 19 AIR 1932 Cal 221 (224) : 58 Cal 1359 : 135 Ind Cas 296 (DB), *Prokash Chandra* v. *Rajendra Nath.*

5. ('20) 7 AIR 1920 Cal 866 (868) : 60 Ind Cas 312 (DB), *Motilal Pal* v. *Chandra Coomar.*

('12) 14 Ind Cas 747 (749) (All), *Qadir Bux* v. *Prag Narain.*

('18) 5 AIR 1918 Cal 969 (971) : 45 Cal 469 : 41 Ind Cas 952 (DB), *Naurang Singh* v. *Janardhan.*

('14) 1 AIR 1914 All 160 (161) : 24 Ind Cas 624, *Prayag Sonar* v. *Motar Singh.*

('13) 35 All 145 (148) : 18 Ind Cas 728 (729) (DB), *Prag Narain* v. *Kadir Baksh.*

('37) 24 AIR 1937 Cal 129 (139) : ILR (1937) 1 Cal 203 : 170 Ind Cas 214 (DB), *Creet* v. *Gangaraj Gulraj Firm.*

6. ('17) 4 AIR 1917 Bom 5 (7) : 42 Bom 195 : 43 Ind Cas 851 (DB), *Isabali* v. *Mahadu.* (The mere institution of the suit and the assertion in the plaint as to the repudiation of the landlord's title constitutes a sufficient manifestation of the landlord's intention to determine the lease for the purposes of cl. (g) of S. 111.)

('21) 8 AIR 1921 Bom 307 (309) : 45 Bom 535 : 58 Ind Cas 69, *Kasturbbai Manibbai* v. *Hiralal.* (The presentation of the plaint in ejectment suits is a conclusive declaration of intention by plaintiff lessors to determine the lease.)

7. ('40) 27 AIR 1940 Oudh 92 (92) : 185 Ind Cas 25, *Saheb Din* v. *Gouri Shankar.*

8. ('20) 7 AIR 1920 P C 190 (197) (P C), *King* v. *Paulson.*

8a. ('47) 1947 Rang L R 423 (466, 467) (FB), *K. M. Modi* v. *Mohamed Siddique.*

9. ('46) 33 AIR 1946 Mad 57 (58) : 222 Ind Cas 646 *Ramchandra Prabhu* 1. *Mahadevi.* [Denial of landlord's title in reply to landlord's notice works forfeiture.]

('15) 2 AIR 1915 Mad 813 (814) : 38 Mad 445 : 20 Ind Cas 930 (DB), *Korapalu* v. *Narayana.* (The provision in S. 111 of the Transfer of Property Act, about a further act being necessary besides the breach of the covenant in the forfeiture clause before a suit could be brought is a relic of the old English common law, and is unnecessary in the case of leases not governed by the Transfer of Property Act.)

('14) 1 AIR 1914 Mad 706 (707) : 24 Ind Cas 139 (DB), *Rama Krishna* v. *Baburaya.* (In an ejectment suit, based on leases executed prior to the T. P. Act no act on the part of the landlord showing that he elects to take advantage of the forfeiture for non-payment of rent is necessary.)

('19) 6 AIR 1919 Mad 266 (266) : 51 Ind Cas 709 (DB), *Venkatachariar* v. *Rangaswami.* (Lease before Act came into force.)

('13) 21 Ind Cas 405 (406) (DB) (Mad). *Vidyapurna* v. *Rangappayya.*

('19) 6 AIR 1919 Mad 897 (902) : 46 Ind Cas 62 (DB), *Rama Iyengar* v. *Gurusami.*

('12) 17 Ind Cas 947 (947) (DB) (Mad), *Ramakrishna* v. *Baburaya.* (In the case of leases made before the Transfer of Property Act came into operation, an act on the part of the landlord showing that he elects to take advantage of the forfeiture is not a condition precedent to his right to sue in ejectment.)

('32) 19 AIR 1932 Cal 221 (225) : 58 Cal 1359 : 135 Ind Cas 296 (DB), *Prokash Chandra* v. *Rejendra Nath.*

('11) 34 Mad 161 (166) : 6 Ind Cas 447 (449) (DB), *Padmanabaya* v. *Ranga.* (Overt act determining lease on forfeiture need not be before suit but may be the institution of the suit itself.)

Where a lease provides that on breach of condition the lessee should be given notice according to law before ejectment, the tenant cannot be ejected unless a notice according to the contract is given.[10]

Clause (g) of this section, requires in the case of a forfeiture, merely that the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease, but prescribes no period for that purpose.[11] Nor is the notice required to state the grounds upon which the lessor claims to be entitled to determine the lease.[12]

Conditional notice :—Where the fulfilment or non-fulfilment of a condition attached to a notice under this clause rests entirely with the tenant, the notice is a good notice of the lessor's intention to determine the lease. The position would, however, be otherwise if the fulfilment of the condition depends wholly or partly upon chance, or on the lessor's whim.[13]

A lease does not come to an end as soon as a notice to determine the lease is given. Something more, such as an actual entry or the institution of a suit in ejectment, is required to be done by the lessor to end it.[14]

See also Note 23.

17. **Tenant cannot deny his landlord's title — Estopel.**—Section 116 of the Evidence Act provides that no tenant of immovable property or person claiming through such tenant shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy, a title to such immovable property. It has been held by their Lordships of the Privy Council that even though the lease expires by efflux of time, a tenant who has been let into possession under the lease cannot deny the landlord's title under S. 116 of the Evidence Act, so long as he has not openly restored possession by surrender to his landlord.[1] Even where the tenant has not been let into possession by X, if once the relation of landlord and tenant comes into existence between them, the tenant cannot dis-

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('15) 2 AIR 1915 Mad 85 (85, 86) : 25 Ind Cas 944 (DB), *Abbakka Shetthi* v. *Seshamma.*

('17) 4 AIR 1917 Cal 236 (240, 241) : 34 Ind Cas 833 (DB), *Dwarika Nath* v. *Mathura Nath.*

[But see ('47) 34 AIR 1947 Mad 68 (69) : 231 Ind Cas 276, *T. Umar Pulavar* v. *Dawood Rowther.* [Agricultural lease forfeiture by denial of landlord's title—Principle of S. 111 (g) applies and notice determining tenancy before institution of suit held necessary.]

('35) 22 AIR 1935 Mad 943 (944) : 158 Ind Cas 1093, *Lakshmu Naidu* v. *Venkayya.* (Lease before T. P. Act.)

('35) 22 AIR 1935 Mad 918 (919) : 163 Ind Cas 36, *Venkatarama* v. *Ponuswami.*]

10. ('17) 4 AIR 1917 Cal 426 (426) : 34 Ind Cas 516 (DB), *Umesh Chandra* v. *Kala Chand.*

('47) 1947 Rang L R 394 (397), *Cheru* v. *V. S. Rahman.*

('47) 1947 Rang L R 423 (468) (FB), *K. M. Modi* v. *Mohamed Siddique.*

('47) 1947 Rang L R 423 (472) (FB), *K. M. Modi* v. *Mohamad Siddique.* [Where the notice says "If the above demands are not fulfilled, please treat this as final notice of the termination of the lease ; this amounts to a clear statement of the landlord's intention to determine the lease.]

('45) 32 AIR 1945 Pat 260 (261, 262) : 24 Pat 109 : 221 Ind Cas 82 (FB), *Chotu Mia* v. *Mt. Sundri.* [Even after service of the notice, the lease is still voidable and not void ; otherwise there will be a conflict between S. 111 (*g*) and S. 112.]

Section 111—Note 17

1. *('15) 2 AIR 1915 P C 96 (98) : 42 Ind App 202 : 37 All 557 : 30 Ind Cas 299 (PC), *Mt. Bilas Kunwar* v. *Desraj Ranjit Singh.*

*('27) 14 AIR 1927 P C 151 (155) : 54 Ind App 276 : 5 Rang 427 : 102 Ind Cas 639 (PC), *Vertannes* v. *Robinson.*

[*See also* ('38) 25 AIR 1938 Mad 73 (74) : 176 Ind Cas 84, *Sitharamiah* v. *Ramaswamy.*

('15) 2 AIR 1915 Mad 345 (349) : 25 Ind Cas 109 (DB), *Ganapathi Mudali* v. *Venkatalakshminarasayya.* (15 Mad L Jour 368 followed. Observations to the contrary in 33 Mad 260 held should be reconsidered.)

('35) 22 AIR 1935 Bom 144 (147) : 155 Ind Cas 249, *Krishnarao* v. *Ghamon.*

('10) 34 Bom 329 (338) : 5 Ind Cas 965 (966) (DB), *Trimbak Ramchandra* v. *Ghulam Zilani.*

('72) 8 Bom H C R (A C) 175 (177) (DB), *Vasudev Daji* v. *Babaji Ranu.*

('99) 1 Bom L R 491 (492, 493) (DB), *Lakshman* v. *Raghunath.*

('27) 14 AIR 1927 Oudh 544 (545) : 101 Ind Cas 771, *Mahammad Sayid* v. *Zahir-ud-din Ahmad.* (AIR 1915 PC 96 : 37 All 557 : 42 Ind App 202 (PC), followed.)

('32) 19 AIR 1932 Mad 298 (299) : 55 Mad 601 : 138 Ind Cas 34 (DB), *Krishnarao* v. *Mungara Sanyasi.* (Do.)

('05) 28 Mad 526 (527) : 15 Mad L Jour

pute the title of X.[2] An under-tenant or assignee from the lessee or a person who comes in by collusion with the lessee is bound by the estoppel against the tenant (his lessor) and cannot deny the title of the original landlord.[3]

But it is always open to a tenant to show that the landlord's title has determined, *since the beginning of the relationship* of landlord and tenant between them.[4] It is also open to him to show that his acknowledgment of a person as a landlord was due to fraud, coercion, or misrepresentation.[5]

Since a tenant cannot deny his landlord's title his possession also cannot become adverse to the landlord so long as the tenancy continues.[6]

18. Re-entry on forfeiture under clause (g) need not be enforced by suit—Where a right of re-entry has accrued to the landlord on breach of condition, the property reverts to the landlord and the latter can, if he can do so *peaceably* and quietly, re-enter and take possession of the demised property. It is not necessary that he should *sue* for this purpose.[1] But if the lessee resists the plaintiff's entry, then the lessor's only remedy is to sue in ejectment and not to make a forcible entry.[2] A condition for re-entry by force is void.[3]

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419 (DB), *Muthuvaiyan* v. *Sinna Samavaiyan.*

('22) 9 AIR 1922 All 423 (424) : 68 Ind Cas 750 (DB), *Debi Prasad* v. *Mt. Gujar.* (A tenant holding over cannot set up an adverse title to the landlord.)

('28) 15 AIR 1928 Cal 546 (547) : 56 Cal 15 : 114 Ind Cas 409 (DB), *Mujibar Rehman* v. *Isab Surati.*

('05) 15 Mad L Jour 368 (369) (DB), *Usman Koya* v. *Chidrimokkausa.*

('30) 17 AIR 1930 Bom 395 (396) : 54 Bom 487 : 125 Ind Cas 695, *Nagindas Sankalchand* v. *Bapalal Purshottam.*

('03) 7 Cal W N 596 (597) (DB), *Ketu Das* v. *Surendra Nath Sinha.*

('92) 19 Bom 133 (135) (DB), *Patel Kila Bhai* v. *Hargovan.*

('26) 13 AIR 1926 Sind 71 (74) : 21 Sind L R 185 : 90 Ind Cas 1007 (DB), *Sidik Haji Yacub* v. *Mahomed Faruq.*

('31) 18 AIR 1931 Mad 577 (580) : 133 Ind Cas 369, *Gopala Kudva* v. *Juvappa Kamathi*]

[*But see* ('26) 98 Ind Cas 911 (912) (DB) (Bom), *Sharavan* v. *Fattu.* (From the determination his possession is adverse—Submitted not correct.)

('10) 7 Ind Cas 202 (207) (DB) (Mad), *Raja of Venkatagiri* v. *Mukhu Narasayya.* (Submitted not correct.)]

2. ('28) 15 AIR 1928 Bom 265 (266, 267) : 111 Ind Cas 911 (DB), *Shankar* v. *Jagannath.*

[*But see* ('85) 11 Cal 519 (524) (DB), *Lal Mahomed* v. *Kallanus.* (Estoppel only against person who had let the tenant into possession.)]

3. ('32) 19 AIR 1932 Cal 241 (243) : 59 Cal 739 : 137 Ind Cas 139 (DB), *Yusuf Sheikh* v. *Jyotish Chandra.* (Under-tenant.)

('06) 16 Mad L Jour 351 (351) (DB), *Parattahath Kunhi Mayan* v. *Parattahath Muhammad.* (Assignee. 13 Mad 335 followed.)

†('90) 13 Mad 335 (338) (DB), *Pasupati* v. *Narayana.* (Person coming in by collusion.)

(1834) 111 E R 7 (9) : 2 Ad & El 17 : 1 N & M 25 : 1 Moo & Rob 385 : 41 R R 364, *Doe d. Bullen* v. *Mills.* (Do.)

4. ('26) 13 AIR 1926 Pat 498 (499) : 96 Ind Cas 442, *Hira Lal* v. *Sarabjit Kamkar.*

('98) 22 Bom 428 (430) (DB), *Vedu* v. *Nilkanth.* (Tenant can show that landlord's title has determined, e. g. by a sale to him by the landlord.)

('29) 16 AIR 1929 Cal 22 (24,25) : 55 Cal 1013 : 112 Ind Cas 172 (DB), *Jovendra Lal* v. *Mohesh Chandra.*

†('35) 22 AIR 1935 Bom 144 (147) : 155 Ind Cas 249, *Krishnanarao* v. *Ghaman.*

('79) 2 Mad 226 (229) (DB), *Ammu* v. *Ramakrishna.*

(1833) 131 E R 744 (745) : 9 Bing 613 : 2 Moore & Scott 760 : 35 R R 644, *Hopcraft* v. *Keys.*

5. *('17) 4 AIR 1917 Mad 789 (797, 799) : 40 Mad 561 : 36 Ind Cas 817 (FB), *Venkata Chetty* v. *Aiyanna Goundan.*

('38) 25 AIR 1938 Rang 227 (228) : 177 Ind Cas 599, *Alagammal Achi* v. *P. L. P. R. P. R. Firm.* (AIR 1917 Mad 789) : 40 Mad 561 relied on.)

(1826) 130 E R 596 (596) : 4 L J C P (o s) 159, *Gregory* v. *Doidge.*

('13) 18 Ind Cas 916 (917) (All), *Girdhari Lal* v. *Kallo Mistri.*

[*See also* ('03) 7 Cal W N 596 (597) (DB), *Ketu Das* v. *Surendra Nath Sinha.* (11 Cal 519 distinguished.)

6. See Note 59 on Articles 142 & 144 of the A. I. R. Commentaries on the *Limitation Act,* 2nd (1942) Edn., and Note 79 on S. 105, T. P. Act.

Section 111—Note 18

1. ('66) 2 Agra Ex O C 1 (11), *Great Eastern Hotel Co. Ltd* v. *Collector of Allahabad.*

F. A. No. 10 of 1943 D/-28-2-46 (DB) (Lah), *Bhim Sen* v. *Secretary of State.*

2. ('12) 15 Oudh Cas 295 (300) : 15 Ind Cas 857 (859), *Habibulla Shah* v. *Surji.*

('15) 2 AIR 1915 Oudh 218 (219) : 30 Ind Cas 292 (DB), *Habib Ullah Shah* v. *Bakht Bali Singh.*

[*See also* ('09) 36 Cal 489 (492) : 2 Ind Cas 495 (405) (DB), *In re Maud Anderson.* (Forfeiture of lease on tenant's insolvency—Landlord applying to Insolvency Court for delivery of possession of property

19. Who can enforce forfeiture.—As has been seen already, the *lessee* himself cannot take advantage of his own wrong and cannot vacate a lease for forfeiture caused by his own act.

As a rule the lessor can enforce the forfeiture unless he has parted with his interest.[1] A transfer of the reversion (i. e., the lessor's interest) carries with it the right to enforce a forfeiture, and the transferee can enforce the same even if the forfeiture was incurred *before* the transfer was made.[2] Thus, a usufructuary mortgagee of the lessor of his interest can enforce a forfeiture clause in the lease given by the mortgagor.[3] In the undermentioned case[4] where after a notice to determine the lease had been given, the lessor granted a new lease in favour of a third person it was held that the latter could enforce the forfeiture against the previous lessee.

As to whether one of several joint lessors can determine the lease for forfeiture, see Note 26.

20. *Waiver of forfeiture.*—See Notes on Section 112.

21. *Relief against forfeiture.*—See Notes on Section 114 and 114A.

22. Forfeiture of service tenures.—The principles relating to forfeiture apply also to service tenures, i. e., tenures granted on the condition of performance of services. In cases to which the Act does not apply, the refusal to perform service will, according to the undermentioned cases,[1] terminate the lease even without any overt act being done by the lessor to terminate the lease. In cases governed by cl. (g) as it stood prior to 1929, it was held that an overt act by the landlord was necessary to determine the lease.[2] Under the present clause a notice in writing determining the lease is necessary.[3]

A *notice to quit,* is, however, not necessary for determining a lease where a forfeiture has been incurred for refusal to perform the service.[4]

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leased on failure of lessee to give possession —Insolvency Court has no jurisdiction to pass an ejectment decree in such a porceeding.)]

Also see S. 105, Note 71.

3. ('15) 2 AIR 1915 Oudh 218 (219) : 30 Ind Cas 292 (DB), *Habib Ullah Shah* v. *Bakht Bali Singh.* (50 L J Ch 577 followed.)

Section 111—Note 19

1. Woodfall, *Landlord and Tenant,* 22nd Edn., page 390.
2. Woodfall, *Landlord and Tenant,* 22nd Edn., page 391.
†('18) 5 AIR 1918 Bom 79 (80) : 43 Bom 28 : 47 Ind Cas 198 (DB), *Vishweshwar* v. *Mahabaleshwar.*
('87) 14 Cal 176 (183), *Kristo Nath Koondoo* v. *T. F. Brown.*
3. ('36) 23 AIR 1936 Mad 116 (117) : 160 Ind Cas 530, *Vamana Pai* v. *Venkatu Naika.*

Also see Note 8 and S. 109, Note 4.

4. ('24) 11 AIR 1924 Lah 49 (51, 52) : 71 Ind Cas 837 (DB), *Kallan* v. *Jowahar.*

Section 111—Note 22

1. ('32) 19 AIR 1932 Cal 221 (225) : 58 Cal 1359 : 135 Ind Cas 296 (DB), *Prokash Chandra* v. *Rajendra Nath.* (4 Cal 67 relied on.)
('23) 10 AIR 1923 Nag 163 (163) : 67 Ind Cas 30, *Bed Prosad* v. *Kangalu.* (*A muafi-khairati* tenant who holds land free of rent on condition of his rendering services to *malguzar* loses his tenure on ceasing to render the services.)
('05) 2 Cal L Jour 403 (406) (DB), *Ansar Ali Jemadar* v. *C. E. Grey.*
('68) 10 Suth W R 289 (291) (DB), *Ram Gopal Chuckerbutty* v. *Chundernath Sein.*

[*See also* ('17) 4 AIR 1917 Cal 116 (117) : 40 Ind Cas 348 (DB), *Ramnath Sil* v. *Siba Sundari.* (A service tenure, whether created before or after the passing of the Transfer of Property Act, determines if the tenant refuses to render the requisite service and the landlord can re-enter without serving a notice to quit.)
('27) 14 AIR 1927 Cal 561 (562) : 103 Ind Cas 542 (DB), *Sati Prasad* v. *Mahesh Bhunia.* (Service tenant refusing to serve or denying title—Notice to eject is not necessary.)
('95) 22 Cal 938 (942, 943) (DB), *Radha Pershad Singh* v. *Budhu Dashad.*]

Also see S. 105, Note 69.

2. ('41) 28 AIR 1941 Cal 506 (509) : 197 Ind Cas 45, *Narendra Chandra* v. *Rajendra Chandra.*
('11) 11 Ind Cas 695 (695) (Cal), *Atul Chandra* v. *Bejoy Dhupi.* (Overt act must be by all the joint landlords where there are more than one.)
('09) 2 Ind Cas 993 (993, 994) (Cal), *Sheikh Abdul* v. *Chabil Jan Bibi.* (Tenant renouncing character as service tenant of homestead land by claiming it as his occupancy jote—No notice held necessary before suit for ejectment as the landlord had shown his intention to determine lease by ejecting the tenant on a previous occasion.)
3. ('32) 19 AIR 1932 Cal 221 (225) : 58 Cal 1359 : 135 Ind Cas 296 (DB), *Prokash Chandra* v. *Rajendra Nath.*
4. †('17) 4 AIR 1917 Cal 116 (117) : 40 Ind Cas 348 (DB), *Ramnath Sil* v. *Siba Sundari.*

The dismissal of a *ghatwal* has been held to carry with it the forfeiture of his tenure.[5]

23. Notice to quit or determine the lease—Clause (h).—In the case of a lease from year to year or from month to month, it is, in the absence of a contract or local law or usage to the contrary, terminable by a *notice to quit* under S. 106.[1] Where, in the case of such leases, there is a contract or local law or usage to the contrary, and in cases of leases where the contract of tenancy provides for notice before determination of the lease, the lease is terminable by a *notice to determine the lease* as contemplated by the contract or local law or usage.[2]

A notice to quit or to determine the lease is necessary only where the tenancy is valid and *admitted* to exist between the parties. Where there is no tenancy at all[3] or where the tenancy is denied[4] or where a lease is cancelled on the ground of fraud[4a] no such notice is necessary before suing for ejectment.

A lease whether governed by the Act or not, if not determined in any of the modes provided by clauses (a) to (g) of the section, can be determined only by a proper notice to quit or to determine the lease.[5]

The notice to quit or to determine the lease must be *duly* given by the one party to the other before the tenancy can be determined, that is to say, it must be given as required by S. 106 or as required by the contract of lease, if any, or by the local law or usage governing the case. An invalid notice does not determine the lease or render the possession of the tenant wrongful.[6] But where an invalid notice is accepted by

('27) 14 AIR 1927 Cal 561 (562) : 103 Ind Cas 542 (DB), *Raja Sati Prasad* v. *Mahesh Bhunia.*

('95) 22 Cal 938 (942, 943) (DB), *Radha Pershad Singh* v. *Budhu Dashad.*

('15) 2 AIR 1915 Mad 1135 (1136) : 28 Ind Cas 915 (DB), *Ramasami Chettiar* v. *Ambalagaran.*

[*See also* ('09) 2 Ind Cas 993 (994) (Cal), *Sheikh Abdul* v. *Chabil Jan Bibi.* (Service tenure—Tenant renouncing character as service tenant—Notice to eject is not necessary.)

('16) 3 AIR 1916 Mad 20 (20) : 27 Ind Cas 863 (DB), *Thikkillath Tarawad Karanavan* v. *Monchu Nair.* (In the case of a Kudima Jenman demise the landlord's power to eject the tenant is limited to cases where the latter omits to perform the services for which the grant was made.)

('20) 7 AIR 1920 Mad 256 (256) : 43 Mad 480 : 56 Ind Cas 13 (DB), *Raman Nair* v. *Moriyamma.* (A kudima tenure will be forfeiture if it was granted for future services and the tenant refuses to perform such services—A denial of the landlord's title is tantamount to a refusal to render the services required.)]

5. ('32) 19 AIR 1932 Cal 77 (80) : 135 Ind Cas 275 (DB), *Pitambar Laik* v. *Motilal Laik.*

Section 111—Note 23

1. ('20) 7 AIR 1920 Nag 62 (62) : 57 Ind Cas 311, *Manalal* v. *Sukhlal.*

('17) 4 AIR 1917 Mad 141 (141) : 32 Ind Cas 709 (DB), *Mt. Bevi Umma* v. *Sbamu Menon.*

2. *See* ('28) 15 AIR 1928 Mad 687 (688) : 100 Ind Cas 398 (DB), *Moosa Kutty* v. *Kovilakath Thekke.*

3. ('39) 26 AIR 1939 Pat 167 (168) : 178 Ind Cas 362, *Shiba Prasad* v. *Chamru Pasi.*

4. ('19) 6 AIR 1919 Mad 897 (900) : 46 Ind Cas 62 (DB), *Rama Iyengar* v. *Gurusami Chetty.* (*Doe* v. *Frowd,* 1 Moo & P 480, followed.)

See also cases cited in Note 14.

4a. ('33) 20 AIR 1933 Mad 67 (68) : 140 Ind Cas 281, *Meyappa Chettiar* v. *Nagammai Achi.*

('09) 36 Cal 675 (691) : 1 Ind Cas 626 (631) (DB), *H. Mathewson* v. *Sri Ram Kanai Singh.*

5. ('90) 1890 All W N 175 (176) (DB), *Harbansi* v. *Bholai.* (7 All 899 followed.)

('96) 6 Mad L Jour 59 (61) (DB), *Vengu Padiyachi* v. *Ragava Chetty.*

('75) 23 Suth W R 271 (272), *C. G. D. Betts* v. *Jamie Shikh.*

('84) 8 Bom 164 (166) (DB), *Balaji* v. *Bhikaji.* (A yearly tenancy can only be terminated by six months' notice on either side ending with the cultivating year.)

('21) 8 AIR 1921 Pat 334 (335) : 62 Ind Cas 421, *Farzand Ali* v. *Motilal Chowdhry.*

('37) 24 AIR 1937 Pat 391 (395) : 170 Ind Cas 316 (DB), *Secretary of State* v. *Rajendra Prasad.*

('93-1900) 1893-1900 Low Bur Rul 36 (36), *Asad Ali* v. *Kadimali.*

('97-1901) 2 Upp Bur Rul 414 (415), *Maung San Pyi* v. *Maung Tun.*

[*See* ('92) 1892 Bom P J 405 (DB), *Raghunathrao* v. *Krishnarao.*]

[*See also* ('36) 23 AIR 1936 Cal 351 (352) : 166 Ind Cas 811, *Golam Hossain* v. *Abu Bakkar.*

('10) 6 Ind Cas 701 (702) (DB) (Mad), *Gandrapu Sinayya* v. *Koppineni Venkataratnam.* (A landlord is entitled to eject, after giving due notice to quit.)

('11) 9 Ind Cas 19 (20) (Cal), *Mozaffar Ali* v. *Darogha Gope.*]

6. ('36) 23 AIR 1936 Cal 581 (582) : 167 Ind Cas 281, *Shambhu Chandra* v. *Kanai Lal.*

the landlord and the defect is waived, the lease will be terminated.[7] Where a tenant gives a notice of his intention to quit by a particular date, but does not vacate fully on that date, the landlord is entitled to another notice to quit or an equivalent rent for the period of notice.[8] Where there has been an assignment of the lease by the lessee, the lessor is only bound to give the notice to quit to the *lessee* and not the assignee.[8a]

A notice to quit or determine the lease must be given *before* a suit for ejectment is instituted.[9] The Court cannot in its decree in a suit for ejectment give such notice.[10]

As to whether a plea of want of notice can be taken for the first time in second appeal, see the undermentioned cases.[11]

23a. **Lease and Rent Control Legislation.**—Madras Buildings (lease and Rent Control) Act (XV of 1946).—It has been held in the case noted below[1] that a notice to quit is not necessary before filing an application for eviction to the Rent Controller under S. 7 of that Act and that S. 111 (h), T. P. Act, has no place in the scheme of procedure laid down in S. 7 of the Madras Act. It was also observed that even if such notice to quit was necessary it would be merely one of the issues to be decided by the Rent Controller and would not in any way affect his jurisdiction to entertain the application.

24. **Tenancy at will.**—A tenancy at will is a tenancy only so long as *both* parties are willing to continue it. Either party may terminate it by expressing his desire to do so.[1] It has been held that it is not a "lease" as defined by the Act[2] and this section has, therefore, no application to such tenancy. The observations in the undermentioned case[3] that the tenancy might be terminated under clause (h) of this section are inconsistent with the above view.

A tenancy at will is determined by the death of the tenant or the landlord.[4]

(Lease from month to month—Invalid notice to quit—Landlord held not entitled to evict tenant.)

('28) 15 AIR 1928 All 95 (96) : 107 Ind Cas 690, *Aminullah* v. *Emperor.*

7. ('25) 12 AIR 1925 Rang 206 (206) : 86 Ind Cas 512, *F. Morgan* v. *Ahmad Moola Dawood.*

8. ('10) 1910 Pun Re No. 94 : 8 Ind Cas 355 (355), *Niadar Mal* v. *Lewin.*

8a. ('48) 35 AIR 1948 Bom 349 (357) (DB), *Treasurer of Charitable Endowments* v. *S. F. B. Tyabji.*

9. ('10) 6 Nag L R 17 (19) : 5 Ind Cas 699 (700), *Udebhan* v. *Jagganath.* (The suit itself will not be regarded as a notice.)

10. ('94) 18 Bom 107 (108) (DB), *Abu Bakar* v. *Venkataramana.*

11. ('44) 31 AIR 1944 Pat 77 (86) : 22 Pat 513, 216 Ind Cas 111 (DB), *Krishna Prasad Singh* v. *Adyanath Ghatak.* (Plea cannot be raised for first time in appeal. 95 Ind Cas 573 (Bom), followed.)
('96) 20 Bom 759 (761) (DB), *Ambabai* v. *Bhau.* (Yes.)
('94) 18 Bom 119 (113) (DB), *Dodhu* v. *Madhavrao Narayan.* (Yes. 15 Bom 407 ; 15 Bom 415 ; 2 Mad 346 and 12 Mad 353, fallowed.)
('93) 1893 Bom P J 292 (DB), *Krishna Sahkaram Swar* v. *Ladu Vithu Kawatkar.* (Yes.)
('80) 2 Mad 346 (350, 351) : 3 Ind Jur 160 (DB), *Abdulla Rawutan* v. *Subbarayyar.* (Yes.)
('23) 10 AIR 1923 Rang 13 (15) : 70 Ind Cas 834 (DB), *The Punjab Motor Co.* v. *Shaikh Juman.* (Question of validity of notice given will be deemed to have been waived if not taken in the first Court.)
('24) 11 AIR 1924 Mad 904 (905) : 82 Ind Cas 956, *Nalluli Pandarathil* v. *Secy. of State for India.* (Cannot be taken as of right in second appeal.)
('12) 15 Ind Cas 584 (586) (Mad), *In re Arumygam Pillai.* (No.)
Also see S. 106, Note 24.
('49) 36 1949 Mad 780 (781, 782) (DB), *Krishnamurthy* v. *Parthasarthi.* [AIR 1949 Mad 387, Reversed.]

Section 111—Note 24

1. ('36) 23 AIR 1936 Bom 98 (98) : 161 Ind Cas 210, *Bai Jivkore* v. *Himatlal.*
2. ('40) 27 AIR 1940 Cal 89 (91) : ILR (1939) 2 Cal 254 : 186 Ind Cas 625, *Anwarali* v. *Jamini Lal Roy.*
3. ('36) 23 AIR 1936 Bom 98 (98) : 161 Ind Cas 210, *Bai Jivkore* v. *Himatlal.*
4. †('40) 27 AIR 1940 Cal 89 (91) : I L R (1939) 2 Cal 254 : 186 I. C. 625, *Anwarali* v. *Jamini Lal Roy.*
('25) 12 AIR 1925 Pat 256 (257) : 85 Ind Cas 77 (DB), *Ramdhani Gope* v. *C. V. Scott.* (Where tenancy is determined by the death of either party there can be nothing that the heir can take.)
(1900) 10 Mad L Jour 201 (202) (DB), *Chemminian Pockan* v. *Udayavarma.*
Also see S. 106 Note 6.

No formal notice is necessary to terminate a tenancy at will.[5] A verbal demand for possession is enough to terminate it.[6] See also S. 105, Note 32 and S. 106, Note 6.

25. **Leases not governed by the Act.**—To tenancies created before the Act and to tenancies excepted from its operation, the principles of English law as to the determination of leases have been applied, as being in consonance with justice, equity and good conscience.[1] This section is largely based on the English law and, consequently, the principles underlying it may be applied to such cases but not its technical rules. In applying such principles the Courts should have due regard to the equities of the case.[3]

A tenancy not governed by the Act and not determined on any grounds referred to in clauses (a) to (g) can only be determined by a *reasonable* notice to quit.[4]

By some Provincial Acts a right of forfeiture is excluded for denial of the landlord's title.[5] In such a case, of course, the law of forfeiture as laid down in this section or by the English law cannot be applied. Where there is no such exclusion the general principles of the law of forfeiture will apply.

26. **Joint lessors—Termination of lease.**—Under the English law one of several joint lessors may determine the lease and recover his share. A notice by a

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5. ('33) 20 AIR 1933 Pat 561 (562) : 145 Ind Cas 567 (DB), *Ram Kishnu* v. *Bibi Sobila.* (AIR 1925 Pat 256 followed.)
[*See also* ('26) 13 AIR 1926 Lah 129 (130) : 89 Ind Cas 869, *Kaka* v. *Ram Saran.*]
6. †('25) 12 AIR 1925 Pat 256 (257) : 85 Ind Cas 77 (DB), *Ramdhani Gope* v. *C. V. Scott.*
('07) 34 Cal 57 (64) : 5 Cal L Jour 181 (DB), *Deonandan Pershad* v. *Megnu Mahton.*
(1832) 131 E R 649 (650) : 9 Bing 356 : 2 Moore & Scott 464 : 35 R R 553, *Doe d. Price* v. *Price.*
Also see S. 105 Note 32 and S. 106 Note 6.

Section 111—Note 25

1. ('45) 32 AIR 1945 Pesh 16 (18) : 220 Ind Cas 227 (DB), *Ishar Dass* v. *Raji Mohammad.* [Sections 111 and 116 do not apply to the N. W. F.]
†('35) 22 AIR 1935 Bom 41 (42) : 59 Bom 194 : 155 Ind Cas 516 (DB), *Rachotappa* v. *Konher Annarao.*
('18) 5 AIR 1918 Lah 286 (287) : 1918 Pun Re No. 32 : 45 Ind Cas 105, *Fakir* v. *Wazir Khan.* (English rule of forfeiture on denial of the landlord's title is applied in the Punjab.)
('24) 11 AIR 1924 Lah 281 (283) : 70 Ind Cas 349, *Chiragh Din* v. *Mohammad Usman Khan.*
2. ('47) 34 AIR 1947 Mad 68 (69) : 231 Ind Cas 276, *T. Umar Pulavar* v. *Dauood Rowther.* [Principle of S. 111 (g) as amended in 1929 applied to agricultural lease as principle of justice, equity and good conscience and notice of intention to determine tenancy held essential even in agricultural lease.]
(1945) 47 Pun L R 87 (88), *Sham Lal* v. *Mt. Gindori.* [Principle of forfeiture of tenancy under S. 111 (g), applied in Punjab.]
('03) 26 Mad 157 (160) : 12 Mad L Jour 189 (DB), *Parameshri* v. *Vittappa Shanbaga.*
('27) 14 AIR 1927 Nag 50 (51) : 98 Ind Cas 16, *Ganesh* v. *G. S. Khaparde.* (Though S. 111 (g), of the T. P. Act, does not apply to agricultural leases in Berar, yet the principle of forfeiture therein enunciated applies as a principle which should guide the Courts in dealing with such matters.)
('19) 6 AIR 1919 Mad 1106 (1107) : 41 Mad 629 : 45 Ind Cas 743, *Komalukutti* v. *Muhamad.*
('26) 13 AIR 1926 Sind 71 (74, 75) : 21 Sind L R 185 : 90 Ind Cas 1007 (DB), *Sidik Haji Yacub* v. *Mahomed Faruq.* (Lease in Sind to which Act was not made applicable.)
3. ('27) 14 AIR 1927 Nag 50 (52) : 98 Ind Cas 16, *Ganesh* v. *G. S. Khaparde.*
4. ('79) 4 Cal 339 (341) (DB), *Ram Rotton Mundal* v. *Netro Kally Dassee.*
('04) 8 Cal W N 774 (778) (FB), *Sulatu Das* v. *Judu Nath Das.*
5. (33) 20 AIR 1933 Mad 165 (166) : 145 Ind Cas 690, *Gurumurti* v. *Rangiah.*
('08) 31 Mad 261 (263) : 18 Mad L Jour 153 (DB), *Peria Karuppan* v. *Subramanian Chetti.*
('86) 12 Cal 82 (88) (DB), *Radha Gobind Koer* v. *Rakhal Das Mukerjee.*
('97) 24 Cal 720 (723) (DB), *Kishori Mohan* v. *Nund Kumar.*
('97) 1 Cal W N 158 (159) (DB), *Chandra Mohun* v. *Bissesswar Chetterjee.* (Parting with possession of a holding or denying title of a person under whom a non-occupancy raiyat holds is not a ground of forfeiture and therefore he cannot be ejected except on grounds mentioned in S. 44 of the Bengal Tenancy Act, 1885.)
See Bengal Tenancy Act, VIII of 1885.

joint lessor on behalf of himself and the others will terminate the lease as to all.[1] This is not the law in this country. All of them must act.[2] It has been held by the High Court of Madras that where a lease is granted by several joint lessors, containing a clause for forfeiture for non-payment of rent and subsequent to the lease the lessors become divided, each of them can enforce the forfeiture clause for non-payment of his share of the rent, by virtue of the principles underlying sections 37 and 109 of the Act.[3]

Where once a lease has been properly determined, one of the lessors may maintain a suit in ejectment, making the others parties to the suit.[4]

27. **Possession after determination of tenancy.** The possession of a tenant who holds over after the determination of the tenancy, without the consent of the landlord is wrongful possession, though not adverse possession.[1] As a person in wrongful possession he will be liable to pay damages to the lessor for such unlawful occupation.[2] The use of the words "damages for use and occupation" in such cases is not strictly correct. As seen in Note 40 on S. 105, the said words imply an occupation by a person with the permission of the owner in which case the law implies a contract to pay compensation for such occupation.[3]

Section 111—Note 26

1. Woodfall, *Landlord and Tenant*, 22nd Edn., page 437.
(1842) 174 E R 507 (508) : Car & M 280 : 66 R R 867, *Alford* v. *Vickery*.
2. †('11) 9 Ind Cas 110 (113) (DB) (Cal), *Surendra Nath* v. *Krishna Sakhi*.
*('08) 35 Cal 807 (811) : 7 Cal L Jour 483 (DB), *Gopal Ram Mohuri* v. *Dukheswar Pershad Narain Singh*.
('17) 4 AIR 1917 Cal 621 (624) : 34 Ind Cas 221 (SB), *Cassim Ahmed* v. *Eusuf Haji*. (A tenancy under joint receivers can be determined only by a notice given by them jointly.)
('14) 1 AIR 1914 All 160 (161) : 24 Ind Cas 624, *Prayag Sonar* v. *Motar Singh*.
('11) 11 Ind Cas 695 (695) (Cal), *Atul Chandra Majumdar* v. *Bejoya Dhupi*.
('35) 22 AIR 1935 Cal 577 (577) : 157 Ind Cas 1115, *Panchu Charan* v. *Benode Behari*. (The principle of English law that a joint landlord may put an end to his own demise, as far as it operates on his share, whether his companions join him or not, has no application in India.)
('10) 5 Ind Cas 277 (277) (Cal), *Thakur Ram* v. *Shakroo Mian*.
('24) 11 AIR 1924 Mad 771 (772) : 80 Ind Cas 139 (DB), *Kannan Kutti* v. *Elaya Veetil*. (A notice to quit by one only of two Uralans of a Malabar Devaswom is invalid.)
('06) 29 Mad 29 (34) (DB), *Appa Rao* v. *Prattipati Ramayya*.
('81) 7 Cal 470 (472) : 9 Cal L R 260 (DB), *Reasut Hossein* v. *Chorwar Singh*.
(34) 21 AIR 1934 Cal 127 (128) : 149 Ind Cas 559 (DB), *Jarman Gomez* v. *Ram Kumar*.
Also see S. 106, Note 34.
[But see ('87) 11 Bom 644 (648), *Ebrahim Pir* v. *Cursetji Sorabji*. (Principle of English law applied.)]
3. ('15) 2 AIR 1915 Mad 813 (814) : 38 Mad 445 : 20 Ind Cas 930 (931, 932) (DB), *Korapalu* v. *Narayana*. (29 Mad 29 followed ; 35 Cal 807 not followed.)
4. (1865) 2 Suth W R 290 (290) (DB), *Mudun Singh* v. *Nurput Singh* v. *Nurput Singh*. (Lease determined by efflux of time.)
('17) 4 AIR 1917 Mad 151 (153) : 39 Mad 1049 : 32 Ind Cas 512 (DB), *Ahmad Sahib Shuttari* v. *Magnesite Syndicate, Ltd*.
('47) 34 AIR 1947 Lah 388 (402) (DB), *Vinod Sagar* v. *Vishnubhai*. [Where the tenancy has been determined, one of the co-owners can maintain a suit for ejectment of a trespasser without impleading the other co-owners :]

Section 111—Note 27

1. See Note 13 on Section 116.
('34) 21 AIR 1934 Lah 129 (130) : 149 Ind Cas 948 (DB), *Kirat Singh* v. *Bhai Kalu Singh*.
('33) 20 AIR 1933 Lah 509 (510) : 146 Ind Cas 845 (DB), *Ubedul Rahman* v. *Darbari Lal*.
('07) 34 Cal 922 (924) (DB), *Khater Mistri* v. *Sadruddi Khan*.
[*See also* ('14) 1 AIR 1914 All 1 (2) : 22 Ind Cas 7, *Munna Lal* v. *Buchchu Lal*.]
2. ('28) 15 AIR 1928 Cal 436 (438) : 110 Ind Cas 715 (DB), *Suresh Chandra* v. *Kanti Chandra*.
[*See also* ('17) 4 AIR 1917 Mad 901 (902) : 39 Mad 54 : 33 Ind Cas 705 (DB), *Madar Sahib* v. *Kader Maideen Sahib*.]
3. ('99) 26 Cal 338 (347), *Madhubmoney Dossee* v. *Nundo Lal*.

112. A forfeiture under section 111, clause (*g*), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting :

waiver of forfeiture

Provided that the lessor is aware that the forfeiture has been incurred :

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

Synopsis

1. Scope of the section.
2. Acceptance of rent.
3. Distress for rent.
4. "Any other act."
5. Knowledge of breach.
6. Effect of waiver.
7. Second proviso.

TOPIC INDICATOR

Acceptance of rent after suit. See Note 7.
Subsequent breaches. See Note 6.
Waiver cannot be revoked. See Note 1 and 6.

1. Scope of the section.—It has been seen in the Notes on S. 111, that incurring of a cause of forfeiture by the lessee does not *ipso facto* determine the tenancy. but that it is at the *option of the lessor* to elect whether he would determine the tenancy or not. The Courts always lean against forfeiture,[1] and if the lessor, knowing that a forfeiture has been incurred, *does any act* whereby he acknowledges the continuance of the tenancy, at a later period, he will be regarded in law as having *waived* the forfeiture.[2] This rule is enacted in this section. The rule really rests on the principle enunciated by the maxim *allegans contraria non est audiendus* (he is not to be heard who alleges things contradictory to each other). A lessor cannot proceed on the footing that a lease subsists and at the same time claim that it has been forfeiture.[3]

Where once the forfeiture is waived, the lessor cannot be allowed to retract from it.[4] "Cases of forfeiture," said Lord Mansfield in *Goodright* v. *David*,[5] "are not favoured in law ; and where the forfeiture is once waived, the Court will not assist it."

No question of waiver arises where a lease has been determined by the landlord taking advantage of forfeiture.[6] But the lease will not be at an end *merely* on

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Section 112—Note 1

1. See Note 11 on Section 111.
('24) 11 AIR 1924 Mad 649 (650) : 78 Ind Cas 1007 (DB), *Akkamma Shetti* v. *Chandra Shetti.*
('89) 1889 Pun Re No. 6 Page 8 (12, 13), (DB), *Sukhdeo* v. *Abdul Rahman.*
2. Woodfall, *Landlord and Tenant*, 22nd Edn., page 397.
(1864) 5 B & S 359 (363) : 122 E R 865 (866) : 33 L J Q B 254 : 10 L T (N S) 578 : 12 W R (Eng) 829 : 136 R R 598, *Word* v. *Day.*
('40) 27 AIR 1940 Pat 478 (478, 479) : 186 Ind Cas 686 (DB), *Shiva Prasad Singh* v. *Mandira Kumari Debi.*
('36) 23 AIR 1936 Mad 252 (255) : 168 Ind Cas 1005, *Sooraiyya* v. *Sooranna.* (It is at the option of the landlord to take advantage of the forfeiture or not, and if he elects not to do so, the forfeiture is waived.)
3. Broom, *A Selection of Legal Maxims*, 10th Edn., page 107.
('20) 7 AIR 1920 P C 190 (195) (PC), *King* v. *Paulson.*
4. (1864) 122 E R 865 (866) : 5 B & S 359 : 33 E J Q B 254 : 10 L T (N S) 578 : 12 W R (Eng) 829 : 136 R R 598, *Ward* v. *Day.*
('10) 6 Ind Cas 766 (768) (DB) (Mad), *Chengiah* v. *Thimma Nayanim.*
5. (1778) 98 E R 1371 (1371) : Cowp 803.
6. ('47) 1947 Rang L R 423 (450), *K. M. Modi* v. *Mohamed (SB)*, *Siddrgue.* (Thein Maung J., on Original Side.)—A lease which has been terminated by frustration or by the Landlord having actually exercised the right of re-entry under a forfeiture clause is dead and cannot be revived by estoppel or waiver :

the service of the notice under S. 111 (g) until the landlord actually enters on the property or institutes a suit in ejectment or does something of a similar nature. Till then, the lease is only *voidable* and not *void* and hence, an acceptance of rent accruing due after forfeiture will amount to waiver even if the acceptance is after the service of the notice.[6a] A distinction must be made between the waiver of forfeiture of a lease and the creation of a new lease.[6b]

The principle of this section has been applied to the Punjab and the Delhi province as being consonant with justice, equity and good conscience.[7]

2. Acceptance of rent.—The acceptance of rent accruing due after the forfeiture operates as a matter of law to waive all forfeitures then known to the lessor.[1] It operates as a waiver even though it is accepted under protest[2] or conditionally without prejudice to the forfeiture[3] and even though the lease provides that a waiver must be expressed in writing.[4] The fact that the rent received credited to a suspense account will not prevent it from operating as a waiver of forfeiture.[5] So also the fact that the rent which had accrued due since the forfeiture but prior to the issue of the notice was accepted subsequents to the service of the notice will not make any difference.[5a]

The rent accepted must be rent which has accrued due *since the forfeiture.*[6] The acceptance of rent due *prior* to forfeiture, though made after forfeiture does not

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Dendy v. *Nicholl* (1858) 4 C B (N S) 376, *Rel. on ; Doe D. Nash* v. *Birch* (1836) 1 M & W 402, *Disting.* (Roberts C. J., Sharpe and Blagden JJ.)]

('31) 18 AIR 1931 Pat 240 (240) : 132 Ind Cas 875 (DB), *Upendra Nath Mukherjee* v. *Dhubeswar Lal Singh.*

('10) 6 Ind Cas 766 (768) (DB) (Mad), *Chengliah* v. *Thimma Nayanim.* (Per Munro, J.)

('12) 15 Ind Cas 445 (450) (SB) (Mad), *Chengiah* v. *Damara Kumara Thimma.*

('45) 32 AIR 1945 Pat 260 (262, 264) : 24 Pat 109 : 221 Ind Cas 82 (FB), *Chotu Mia* v. *Mt. Sundri.*

(1947) 1 All ELR 116 (117) : (1947) KB 342 : 63 T L R 54, *Lowenthal* v. *Vanroute.* [When forfeiture of lease is incurred, the lease is voidable and not void. Hence growing of a notice to quit may amount to waiver of the forfeiture in such a case. But when the lease is *determined* by a notice to quit, a subsequent notice to quit as of no effect unless other circumstances lead to the inference of a new tenancy. *Note*—It is doubtful whether this ruling is good law under this Act in view of S. 113 and Illustration (b) thereunder.]

('46) 33 AIR 1946 Lah 330 (338) : ILR (1947) Lah 235 : 226 Ind Cas 583 (FB), *Mt. Gindori* v. *Shamlal.*

Section 112—Note 2

1. Woodfall, *Landlord and Tenant,* 22nd Edn., page 397.

('40) 44 Cal W N 1109 (1112) (DB), *Motilal* v. *Pure Jambad Colliery Ltd.*

('40) 27 AIR 1940 Pat 478 (479) : 186 Ind Cas 686 (DB), *Shiva Prasad* v. *Mandira Kumari.*

('36) 160 Ind Cas 1012 (1013) (Nag), *Shri DeoJanki Ramji* v. *Ramchand.*

('97) 1897 Bom P J 182 (DB), *Vithu* v. *Durgabai.*

('87) 1887 Bom P J 154 (DB), *Shivram* v. *Gangadhar.*

† (1862-64) 1862-64 Suth W R (Sp. No.) 10 (10) (FB), *Peer Bux* v. *Mowzah Ally.*

('25) 12 AIR 1925 Mad 914 (915) : 86 Ind Cas 294, *Krishnan Nambudripad* v. *Kunkan Nair.*

('08) 7 Cal L Jour 648 (649) (DB), *Farman Bibi* v. *Tasha Haddal Hossein.*

(20) 7 AIR 1920 Cal 655 (657) : 59 Ind Cas 273 (DB), *Basanta Kumar Chowdhuri* v. *Secretary of State.*

('14) 1 AIR 1914 All 460 (461) : 26 Ind Cas 107, *Chattar Singh* v. *Nand Kishore.*

2. Woodfall, *Landlord and Tenant,* 22nd Edn., page 397.

('39) 26 AIR 1939 Oudh 257 (268) : 14 Luck 723 : 183 Ind Cas 821 (DB), *Amar Krishna* v. *Nazir Hasan.*

('15) 2 AIR 1915 Cal 454 (456) : 28 Ind Cas 343 (DB), *Motookdhari* v. *Jugdip Narain Singh.*

3. Woodfall, *Landlord and Tenant,* 22nd Edn., pages 397, 398.

† ('20) 7 AIR 1920 P C 190 (195, 197) (PC), *The King* v. *Paulson.*

('23) 10 AIR 1923 Cal 663 (664) : 80 Ind Cas 200 (DB), *Bengal Nagpur Ry. Co.* v. *Firm of Bal Mukunda Bisseswar Lall,* (*Croft* v. *Limely,* 6 W R 523 (Eng), followed.)

('35) 22 AIR 1935 Mad 454 (455) : 157 Ind Cas 804 (DB), *Sripadada Satyanarayana* v. *Venkataramamurthy.* (Conditional acceptance.)

4. ('20) 7 AIR 1920 P C 190 (195) (PC), *King* v. *Paulson.*

5. ('83) 9 Cal 843 (846) : 12 Cal L R 592 (DB), *Kali Krishna* v. *Fazle Ali Chowdhry.*

5a. ('45) 32 AIR 1945 Pat 260 (262, 264) : 24 Pat 109 : (221 Ind Cas 82 (FB), *Chotu Mia* v. *Mt. Sundri.* [Principle is that even after service of notice lease is not void but only voidable until actual entry by landlord or institution of ejectment suit, or some other similar act.]

5b. ('45) 32 AIR 1945 Pat 260 (261, 261) : 24 Pat 109 : 221 Ind Cas 82 (FB), *Chotu Mia* v. *Mt. Sundri.*

operate as a waiver.[7] The reason is that the acceptance of money as *rent* due subsequent to forfeiture shows that the landlord acts on the view that the lease is subsisting, and not as forfeited, whereas there is nothing inconsistent in a landlord accepting rent due before the supposed determination of the lease.[8]

It is not necessary that the rent should have been paid by the *lessee*. Acceptance of *rent* from any person in possession, such as a sub-lessee, will operate as a waiver.[9]

Where a tenant incurs forfeiture under the provisions of Calcutta House Rent Control Order (1943) by falling into arrears with regard to his rent, subsequent acceptance if rent by the landlord will not amount to a waiver so as to entitle the tenant to the protection of the Order.[10] This is on the principle that a general provision must yield to a special provision. Where after the forfeiture of the lease of the lessee remits certain amount as rent it has been held that acceptance of the amount by the landlord, even though as damages for use and occupation, will operate as a waiver of the forfeiture.

3. Distress for rent.—Where the lessor distrains for rent, he thereby affirms by a solemn act that a tenancy subsists. Consequently, on the principle stated in Note 1, the forfeiture is waived. Under the English law, there is a distinction drawn between a waiver by acceptance of rent and a waiver by distress for rent. An acceptance of rent is a waiver only where the rent is for a period *subsequent* to the forfeiture. But a distress, even if it be for rent due *prior* to forfeiture, will operate as a waiver of the forfeiture. The reason is that there can be a distress in England only *during* the subsistence of relationship of landlord and tenant, so that the taking out a distress at any time involves the position that the lease is subsisting *at that time*.[1] This Act does not recognise this distinction ; a distress will not operate as a waiver unless it be for rent due *subsequent* to forfeiture. This is made clear by the use of the words "by distress for *such* rent."

As to a right of distress in this country, apart from agricultural tenancies see S. 53 of the Presidency Small Cause Courts Act (XV of 1882).

4. "Any other act."—The acceptance of rent, and the distress for rent are only important illustrations of acts on the part of the lessor showing intention to treat the lease as subsisting. As instances of other acts may be mentioned the following :

(1) Demand for rent due after forfeiture.[1]

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6. ('46) 33 AIR 1946 All 328 (329) : 222 Ind Cas 596 *Habile Ahmed* v. *Keotikuer* ('45) 32 AIR 1945 Nag. 255 (256) : ILR (1945) Nag 629 (DB), *Mohanlal* v. *G. G. in Council.*
Woodfall, *Landlord and Tenant*, 22nd Edn., page 397.
('72) 18 Suth W R 218 (220) (DB), *Chunder Nath* v. *Sirdar Khan.*
('16) 3 AIR 1916 Cal 931 (933) 33 Ind Cas 331 (DB), *Raj Mohan De* v. *Mati Lal.*
('24) 11 AIR 1924 Cal 520 (522) : 70 Ind Cas 999 (DB), *Purna Chandra Das* v. *Ali Mahomed.*
7. ('46) 33 AIR 1946 All 328 (329) : 222 Ind Cas 596, *Habile Ahmed* v. *Mt. Keoti Kuer.* [Acceptance of rent due prior to forfeiture, though made after notice to quit will not operate as waiver.]
('45) 32 AIR 1945 Nag 255 (256) : ILR (1945) Nag 629 (DB), *Mohanlal* v. *G. G. in Council.*
('24) 11 AIR 1924 Cal 520 (522) : 70 Ind Cas 999 (DB), *Purna Chandra Das* v. *Ali Mohamed.*
(1863) 33 L J Q B 3 (10) : 4 B & S 337 : 11 W R (Eng) 948 : 136 R R 582, *Ward* v. *Day.*
8. (1863) 33 L J Q B 3 (10) : 4 B & S 337 : 11 W R (Eng) 948 : 136 R R 582, *Ward* v. *Day.*
9. ('25) 90 Ind Cas 832 (833) (DB) (Cal), *Chandra Kumar Saha* v. *Mafizar Rahman.*
('96) 20 Bom 439 (446), *Sarafali* v. *Subraja.* (Assignee in breach of covenant not to assign—Receipt of rent from him will operate as waiver.)
10. ('49) 36 AIR 1949 Cal 571 (572) : ILR (1945) 2 Cal 591, *Kanto M. Mullick* v. *Jyotish Ch. Mukherjee.*

Section 112—Note 3

1. (1863) 33 L J Q B 3 (10) : 4 B & S 337 : 11 W R (Eng) 948 : 136 R R 582, *Ward* v. *Day.*
('16) 3 AIR 1916 Cal 931 (933) : 33 Ind Cas 331 (DB), *Raj Mohan De* v. *Matilal Shah.*

Section 112—Note 4

1. Woodfall, *Landlord and Tenant*, 22nd Edn., page 397.

(2) Action for rent due after forfeiture.[2] There is a difference of opinion as to whether a suit in which ejectment on forfeiture is claimed and also rent up to the date of delivery of possession constitutes a waiver; one view being that it is a waiver,[3] while according to another view, it is not.[4] It is submitted that the latter view is correct.

(3) A fresh notice to terminate a tenancy is waiver of prior forfeiture.[5]

(4) A notice to quit given by the lessor.[6]

See also the undermentioned cases.[7]

A forfeiture may also be *expressly* waived. In England an express waiver of forfeiture was originally regarded as a waiver of the covenant itself so that no question of forfeiture could arise at all thereafter for later breaches of the covenant.[8] This was not followed in India[9] and even in England an express waiver now operates only as a waiver of the particular breach for which the forfeiture was incurred.[10]

The words "any other *act*" show that there must be a *positive* act. It is not sufficient that the lessor, knowing that a forfeiture has been incurred, is merely silent[11]

('87) 14 Cal 176 (184), *Kristo Nath* v. *Brown*.

2. †(1858) 27 L J C P 220 (223) : 4 CB (NS) 376 : 6 W R (Eng) 502 : 31 L T (OS) 134 : 114 R R 773, *Dendy* v. *Nicholl*.

('86) 14 Cal 33 (36) (DB), *Jogesbuni* v. *Mahomed Ebrahim*.

(1900) 2 Cal L Jour 540 (542, 543) (DB), *Sitanath* v. *Basudeb*.

('20) 7 AIR 1920 Mad 1006 (1007) : 43 Mad 503 : 61 Ind Cas 658 (DB), *Udipi Seshagiri* v. *Seshamma Shetatti*.

('21) 8 AIR 1921 Mad 284 (284) : 69 Ind Cas 282 (DB), *Ramappa* v. *Abdulla Beari*.

('20) 7 AIR 1920 Cal 899 (900) : 64 Ind Cas 711 (DB), *Rash Behari* v. *Upendra Nath*.

('16) 3 AIR 1916 Pat 409 (410) : 1 Pat L Jour 186 : 34 Ind Cas 918, *Midnapore Zamindari Co., Ltd.* v. *Joyram Santal*.

[*See also* ('21) 60 Ind Cas 476 (477) (Pat), *Llewhellin* v. *Ali Asgar*.

('09) 1 Ind Cas 753 (753, 754) (DB) (Cal), *Mansar Ali* v. *Abdul Karim*. (Suit for rent accrued prior to forfeiture, not a waiver.)]

3. ('18) 5 AIR 1918 Cal 552 (553) : 42 Ind Cas 614 (DB), *Abdul Rashid Khan* v. *Safar Ali*.

4. ('27) 14 AIR 1927 Mad 261 (263) : 99 Ind Cas 700, *Koragalava* v. *Jakri Beary*.

5. ('24) 11 AIR 1924 Bom 454 (456) : 48 Bom 541 : 83 Ind Cas 45 (DB), *Rukmini* v. *Rayaji*. (In a suit for ejectment on the ground of forfeiture of tenancy, the plaintiff made an alternative claim that the notice given by him should be treated as a notice terminating the tenancy in suit—*Held*, he was estopped from relying upon the forfeiture since the claim amounted to an assertion that the tenancy was still subsisting and was therefore a waiver of forfeiture.)

6. (1947) 1 All ELR 116 (117) : (1947) KB 342 : 63 TLR 54, *Lowenthal* v. *Vanroute*. [But where the tenancy is determined by a notice to quit, a subsequent notice to quit is of no effect unless other circumstances favour the basis for inferring a new tenancy having been created after the expiry of the first notice. The mere fact that a solicitor in order to get possession gave another notice to quit is not any reason for inferring any agreement for a new tenancy : *Woodfall's Landlord and Tenant, held not accurate.*] *Note* :—It is doubtful if this ruling is good law under this Act in new of S. 113 and Illustration (b) thereunder.

('45) 32 AIR 1945 Pat 260 (262) : 24 Pat 109 : 221 Ind Cas 82 (FB), *Chotu Mia* v. *Mt. Sundri*. [AIR 1 940 Pat 478 affirmed.]

('40) 27 AIR 1940 Pat (479) : 186 Ind Cas 686 (DB), *Shiva Prasad Singh* v. *Mandira Kumari Debi*.

7. ('45) 32 AIR 1945 All 293 (297) : ILR (1945) All 248 (DB), *Shiam Behari* v. *Madan Singh*. [Non payment or refusal to pay rent does not constitute unequivocal disclaimer of title of the landlord—In any even if no action is taken by the landlord to terminate the lease on this ground for several years it must be deemed to have been waived.]

('10) 8 Ind Cas 309 (310) (DB) (Mad), *Mussa Kutti* v. *Rangachariar*.

8. Woodfall, *Landlord and Tenant*, 22nd Edn., page 403.

9. ('92) 1892 Bom P J 353 (DB), *Sattyappa* v. *Mahadevamma*.

10. See Law of Property Act, 1925 (15 Geo. V, Ch. 20), S. 148.

11. *See* ('23) 10 AIR 1923 Nag 129 (130) : 68 Ind Cas 178, *Yeshwant* v. *Shiwappa*.

[*But see* ('24) 11 AIR 1924 Lah 281 (285) : 70 Ind Cas 349, *Chiragh Din* v. *Muhammad Usman Khan*. (Where the lessor did not exercise his right to forfeit the tenancy for two years after his title was repudiated by the tenant and allowed a third party to purchase the leased property at a court auction he was held to have waived his right and was estopped as against the third party from setting up the forfeiture.)]

12. Woodfall, *Landlord and Tenant*, 22nd Edn., page 400.

although long continued acquiescence in repeated breaches of a covenant has been regarded in England as a waiver.[12]

Where the lessor in granting a receipt for rent due prior to forfeiture, described the grantee of the receipt as a "tenant," it was held that this did not show that he intended to treat the lease as subsisting and was therefore not a waiver.[13]

Where the landlord allowed extra time for removal of meterial, there is no waiver of forfeiture.[14]

5. Knowledge of breach.—The first proviso merely reproduces the English law, that in order to render acceptance of rent or any other act a waiver of a forfeiture the lessor must have notice or knowledge of the forfeiture at the time of the supposed waiver.[1] For, a man cannot be said to waive that of which he has no knowledge. The *onus* is on the lessee to show such knowledge on the part of the lessor.[2]

6. Effect of waiver.—A waiver of a forfeitures operates not only as regards the particular forfeiture incurred but also all *prior* causes of forfeiture.[1] But it does not preclude the lessor from taking advantage of *subsequent* causes of forfeiture.[2]

Where the breach is of a continuing nature the waiver of any forfeiture up to a certain day will afford no defence to an ejectment for a subsequent breach as where the covenant is to keep the premises in repair during the term.[3]

A waiver once made is irrevocable as to the forfeiture waived, and the lessor cannot subsequently claim to enforce the forfeiture.[4]

7. Second proviso.—An acceptance of rent after the institution of a suit for ejectment on the ground of forfeiture is not a waiver.[1] In England even a distress for rent does not operate as a waiver if it is after the institution of a suit for ejectment.[2] It is doubtful if any act, other than the acceptance of rent, showing an intent to treat the lease as subsisting, will not operate as waiver, even if such act is done after the institution of the suit.

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13. ('16) 3 AIR 1916 Cal 931 (934) : 33 Ind Cas 331 (DB), *Raj Mohan* v. *Mati Lal.*
14. ('19) 36 AIR 1949 Cal 47 (54)

Section 112—Note 5

1. Woodfall, *Landlord and Tenant*, 22nd Edn., page 400.
('32) 19 AIR 1932 Cal 787 (789) : 60 Cal 47 : 139 Ind Cas 239 (DB), *Swarnamoyee Debya* v. *Aferaddi.*
('91) 1891 Bom P J 107 (DB), *Nagardas* v. *Ganu.*
2. ('49) 36 AIR 1949 Nag 218 (222) : ILR (1949) Nag 167, *Fatelal Shah* v. *Dayalal.* [Under Tenancy Act diversion does not automatically result in forfeiture—To establish waiver of forfeiture by acceptance of rent after forfeiture tenant must show landlord's knowledge of his right to enforce forfeiture and acceptance of rent with conscious abandonment of right of forfeiture—C. P. Tenancy Act (I [1] of 1920), S. 27.]
('32) 19 AIR 1932 Cal 787 (789) : 60 Cal 47 : 139 Ind Cas 239 (DB), *Swarnamoyee Debya* v. *Aferaddi.*

Section 112—Note 6

1. ('11) 11 Ind Cas 974 (975) (DB) (Cal), *Kalanand Singh* v. *Gunput Singh.*
2. †('36) 23 AIR 1936 Pat 493 (495) : 15 Pat 673 : 164 Ind Cas 811 (DB), *Dayal Singh* v. *Promatha Nath.*
('16) 3 AIR 1916 Lah 403 (404) : 35 Ind Cas 235, *Locha Ram* v. *Jindwadda Khan.*
(1863) 1 Mad H C R 15 (16) (DB), *Cutenho* v. *Souza.*
('92) 1892 Bom P J 353 (DB), *Sattyappa* v. *Mahadevamma.*
('24) 11 AIR 1924 Mad 776 (777) : 84 Ind Cas 629 (DB), *Gopala Kuduva* v. *Hamza Sahib.*
3. ('67) 8 Suth W R 138 (139) (DB), *Dulli Chand* v. *Meher Chand.*
('21) 8 AIR 1921 Bom 307 (308, 309) : 45 Bom 435 : 58 Ind Cas 69, *Kasturbhai Manibhai* v. *Harilal Dahya Bhai.* (Non-payment of rent at a stipulated rate month after month is a continuing breach—The landlord's conduct in having waived his right to forfeit on such a breach for any particular month or months does not destroy his right to forfeit on similar breaches in a subsequent month.)
4. ('20) 7 AIR 1920 P C 190 (195) (PC), *The King* v. *Paulson.*
('15) 2 AIR 1915 Cal 68 (69) : 25 Ind Cas 880 (DB), *Haldhar Jha* v. *Ashraf Alam.*

Section 112—Note 7

1. ('46) 33 AIR 1946 Lah 330 (338) : ILR (1947) Lah 235 : 226 Ind Cas 583 (FB), *Mt. Gindori* v. *Sham Lal.*
('40) 44 Cal W N 1109 (1112) (DB), *Motilal Daga* v. *Pure Jambad Colliery, Ltd.*
('10) 6 Ind Cas 264 (264) (DB) (Mad), *Mazhoor Pudukudi* v. *Paramban Moideen.*
('66) 2 Bom H C R 66 (69), *Timmiarsa Puranik* v. *Badiya Kuppagouda.*
[*See also* ('11) 34 Mad 161 (162) : 6 Ind Cas 447 (450) (DB), *Padmanabaya* v. *Ranga.* (Under the law prior to the Act claim for rent will not affect lessor's right to eject.)]
2. (1872) 41 L J C P 239 (240) : 20 W R (Eng) 972 : L R 7 C P 360 : 27 L T 268, *Grimwood* v. *Moss.*

113. A notice given under section 111, clause (*b*), is waived, Waiver of notice to quit with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

Illustrations.

(*a*) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(*b*) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived.

Synopsis

1. Scope of the section.
2. "With the express or implied consent."
3. Act showing an intention to treat the lease as subsisting.
4. Effect of waiver.

TOPIC INDICATOR

Distinction between waiver of notice to quit and waiver of forfeiture. See Note 2.
Waiver of notice to quit—Instances. See Note 3.

1. **Scope of the section.**—Section 112 deals with waiver of *forfeiture* under S. 111, cl. (g). This section deals with waiver of *notice to quit* under S. 111, cl. (h), and reproduces substantially the English law on the subject.[1] There is a fundamental difference between a waiver of forfeiture (which is a matter which can be done at the election of the landlord alone) and what is inaccurately referred to as the waiver of a notice to quit, (which can only proceed on the basis that the landlord and tenant are *ad idam* in making a *new* agreement.[1a]

The section applies only to leases that are admittedly determinable by a notice to quit, that is, to leases from year to year and from month to month. The section will not apply where the landlord claims to treat the tenant as a tenant from year to year but the latter asserts a permanent tenancy.[2]

Where a lease is determined by a notice to quit, and the landlord subsequently receives rent from the tenant the rights and liabilities of the parties must be decided with reference to this section and not S. 116.[3]

2. **"With the express or implied consent."**—A waiver of a notice to quit under this section can be made only *with the express or implied consent* of the person to whom notice is given. In this respect it differs from a waiver of forfeiture which depends upon the exercises of the option by the lessor alone. This is also the English law on the point.[1]

Section 113—Note 1

1. ('45) 32 AIR 1945 Bom 132 (135) : ILR (1945) Bom 68 (DB), *Navnitlal* v. *Baburao* (No. 1)

See Halsbury, *Laws of England*, 2nd Edition Volume—20 142—144 Paras. 153 and 154.

('45) 32 AIR 1945 Bom 132 (134) : ILR (1945) Bom 68 (DB), *Navnitlal* v. *Baburao* (No. 1)

2. ('27) 14 AIR 1927 Pat 305 (308) : 102 Ind Cas 821 (DB), *Kamakhya Narain Singh* v. *Khalik Ahmad.*

('45) 32 AIR 1945 Bom 132 (135) : ILR (1945) Bom 68 (DB), *Navnitlal* v. *Baburao* (No. 1) [S 116 must be read with S 111 (a) which deals with termination of lease by efflux of time and does not affect rights of landlord and tenant as contained in Ss. 112 and 113.]

Section 113—Note 2

1. (1853) 13 C B 178 (180) : 138 E R 1165 : L J C P 79 : 93 R R 480, *Blyth* v. *Denett.*
(1868) 37 L J Ex 173 (174) : 16 W R (Eng) 1018 : L R 3 Ex 303 : 18 L T 655, *Tayleur* v. *Wildon.*

See also Halsbury, *Laws of England*, Volume 18, p. 454, paras. 922, 923.

3. Act showing an intention to treat the lease as subsisting.— Waiver is a matter of intention of the parties. The act alleged to constitute waiver must import the recognition of the tenancy. The illustrations to the section give two instances of waiver :

(1) acceptance of rent which has become due since the expiration of the notice to quit, and

(2) giving a second notice to quit.

Acceptance of rent.

The acceptance of rent accrued due *before* the date of the notice to quit is not a waiver of the notice to quit.[1] The acceptance of rent accrued due *subsequent* to the notice is a waiver of the notice.[2] It clearly indicates that the lessor intends to treat the lease as subsisting. The *payment* of rent by the lessee also shows that the lessee *impliedly consents* to waiver. But acceptance of rent by the lessor under a mistake will not amount to such waiver.[2a] So also, the acceptance of an amount as damages for use and occupation though tendered as rent will not amount to waiver.[2b] In other words, the acceptance of an amount tendered as rent will not necessarily imply an intention to " treat the lease as subsisting. "

A *mere demand* for the rent accrued due subsequent to the notice not followed by a promise by the tenant to pay cannot operate as a waiver of the notice, for want of the tenant's consent.[3] On the same principle, a claim in a suit for ejectment for the arrears of rent due is not a waiver of the notice.[4] So also mere abortive negotiations between the parties with regard to the payment of rent subsequent to the notice do not constitute a waiver.[5]

By virtue of the second proviso to S. 112 the acceptance of rent, even though subsequent to a forfeiture, does not constitute a waiver of the forfeiture if such acceptance is made after a suit for ejectment is instituted against the lessee on the ground of forfeiture. There is no provision corresponding to that proviso in this section and it has been held that the acceptance of rent due subsequent to the notice to quit, even after the institution of a suit for ejectment, will operate as a waiver of such notice.[6] A contrary view has, however, been taken in the undermentioned cases.[6a] In the undermentioned case[7] where, pending a suit for ejectment the Court passed an order by consent of parties by which certain payments were made by the defendant

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Section 113—Note 3

1. ('21) 8 AIR 1921 Cal 126 (127) : 63 Ind Cas 191 (DB), *Ratneshwar Das* v. *Kamal Deb.*
2. ('26) 13 AIR 1926 Cal 763 (763) : 94 Ind Cas 156, *Manicklal* v. *Kadambini.*

(1946) 2 All ELR 778, *Maconochie, Bros., Ltd.* v. *Brand*

('45) 32 AIR 1945 Bom 132 (134) : ILR (1945) Bom 68 (DB) *Navnitlal* v. *Baburao* (No. 1)

3. (1853) 13 C B 178 (180, 181) : 138 E R 1165 : 22 L J C P 79 : 93 R R 480 (482, 483), *Blyth* v. *Denett.*
4. ('17) 4 AIR 1917 Pat 469 (470) : 2 Pat L Jour 595 : 42 Ind Cas 655 (DB), *Shah Wali Ahmad* v. *Hussaini Begum.* (1 Ind Cas 753 : 34 Mad 161 and *Penton* v. *Bornett* 67 L J Q B 11 followed.)
5. ('27) 14 AIR 1927 Rang 276 (276, 277) : 104 Ind Cas 635 (DB), *Thai Un Tung* v. *Mohamed Ajam Esmail.*
6. ('26) 13 AIR 1926 Cal 763 (763) : 94 Ind Cas 156, *Manicklal* v. *Kadambini.*

[*See also* (1874) 1864 Suth W R (Sp. No,) 10 (10) (FB), *Peer Bux* v. *Mowzah Ally.*]

6a. ('48) 35 AIR 1948 Oudh 127 (128), *Kamalpat* v. *Mt. Manho Bibi.* [Once a suit for ejectment has been instituted, it cannot possibly be said that any act of the lessor shows an intention to treat the lease as subsisting unless he withdraws the suit. AIR 1926 Cal 763 diss-form.]

('46) 1946 ILR 413 (415) (DB), *Gopal Das* v. *Ram Niwas.* [AIR 1926 Cal 763 diss-from.]

('45) 32 AIR 1945 Bom 132 (134, 135) : ILR (1945) Bom 68 (DB), *Navnitlal* v. *Baburao* (No. 1). [Notice to quit—Whether landlord intended to renew tenancy or treat it as still subsisting is question of fact—Suit for ejectment—Payment made during tendency of suit as rent but expressly accepted as compensation for use and occupation —When payments were accepted premises subject to standard rent contained cl. 3 (4) of Bombay Rent Restriction Order (1942) —Considering all these facts it was held that there was no intention on the part of landlord to treat the lease as subsisting— AIR 1926 Cal 763 not foll.]

7. ('34) 21 AIR 1934 Cal 837 (837, 838) : 153 Ind Cas 673, *Susil Chunder* v. *Birendrajit Shaw.*
8. ('23) 10 AIR 1923 Cal 663 (664) : 80 Ind Cas 200 (DB), *Bengal Nagpur Railway Co. Ltd.* v. *Firm Bal Mukund Biseswar Lall.*

and accepted by the plaintiff, it was held that such acceptance would not constitute a waiver of the notice.

The fact that the lessor accepts the rent under protest as where he states that he accepts it as damages for use and occupation will not prevent it from operating as a waiver of the notice.[8]

Second notice to quit.

The giving of a second notice to quit is a waiver of the first notice to quit.[9] This is also shown by the Illustration (b) under the section. The consent of the lessee to the waiver is implied in this case by his continuing in possession in spite of the first notice to quit. But the circumstances may show that in giving the second notice to quit, the landlord had no intention of waiving the first notice—as, for instance, where the notice is given as a preliminary to recovering double value or where the landlord is at the same time proceeding for recovery of possession.[9a] A party who denies having given a first notice to quit, cannot on being found against on that point, plead that his second notice was a waiver of the first.[10]

Distress for rent.

A distress for rent due subsequent to the notice to quit is an act showing an intention to treat the lease as subsisting (see S. 112), and if acquiesced in by the tenant, will operate as a waiver of the notice.[11]

Acts not amounting to waiver.

The mere fact that the tenant is allowed to remain in possession, out of favour, after the expiry of the notice to quit[12] or the fact that no suit is filed for ejectment immediately on the expiry of the notice[13] does not operate as a waiver. The acceptance of rent by an unauthorised person does not bind the landlord and will not constitute a waiver of the notice.[14] In the case of cosharers, the acceptance of rent by *one* of them will operate as waiver only in so far as he is concerned. The others will not be affected thereby.[15] Where there is an arrangement between the landlord and the tenant that the municipal taxes paid by the tenant would be set off against rent, any tax paid by the tenant after the service of notice to quit would not constitute a waiver of the notice, in the absence of any further arrangement after the service of notice.[16]

4. Effect of waiver.—Under the English law, a withdrawal or abandonment of the notice to suit *before its expiry* does not nullify the notice but operates as evidence of an agreement for a *new tenancy* on the expiration of the old one. *After the expiry* of the notice, a waiver of it operates by creating a *new tenancy,* the old tenancy being determined by the notice.[1] Under this section, it has been held that the effect of

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9. (1812) 16 East 53 (56) : 104 E R 1009 : 14 R R 284 (286), *Doe d. Brierly* v. *Palmer.* [But see] (1947) 1 All E L R 116 (117) : (1947) KB 342 : 63 TLR 54, *Lowenthal* v. *Vanhoute.*

9a. *See Halsbury's Laws of England* 2nd Ed. Vol 20, p. 144, p. 154.

10. ('27) 14 AIR 1927 Pat 305 (308) : 102 Ind Cas 821 (DB), *Kamakhya Narain Singh* v. *Khalik Ahmad.*

11. (1790) 1 H & Bl 311 (312) : 2 R R 770 (772), *Zouch* v. *Willingale.*

12. (1808) 10 East 13 (16) : 103 E R 680 : 10 R R 224 (226), *Whiteacre of Boult* v. *Symonds.*

(1862) 11 C B (NS) 520 (525) : 5 L T (NS) 841 : 132 R R 648 (651), *Gray* v. *Bompas.* (Notice to quit duly given—The tenant quitted before time but inadvertently or accidentally retained the key of the house for 2 days more after the expiration of the notice—*Held* that this inadvertent holding over for two days could not amount to an intention to continue the tenancy and did not constitute waiver of notice.)

13. ('23) 10 AIR 1923 Nag 129 (130) : 68 Ind Cas 178, *Yeshwant* v. *Shiwappa.* (Tenant allowed to continue in possession for two years after notice to quit—Rent neither paid nor accepted—No waiver of notice.)

14. (1810) 2 Camp 387 (388) : 11 R R 745 (746), *Doe d. Ash* v. *Calvert.*

15. ('32) 19 AIR 1932 Pat 259 (260, 261) : 140 Ind Cas 14 (DB), *Lachmi Lal* v. *Ganesh Chamar.*

('49) 36 AIR 1949 Pat 137 (138) : 27 Pat 395 (DB), *Sant Kuer* v. *Ganesh.* [Under the Municipal law, the tax could be realised even from the occupant of a building.]

Section 113—Note 4

1. Halsbury, *Laws of England,* Volume 18, p. 454, paragraph 922.

[*See also* (1868) LR 3 Ex 303 (305) : 37 L J Ex 173 : 18 L T 655 : 16 W R (Eng) 1018, *Tayleur* v. *Wildin.*]

waiver is that the tenancy is not regarded as having been at all determined, but is regarded as continuing.[2] A guarantor for rent under a tenancy would not, under the English law, be liable after the expiry of a notice to quit even if, subsequently, the notice is waived.[3] It is doubtful *whether* this principle is applicable where a notice to quit is waived under this section.

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114. Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

Relief against forfeiture for non-payment of rent.

Synopsis

1. Scope.
2. Law before the Transfer of Property Act of 1882.
3. "Lessor."
4. "Lessee."
4a. "Pays or renders"
5. "At the hearing of the suit."
6. "Rent in arrear."
7. "The Court may pass an order."
8. Relief where period of grace is provided for the payment of the rent.
9. Consent decree creating relation of lessor and lessee and providing for forfeiture on non-payment of rent—Relief.
10. Suit for ejectment on forfeiture—Court, if can pass decree for arrears of rent only.
11. Relief against forfeiture for breaches of other conditions.
12. Forfeiture under decree—Construction of decree.

TOPIC INDICATOR

Conditions of relief. See Notes 6 and 7.
Relief after decree. See Note 5.
Which Court can grant relief. See Note 5.
Who can claim relief under this section. Note 4.
Sub-lessee. See Note 4.
Transferee from lessee. See Note 4.

1. Scope.—It is a general principle that wherever a penalty is provided to secure the performance of an act, the latter is considered as the principal intent of the instrument and the penalty is deemed only as necessary and intended only to secure such performance.[1] On this principle where the forfeiture of a lease and an entry for the forfeiture is stipulated for in a lease, in case of non-payment of rent, the right of re-entry is deemed merely as a security for the payment of the rent.[2] So that if the lessee makes adequate compensation to the landlord and puts him in the same position as if the rent had been paid to him when it was due, the purpose of the clause of forfeiture, namely to secure the rent is served and lessee would be relieved from the forfeiture by a Court of Equity.[3]

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2. ('23) 10 AIR 1923 Cal 663 (665) : 80 Ind Cas 200 (DB), *Bengal Nagpur Railway Co. Ltd.* v. *Firm Bal Mukund Biseswar Lall.*
3. Halsbury, *Laws of England,* Volume 18, p. 454, para. 922, foot-note (c).

Section 114—Note 1

1. Snell's *Principles of Equity,* 11th Edition, page 361.
Story, *Equity, jurisprudence,* 1920 Edition, paragraphs 1314, 1315, 1316.
('24) 11 AIR 1924 Lah 49 (51) : 71 Ind Cas 837 (DB), *Kallan* v. *Jowahar Singh.*
2. Story, *Equity Jurisprudence,* 1920 Edition, paragraph 1315.
3. ('31) 18 AIR 1931 Cal 457 (457, 458) : 58 Cal 311 : 132 Ind Cas 87, *Dhurrumtolla Properties Ltd.* v. *Dhunbai.* (Rent in arrear is not eqivalcnt to rent claimed in suit.)
(1721) 1 Str 447 (453) : 93 E R 626 : 2 White & Tud L C 3rd Edn. p. 1008 : Prec Ch 568 : 2 Eq Cas Abr 227, *Peacly* v. *Duke of Somerset.*
* (1895) 64 L J Ch 666 (670) : (1895) 2 Ch 581 : 43 W R (Eng) 645 : 73 L T 77, *Howard* v. *Fanshawe.*
* ('16) 3 AIR 1916 Mad 680 (682) : 39 Mad 834 : 30 Ind Cas 596 (DB), *Appaya Shetty* v. *Mahammade Beari.*

This section is based on the abovementioned principles. It is, however, limited to forfeiture of *leases*[4] for *non-payment of rent.*

By virtue of S. 117, this section does not apply to agricultural leases. The section is not also applicable to the Punjab to which the Transfer of Property Act does not apply. But in all such cases, the general principle on which this section is based will be applicable and Courts can grant relief against forfeiture on such conditions and in such circumstances as may appear equitable,[5] but are not bound by the conditions laid down in this section.[6]

2. Law before the Transfer of Property Act of 1882.—The principle on which this section is based was applied even before the passing of this Act.[1]

The second paragraph of S. 78 of the Bengal Rent Act (X of 1859) provided for relief against forfeiture and ran as follows :

> "In all cases of suits for the ejectment of a *raiyat* or the cancelment of a lease, the decree shall specify the amount of the arrear, and, if such amount together with interest and costs of suit be paid into Court within fifteen days from the date of the decree, execution shall be stayed."

('83) 6 Mad 327 (330) (DB), *Narayana Sanabhoga* v. *Narayana Nayak.* (Proper course is to ascertain and give effect to intention of parties—Clause of forfeiture for non-payment of rent held to be *in terrorem* and not intended to be enforced.)

('71) 6 Mad H C R 258 (261) (DB), *Kottal Uppi* v. *Edavalath Thathan.*

†('07) 34 Cal 358 (368) : 5 Cal L Jour 208 (DB), *Megh Lal* v. *Raj Kumar.* (Reversed in AIR 1917 P C 163 : 44 Ind App 246 : 45 Cal 87 (P C), on another point.)

(1806) 12 Ves 475 (476) : 33 E R 180, *Davis* v. *West.*

†(1893) 62 L J Q B 187 (188) : 41 W R (Eng) 297 : 68 L T 223 : (1893) 1 Q B 604, *Hare* v. *Elms.*

('87) 1887 Bom P J 154 (DB), *Shivram Bapuji* v. *Gangadhar Laxman.*

('88) 1888 Bom P J 304, *Ramchandrarao* v. *Sidu.*

('83) 1883 Bom P J 104 (DB), *Vishvanath* v. *Yakub.*

('95) 1895 Bom P J 206 (DB), *Gangadhar* v. *Savitribai.*

(1864) 1864 Suth W R (Gap No. Act X) 31 (32) (DB), *Alum Chunder* v. *Moran & Co.*

4. *See* (31) 18 AIR 1931 Nag 60 (63) : 27 Nag L R 24 : 132 Ind Cas 450, *Bana Bai* v. *Chandrabhaga.* (Section has no application to maintenance grants.)

5. †('44) 31 AIR 1944 Nag 229 (230) ILR (1944) Nag 877 : 219 Ind Cas 163 (DB), *Shrikishanlal* v. *Ramnath.* (Agricultural lease governed by contract—Court can apply equitable principles underlying this section.)

†('28) 15 AIR 1928 Mad 250 (252) : 108 Ind Cas 273, *Ramabrahman* v. *K. Rami Reddi.*

('36) 160 Ind Cas 1012 (1013) (Nag), *Shrideo Jankiramji* v. *Ramchand.* (Court has power to extend principles involved in S. 114 to agricultural leases which are not the subject of any local Act.)

†('19) 6 AIR 1919 Mad 12 (13) : 42 Mad 654 : 50 Ind Cas 898 (SB), *Krishna Shetti* v. *Gilbert Pinto.* (Principles of T. P. Act may be applied to agricultural leases as embodying rules of equity, justice and good conscience.)

('83) 6 Mad 159 (167) (DB), *Subbaraya* v. *Krishna.*

†('10) 7 Ind Cas 565 (565) (DB) (Mad), *Parapurath Kalliani Amma* v. *A. Chinnan.*

('92) 15 Mad 125 (126) (DB), *Vaguran* v. *Rangayyangar.*

('27) 14 AIR 1927 Mad 239 (239) : 98 Ind Cas 851, *Ramakrishna Martoba* v. *I. P. Fernandez.*

('12) 1912 Pun Re No. 6 : 17 Ind Cas 991 (992) (Rev), *Aziz-ud-din* v. *Bhagwan Das.*

('24) 11 AIR 1924 Lah 49 (51, 52) : 71 Ind Cas 837 (DB), *Kallan* v. *Jowahar Singh.*

('83) 6 Mad 327 (330) (DB), *Narayana Sanabhoga* v. *Narayana Nayak.* (Section 114 inapplicable under S. 2, cl. (c)—Contract before 1882.)

[*See however* ('16) 3 AIR 1916 Mad 680 (684) : 39 Mad 834 : 30 Ind Cas 596 (DB), *Appayya Chetty* v. *Mahammad Beari.* (Principles of English law held applied to India in case of leases not falling under T. P. Act.)]

6. ('27) 14 AIR 1927 Mad 239 (240) : 98 Ind Cas 851, *Ramakrishna Martoba* v. *I. P. Fernandez.*

Section 114—Note 2

1. ('71) 6 Mad H C R 258 (261) (DB), *Kottal Uppi* v. *Edavalath Thathan.*

('81) 7 Cal 566 (570) : 9 Cal L R 185 (DB), *Mahomed Ameer* v. *Peryag Singh.*

(1865) 2 Bom H C R 66 (69) (DB), *Timmarsa Puranik* v. *Badiya.* (Practice of Courts of Equity in England and America followed.)

('79) 4 Cal L R 469 (472) (DB), *Mothoora Mohun* v. *Ram Lal.*

(1867) 2 Agra (Ex O C J) 1 (15), *Great Eastern Hotel Co.* v. *Collector of Allahabad.*

('83) 1883 Bom P J 104 (DB), *Vishvanath* v. *Yakub.*

2. (1864) 1864 Suth W R (Gap. No. Act X) 31 (32) (DB), *Allum Chunder* v. *Moran & Co.*

See also the undermentioned cases under the Bengal Rent Act.[3]

3. "Lessor."—The word "lessor" includes an assignee of the lessor's rights. As has been seen in Notes on S. 111 an assignee of the lease can also enforce a forfeiture of the lease for non-payment of rent and if, in a suit by him for ejectment on the ground of forfeiture, the tenant pays up the rent in arrears the Court can grant relief against forfeiture.[1]

4. "Lessee."—In England an under-tenant is entitled to claim relief from forfeiture in the same way as the tenant can, a liberal construction being placed on the word "tenant."[1] It has been held in the undermentioned cases[2] that the word "lessee" in this section must similarly be liberally construed as including transferees from him and that such transferees also can claim relief under this section.[3]

Where there are *several* transferees from the lessees and only some of them claim relief against forfeiture, they must pay the *whole of the amount due* to the lessor with interest and costs.[4]

4a. "Pays or tenders".—Under the section there must be an actual payment or tender before the Court. Mere readiness to pay will not be sufficient.[1]

5. "At the hearing of the suit."—The payment or tender mentioned in this section must be made "at the hearing of the suit." The word "suit" would include an appeal also, and consequently the payment or tender may be made at the hearing of the appeal and relief claimed under this section.[1]

In England the lessee is entitled, even after the trial and judgment, to apply for relief within six months of such judgment.[2] This rule has not been adopted in this Act, and no relief can be granted to the tenant under this Act after an order for ejectment has been passed.[3]

6. "Rent in arrear."—As already seen in Note 1, this section is based on the principle of equity that where the object of the clause of forfeiture, namely, to

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('67) 7 Suth W R 374 (374) (DB), *Mahomed Hossein* v. *Boodhun Singh.*
('69) 11 Suth W R 201 (DB), *Kumla Sahoy* v. *Ramruttun Neogy.*

Section 114—Note 3

1. ('36) 23 AIR 1936 Mad 116 (117) : 160 Ind Cas 530, *Vamana Pai* v. *Venkatu Naika.*

Section 114—Note 4

1. (1811) 3 Taunt 402 (403) : 128 E R 160, *Doe d. Whitfield* v. *Roe.* (Mortgagee of a lessee is entitled to relief.)
(1905) 74 L J Ch 370 (372, 373) : 53 W R (Eng) 552 : (1905) 1 Ch 739 : 92 L T 834, *Humphreys* v. *Marten.* (Mortgagee of an assignee from lessee is entitled to relief.)
(1907) 76 L J K B 658 (660, 661) : (1907) 2 K B 8 : 96 L T 594, *Moore* v. *Smee & Cornish.* (Sub-lessee held entitled to relief.)
2. ('47) 34 AIR 1947 Bom 86 (87) : 230 Ind Cas 67 (DB), *Ladhuram Manormal* v. *Chimniram Dongardas.* [A mortgagee of lessee's rights who has purchased the lessee's rights in execution of his mortgage decree can claim relief against forfeiture.]
('14) 1 AIR 1914 All 411 (413) : 25 Ind Cas 186, *Ahmad Hussain* v. *Riaz Ahmad.*
3. *See also* ('71) 6 Mad H C R 258 (261) (DB), *Kottal Uppi* v. *Edavalath Thathan.*
4. (1689) 2 Vern 103 (103, 104) : 23 E R 676, *Webber* v. *Smith.*
4a. ('46) 33 AIR 1946 All 328 (329) : 222 Ind Cas 596, *Habile Ahmad* v. *Mt. Keoti Kuer.*

Section 114—Note 5

1. ('44) 31 AIR 1944 Nag 229 (231) : I L R (1944) Nag 877 : 219 Ind Cas 163 (DB), *Shrikishanlal* v. *Ramnath.* (Appellate Court can relieve against forfeiture for non-payment of rent even in cases of agricultural leases to which S. 114 in terms does not apply.)
('13) 21 Ind Cas 405 (406) (DB) (Mad), *Vidyapurna Thirtha Swamiar* v. *Ramgappayya.*
But See ('46) 33 AIR 1946 All 328 (329) : 222 Ind Cas 596 *Habile Ahmed* v. *Mt. Keoti Kuer.*
2. ('16) 3 AIR 1916 Mad 680 (681) : 39 Mad 834 : 30 Ind Cas 596 (DB), *Appayya Shetty* v. *Mahammade Beari.*
(1725) 8 Mod Rep 345 (345) : 88 E R 247, *Phillips* v. *Doelittle.*
(1885) 54 L J Q B 277 (278) : 14 Q B D 347 : 42 L T 374, *Croft* v. *London and County Banking Co.*
See O. 14, R. 10, Supreme Court Rules, as amended after 1902.
3. †('31) 18 AIR 1931 Cal 457 (458) : 58 Cal 311 : 132 Ind Cas 87, *Dhurrumtolla Properties, Ltd.* v. *Dhunbai.*
('16) 3 AIR 1916 Mad 680 (681, 682) : 39 Mad 834 : 30 Ind Cas 596 (DB), *Appayya Shetty* v. *Muhammade Beari.*
('28) 15 AIR 1928 Mad 193 (194) : 51 Mad 157 : 107 Ind Cas 792 (DB), *Giridharadoss Co.* v. *Para Appadurai.* (Tenant making default by not paying within the time allowed by the Court.)

secure the rent, is fulfilled and the tenant puts the landlord in the same position as if no default in payment had been made, the forfeiture should be relieved against. If the tenant seeks equity by asking for this equitable relief he must do equity : he must pay *all* that is due to the lessor. Hence, the words "rent in arrear" must be taken to mean all the rent *due up to the date of relief* and not merely the rent for the non-payment of which the forfeiture of the lease had occurred.[1] The expression "rent in arrear" will also include the rent which the lessor may be unable to recover under the law relating to limitation. The reason is that though the lessor's *remedy* under the law to recover the rent is lost, the tenant's *liability in equity* to pay the rent subsists ; and if this duty is not discharged the tenant is not entitled to the equitable relief under this section.[2]

7. **"The Court may pass an order."**—The word "may" shows that the Court has a *discretion* in the matter which it may exercise according to the circumstances of the case.[1] In the absence of special circumstances which would go against the lessee, the Court will generally exercise its discretion in *favour* of granting relief.[2] The mere fact that the lessee sets up a plea of payment which he fails to prove will not, in itself, disentitle him to relief.[3] But such a fact may, along with other circumstances, disentitle him to the relief.[4]

A lessee who wants relief under this section must come to the Court with clean hands. Where the conduct of a tenant *qua* tenant has been such that it would be unreasonable that the landlord should be compelled to keep him as a tenant, relief against forfeiture will not be granted.[5]

Section 114—Note 6

1. ('31) 18 AIR 1931 Cal 457 (458) : 58 Cal 311 : 132 Ind Cas 87, *Dhurrumtolla Properties, Ltd.* v. *Dhunbai.* (Rent in arrears is not equivalent to rent claimed in suit.)
(1895) 64 L J Ch 666 (671) : (1895) 2 Ch 581 : 73 L T 77 : 43 W R (Eng) 465, *Haward* v. *Fanshawe.* (Quoted in AIR 1931 Cal 457 : 58 Cal 311.)
2. ('21) 8 AIR 1921 Mad 418 (419) : 44 Mad 629 : 62 Ind Cas 593 (DB), *Vasudeva Udpa* v. *Krishna Udpa.*
('36) 23 AIR 1936 Mad 116 (117) : 160 Ind Cas 530, *Vamana Pai* v. *Venkatu Naika.*

Section 114—Note 7

1. ('47) 34 AIR 1947 Bom 86 (87) : 230 Ind Cas 67 (DB), *Ladhuram Manormal* v. *Chimniram Dongardas.*
('31) 18 AIR 1931 Cal 457 (457) : 58 Cal 311 : 132 Ind Cas 87, *Dhurrumtolla Properties Ltd.* v. *Dhunbai.*
2. *('27) 14 AIR 1927 Cal 908 (810) : 54 Cal 485 : 106 Ind Cas 477, *Debendra Lal Khan* v. *F. M. A. Cohen.*
('14) 1 AIR 1914 All 305 (306) : 24 Ind Cas 79, *Kundan Lal* v. *Kallu.*
('25) 12 AIR 1925 Mad 919 (921) : 85 Ind Cas 964, *Elagan* v. *Nanjappan.*
†('14) 1 AIR 1914 Mad 706 (708) : 24 Ind Cas 139 (DB), *Ramkrishna* v. *Baburaya.* (Whether a tenant is entitled to relief against forfeiture depends upon the circumstances of each case.)
('93) 17 Mad 216 (218) : 4 Mad L Jour 70 (DB), *Krishnasami Chetti* v. *Natal Emigration Board.*
(1806) 12 Ves 475 (476) : 33 E R 180, *Davis* v. *West.*
('69) 11 Suth W R 201 (201) (DB), *Kumla Sahoy* v. *Ram Ruttun.* (Case under Bengal Rent Act.)
(1905) 74 L J Ch 370 (372) : 53 W R (Eng) 552 : (1905) 1 Ch 739 : 92 L T 834, *Humphreys* v. *Marten.*
('87) 1887 Bom P J 154 (DB), *Shivram Bapuji* v. *Gangadher Laxman.*
('88) 1888 Bom P J 304, *Ramchandrarao* v. *Sidu.*
('95) 1895 Bom P J 206 (DB), *Gangadhar* v. *Savitribai.*
3. †('14) 1 AIR 1914 Mad 706 (708) : 24 Ind Cas 139 (DB), *Ram Krishna* v. *Bubu Raya.*
(1865) 2 Bom H C R 66 (70) (DB), *Timmarsa Puranik* v. *Badiya Kuppagooda.*
('88) 13 Bom 323 (325) (DB), *Jamsetji Sorabji* v. *Lakshmiram Rajaram.*
4. †('23) 10 AIR 1923 Nag 193 (195) : 19 Nag L R 50 : 71 Ind Cas 445, *Arjun* v. *Narayan.* (Failure to offer to pay arrears during hearing in lower Courts—Sufficiently long period of grace given by the lease allowed to pass without pay-ment.)
('05) 15 Mad L Jour 210 (210) (DB), *Narayana Kamti* v. *Handu Shetty.*
('11) 12 Ind Cas 456 (456) (DB) (Mad), *Mahalakshmi Amma* v. *Lakshmi.* (Payment not made even within period of grace—Tenant falsely pleading discharge in answer to landlord's suit in ejectment.)
5. †('27) 14 AIR 1927 Cal 908 (910) : 54 Cal 485 : 106 Ind Cas 477, *Debendra Lal Khan* v. *F. M. A. Cohen.*
('23) 10 AIR 1923 Nag 193 (195) : 19 Nag L R 50 : 71 Ind Cas 455, *Arjun* v. *Narayan.* (Tenant unsuccessfully pleading discharge—Failing to pay arrears in lower Court—Rent not paid in spite of long period of grace.)
(1886) 3 T L R 34 (35), *Stanhope* v. *Haworth.* (Tenant making delay in asking relief—Relief refused.)
(1841) 1 Hare 109 (138) : 11 L J Ch 132 : 66 E R 969, *Bowser* v. *Colby.*

The relief is also subject to other equities that may have arisen between the date of the forfeiture and the application for relief.[6] Thus, where the landlord, during that period, has re-let the premises to a third party or otherwise dealt with them, relief under this section will not be given.[7] The reason is that the equities in favour of the third party or the transferee are greater than those in favour of the tenant who has committed a default in payment giving rise to forfeiture.

Relief against forfeiture will not be given also where the landlord and other interested parties cannot be put in the same position as if no default in payment had been made. In *Stenhope* v. *Haworth*[8] there was a forfeiture of a lease of a colliery, for non-payment of rent. The lessee applied for relief against forfeiture just before the expiry of the period allowed by the law to make such applications. In the meantime the landlord had to maintain the colliery and third parties had offered to take it and had incurred expenses. It was held that relief could not be given against forfeiture inasmuch as the parties could not be put back in the same position as they were in before.

The question whether the lessor has or has not entered and dispossessed the tenant is immaterial in deciding whether relief should or should not be granted under this section.[9]

Where the discretion has been exercised by the Court one way or the other, it will not be interfered with by the appelate Court unless it is clear that the first Court had not exercised its discretion on proper judicial principles.[10]

8. Relief where period of grace is provided for the payment of the rent.— Where the lease itself privodes for a period of grace for payment of the rent which may become due, there is a difference of opinion on the question whether the Court can grant relief against the forfeiture.

On the one hand, it has been held that relief should not be granted in such cases.[1] This view proceeds on the ground that the principle of granting relief against forfeiture is that a clause for forfeiture is regarded in equity as merely being *in terrorm* intended merely to safeguard the due payment of rent, that where the lessee is given a period of grace after default, for making the payment, it cannot be said that the clause of forfeiture was intended to be merely *in terrorem*, and that therefore relief need not be given in such cases.

On the other hand, the contrary view has been taken in other cases,[2] namely,

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[*See* ('98) 1898 Bom P J 339 (DB), *Yamunabai* v. *Mathurabai.* (Tenant not dealing honestly with the landlord.)]

6. †('27) 14 AIR 1927 Cal 908 (910) : 54 Cal 485 : 106 Ind Cas 477, *Debendra Lal Khan* v. *F. M. A. Cohen.*

(1895) 43 W R (Eng) (Dig) 89 (89) : 72 L T 852 : 14 R 526, *Newbolt* v. *Bingham.* (Referred in AIR 1927 Cal 908 : 54 Cal 485.)

7. †('27) 14 AIR 1927 Cal 908 (910) : 54 Cal 485 : 106 Ind Cas 477, *Debendra Lal Khan* v. *F. M. A. Cohen.*

(1886) 3 T L R 34 (35), *Stenhope* v. *Haworth.* (Referred in AIR 1927 Cal 908 : 54 Cal 485.)

8. (1886) 3 T L R 34 (35).

9. ('06) 34 Cal 358 (368) : 5 Cal L Jour 208 (DB), *Meghalal* v. *Raj Kumar.* (Reversed on another point in AIR 1927 P C 163 : 45 Cal 87 : 44 Ind App 246 (PC).)

10. ('47) 34 AIR 1947 Bom 86 (87) : 230 Ind Cas 67 (DB), *Ladhuram Manormal* v. *Chimniram Dongardas.*

('28) 15 AIR 1928 Mad 250 (253) : 108 Ind Cas 273, *Ramabrahman* v. *Rami Reddi.*

[*See* ('44) 31 AIR 1944 Nag 229 (230, 231) : ILR (1944) Nag 877 : 219 Ind Cas 163 (DB), *Shri Kishanlal* v. *Ramnath.* (Discretion properly exercised by first appellate Court in granting relief—High Court refused to interfere.)

Section 114—Note 8

1. †('11) 12 Ind Cas 456 (456) (DB) (Mad), *Mahalakshmi Amma* v. *Lakshmi.* (When tenant is given further time in lease itself, it cannot ordinarily be said that condition of forfeiture was intended to be *in terrorem.*)

('10) 6 Ind Cas 438 (438) (DB) (Mad), *Adhiraya Shetty* v. *Billa Tyaupu.* (Provision for accumulated payments with interest.)

('05) 15 Mad L Jour 210 (210) (DB), *Narayana Kamti* v. *Handu Chetty.*

*('05) 28 Mad 389 (391) : 15 Mad L Jour 208 (DB), *Narayana Naicka* v. *Vasudeva Bhatta.*

('12) 16 Ind Cas 803 (803) (DB) (Mad), *Tungama Shettiti* v. *Korattia Shettiti.*

2. ('21) 8 AIR 1921 Bom 403 (404) : 45 Bom 300 : 59 Ind Cas 769 (DB), *Krishnaji* v. *Sitaram.*

that the equitable principle being to grant relief against forfeiture, it is not affected by the insertion of a clause granting a period of grace.

It is submitted that the latter view is to be preferred. The clause providing days of grace is inserted for the benefit of the lessee, and as pointed out by Napier, J., in the undermentioned case[3] it is difficult to see how what was intended as a benefit to the lessee can be made use of to deprive the Court of its power to grant relief.

9. Consent decree creating relation of lessor and lessee and providing for forfeiture on non-payment of rent—Relief.—In *Wentworth* v. *Bullen*[1] Baron Parke observed :

> "The contract of the parties is not the less a contract and subject to the incidents of a contract because there is superadded the command of the Judge."

Where, therefore, a consent decree creates the relation of landlord and tenant and provides for forfeiture on non-payment of rent, the Court can give relief against the forfeiture in the same way as it can do in a lease created by act of parties.[2]

10. Suit for ejectment on forfeiture—Court, if can pass decree for arrears of rent only.—It is clear from the section that unless the lessee pays or tenders the rent in arrear or gives security therefor at the hearing of the suit, the suit for ejectment will be decreed. In the undermentioned case,[1] however, it was held that in appropriate cases, the Court may refuse a decree for ejectment, and may merely pass a decree for the arrears of rent. It is submitted that this view is not correct. The provisions of this section were not referred to in the said decision.

11. Relief against forfeiture for breaches of other conditions.—This section in limited to forfeiture for *non-payment of rent*. There is no provision for relief being granted against forfeiture for breaches of conditions other than non-payment of rent. No relief can therefore be granted in such cases.[1] But in cases of conditions other than conditions against assigning, sub-letting, parting with possession, or disposing of the property leased, S. 114A requires that the lessor should give notice to the lessee requiring him to remedy the breach if it is capable of remedy, and if the breach is remedied within a reasonable time of notice, the lessee cannot be ejected.

A forfeiture for breach of a condition against *alienation* cannot be relieved against under this section,[2] nor does S. 114A apply to the case.

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†('28) 15 AIR 1928 Mad 250 (251, 253) : 108 Ind Cas 273, *Ramabrahman* v. *Rami Reddi.*

('23) 10 AIR 1923 Nag 193 (195) : 19 Nag L R 50 : 71 Ind Cas 445, *Arjun* v. *Narayan.*

*('16) 3 AIR 1916 Mad 680 (683) : 39 Mad 834 : 30 Ind Cas 596 (DB), *Appayya Shetti* v. *Mahammade Beari.*

†('17) 4 AIR 1917 Mad 182 (183) : 32 Ind Cas 526 (DB), *Narayana* v. *Kashappaya.*

3. ('16) 3 AIR 1916 Mad 680 (683) : 39 Mad 834 : 30 Ind Cas 596 (DB), *Appayya Shetti* v. *Mahammade Beari.*

Section 114—Note 9

1. (1820) 9 B & C 840 (850) : 9 L J K B 33 : 33 R R 353 : 109 E R 313.

2. ('47) 34 AIR 1947 Bom 86 (86) : 230 Ind Cas 67 (DB), *Ladhuram Manormal* v. *Chimniram Dongardas.* [Suit by lessor for arrears of rent and possession on forfeiture for non-payment of rent—Compromise decree providing for forfeiture on lessee's failure to pay arrears by certain date—Lessee can apply for relief against forfeiture even in execution of compromise decree which in so far as it contains a clause for forfeiture takes the place of a lease. 35 Bom 239, *Rel. on.*]

*('06) 31 Bom 15 (24, 25) : 8 Bom L R 813 (FB), *Krishna Bai* v. *Hari Govind.* (10 Bom 435 overruled.)

('11) 12 Ind Cas 334 (335) (DB) (Mad), *Theyyammalachi* v. *Rajali.*

†(1900) 24 Mad 265 (270, 271) (DB), *Nagappa* v. *Venkatrao.*

('11) 35 Bom 239 (242) : 10 Ind Cas 746 (746) (DB), *Balambhat Ravjibhat* v. *Vinayak Ganpatrao.*

('21) 8 AIR 1921 Cal 565 (567) : 66 Ind Cas 766 (DB), *Gopal Krishna* v. *Hari Nath.* (Court can grant relief against forfeiture in execution.)

[*See* also (1866) 35 L J C P 351 (353) : 15 L T 386 : L R I C P 570, *Lievesley* v. *Gilmore.*

Section 114—Note 10

1. ('28) 15 AIR 1928 All 716 (717) : 110 Ind Cas 872, *Bhagwati Prasad* v. *Peglar.*

Section 114—Note 11

1. ('36) 23 AIR 1936 Pat 493 (495) : 15 Pat 673 : 164 Ind Cas 811 (DB), *Dayal Singh* v. *Promatha Nath.* (Covenant in restraint of transfer in lease.)

2. †('10) 6 AIR 1919 Mad 12 (12, 13) : 42 Mad 654 : 50 Ind Cas 898 (SB), *Krishna Shetti* v. *Gilbart Pinto.*

12. Forfeiture under decree—Construction of decree.—Where the first Court decreed relief against forfeiture on payment of a certain amount which was paid, and the appellate Court thereafter granted an additional amount to the plaintiff to be paid within "one month from this date," confirming the first Court's decree in other respects, it was held that in construing the decree the Court ought to have acted in favour of the tenant against forfeiture rather than in the landlord's favour and that the failure to pay the additional amount within one month of the first Court's decree did not cause forfeiture of the tenancy, in view of the doubtful wording of the decree.[1]

114.A Where a lease of immovable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—

Relief against forfeiture in certain other cases.

(*a*) specifying the particular breach complained of ; and

(*b*) if the breach is capable of remedy, requiring the lessee to remedy the breach ;

and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, under-letting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent.

a Section 114A was *inserted* by Section 58 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

Synopsis

1. Scope of the section.
2. Notice before suit for ejectment.
3. Contents of notice.

1. Scope of the section.—Under the English law as it stood prior to 1881, Courts of Equity granted relief against forfeiture of leases only in cases of *non-payment of rent* and not in other cases.[1] By the Conveyancing Act of 1881 (44 & 45 Vict., Ch. 41) S. 14, provision was made for the grant of relief against every forfeiture for the breach of any condition whatsoever in a lease other than conditions against assigning, underlying, parting with possession or disposing of the property leased, conditions for forfeiture on the bankruptcy of the lessee and conditions for forfeiture on the taking in execution of the lessee's interest.[2]

('36) 23 AIR 1936 Pat 493 (495) : 15 Pat 673 : 164 I. C. 811 (DB), *Dayal Singh* v. *Promatha Nath.*

Section 114—Note 12

1. ('24) 11 AIR 1924 Mad 649 (650) : 78 Ind Cas 1007 (DB), *Akkamma Shetti* v. *Chandro Shetti.*

Section 114A—Note 1

1. Snell, *Principles of Equity*, 11th Edition, page 365.

Also Williams & Eastwood, *Principles of the Law of Real Property*, 1933 Edition, page 118.

2. Sub-section (1) of S. 14 of the Conveyancing Act of 1881 runs as follows :

"*Section 14 (1).* A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the

The Indian Legislature in enacting S. 114 enabling Courts to grant relief against forfeiture for non-payment of rent, and in not providing for other cases, preferred to adhere to the old English law and not to the provisions of the Conveyancing Act of 1881.[3] No relief could therefore be granted under the Act against forfeiture of leases except in cases of non-payment of rent. In cases not governed by the Act (e. g., agricultural leases), however, the Courts granted relief on equitable principles against forfeiture even in cases other than non-payment of rent.[4]

Section 146 of the English Law of Property Act, 1925 (15 Geo. V, Ch. 20) which replaced the old S. 14 of the Conveyancing Act, 1881, gave much wider powers of granting relief against forfeiture of leases. Even breaches of conditions against assignment, sub-letting, etc., could be relieved against if the breach occurred after the passing of the Act.[5]

The present S. 114A was introduced in this Act by the amending Act of 1929 and is modelled on S. 14 of the English Conveyancing Act, 1881.[5aa] Even after the enactments of S. 114A it has been held that the court can grant relief against forfeiture of an agricultural lease on equitable grounds. Thus it will grant relief even when the notice of forfeiture is not in acceptance with the section as the section only embodies an equitable principle which the court can apply in such a case.[5b]

The words "where a lease of immovable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the

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satisfaction of the lessor, for the breach." Sub-section 6 (1) of S. 14 of the said Act runs as follows:

"6. This section does not extend—

(1) To a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest;"

3. ('19) 6 AIR 1919 Mad 12 (13): 42 Mad 654: 50 Ind Cas 898 (SB), *Krishna Shetti* v. *Gilbert Pinto.* (In the absence of any special reason, there is no ground for applying a different rule to agricultural leases.)

4. ('26) 13 AIR 1926 Bom 304 (305): 50 Bom 450: 94 Ind Cas 1054 (DB), *Janaradn* v. *Mhalappa.* (Covenant against alienation.)

('71) 3 N W P H C R 322 (322) (DB), *Koora* v. *Dick.* (Forfeiture incurred by planting trees relieved against.)

('71) 3 N W P H C R 282 (302) (DB), *Ramjuthun Singh* v. *Mehdee.* (Forfeiture incurred by digging a temporary well relieved against.)

(1879) 2 All 437 (442, 443) (DB), *Ablakh Rai* v. *Salim Ahmad.* (Do.)

('35) 22 AIR 1935 Bom 41 (46): 59 Bom 194: 155 I. C. 516 (DB), *Rachotappa* v. *Konher.* (Denial of title—Forfeiture can be relieved against on equitable principles.) [*See also* ('19) 6 AIR 1919 Mad 1106 (1107): 41 Mad 629: 45 Ind Cas 743 (DB), *Komalukutti* v. *Muhamad.* (Forfeiture by disclaimer of title will be relieved only if the disclaimer was occasioned by fraud, mistake or accident on the part of the landlord and the tenant was not careless or negligent.)]

[*But see* ('20) 7 AIR 1920 Mad 312 (312): 55 I. C. 781 (DB), *Vittappa Kudva* v. *Durgamma.* (Forfeiture incurred by alienating land not relieved against.)

('19) 6 AIR 1919 Mad 12 (13): 42 Mad 654: 50 Ind Cas 898 (SB), *Krishna Shetti* v. *Gilbert Pinto.* (Covenant against alienation cannot be relieved against.)]

5. Sub-section (1) of S. 146 of the Law of Property Act, 1925, runs as follows:

"*146.* (1) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice—

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and

(c) in any case, requiring the lessee to make compensation in money for the breach;

and the lessee fails, within a reasonable time thereafter, to remedy the breach if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

5a. ('47) 34 AIR 1947 Mad 119 (120): 231 Ind Cas 344 (DB), *Briget Sonza Bai* v. *Maria Louis Bai.*

('46) 33 AIR 1946 Lah 330 (338): ILR (1947) Lah 235: 226 Ind Cas 583 (DB), *Mt. Gindori* v. *Shamlal.*

('43) 30 AIR 1943 All 279 (280): 208 Ind Cas 422, *Anand Sarup* v. *Taiyub Hasan.* (The Act does not provide for relief against forfeiture when lessee renounces his character by setting up a title in himself or in a person other than the lessor—Courts cannot therefore import into the Act such a provision which is not there.)

5bb. ('47) 34 AIR 1947 Mad 119 (119): 231 Ind Cas 344 (DB), *Briget Sonza Bai* v. *Maria Louis Bai.*

lessor may re-enter" show that the section applies only to cases falling within cl. (1) of S. 111 (g). It thus excludes from its operation forfeitures on the ground of denial of title[5a] and forfeiture on the insolvency of the lessee falling within cls. (2) and (3) of S. 111 (g). Even in cases falling within cl. (1) of S. 111 (g), the last paragraph of this section execludes from its operation a forfeiture for non-payment of rent (which is separately provided for by S. 114) and forfeiture for breach of a condition against assigning, sub-letting, parting with possession or disposing of the property leased. The creation of a usufructuary mortgage does not amount to an assignment.[5bb] Where a lease contained a covenant that the land should not be given as security for any pecuniary obligation of the lessee and the lessee granted a usufructuary mortgage of the property to secure a loan it was held that the lessee has incurred a forfeiture of the lease.[5c]

2. Notice before suit for ejectment.—Under S. 111 (g) it is necessary for the *determination of the lease* for breach of a condition that the lessor should give a notice in writing to the lessee of his *intention to determine* the lease. This section provides that *after the determination* of the lease under S. 111 (g), it is necessary for the lessor, before suing for ejectment to serve on the lessee a notice containing the particulars mentioned in the section. The object of this notice is merely to give the lessee an opportunity *even after the determination of the lease* to remedy the breach if he can and continue the lease. It seems to be clear, therefore, that in cases of breaches of conditions referred to in this section, *two* notices are necessary to be given before the lessor can maintain a suit for ejectment. He must first give a notice of his intention to determine the lease and, after the determination of the lease in pursuance of such notice, he must give a further notice as required by this section before suing for ejectment. It has, however, been held by the High Court of Calcutta in the undermentioned case[1] that a single notice is sufficient. According to the decision this section merely defines the *form* in which the notice under S. 111 (g) is to be issued in cases where the breach of the condition is capable of being remedied. It is submitted that this view is not correct for the reasons stated above.

3. Contents of notice.—The provisions as to the particulars required to be given in the notice have been reproduced from S. 14 of the Conveyancing Act, 1881, and S. 146 of the Law of Property Act, 1925, with this difference, however, that the notice under the latter provisions should also require the lessee, in any case, to make *reasonable compensation for the breach.*

The object of the notice is to give the lessee precise information of what is alleged against him and what is demanded of him.[1] The notice "specifying the particular breach complained of," therefore, must not specify the breach complained of merely by reference to the particular covenant broken but must give sufficient details to enable the lessee to understand with reasonable certainty, what he is required to do to remedy the breach. Where a number of houses were let with a covenant to "keep them in good condition and complete tenantable repairs" and on a breach thereof a notice was served upon the lessee in the following words "I hereby give you notice that you have broken the covenants for repairing the inside and outside of the houses contained in the lease and I require you to repair them forthwith," it was held that there was nothing in the notice to show in respect of which house the breach had been committed and that the notice was, therefore, not a valid one.[2]

Where a breach of more conditions than one is complained of, a notice to remedy those breaches is not bad merely because in respect of one or more of them the breach cannot be established.[3]

5c. ('47) 34 AIR 1947 Mad 119 (120) : 231 Ind Cas 344 (DB), *Briget Souza Bai* v. *Maria Louis Bai.*

6. ('39) 26 AIR 1939 Lah 330 (338) : 186 Ind Cas 45 (DB), *Mohammad Hussain* v. *Secy. of State.*

Section 114—Note 2

1. ('38) 25 AIR 1938 Cal 589 (593) : ILR (1938) 2 Cal 434 : 181 Ind Cas 657 (DB), *Pravat Chandra* v. *Bengal Central Bank Ltd.*

Section 114—Note 3

1. (1899) 47 W R (Eng) 644 (646) : (1899) 2 QB 79 : 80 LT 857 : 68 LJQB 743, *Horsey Estate, Ltd.* v. *Steiger.*

2. (1897) 45 W R (Eng) 471 (472) : (1897) 1 Ch 271 : 66 L J Ch 177 : 76 L T 107, *Fletcher* v. *Nokes.*

3. (1900) 48 W R (Eng) 264 (265, 266) : (1900) 1 Ch 496 : 69 L J Ch 244 : 82

Where two covenants are broken and a notice in respect of only one of them is given and afterwards that breach is waived, the lessor cannot take advantage of the notice in respect of the other breach.[4]

As to what time will be "reasonable" for remedying the breach complained of will depend upon circumstances of each case. In the undermentioned case[5] where a vast number of repairs were to be made and a suit for ejectment was filed only two days after the service of notice upon the lessee, it was held that reasonable time had not been allowed to remedy the breach.

Where the notice served upon the lessee does not give him an opportunity of remedying the breach where it is capable of being remedied the lessor cannot maintain the suit for ejectment.[6]

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115. The surrender, express or implied, of a lease of immovable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

Effect of surrender and forfeiture on under-leases.

The forfeiture of such a lease annuls all such under-leases except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under section 114.

Synopsis

1. Scope of the section.
2. Surrender for obtaining new lease.
3. Sub lease put an end to by forfeiture.
4. Agricultural leases.

1. Scope of the section.—A lease is a transfer of an interest in immovbale property. Under S. 108, cl. (j) the lessee can, in the absence of a contract or local usage to the contrary, transfer his interest by way of sub-lease. The sub-lessee's interest being carved out of the lessee's interest, it will as a general rule be determined by the determination of the lease itself[1] in accordance with the maxim *cessante statu primitivo, cessat derivativus* (the derived estate ceases on the determination of the original estate). Thus, if the lease is determined by efflux of time or by forfeiture or by operation of law the sub-lease will also be determined.[2]

L T 53, *Pannell* v. *City of London Brewery Co.*

4. (1900) 48 W R (Eng) 441 (442, 443) : (1900) 2 Ch 156 : 69 L J Ch 493 : 83 L T 191, *Jacob* v. *Down.*

5. (1899) 47 W R (Eng) 644 (646) : (1899) 2 Q B 79 : 80 L T 857 : 68 L J Q B 743, *Horsey Estate, Ltd.* v. *Steiger.*

6. ('47) 34 AIR 1947 Mad 119 (120) : 231 Ind Cas 344 (DB), *Briget Souza Bai* v. *Maria Louis Bai.* [*Mortgage by lessee in breach of condition of lease—Notice by lessor*—Notice not giving opportunity of remedying breach, which means opportunity of redeeming mortgage—Notice bad —Lessor not entitled to eject lessee.]

Section 115—Note 1

1. †('23) 10 AIR 1923 Cal 691 (691) : 50 Cal 419 : 77 Ind Cas 910, *Ramkissendas* v. *Binjraj.* (A lessee cannot give to a sub-tenant what he does not possess himself.)

2. ('49) 36 AIR 1949 Mad 387 (392), *Parthasarathy* v. *Krishnamoorthy* [Order of eviction against tenant under Madras Buildings (Lease and Rent Control) Act (1946), S. 7.—Sub-tenant is also bound by that order—Fact that he was not made party to proceedings before Rent Controller does not affect question.]
('46) 33 AIR 1946 Nag 419 (423) : 223 Ind Cas 437 (DB), *Bhabhutmal Nathmal* v. *Khan Mohammad.*
('17) 4 AIR 1917 Nag 51 (52) : 43 Ind Cas 912, *Rani Bahu* v. *Sobharam.* (Usufructuary mortgage by tenant—Tenant dying heirless—Mortgage grafted on the tenancy necessarily determines with it.)
('32) 19 AIR 1932 Nag 107 (109) : 28 Nag L R 93 : 139 Ind Cas 369, *Baideo Prasad* v. *Prem Narain.* (Do.)
('33) 20 AIR 1933 Nag 255 (256) : 30 Nag L R 25 : 148 Ind Cas 257, *Shivlal* v.

A determination by *surrender* of the lease by the lessee is an exception to this general rule. A surrender being a voluntary act on the part of the lessee, the principle that a man cannot derogate from his own grant will come into play, and the lessee's action will not be allowed to prejudice the sub-lessee.[3] This principle was recognised in England from very early times.[4] Lord Coke, after noticing that as between the parties to a surrender the estate is absolutely drowned, said : "But having regard to strangers who were not parties or privies thereunto (lest, by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender), the estate surrendered hath, in consideration of law, a continuance."

A disclaimer by trustee in bankruptcy of the lease, will, it appears, have the same effect. Thus in the undermentioned English decision[4a] where a purchaser had agreed to by an under lease and on the head lessee's becoming bankrupt the trustee disclaimed the lease it was held that the disclaimer did not entirely extinguish the lease ; if only operated to determine the head lessee's interest in the lease and therefore the interest of the purchaser could he described as an under lease.

2. **Surrender for obtaining new lease.**—It has been seen already that a valid surrender of a head lease obliterates it and establishes direct contract between the under-lessee and the original lessor. The exception to this rule is, where the surrender is made for the purpose of obtaining a new lease. In the latter case, the benefits of the contract of under-lease and the right to the rent thereunder vest in the lessee whether he is the original lessee or his nominee.[1]

Abdul Husein. (Tenant's rights terminating by decree in ejectment suit—Rights of tenant's mortgagee are terminated thereby.)

†('26) 13 AIR 1926 Nag 62 (63) : 89 Ind Cas 872, *Govindrao* v. *Sarja Bai.* (Sub-lease though granted with landlord's consent does not survive after determination of tenancy.)

(1876) 2 Ch D 235 (253) : 24 W R (Eng) 443 : 45 L J Ch 235 : 34 L T 267, *Great Western Rly. Co.* v. *Smith.*

('04) 31 Cal 1021 (1024) : 8 Cal W N 860, *Ram Kumar* v. *Ram Newaz.*

†('32) 19 AIR 1932 Cal 241 (242) : 59 Cal 739 : 137 Ind Cas 139 (DB), *Sheikh Yusuf* v. *Jotish Chandra.* (Tenant's right terminating by decree in ejectment suit.)

('04) 27 Mad 401 (404) (DB), *Ekambara Ayyer* v. *Meenatchi Ammal.*

('20) 7 AIR 1920 Cal 706 (707) : 47 Cal 907 : 60 Ind Cas 969, *D. E. D. J. Ezra* v. *J. E. Gobbay.*

('74) 22 Suth W R 274 (275) (DB), *Hurish Shunder Roy* v. *Sree Kalee Mookerjee.* (A lessee cannot create an under-lease to last for a longer time than his own lease.)

('76) 25 Suth W R 347 (350) (DB), *Rance Shoorut Soondry* v. *Charles Binny.* (No farmer can create a sub-tenure so as to last beyond his lease to the prejudice of the owner.)

Also see S. 106, Note 29 and S. 108 (j), Note 1.

3. ('46) 33 AIR 1946 Nag 419 (423) : 223 Ind Cas 437 (DB), *Bhabhutmal Nathmal* v. *Khan Mohammad.*

('26) 13 AIR 1926 Nag 62 (62) : 89 Ind Cas 872, *Govindrao* v. *Sarjabai.* (*Obiter.*)

†('17) 4 AIR 1917 Nag 51 (52) : 43 Ind Cas 912, *Rani Bahu* v. *Sobharam.*

4. See Halsbury, *Laws of England,* Volume 18, p. 551, paragraph 1064.

† (1876) 2 Ch D 235 (253) : 24 W R (Eng) 443 (449) : 45 L J Ch 235 : 34 L T 267, *Great Western Railway Co.* v. *Smith.*

† (1859) 28 L J C P 297 (300) : 7 W R (Eng) 611 : 120 R R 380, *London and Westminister Loan and Discount Co. Ltd.* v. *Drake.* (Mortgagee from tenant not prejudiced by a surrender by the tenant.)

(1875) 44 L J Ex 33 (35, 36) : L R 10 Ex 137 : 33 L T 93 : 23 W R (Eng) 753, *Saint* v. *Pilley.*

(1816) 105 E R 1005 (1008) : 5 M & S 146 : 17 R R 296, *Doe* v. *Pyke.*

4a. (1943) 1 Ch 97 (1943) 1 All E R 169 : 112 L J Ch 109, *Re, Thompson* v. *Cottrell's Contract.*

5. ('17) 4 AIR 1917 Nag 51 (52) : 43 Ind Cas 912, *Rani Bahu* v. *Sabha Ram.*

('17) 4 AIR 1917 Nag 86 (87) : 14 Nag L R 107 : 46 Ind Cas 244, *Sarjerao* v. *Tukaram.* (Case of implied surrender under S. 35 (4) of C. P. Tenancy Act.)

This view was held even before the Act, see :

('69) 11 Suth W R 485 (487) (DB), *Ruston* v. *Atkinson.*

('68) 10 Suth W R 384 (384, 385) (DB), *Heeramonee* v. *Gunga Narain.*

('70) 13 Suth W R 281 (281) (DB), *Nehaloonissa* v. *Dhunnoo Lall.*

6. ('39) 26 AIR 1939 Bom 98 (100) : ILR (1939) Bom 144 : 180 Ind Cas 945 (DB), *Suleman Haji* v. *Darabshaw.* (Surrender of head-lease for obtaining new lease—Sub-lessee continues as before under the lessee.)

7. ('24) 11 AIR 1924 Bom 212 (216) : 85 Ind Cas 1038, *Rahimtulla* v. *Hasan Ali.*

Section 115—Note 2

1. ('39) 26 AIR 1939 Bom 98 (100) : ILR (1939) Bom 144 : 180 Ind Cas 945 (DB), *Suleman Haji* v. *Darabshaw.*

3. **Sub-lease put an end to by forfeiture.**—A *forfeiture* of a lease will, unlike a *surrender* thereof, destroy the sub-lease on the general principle that a derivative estate will fall with the determination of the original estate. (See Note 1.) But where such forfeiture is procured by the lessor in *fraud* of the under-lessee it will not have any operation against the under-lessee.[1a] Where the landlord acquires a right to enact his tenant under S. 7 of the Madras Buildings (Lease and Rent Control) Act (XV L 15) of 1946) after giving a notice to quit under the provision of the Transfer of Property Act, the sub-tenant is liable to be evicted.[1b]

An implied surrender under S. 25 (4) of the C. P. Tenancy Act, 1898, has been held to be analogous to a forfeiture which would put an end to the sub-lease in the absence of fraud or collusion.[1]

Where relief against forfeiture is granted under S. 114, the rights of lessee remain as if the forfeiture had not occurred. Consequently, the under-lessee's rights also are not affected. The section does not refer to cases where a forfeiture is relieved under S. 114A. There does not seem to be any reason why the same principle should not apply to such cases.

4. **Agricultural leases.**—The section does not in terms apply to agricultural leases. The effect of a surrender or of a forfeiture of such leases on under-leases must be determined by reference to the local laws, or custom, if any, governing the particular transaction[1] and in the absence thereof, by reference to the general principles underlying this section.[2] On the principles stated in Note 1 a voluntary surrender, even in the case of an agricultural lease will not put an end to a valid under-lease,[3] while a forfeiture will put an end to it.[4]

Section 115—Note 3

1a. ('49) 53 Cal W N 555 (559, 560), *Premier National Bank Ltd.* v. *Bhairodan Sethia.* [Determination of lease by forfeiture of notice to quit—Landlord obtaining deed for ejectment—Decree binding on sub-tenants—Unless sub-tenant shows that decree has been obtained on grounds not annulling sub lease—Ejectment can be resisted also on ground of protection under West Bengal Provinces Rent Control Act (38) [XXXVIII of 1948.]

1b. ('49) 36 AIR 1949 Mad 387 (392), [*Parthasarathy* v. *Krishnamoorthy.*]

1. ('17) 4 AIR 1917 Nag 86 (87) : 14 Nag L R 107 : 46 Ind Cas 244, *Sarjerao* v. *Tukaram.*

Section 115—Note 4

1. ('71) 3 N W P H C R 63 (65) (FB), *Hoolasee Ram* v. *Pursotum Lal.* (Sub-lease only for the duration of the head lease—Relinquishment of lease puts an end to sub-lease.)
[*See* ('98) 22 Bom 389 (404) (FB), *Narayan* v. *Parshotam.* (Declaration of forfeiture of a muljeni lease under S. 153 of the Bombay Land Revenue Code (V of 1879), not followed by sale but by an order transferring possession of holding to lessor under S. 57—Prior incumbrances are not defeated.)]

2. ('46) 33 AIR 1946 Nag 419 (423) : 223 Ind Cas 437 (DB), *Bhabhutmal Nathmal* v. *Khan Mohammad.*

Civ. Rev. Nos. 334 to 338, 340 to 343, 345 to 348, 350, 351, and 353 to 361 of 1945 D/-9-4-1946 (Pat), *Baralal Kander* v. *Bai Sakhu Singh.* [The principle enacted in S. 115, would be applicable to under tenure-holders in Chota Nagpur when the tenure-holder under whom they immediately hold comes to an arrangement with his own landlord as a resuit of which the latter is put in a position to assert that the under-tenures have come to an end.]

('20) 7 AIR 1920 All 128 (129) : 57 Ind Cas 589 (DB), *Gobind Prasad* v. *Parmanand.* (Lessor will be entitled to benefit of covenants by sub-lessee.)

3. †('17) 4 AIR 1917 Cal 236 (241) : 34 Ind Cas 833 (DB), *Dwarika Nath* v. *Mathura Nath.*

('96) 18 All 354 (356) : 1896 All W N 109 (DB), *Badri Prasad* v. *Sheodhian.*

('95) 1895 Bom P J 545 (DB), *Manager, Rangappa* v. *Shambhatta.*

†('21) 8 AIR 1921 Cal 444 (448) : 48 Cal 605 : 61 Ind Cas 443 (FB), *Mohsenuddin* v. *Baikuntha Chandra.* (Occupancy raiyat having transferred portion of non-transferable holding cannot surrender to landlord either such portion or whole holding.)

('14) 1 AIR 1914 Cal 376 (377) : 21 Ind Cas 58 (DB), *Asger Ali* v. *Gauri Mohan.*

('36) 23 AIR 1936 Mad 422 (423) : 162 Ind Cas 873, *Lakshmi* v. *Kalu.*

('32) 19 AIR 1932 Nag 107 (109) : 28 Nag L R 93, 139 Ind Cas 369, *Baldeo Prasad* v. *Prem Narain.*

('98) 11 C P L R 5 (10), *Diwan Maharajsha* v. *Abheram Gujar.*

('09) 4 Ind Cas 325 (325) (DB) (Cal), *Nabadip Chandra* v. *Bhairab Chandra.*

4. ('30) 17 AIR 1930 All 352 (352) : 126 Ind Cas 362 (DB), *Shahzad Singh* v. *Bachoo Singh.*

† ('17) 4 AIR 1917 Cal 236 (241) : 34 Ind Cas 833 (DB), *Dwarka Nath* v. *Mathura Nath.*

116. Effect of holding over. **If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.**

Illustrations.

(*a*) A lets a house to B for five years. B underlets the house to C at a monthly rent of Rs. 100. The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

(*b*) A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.

Synopsis

1. Scope of the section.
2. "Remains in possession."
3. More lessees than one—Only some remaining in possession—Effect of.
4. Effect of lessee's legal representative remaining in possession.
5. Legal representative of the lessor.
6. "Accepts rent or otherwise assents to his continuing in possession."
7. More lessors than one — Acceptance by one only.
8. Clause for enhancement of rent in a quit notice, whether amounts to an assent.
9. Suit for rent for the period of lessee's possession after determination, whether amounts to assent.
10. Clause for renewal.
11. "In the absence of an agreement to the contrary."
12. Effect of renewal.
13. Nature of possession of tenant holding over without consent.
14. Possession under a lease valid for a part of the term only.

TOPIC INDICATOR

Holding over. See Note 1.
Holding over in case of oral lease. See Note 14.
Implied terms of holding over. See Notes 1 and 12.
Suit for possession against tenant holding over —Limitation. See Note 13.
Tenancy by sufferance and tenancy at will—Distinction. See Note 1.

1. Scope of the section.—Whenever after the determination of a lease the lessee remains in possession, he is said to "hold over."[1] This section deals with the effect of "holding over" by a lessee with the *Consent* of the lessor. Where there is a fresh contract of lease entered into after the expiry of the original lease, it is evident, that this section will not apply.[1a]

Before the passing of this Act, it had been held that a tenant holding over after the expiration of his tenancy must be presumed to hold on the same terms as those of the original lease.[1b]

('24) 11 AIR 1924 Mad 776 (777) : 84 Ind Cas 625 (DB), *Gopala Kuduva* v. *Hamza Sahib.*

('04) 27 Mad 401 (406) (DB), *Ekambara Ayyar* v. *Meenatchi Ammal.*

† ('90) 14 Bom 384 (386) (DB), *Vishnu* v. *Anant.*

Section 116—Note 1

1. Wharton, *Law Lexicon*, 14th Edn., 1938.

1a. ('47) 1947 A a R (HC) 167 (168), *Beshambhor Nath* v. *Kailash Wati.* [In the absence of a registered instrument as required by S. 107 the lessee could not to be held to be a tenant from year to year and was not, therefore entitled to six months notice.]

1a. (1864) 1864 Suth W R Gap No. Act X, Rul 42 (43) (DB), *Sheik Enayutoollah* v. *Sheik Elaheebuksh.*

('76) 25 Suth W R 234 (235), *Altab Bibee* v. *Joogul* Mundul...

('74) 22 Suth W R 31 (32) (DB), *Sheo Sahoy Singh* v. *Bechun Singh.*

('74) 22 Suth W R 394 (395) (DB), *Tara Chunder* v. *Ameer Mundul.*

('98) 2 Cal W N 303 (304) (DB), *Kishore Lal* v. *Administrator-General of Bengal.*

Under the English law, a tenant who continues in possession after the determination of the tenancy without the agreement or disagreement of the person in whom the right of possession resides is said to be a tenant by sufferance.[2] The difference between a *tenancy by sufferance* under the English law and a tenant holding over under this Act, is this : In the former case the consent of the lessor to such possession converts the lessee into a *tenant at will* except in cases where the original lease was itself for a year, in which case the tenant becomes a tenant from year to year.[3] In this country, the consent of the lessor does not convert the tenant holding over into a tenant at will but converts him into a tenant from year to year or from month to month as the case may be. Except for this distinction the nature of a tenancy by sufferance in English law and the nature of the possession of a person holding over appears to be the same.

A tenancy by holding over or a tenancy by sufferance is merely a fiction to avoid continuance of possession operating as a trespass. It cannot therefore be created by contract, and arises only by implication of law when a person who has been in possession under a lawful title continues in possession after that title has determined without the consent of the person entitled.[4]

The effect of holding over with the consent of the lessor under this section is, firstly, that in the absence of an agreement to the contrary the lease is renewed as to all terms except the *duration* of the lease, and, secondly, that the duration of the renewed lease is from year to year or from month to month according to the purpose for which the property is leased as specified in section 106.[5]

It is the assent of the *lessor or his legal representative* that effects a renewal of the lease under this section.[6] The lessee's assent is not necessary.[7] The tenancy created under this section is a new tenancy though many of the terms of the old lease may be continued in the new lease by implication and therefore by the lessee continuing in possession after the determination of the old lease there is an offer on the part of the lessee which has to be accepted by the lessor by giving his assent if a new tenancy is to arise under the section.[7a]

See also Notes under S. 113

The doctrine of holding over contained in this section involves the position

('66) 3 Bom HCR (AC) 27 (30) (DB), *Sayaji* v. *Umaji.*
[*See also* ('74) 12 Beng L R 263 (265), *Nocoordass* v. *Jewrdaj.* (The nature of the terms depends upon the facts of the particular case.)]

2. Wharton, *Law Lexicon*, 14th Edn., 1938, *sub voce* "*Sufferance.* Tenancy at."

3. Odger. *The Common Law of England,* Vol. 1, page 870.

†(1893) 1 Q B 736 (743) : 62 L J Q B 462 : 68 L T 699 : 41 W R (Eng) 484, *Dougal* v. *Mc Carthy.* (Per A. L. Smith, L. J.)
(1907) 2 Ch 137 (143) : 76 L J Ch 548 : 97 L T 445, *Morgan* v. *William Harrison Ltd.*
(1916) 2 K B 91 (98, 99) : 85 L J K B 1298 : 115 L T 243, *Wedd* v. *Porter.*
('08) 31 Mad 163 (166) : 18 Mad L Jour 26 (DB), *Vadapalli Narasimham* v. *Dronamraju.*
('23) 10 AIR 1923 Pat 201 (202) : 71 Ind Cas 570 (DB), *Ram Lochan* v. *Kamakhya Narain.*
('25) 12 AIR 1925 Pat 357 (361) : 86 Ind Cas 387 (DB), *Charan Mahton* v. *Kamakhya Narayan.*
('30) 17 AIR 1930 Cal 262 (263) : 125 Ind Cas 654, (DB), *Gopal Chandra* v. *Khater Karikar.*
[*See also* (1930) 142 L T 299 (305) : 99 L J Ch 201 : (1930) 1 Ch 304 : 46 TLR 171, *Ladies' Hosiery and Underwear Ltd.* v. *Parker.* (On facts tenancy held not renewed as there was no payment of rent to the landlord.)]

4. ('42) 29 AIR 1942 Cal 341 (341) : 200 Ind Cas 660 (DB), *Mouzam Shaikh* v. *Annada Prasad.*

5. ('49) 36 AIR 1949 P. C. 90 (95) (PC), *Gooderham and Works Ltd.* v. *Canadian Broadcasting Corpn.*
('48) 1 Sau. L R 41 (43), *Jagadishchandra Jayantilal* v. *Metha Girdharlal.*
('34) 21 AIR 1934 Mad 458 (459, 460) : 58 Mad 75 : 155 I. C. 838 (DB), *Gnanadesikam* v. *Antony.*

6. ('24) 11 AIR 1924 Bom 322 (323, 324) : 48 Bom 341 : 80 Ind Cas 507, *Meghji Vallabhdas* v. *Dayalji Lal & Co.*
('26) 13 AIR 1926 Mad 566 (567) : 94 Ind Cas 308, *Kuppuswamy Pillai* v. *Md. Kasim.*
('29) 16 AIR 1929 Cal 553 (555) : 57 Cal 538 : 123 Ind Cas 268 (DB), *Solaiman Moosaji* v. *Jatindra Nath.*

7. ('24) 11 AIR 1924 Bom 322 (323, 324) : 48 Bom 341 : 80 Ind Cas 507, *Meghji Vallabhdas* v. *Dayalji Lal & Co.*

7a. ('49) 36 AIR 1949 F. C. 124 (127) (FC), *Kai Khushroo* v. *Bai Jerbai.*

that there existed a relationship of landlord and tenant between the parties. Where there was no contract of tenancy between the parties, this section has no application.[7b]

This chapter, and therefore this section, does not apply to leases for agricultural purposes (see S. 117) but the principle underlying it has been applied to such leases on the ground of justice, equity and good conscience, in the absence of any special reason for not doing so.[8]

The Act has not been made applicable to N. W. F. P. and[8a] the Punjab but the principle of this section has been applied to cases arising in that Province.[9]

2. "Remains in possession."—It is not necessary that the lessee should, after the determination of the tenancy, remained in possession for any *particular number of days*. Where the lessee remained in possession for six days after the determination of the lease, it was held that he had become a lessee from month to month and liable

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7a. ('44) 31 AIR 1944 Nag 141 (142) : ILR (1944) Nag 267 : 218 Ind Cas 25 *Nawabali Syed* v. *Mohammad Ramzan.*

8. ('26) 13 AIR 1926 Mad 1071 (1072) : 97 Ind Cas 933 (DB), *Venkatachalamayya* v. *Simhadri Naidu.*
('19) 6 AIR 1919 Nag 88 (89) : 53 Ind Cas 212, *Nathu* v. *Gangadhar.*
('21) 8 AIR 1921 Mad 284 (284) : 69 Ind Cas 282 (DB), *Ramappa* v. *Abdulla Beari.*
('17) 4 AIR 1917 Low Bur 37 (38) : 39 Ind Cas 125 (DB), *Vellatappa Pillai* v. *Maung Po Hmyin.*
('21) 8 AIR 1921 Pat 463 (464) : 80 Ind Cas 568 (DB), *Mathura Prasad* v. *Naju Khan.*
('24) 11 AIR 1924 Pat 560 (563) : 3 Pat 403 : 83 I. C. 741 (DB) *Harnarayan Singh* v. *Darshan Deo.* (Per Jwala Prasad, J.)
('17) 4 AIR 1917 Mad 689 (690) : 35 Ind Cas 421 (DB), *Laxmipathaya* v. *Ramachendra.* (Chalgeni lease in South Kanara.)
('10) 6 Nag L R 95 (97) : 6 Ind Cas 937 (938), *Seoram* v. *Abdul Wahidkhan.*
('12) 16 Ind Cas 546 (547) (DB) (Mad), *Kandasawmy* v. *Sengoda.* (31 Mad 163 followed.)
('12) 14 Ind Cas 817 (817, 818) (DB) (Cal), *Baijnath Proshad* v. *Raghunath Rai.*
('13) 18 Ind Cas 448 (449) (DB) (Cal), *Chaturbhuja Nanda* v. *Gopal.*
(1864) 1864 Suth W R Gap No. Act X Rul, 42 (43) (DB), *Sheikh Enayutoollah* v. *Sheikh Elaheebuksh.*
('02) 27 Bom 262 (265) : 4 Bom L R 972 (973) (DB), *Balaji* v. *Ramchandra.*
(1900) 28 Cal 227 (233) (DB), *Administrator-General of Bengal* v. *Asraf Ali.* (Agricultural lease is renewed from year to year. 2 Cal W N 303 doubted on this point.)
('17) 40 Ind Cas 116 (117) (Oudh), *Rameshar* v. *Abbas Ali.* (Agricultural lease is renewed from year to year.)
('98) 2 Cal W N 525 (528) (DB), *Ali Mamud* v. *Bhagabati Debya.* (Agricultural lease is renewed from year to year. 2 Cal W N 303 disapproved for this point.)
(26) 13 AIR 1926 Cal 1239 (1239) : 97 Ind Cas 412 (DB), *Krishna Charan* v. *Nitya Sundari.* (When lessees hold over after the expiry of the lease they must be considered to hold on the terms stipulated for in the lease.)
('10) 7 Ind Cas 721 (722, 723) (DB) (Cal), *Satish Chandra* v. *Kamini Mohan.* (Though the renewal is on same terms as contained in the old lease, such terms may be affected by any statutory provision which comes into existence in the meanwhile.)
[*See also* ('48) 35 AIR 1948 Mad 275 (279) : ILR (1948) Mad 757 (FB), *Brahmayya* v. *Sundaramma.* Rules in sections of in chap. V are found upon reason and equity and should be applied to agricultural leases—Case under S. 106.]
('10) 37 Cal 674 (678, 679) : 6 Ind Cas 339 (340) (DB), *Ram Chandra Singh* v. *Bhikambar Singh.* (Agricultural lease is renewed from year to year.)
('96) 1896 Bom P J 518 (518), *Manohar* v. *Moro.* (Miras tenancy.)
('81) 7 Cal 710 (712) : 9 Cal L R 240 DB), *Chaturi Singh* v. *Makund Lall.* (There is no difference in law between the position of a ryot holding without a patta and that of one holding over after the expiry of the term of a patta.)
('75) 23 Suth W R 440 (441) (DB), *Hem Chunder* v. *Radha Pershad.*
('71) 16 Suth W R 185 (186) (DB), *Jumaut Ali* v. *Chutturdharee Sahee.*
('67) 7 Suth W R 152 (152) (DB), *Ram Khelawun* v. *Mt. Soondra.*
('21) 8 AIR 1921 Cal 300 (301) : 64 Ind Cas 118 (DB), *Chandra Nath* v. *Sheik Inamdi.* (Provisions regarding interest in Bengal Tenancy Act prevailed over those contained in the original lease.)
('22) 65 Ind Cas 589 (591) (DB) (Cal), *Udoy Chandra* v. *Mohammad Ali.* (Tenancy after renewal is a new tenancy coming into existence after the expiration of the old one.)
('17) 4 AIR 1917 Cal 219 (220) : 37 Ind Cas 201 (DB), *Paramananda Singh* v. *Syjou Singh.* (Where there is no assent of the lessor there is no renewal—The lessee can be ejected without notice.)]

8a. ('45) 32 AIR 1945 Pesh 16 (18) : 220 Ind Cas 227 (DB), *Ishar Dass* v. *Qazi Mohammad.*

9. ('28) 112 Ind Cas 651 (652) (Lah). *Muhammad Budha* v. *Ghulam Qudir.*

for the rent of the whole month.[1] There must, however, be a *continuity* of possession by the lessee without any break at the determination of the original lease.[2] If after the determination of the lease, the lessee is dispossessed by the lessor and is again afterwards admitted on the property by him, there can be no renewal of the old lease under this section.[3]

Where a tenant remained in possession in disobedience of the direction by the House Rent Controller to give possession of the house to the landlord by a certain date under the provinces of Madras Buildings (Lease and Rent Control) Act, 1946 it was held that he was not a person remaining in possession within the meaning of this section but was wrongfully remaining in possession and acceptance of rent by the landlord did not create a new tenancy.[4]

3. **More lessees than one—Only some remaining in possession—Effect of.**—Where there are more lessees than one and only some of them remain in possession without the consent of others, the lease is renewed only in favour of such of them as remain in possession. There is no renewal in favour of the rest and consequently they are not liable for rent for the period during which the others remained in possession after the determination of the lease.[1] So also where a single lessee creates a number of under leases and the lessor accepts rents from one or more of the under lessees remaining in possession after determination of the head lease, this section will apply and there will be a renewal in favour of those from whom the lessor accepts rent.[2]

4. **Effect of lessee's legal representative remaining in possession.**—This section will apply only when the *lessee* remains in possession after the determination of the lease and such possession is assented to by the lessor. Where, therefore, the lease *terminates* by the death of the lessee the latter's legal representative cannot be said to be a lessee and the consent of the lessor to his remaining in possession will not, under this section, operate as a renewal of the lease in his favour.[1] The position will, however, be different where the lessee dies *during the continuance* of the lease and his legal representative enjoys the lease for the rest of the period of the lease, and after its determination remains in possession with the assent of the lessor. In such a case, the position of the legal representative would be that of the lessee himself and there would be a renewal in his favour as provided for by this section.[2] Again where, there has already been a renewal of the expired lease in favour of the

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Section 116—Note 2

1. ('24) 11 AIR 1924 Bom 322 (322, 324) : 48 Bom 341 : 80 Ind Cas 507, *Meghji Vallabhdas* v. *Dayalji Lal and Co.* (There is no justification for holding that any days or months of grace can be allowed in regard to tenant's posssession.)
2. ('26) 13 AIR 1926 Cal 696 (697) : 91 Ind Cas 312 (DB), *Ekabbar Ali* v. *Sheikh Alim.*
3. ('12) 15 Ind Cas 445 (452 (FB) (Mad), *Chengiah* v. *Damara Kumara.*
4. ('47) 34 AIR 1947 Mad 436 (436), *Ghulam Ghouse* v. *Raja Rao.*

Section 116—Note 3

1. ('05) 9 Cal W N 340 (342), *Brojo Lal* v. *Belchambers.* ((1846) 15 L J Ex 92 followed.)
2. ('49) 36 AIR 1949 F C 124 (131) (FC), *Kai Khushroo* v. *Bai Jerbai.* [Per Patanjali Sastri J.]

Section 116—Note 4

1. ('38) 25 AIR 1938 Nag 506 (510) : ILR (1940) Nag 269 : 182 Ind Cas 581 (DB), *Abdul Razak* v. *Nandlal Sheolal.* (Tenancy at will—Lease determined at the death of the lessee—His son entering in possession —Son's possession held wrongful.)
('27) 14 AIR 1927 Pat 305 (306, 307) : 102 Ind Cas 821 (DB), *Kamakhya Narain Singh* v. *Khalik Ahmad.* (*Istemarari mukarari* lease—Lease determines on the death of grantee as it is for the lifetime of the grantee. Followning AIR 1925 Pat 357 and AIR 1925 Pat 216 : 4 Pat 139.)
('26) 13 AIR 1926 Pat 241 (243) : 93 Ind Cas 300 (DB), *Kuldip Singh* v *Kamakhya Narain Singh.*
†('25) 12 AIR 1925 Pat 357 (361, 362) : 86 Ind Cas 387 (DB), *Charan Mahton* v. *Kamakhya Narayan.* (*Istemarari mukarari* lease. Affirmed in appeal in AIR 1928 P C 146 : 55 Ind App 212 : 7 Pat 649 (PC).)
('25) 12 AIR 1925 Pat 216 (224) : 4 Pat 139 : 84 Ind Cas 586 (DB), *Ram Rachhya* v. *Kamakhya Narain.* (*Istemarari mukarari* lease—The kind of tenancy under S. 116 of the T. P. Act is only created by law in favour of the original lessee. Affirmed in appeal in AIR 1928 P C 146 : 55 Ind App 212 : 7 Pat 649 (P C).)
[*See also* ('98) 1898 Bom P J 357 (365) (DB), *Shivabasaya* v. *Totad Swami.*]
2. *See* ('21) 8 AIR 1921 Cal 741 (747) : 48 Cal 359 : 61 Ind Cas 503 (DB), *Aye-Juddin Mea* v. *P. K. Tagor.*

lessee himself and afterwards his representative comes in possession of the property, there is nothing in the section to preclude him from getting the benefit of the renewal.[3]

In *Vadappalli Narasimham* v. *Sitarammurti*,[4] A continued in possession after the expiry of his lease but without the consent of the lessor. He then died and his legal representative continued in possession. It was held that the legal representative of A was a mere trespasser when he entered into possession and the lessor could not by his assent effect a renewal of the original lease under this section. See also the undermentioned case[5] to the same effect.

5. Legal representative of the lessor.—The term "legal representative" is not defined in the Act. But it clearly implies a person who occupies the same position as the lessor.[1] A grants a lease to B who in turn sub-lets the property to C. After the determination of B's lease, C continues in possession. A leases the same property to D who accepts rent from C. D, who holds only a fraction of the interest held by A, cannot be called his legal representative as he (D) is not in the same position as A. Acceptance of rent by him from C, therefore, does not renew the lease of C.[2]

6. "Accepts rent or otherwise assents to his continuing in possession."—
—The section clearly shows that the consent, express or implied, of the lessor has to be shown before the lessee is entitled to a renewal.[1] The acceptance of rent is only one form of the assent of the lessor to the lessee's remaining in possession of the property.[1a] But the acceptance must be of rent as such[2] and must be voluntary.[3] Further, the payment of the rent by the lessee must be in the capacity which he held under the original lease. If he pays rent in the assertion of some other capacity, then the acceptance of such payment will not have the effect of renewing the lease.[3a]

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3. ('33) 20 AIR 1933 Cal 822 (824) : 147 Ind Cas 209 (DB), *Asutosh Pramanik* v. *Jibandhan.*
[*See also* ('27) 14 AIR 1927 Cal 725 (730, 733) : 54 Cal 813 : 104 Ind Cas 484 (DB), *Bengal National Bank* v.. *Janoki Nath.* (Lessee holding over under renewal clause—Mortgagee from such lessee is liable to lessor for rent.)]
4. ('07) 31 Mad 163 (166, 167) : 18 Mad L Jour 26 (DB), (8 Mad 424 not followed.)
5. ('29) 16 AIR 1929 All 610 (612) : 114 Ind Cas 725, *Zafaryab Husain* v. *Umar Duraz Ali.*

Section 116—Note 5

1. ('15) 2 AIR 1915 Cal 64 (66) : 24 Ind Cas 183 (DB), *Durgi Nikarini* v. *Goberdhan.*
2. ('15) 2 AIR 1915 Cal 64 (66) : 24 Ind Cas 183 (DB), *Durgi Nikarini* v. *Goberdhan.*

Section 116—Note 6

1. ('49) 36 AIR 1949 Cal 47 (52) (DB), *Karnani Industrial Bank Ltd.* v. *Bengal Province.*
('43) 30 AIR 1943 Oudh 392 (395) : 210 Ind Cas 526 : 19 luck 265 (DB), *Punjab National Bank Ltd.* v. *S. B. Chaudury.*
[*See also* ('90) 13 Mad 249 (253) (DB), *Appa Rau* v. *Ratnam.* (A wrongful holding over could not be treated as a continuation of the prior tenancy unless the zamindar accepted rent or by some overt act condoned the wrong.)]
1a. ('67) 7 Suth W R 152 (152) (DB), *Ram Khelawun* v. *Mt. Soondra.*
('34) 21 AIR 1934 Mad 458 (459) : 58 Mad 75 : 155 Ind Cas 838 (DB), *Gnanadesikam* v. *Antony.*
2. ('49) 36 AIR 1949 F. C. 124 (127) (FC), *Kai Khushroo* v. *Bai Jerbai.* [*A* letting his house to *B* and *B* sub-letting to *C*—After determination of lease *C* continuing in possession and sending cheque to *A* as rent—*A* first refusing cheque but subsequently accepting it and putting it into his bank account—*Held* (per majority) monthly tenancy came into existence—(Per Patanjali Sastri J)—No monthly tenancy created]
('48) 35 AIR 1948 Bom 385 (386) (DB), *Baldeodas* v. *G. P. Sonavalla.* [Acceptance must be shown to be attributable to landlord's assenting to a new tenancy coming into existence.]
('45) 32 AIR 1945 Bom 132 (134) : ILR (1945) Bom 68 (DB), *Navnitlal* v. *Baburao* (No. 1). [Acceptance of rent after notice to quit—payments tendered as rent but expressly accepted as compensation for one and occupation—Held there was no renewal of tenancy.]
('21) 8 AIR 1921 Cal 789 (791, 792) : 81 Ind Cas 744 (DB), *Mukbusor Rahman* v. *Raj Lakhi Debya.* (Where money is accepted from lessee only provisionally in case there should be a fresh settlement the landlord cannot be deemed to have elected to treat the person paying the money as tenant.)
3. ('09) 3 Ind Cas 100 (100) (Cal), *Gangaram Patra* v. *Sasi Sekhar.*
('47) 34 AIR 1947 Mad 436 (436), *Ghulam Ghouse* v. *Raja Rao.* [Order directing tenant to give possession of house to landlord under Madras Act 15 [XV]] of 1946—Disobedience of Order—Subsequent payment of rent—S. 116 held not applicable—No new tenancy created.]
3a. ('02) 26 Mad 535 (537) (DB), *Parameswaram Mumbannoo* v. *Krishnan.*

Mere acceptance of rent would not amount to a conclusive proof of such assent. Thus where the lessee after the determination of the lease remained in possession against the the will of the lessee and the rent for a period subsequent to the determination of the lease was accepted long before the determination it was held that such acceptance would not amount to a conclusive proof of the assent by the lessor to his continuing at possession.[3b] Where the acceptance of rent by the landlord could be attributed either to the tenants' becoming a statutory tenant under the provisions of Bombay Rents, Hotel Rates and Lodging House Rates (control) Act, 1944 on to the landlord's agreeing to a new tenancy under this section it was held that in order to show that a new tenancy had been created under this section it must be shown that the acceptance of rent was attributable to his asserting to a new tenancy.[3c]

When the lessor accepts the payment as rent any subsequent protest by him cannot alter the legal consequences of acceptance under this section.[3d]

Mere delay[4] or passive failure,[5] on the part of the lessor in taking steps to eject a lessee who remains on the property after the determination of the lease does not *by itself* amount to an assent on the part of the lessor to the lessee's remaining in possession of the property.

A notice desiring the tenant "to quit the premises which you hold under me, your term therein having long since expired" does not indicate that the lessee was in possession with the assent of the lessor after the expiry of his lease.[6]

7. **More lessors than one—Acceptance by one only.**—Where there are more lessors than one and one of them accepts rent from the tenant with respect to his share in the property, the lease is renewed in respect of that lessor's share only.[1]

8. **Clause for enhancement of rent in a quit notice, whether amounts to an assent.**—If in a notice to quit, the lessor, *alternatively* asks the lessee to pay an enhanced rent, there can be no doubt that the lessor assent to the lessee remaining in possession on payment of the enhanced rent; but if he asks for an enhanced rent not alternatively but by way of *penalty,* such demand for an enhanced rent cannot be construed to be an assent on his part to the possession of the lessee on payment of such rent. Thus, where the clause in the quit notice was: "In default of so vacating I write this, with a pure mind, that Rs. 75 per month will be collected from the tenancy along with the costs of Court," it was held that no consent on the part of the lessor could be inferred from the clause.[1]

9. **Suit for rent for the period of lessee's possession after determination, whether amounts to assent.**—Where after the determination of a lease, the lessee remains in possession and there is nothing to indicate that the lessor declined to consent to the continuance of possession, the institution by him of a suit for the rent of such period amounts to an assent on his part;[1] but where there are clear indications to show the dissent of the lessor, no consent on his part can be inferred from a suit for rent of such a period.[2]

3b. ('49) 36 AIR 1949 Cal 47 (52) (DB), *Karnani Industrial Bank Ltd., Calcutta* v. *Bengal Province.*

3c. ('48) 35 AIR 1948 Bom 385 (386) (DB), *Baldeodas* v. *G. P. Sonavalla.*

3d. ('49) 36 AIR 1949 F C 124 (129) (FC), *Kai Khushroo* v. *Bai Jerbai.*

4. ('07) 34 Cal 396 (398) : 11 Cal W N 826 (DB), *Ratan Lal* v. *Farshi Bibi.*

5. ('49) 36 AIR 1949 Nag 336 (337), *Baban Purnaji* v. *Champabai.* [Sub-lessee]

('17) 4 AIR 1917 Mad 735 (737) : 34 Ind Cas 6 (DB), *Govindaswamy* v. *Ramaswamy.*

6. (1810) 3 Taunt 54, *Doe d. Godself* v. *Inglis.*

Section 116—Note 7

1. ('19) 6 AIR 1919 Cal 110 (110) : 49 Ind Cas 245 (DB), *Mon Mohan* v. *Md. Hatim.*

Section 116—Note 8

1. ('26) 13 AIR 1926 Mad 566 (566, 567) : 94 Ind Cas 308, *Kuppuswamy Pillai* v. *Md. Kasim.*

Section 116—Note 9

1. ('35) 22 AIR 1935 Pat 271 (272) : 155 Ind Cas 367, *Ramsunder* v. *Bataso Kuer.*

('40) 27 AIR 1940 Pat 555 (556) : 190 Ind Cas 733, *Bachu Narain* v. *Mohammad Umrao.*

2. ('40) 27 AIR 1940 Pat 555 (556) : 190 Ind Cas 733, *Bachu Narain* v. *Mohammad Umrao.*

10. Clause for renewal.—If there is a clause for renewal in the original lease but after the determination thereof no fresh lease is formally executed under the covenant for renewal, but the lessee remains in possession with the assent of the lessor, he can claim the benefit of this section.[1] The agreement to grant a further lease is not an "agreement to the contrary" within the meaning of this section. At the same time, the section does not mean that the continuance in possession by the lessee with the lessor's consent will cause a renewal of the lease for the period mentioned in the renewal clause. The renewal under the section is only from month to month or from year to year, as the case may be, according to the purpose of the lease. What then is the effect of the renewal clause when the lessee continues in possession with the lessors's consent? If the lessee has exercised his option of obtaining a further lease (no particular form is necessary for exercising the option unless the agreement provides otherwise) he will have, besides his rights under S. 116, all the rights of a person who has been let into possession of the property under an agreement to grant a lease of such property for the period mentioned in the renewal clause. His rights in the latter role will not amount to an *actual lease* in his favour like the one that is created under this section. But, nevertheless, the lessee may, in certain circumstances, be entitled, under such rights, to retain possession of the property for the period of the lease agreed to be granted (and not only to a lease from month to month or from year to year terminable by notice under this section). As to the rights of a person in possession of property under an agreement for the transfer of such property, see S. 53A and Notes thereunder. If for any reason, the agreement has to be disregarded, the lessee can fall back upon his rights under this section.[2]

A lease for a term of years provided that the lessee was to deliver possession of the property at the expiry of the term without any notice to quit and in case the lessee failed to deliver possession and "held over," he was liable to pay rent at double the rate till he delivered possession. It was held that the clause did not confer on the lessee an option to continue in possession after the expiry of the term and that it was merely a penal clause.[3]

See also section 111, Note 3.

11. "In the absence of an agreement to the contrary."—The agreement to the contrary may be express or implied.[1] The expression "in the absence of an agreement to the contrary" must be taken to mean an agreement as to the terms of the *holding over*. Where there has been no such agreement inconsistent with the tenancy by holding over being from month to month or from year to year, then such tenancy is created whatever the terms of the *original* lease. Thus, the fact that the original lease reserves an annual rent is no objection to holding that the tenancy by holding over under the section is one from month to month where the purpose of the lease is not agricultural or manufacturing. Nor does this fact imply an agreement that the tenancy by holding over should be one from year to year.[2] Similarly, the fact that the original lease contains a clause that the lessee may be ejected without notice is no ground for holding that notice as per Ss. 106 and 116 is not necessary for determining the new tenancy by holding over that arises by the tenant continuing in posses-

Section 116—Note 10

1. ('44) 31 AIR 1944 Bom 210 (213), *Bhikaji Vishnu* v. *Ramchandra Krishna.*
('27) 14 AIR 1927 Cal 725 (730) : 54 Cal 813 : 104 Ind Cas 484 (DB), *Bengal National Bank, Ltd.* v. *Janoki Nath.*
[*See also* ('05) 30 Bom 250 (268) : 6 Bom L R 995, *Macleod* v. *Kissan.*]
2. ('27) 14 AIR 1927 Cal 725 (730) : 54 Cal 813 : 104 Ind Cas 484 (DB), *Bengal National Bank Ltd.* v. *Janoki Nath.*
3. ('43) 30 AIR 1943 Oudh 392 (394, 395) : 19 Luck 265 : 210 Ind Cas 526 (DB), *Punjab National Bank Ltd.* v. *S. B. Chaudury.* (The use of the word 'held over' could not be construed as an anticipatory consent on the part of the lessor giving the lessee a right to retain possession of the leased premises after the termination of the lease.)

Section 116—Note 11

1. ('13) 18 Ind Cas 844 (846) (DB) (Cal), *Matilal* v. *Darjeeling Municipality.*
2. †('04) 32 Cal 123 (127) : 8 Cal W N 901 (SB), *Troilokya Nath* v. *Sarat Chundra.*
('13) 18 Ind Cas 844 (846) (DB) (Cal), *Mati Lal* v. *Darjeeling Municipality.*
('15) 2 AIR 1915 Cal 313 (314) : 26 Ind Cas 962 (DB), *Gobinda Chandra* v. *Dwarka Nath.*
('33) 20 AIR 1933 Cal 260 (261) : 141 Ind Cas 833 (DB), *Secretary of State* v, *Madhu Sudan.*
('19) 6 AIR 1919 Cal 212 (214) : 49 Ind Cas 974, *Ram Prosad* v. *Debi Prosad.*

sion with the lessor's assent.[3] The argument that the reservation of annual rent in the original lease implies an agreement that the tenancy by holding over is one from year to year is based on the rule that "the mode in which rent is expressed to be reserved affords the presumption that the tenancy is of a character corresponding thereto," i. e., if rent is to be paid annually there is the presumption of annual tenancy.[4] But this rule is not of universal application and the presumption of yearly lease does not always arise from the fact of an annual payment of rent.[5]

See also Note 10.

12. Effect of renewal.—The effect of a renewal under the section is that there comes into existence a new lease between the parties[1] but the renewal is, in the absence of an agreement to the contrary, on the same terms as those contained in the expired lease[2] except as to the duration of the lease. This is, however, subject to one qualification that, if any statutory provisions have come in existence in the meanwhile (i. e., before the renewal) the terms of the renewed lease may be affected thereby.[3] Also if the lessor had waived any of the conditions in the old lease during its existence he will not be entitled to enforce such a condition against the lessee after renewal.[4]

The duration of a renewed lease by virtue of this section will be from year to year or from month to month according to the purpose of it and not that of the original lease.[5] Thus, if a land is leased for three years for keeping a shop and after the expiry of the period the lease is renewed under this section, the renewal will be not for three years more but only from month to month.[6]

The renewal being from year to year or from month to month according to the purpose of the lease, as specified in S. 106, it will be necessary for either party to the renewed lease, if he desires to determine it, to give notice to the other party according to the provision of section 106.[7]

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3. ('34) 21 AIR 1934 Cal 135 (135) : 149 Ind Cas 722 (DB), *Dasarathi Kumar* v. *Sarat Chandra.*
4. ('19) 6 AIR 1919 Cal 529 (531) : 51 Ind Cas 415 (DB), *Shamsoonessa Bibi* v. *Satya Sebak.*
5. †('15) 2 AIR 1915 Cal 64 (67) : 24 Ind Cas 183 (DB), *Durgi Nikarini* v. *Goberdhan.*
('15) 2 AIR 1915 Cal 313 (314) : 26 Ind Cas 962 (963) (DB), *Gobinda Chandra* v. *Dwarka Nath.*
('19) 6 AIR 1919 Cal 212 (214) : 49 Ind Cas 974, *Ram Prosad* v. *Debi Prosad.*

Section 116—Note 12

1. (22) 65 Ind Cas 589 (591) (DB) (Cal), *Udoy Chandra* v. *Mahammad Ali.*
('34) 21 AIR 1934 Cal 135 (136) : 149 Ind Cas 722 (DB), *Dasarathi Kumar* v. *Sarat Chandra.*
('31) 18 AIR 1931 Lah 675 (675), *Har Nath* v. *Mohar Singh.* (Lessor's representative accepting rent from lessee.)
2. ('38) 25 AIR 1938 All 649 (650) : 178 Ind Cas 986, *Badal* v. *Ram Bharosa.* (12 Oudh Cas 279 and A. I. R. 1925 Oudh 173 : 27 Oudh Cas 224 followed.)
('17) 40 Ind Cas 41 (42) (Oudh), *Parmeshar* v. *Bishehar.*
†('34) 21 AIR 1934 Mad 458 (460) : 58 Mad 75 : 155 Ind Cas 838 (DB), *Gnanadesikam* v. *Antony.*
('01) 11 Mad L Jour 186 (187) (DB), *Kutti Umma* v. *Madhava Menon.*
('35) 37 Pun L R 765 (765), *Allah Ditta* v. *Kartar Singh.*
('26) 13 AIR 1926 Cal 1239 (1239, 1240) : 97 I. C. 412 (DB), *Krishna Charan* v. *Nitya Sundari.*
('19) 6 AIR 1919 Pat 254 (255) : 53 Ind Cas 180 (DB), *E. W. C. Moore* v. *Makhan Singh.* (Tenant holding over occupies the same character as he did under the expired lease and cannot set up any title adverse to that of the lessor.)
('14) 1 AIR 1914 Cal 754 (755) : 23 Ind Cas 318 (DB), *Fakira Mahton* v. *Leakul Hussain.* (Liable to pay the same rent as before.)
('70) 2 N W P H C R 204 (205) (DB), *Shib Sahae* v. *Mukbool Ahmud.* (Do.)
('29) 16 AIR 1929 Rang 55 (56) : 6 Rang 691 : 117 Ind Cas 52 (DB), *G. Bhandari* v. *R. Nihalchand.*
('11) 35 Bom 333 (338) : 8 Ind Cas 1049 (1050) (DB), *Sidick Haji Hoosein* v. *Bruel & Co.*
[*See also* ('06) 9 Oudh 296 (299) (DB), *Mt. Raj Kuar* v. *Nabi Baksh.* (Liable to pay the same rent as before.)]
3. ('10) 7 Ind Cas 721 (723) (DB) (Cal), *Satish Chandra* v. *Kamini Mohan.*
4. ('15) 2 AIR 1915 Cal 68 (69) : 25 Ind Cas 880 (DB), *Haldhar Jha* v. *Md. Ashraf Alam.*
5. ('09) 12 Oudh Cas 279 (283, 284) : 3 Ind Cas 873 (874), *Khuda Bakhsh* v. *Abid Hussain.*
[*See also* ('25) 12 AIR 1925 Oudh 173 (173) : 27 Oudh Cas 224 : 81 Ind Cas 592, *Lalman* v. *Mt. Mullo.*]
6. ('13) 18 Ind Cas 844 (846) (DB) (Cal), *Mati Lal* v. *Darjeeling Municipality.*
7. ('49) 36 AIR 1949 P C 90 (95) (PC),

13. Nature of possession of tenant holding over without consent.— Where after the determination of a lease, the lessee continues to remain in possession and the lessor has not assented to such holding over by receipt of rent or otherwise, there is no renewal of the lease under this section and no relation of lessor and lessee exists between the parties.[1] The possession of the person holding over under such circumstances becomes *wrongful* from the date of the termination of the old lease.[2]

Gooderham & Worts Ltd. v. *Canadian Broadcasting Corpn.*

('48) 1 Sau L R 41 (43), *Jagadishchandra Jayantilal* v. *Mehta Girdharlal.*

('14) 1 AIR 1914 All 460 (461) : 26 Ind Cas 107 (108), *Chattar Singh* v. *Nand Kishore.*

('23) 10 AIR 1923 Cal 524 (526, 527) : 72 Ind Cas 98 (DB), *Bijoy Chandra* v. *Howrah Amta Light Rly. Co. Ltd.*

('15) 2 AIR 1915 Cal 313 (315) : 26 Ind Cas 962 (DB), *Gobinda Chandra* v. *Dwarka Nath.*

†('04) 32 Cal 123 (128) : 8 Cal W N 901 (SB), *Troilokya Nath* v. *Sarat Chandra.*

('14) 1 AIR 1914 All 1 (2) : 22 Ind Cas 7, *Munna Lal* v. *Buchchu Lal.*

('23) 10 AIR 1923 Pat 201 (202) : 71 Ind Cas 570 (DB), *Ram Lochan* v. *Kamakhya Narain.*

('23) 10 AIR 1923 Pat 340 (340, 341) : 71 Ind Cas 1022 (DB), *Stonewigg* v. *Kumeshwar Narayan.*

('28) 112 Ind Cas 651 (652) (Lah), *Muhammad Budha* v. *Ghulam Qadir.*

('27) 14 AIR 1927 Cal 279 (280) : 100 Ind Cas 614 (DB), *Safar Ali* v. *Abdul Majid.* [*See also* ('24) 11 AIR 1924 Bom 115 (115) : 48 Bom 38 : 82 Ind Cas 791, *William Jacks & Co.* v. *Joossab Mahomed.*

('26) 93 Ind Cas 643 (643) (DB) (Cal), *Khosal Chandra* v. *Brindarani.*

('95) 20 Bom 759 (761, 763) (DB), *Ambabai* v. *Bhau.* (Lease before the Act—Quit notice necessary on general principles.)

('10) 7 Ind Cas 721 (722) (DB) (Cal), *Satish Chandra* v. *Kamini Mohan.*

('69) 12 Suth W R 538 (538) (DB) *Fukeeroonissa Begum* v. *Chunder Monee Dossee.* (Lease before the Act—Fact that lessee is allowed to remain for four years after the expiry of the lease will not affect landlord's right to resume possession after due notice.)

('67) 7 Suth W R 152 (152) (DB), *Ram Khelawun* v. *Mt. Soondra.* (Lease before the Act—Quit notice necessary on general principles.)]

Section 116—Note 13

1. ('49) 36 AIR 1949 Nag 282 (284) : ILR (1948) Nag 922 (DB), *Hasanali* v. *Darashah.* [Tenancy by sufference is created—Landlord can get only compansation for use and occupation.]

('04) 1 All L Jour 201 (206) (DB), *Lachman* v. *Gulzari Lal.*

†('28) 15 AIR 1928 P C 146 (149) : 55 Ind App 212 : 7 Pat 649 : 109 Ind Cas 663 (PC), *Kamakhya Narayan* v. *Ram Raksha.* (Appeal from AIR 1925 Pat 357.)

('25) 12 AIR 1925 Mad 446 (446) : 86 Ind Cas 933, *Sudalaimuthu Thevan* v. *Sappani Thevar.*

('17) 4 AIR 1917 Mad 901 (902) : 39 Mad 54 : 33 I. C. 705 (DB), *Madar Sahib* v. *Kader Moideen.*

('35) 22 AIR 1935 Pat 271 (272) : 155 Ind Cas 367, *Ramsunder* v. *Bataso Kuer*

('25) 12 AIR 1925 Pat 17 (19) : 81 Ind Cas 535 (DB), *Gita Prasad Singh* v. *Emperor.*

('21) 8 AIR 1921 Pat 463 (464) : 80 Ind Cas 568 (DB), *Mathura Prasad* v. *Naju Khan.*

('12) 16 Ind Cas 546 (547) (DB) (Mad), *Kandasawmy* v. *Sengoda.* (31 Mad 163 followed.)

('10) 7 Ind Cas 8 (9) (DB) (Mad), *Nandikolla Gopalam* v. *Manyam Mahalakshmi.*

('26) 13 AIR 1926 Mad 566 (567) : 94 Ind Cas 308, *Kuppuswamy Pillai* v. *Md. Kasim.*

('08) 31 Mad 163 (166) : 18 Mad L Jour 26 (DB), *Vadapalli Narasimham* v. *Dronamaraju.*

('42) 29 AIR 1942 Oudh 93 (95) : 17 Luck 205 : 196 Ind Cas 237 (DB), *Thakur* v. *Jagdamika Pratap.*

('90) 13 Mad 249 (253) (DB), *Appa Rau* v. *Ratnam.* [*See also* ('22) 9 AIR 1922 Bom 197 (197, 198) : 67 Ind Cas 130, *Sugan Chand* v. *Motilal.* (After termination of head lease, sub-tenant's right to possession terminates and the position of such sub-tenant holding over is that of a trespasser.)]

2. ('43) 30 AIR 1943 Oudh 392 (395) : 19 Luck 265 : 210 Ind Cas 526 (DB), *Punjab National Bank Ltd.* v. *S. B. Chaudury.* (Such a person is no better than a trespasser and can be ejected at any time without notice.)

('90) 13 Mad 249 (253) (DB), *Appa Rau* v. *Ratnam.*

('26) 98 Ind Cas 911 (912) (DB) (Bom), *Shravan Shahasing* v. *Fattu.*

('25) 12 AIR 1922 Pat 17 (19) : 81 Ind Cas 535 (DB), *Gita Prasad* v. *Emperor.*

('98) 21 Mad 153 (163) : 8 Mad L. Jour 92 (DB), *Ittappan* v. *Manavikrama.*

('98) 22 Bom 893 (898) (DB), *Kantheppa* v. *Sheshappa.*

('27) 14 AIR 1927 All 821 (821, 822) : 102 Ind Cas 231, *Iaitqad Ali* v. *Md. Bakhsh.*

('17) 4 AIR 1917 Mad 901 (902) : 39 Mad 54 : 33 I. C. 705 (DB), *Madar Sahib* v. *Kader Moideen.*

('27) 14 AIR 1927 Bom 192 (193, 194) : 51 Bom 149 : 101 Ind Cas 35 (DB), *Maganlal* v. *Bhudar.*

('22) 9 AIR 1922 P C 184 (185) : 74 Ind Cas 561 (PC), *Ramanuj* v. *Ramkrishna.* (A tenancy by sufferance by a tenant holding over whose lease has expired does not apply in this country—Per Pletcher. J., in the judgment appealed from.)

As was observed by Sir Lawrence Jenkins, C. J., in *Chandri* v. *Dajibhau*,[3] a tenant holding over " is only in the laches of the owner, so that is no privity between them. "[4]. It is not necessary in such cases to give a notice to him according to the provisions of S. 106 before filling a suit for ejectment against him.[5]

('09) 31 All 318 (321) : 1 Ind Cas 208 (208, 209) (DB), *Khunni Lal* v. *Madan Mohan.*

('28) 15 AIR 1928 Cal 753 (753) : 116 Ind Cas 374. *Gobinda Ram* v. *Dulu Pada.*

†('09) 31 All 514 (517) : 3 Ind Cas 566 (567) (DB), *Pusa Mal* v. *Makdum Bakhsh.*

('34) 21 AIR 1934 Lah 129 (130) : 149 Ind Cas 948 (DB), *Kirat Singh* v. *Bhai Kalu.* (The mere fact that there is a clause in the case deed providing for damages by way of enhanced rent for use and occupation after the term fixed does not mean that the relation of landlord and tenant continues.)

('24) 11 AIR 1924 Cal 445 (446) : 69 Ind Cas 504 (DB), *Reajuddin Patwari* v. *Abdul Jabbar.* (There is no such thing as tenancy on sufferance in India.)

('24) 11 AIR 1924 Cal 240 (242) : 50 Cal 667 : 83 Ind Cas 757, *Sundermull* v. *Ladhuram.* (Lessor can claim damages for use and occupation.)

('14) 1 AIR 1914 All 1 (2) : 22 Ind Cas 7, *Munna Lal* v. *Buchchu Lal.* (Do.).

('17) 4 AIR 1917 Mad 735 (736) : 34 Ind Cas 6, (DB), *Govindasuany* v. *Ramaswamy.* (Do).

('32) 19 AIR 1932 Lah 275 (276) : 13 Lah 216 : 138 Ind Cas 290 (DB), *Narain Das* v. *Dharam Das* (Do.).

('33) 20 AIR 1933 Lah 61 (64) : 14 Lah 137 : 142 Ind Cas 754 (DB), *Sundar Singh* v. *Ram Saran.* (Do.)

('33) 20 AIR 1933 Lah 509 (510) : 146 Ind Cas 845 (DB), *Ubedul Rahman* v. *Darbari Lal.* (The compensation for use and occupation must be assessed on the basis of normal rent realizable during the period in question.)

('34) 21 AIR 1934 Lah 175 (175), *Gobind Ram* v. *Hari Mohan.* (Landlord is not entitled to damages for use and occupation beyond the time actually spent by the tenant on the premises.)

('24) 11 AIR 1924 Lah 643 (644) : 75 Ind Cas 1034, *Rure Khan* v. *Ghulam Mahamed.* (Lessor is entitled to damages for use and occupation.)

('28) 15 AIR 1928 Lah 554 (555) : 9 Lah 576 : 109 Ind Cas 90 (DB), *Mul Raj* v. *Indar Singh.* (Lessor is entitled to damages for use and occupation—Double the rent may sometimes be taken as a fitting standard.)

(1865) 4 Suth W R 24 (25) (DB), *G. P. Mackintosh* v. *Gopee Mohun Mojoomdar.* (Lessor is entitled to damages for use and occupation.)

('23) 10 AIR 1923 Bom 398 (398) : 73 Ind Cas 442 (DB), *Gulam Mohiuddin* v. *Dayabhai.* (Do.)

[*See also* ('19) 6 AIR 1919 Oudh 278 (282, 283) : 49 Ind Cas 80 (DB), *Deputy Commissioner, Partabgarh* v. *Kishan Dayal.* (Lease for the lifetime of the lessor—Lessee's possession after lessor's death held that of a trespasser.)

('27) 8 L R All (Rev) 359 (360) (DB), *Hansai Khan* v. *Fauzdar Khan.* (Agricultural lease.)

(1865) 2 Suth W R Act X Rul 73 (74) (DB), *George Tommy* v. *Sooba Curium Lall.* (Lessor is entitled to damages for use and occupation.)]

[But see ('30) 17 AIR 1930 All 177 (179) : 122 Ind Cas 865 (DB), *Onker Prahad* v. *Dhani Ram.* (Submitted to be wrong in view of AIR 1922 P C 184.)]

3. †(1900) 24 Bom 504 (508) (DB).

4. ('24) 11 AIR 1927 Pat 572 (575) : 3 Pat 534 : 78 Ind Cas 511 (DB), *Hari Gir* v. *K. Kamakhya Narain.*

('27) 14 AIR 1927 Bom 192 (194) : 51 Bom 149 : 101 Ind Cas 35 (DB), *Maganlal* v. *Bhudar.*

('21) 8 AIR 1921 Pat 463 (364) : 80 Ind Cas 568 (DB), *Mathura Prasad* v, *Naju Khan.*

†('25) 12 AIR 1925 Pat 216 (221) : 4 Pat 139 : 84 I. C. 586 (DB), *Ram Rachhya* v. *Kamakhya Narayan.*

5. ('49) 36 AIR 1949 Nag 282 (284) : ILR (1948) Nag 922 (DB), *Hasan Ali* v. *Dara Shah.*

('12) 13 Ind Cas 59 (60) (All), *Gokul Chand* v. *Shib Charan.*

('09) 31 All 514 (517) : 3 Ind Cas 566 (567) (DB), *Pusa Mal* v. *Makdum Bakhsh.*

('13) 20 Ind Cas 11 (13) (All), *Shyam Lal* v. *Bachchu Lal.* (*A* letting out land to *B* —*B* sub-letting it to *C*—*B* subsequently surrendering is right under lease to *A*—*C* held not tenant of *A* and not entitled to notice.)

†('40) 27 AIR 1940 Oudh 401 (403) : 16 Luck 44 : 189 Ind Cas 488 (489, 490) (DB), *Bansidhar* v. *Ram Charan.*

('40) 27 AIR 1940 All 444 (445) : 191 Ind Cas 223, *Rahmat Ullah* v. *Md. Husain.*

('27) 14 AIR 1927 Bom 192 (193) : 51 Bom 149 : 101 Ind Cas 35 (DB), *Maganlal Dulabhdas* v. *Bhudar Purshottam.* (Where there are more than one owner of the property none of whom assents to holding over even one co-owner alone can maintain a suit for ejectment.)

('33) 20 AIR 1933 All 756 (757, 758) : 146 Ind Cas 762 (DB), *Kundan Lal* v. *Deep Chand.*

('18) 5 AIR 1918 Cal 391 (392) : 39 Ind Cas 137 (DB), *Azimuddin* v. *Peer Mahomed.*

[*See also* ('90) 13 Mad 249 (253) (DB). *Appa Rau* v. *Ratnam.*]

Also see S. 105 Note 37 and S. 106 Note 13.

But notwithstanding that the possession of the tenant holding over is wrongful, it is not *adverse* to the owner.[6] In *Mt. Allah Rakhi* v. *Shah Mohammad*,[7] where the defendant in a suit for possession pleaded that his possession had been adverse to the plaintiff for the statutory period and at the same time relied upon Art. 139 of the Limitation Act[8] as barring the plaintiff's suit, their Lordships of the Privy Council observed as follows : " it may be noted at once that the appellant's plea of adverse possession is obviously inconsistent with the application of Art. 139 which relates to the case of a landlord suing to recover possession from a tenant. " It has accordingly been held that where a tenant holds over, for a period of twelve years from the determination of the tenancy, without the landlord's assent he acquires under S. 28 of the Limitation Act, a title to the property, not by reason of his possession having been *adverse* for a period of twelve years but by reason of the efflux of time limited under Art. 139 of the Limitation Act.[9] It has also been held that tenant holding over has a

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6.†('25) 12 AIR 1925 All 698 (699) : 85 Ind Cas. 550, *Dalmir Singh* v. *Joti Prasad.*

('17) 4 AIR 1917 Mad 735 (737) : 34 Ind Cas 6 (DB), *Govindaswamy* v. *Ramaswamy.*

('94) 18 Bom 507 (512) (DB), *Vithalbowa* v. *Narayan Daji.* (Manager of Math granting 'miras malki' which he could not grant beyond his lifetime—*Held* that after his death possession of mirasdar was not adverse in absence of a specific assertion.)

('08) 31 Mad 163 (167) : 18 Mad L Jour 26 (DB), *Vadappalli Narasimham* v. *Dronamaraju.*

('67) 4 Bom H C R (A C) 155 (163), *Radhabai* v. *Shama.*

('96) 19 Mad 437 (439) (DB), *Anantha Bhatta* v. *Holeya Deyyu.*

('22) 9 AIR 1922 All 423 (424) : 68 Ind Cas 750 (DB), *Debi Prasad* v. *Mt. Gujar.*

('22) 9 AIR 1922 All 318 (319) : 44 All 583 : 75 Ind Cas 454 (DB), *Bisheshar Nath* v. *Kundan.*

[*See also* ('84) 7 Bom 40 (41) (DB), *Tatia* v. *Sadashiv.* (Tenant by sufferance in possession for 12 years without paying rent —*Held,* mere non-payment of rent did not constitute adverse possession.)]

7. *('34) 21 AIR 1934 P C 77 (80) : 56 All 111 : 61 Ind App 50 : 147 Ind Cas 887 (PC).

8. Article 139—By a landlord to recover possession from a tenant—Twelve years—When the tenancy is determined.

9. †('15) 2 AIR 1915 Mad 345 (348) : 25 Ind Cas 109 (DB), *Ganapathi Mudali* v. *Venkatalakshminarasayya.* (Per Sadashiva Iyer, J.)

('22) 9 AIR 1922 P C 184 (185) : 74 Ind Cas 561 (PC), *Ramanuj* v. *Ramakrishna.* (Per Fletcher, J., in the High Court judgment appealed from.)

('25) 12 AIR 1925 All 698 (699) : 85 Ind Cas 550, *Dalmir Singh* v. *Joti Prasad.*

('13) 18 Ind Cas 899 (899, 900) (All), *Tulshi Ram* v. *Sunder Lal.*

('08) 7 Cal L Jour 615 (626) (DB), *Madan Mohan* v. *Rameshwar.*

('27) 14 AIR 1927 Bom 650 (651) : 105 Ind Cas 859 (DB), *Purushottam* v. *Vishnu.* (18) Bom 256 must be considered to be overruled in view of 22 Bom 893 ; 24 Bom 504 and 98 Ind Cas 911 (Bom), which have dissented from it.)

†('40) 27 AIR 1940 Lah 410 (412) : 191 Ind Cas 289 (DB), *Banwari Lal* v. *Mt. Hussaini.* (Affirming AIR 1939 Lah 455.)

('98) 22 Bom 893 (897, 898) (DB), *Kantheppa* v. *Sheshappa.*

†(1900) 24 Bom 504 (508, 509) : 2 Bom L R 491 (DB), *Chandri* v. *Daji.*

('24) 11 AIR 1924 Pat 572 (575) : 3 Pat 534 : 78 Ind Cas 511 (DB) *Hari Gir* v. *Kamakhya Narayan.* (18 Bom 256 held overruled by 24 Bom 504.)

('25) 12 AIR 1925 Nag 164 (164) : 82 Ind Cas 1031, *Tukaram* v. *Ganpat.* (8 Mad 424 not followed.)

('25) 12 AIR 1925 Mad 446 (446, 447) : 86 Ind Cas 933, *Sudalaimuthu Theran* v. *Sappani Thevar.* (Suit against representatives of the lessee.)

('17) 4 AIR 1917 Mad 735 (737) : 34 Ind Cas 6 (DB), *Govindaswamy* v. *Ramaswamy.*

('12) 16 Ind Cas 546 (547) (DB) (Mad), *Kandasawmy* v. *Sengoda.* (31 Mad 163 and 33 Mad 260 followed.)

('10) 33 Mad 260 (261, 262) : 4 I. C. 1080 (1080 ,1081) (DB), *Subraveti Ramiah* v. *Gundala Ramanni.*

('10) 5 Ind Cas 907 (907) (DB) (Mad), *Sangila* v. *Maruthamuthu.*

('08) 31 Mad 163 (167) : 18 Mad L Jour 26 (DB), *Vadappalli Narasimham* v. *Dronamaraju.* (8 Mad 424 dissented from.)

[*See also* ('38) 25 AIR 1938 Nag 506 (510, 511) : ILR (1940) Nag 269 : 182 Ind Cas 581 (DB), *Abdul Razak.* v. *Nandlal Sheolal.* (Time once commenced to run against original lessee does not stop even if he dies and his representative comes in).]

position recognised by law and can unlike a trespasser, sue under S. 9 of the Specific Relief Act, if he is dispossessed otherwise than in due course of law.[10] The proposition that a tenant's possession after the determination of the tenancy is not adverse to the landlord would seem to be based on the ground that the principle set forth in *Billaskunwar* v. *Deshraj Aanjitsingh*,[11] viz., that a tenant who has been let into possession cannot deny his landlord's title so long as he has not openly restored possession by surrender to his landlord, is applicable also to cases where the tenancy has determined.[12]

In the undermentioned cases[13] it has been held that possession of a tenant holding over is not *wrongful*. It has also been held in some cases[14] that such possession is *adverse* to the landlord. It is submitted that neither of these views is correct.

See also S. 105, Notes 37, 40 and 70.

14. Possession under a lease valid for a part of the term only.—A granted a lease verbally for seven years to B and delivered possession to him. It was held that the lease being verbal was valid only for the first year, that thereafter, the possession of B was that of a lessee remaining in possession after the determination of his lease with the consent of the lessor and that therefore B became a lessee from year to year under the provisions of this section.[1]

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10. ('19) 6 AIR 1919 Bom 97 (98, 99) : 43 Bom 531 : 51 Ind Cas 193 (DB), *Gulam Mahomed* v. *Emperor.*

('14) 1 AIR 1914 Mad 296 (296) : 37 Mad 281 : 22 Ind Cas 789 (DB), *Bhogavalli Venkayya* v. *Kudapa Settya.*

Also see S. 105 Note 37 and S. 108 (g) Note 1.

11. *('15) 2 AIR 1915 P C 96 (98) : 37 All 557 : 42 Ind App 202 : 30 Ind Cas 299 (PC).

12. See S. 111 Note 17.

13. ('30) 17 AIR 1930 All 177 (179) : 122 Ind Cas 865 (DB), *Onkar Prasad* v. *Dhani Ram.*

[*See* ('12) 65 Ind Cas 589 (591) (DB) (Cal), *Udoy Chandra* v. *Mahammud Ali.* (When a tenant holds over after the expiration of the term of tenancy, it is a new tenancy which comes into operation after the date of the expiration of the term of the previous tenancy.)]

14. ('26) 98 Ind Cas 911 (912) (DB) (Bom), *Shravan Shahasing* v. *Fattu.*

('04) 1 All L Jour 201 (206) (DB), *Lachhman* v. *Gulzari Lal.*

('02) 26 Mad 535 (536, 537) (DB), *Parameswaram Mumbannoo* v. *Krishnan Tengal.*

('98) 21 Mad 153 (163, 164) : 8 Mad L Jour 92 (DB), *Ittapan* v. *Manavikrama.*

('29) 16 AIR 1929 Pat 18 (21) : 7 Pat 675 : 110 Ind Cas 494 (DB), *Rikhi Nath* v. *Rango Mahto.* (Upon the expiration of the term of a lease the lessee becomes a trespasser.)

('12) 16 Ind Cas 546 (547) (DB) (Mad), *Kandaswamy* v. *Sengoda.* (31 Mad 163 and 33 Mad 260, followed.)

('10) 33 Mad 260 (262) : 4 Ind Cas 1080 (1081) (DB), *Subraveti Ramiah* v. *Gundala Ramanni.*

('10) 37 Cal 674 (678, 679) : 6 Ind Cas 339 (340) (DB), *Ram Chandra* v. *Bhikambar.*

('09) 31 All 514 (517) : 3 Ind Cas 566 (567) (DB), *Pusa Mal* v. *Makdum Bakhsh.*

('14) 1 AIR 1914 Mad 564 (568) : 37 Mad 1 : 7 Ind Cas 202 (DB), *Rajah of Venkatagiri* v. *Mukku Narsaya.*

('16) 3 AIR 1916 Lah 353 (355) : 1915 Pun Re No. 97 : 21 Ind Cas 35 (DB), *Umar Bakhsh* v. *Baldeo Singh.*

Section 116—Note 14

1. ('43) 30 AIR 1943 Cal 474 (474, 475) : ILR (1943) 1 Cal 34 : 209 Ind Cas 279 (DB), *Adinath Bhattacharjee* v. *Krishna Chandra.* (Oral lease of tank with delivery of possession—Yearly rent reserved—*Held,* lease was valid for the first year and by the acceptance of rent thereafter it was renewed from month to month as the lease was not for agricultural or manufacturing purposes. Following 20 Ind Cas 715 (Cal) and AIR 1934 Pat 369.)

('33) 20 AIR 1933 Pat 485 (488) : 144 Ind Cas 788, *Azid Ahmad* v. *Alauddin Ahmad,* (Affirmed in Letters Patent Appeal in AIR 1934 Pat 369.)

(1854) 9 Ex 662 : 23 L J Ex 198 : 23 L T (O S) 70 : 96 R R 903, *Lee* v. *Smith.* (Covenant to pay rent in advance incorporated in the new lease.)

117. None of the provisions of this Chapter apply to leases for agricultural purposes, except in so far as the [a][Provincial Government] [b][***] may, by notification published in the [c][Official Gazette], declare all or any of such provisions to be so applicable [d][in the case of all or any of such leases] together with, or subject to, those of the local law, if any, for the time being in force.

Exemption of leases for agricultural purposes.

Such notification shall not take effect until the expiry of six months from the date of its publication.

a. *Substituted* by A. O. for "Local Government."

b. The words "with the previous sanction of the Governor-General in Council" were *omitted* by Section 2 and Sch. I of the Devolution Act, 1920 (XXXVIII of 1920).

c. *Substituted* by A. O. for the words "local official Gazette."

d. These words were *inserted* by S. 6 of the Transfer of Property (Amendment) Act, 1904 (VI of 1904).

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Agricultural purposes."
4. Agricultural leases may be made orally.

1. Legislative changes.

(1) The words "with the previous sanction of the Governor-General Council" after the words "Local Government" were omitted by S. 2 and Sch. I of the Devolution Act, 1920 (XXXVIII of 1920).

(2) The words "in the case of all or any of such leases" after the words "so applicable" are new and were inserted by S. 6 of the Transfer of Property (Amendment) Act, 1904 (VI of 1904).

2. Scope of the section.—Prior to this Act, no distinction was made between agricultural and non-agricultural leases[1] and the general principles of English law relating to leases were applied to them as being in consonance with justice, equity and good conscience.[1a] This section, however, exempts *leases for agricultural purposes* from the provisions of this chapter, unless they are made applicable by notification by the Provincial Government.[1b] The object of the Legislature, in excepting

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Section 117—Note 2

1. ('99) 4 Cal W N 574 (576) (DB), *Madhab Chandra Pal* v. *Bejoy Chand Mahatab Bahadur.*

1a. ('02) 26 Mad 157 (160) : 12 Mad L Jour 189 (DB), *Parameshri* v. *Vittappa Shanbaga.* (Principle of S. 111 (g) applied.)

('96) 20 Bom 354 (362) : 1895 Bom P J 135 (FB), *Venkaji Krishna* v. *Lakshman Devaji.* (Principle of S. 111 (g) applied—Disclaimer of landlord's title held worked forfeiture of the agricultural lease created at a time when the Transfer of Property Act was not applicable to Bombay Presidency.)

('01) 24 Mad 47 (56) : 10 Mad L Jour 321 (FB), *V. Nambudripad* v. *Valia Chathu Achan.* (Principle of S. 108 (h) applied to a Kanom demise arising prior to Transfer of Property Act.)

1b. ('09) 4 Ind Cas 1124 (1124) (Mad), *Madurai Mudaly* v. *Masilamani Gramani.*

('97) 1897 Bom P J 182 (182) (DB), *Vithu Rakhmaji* v. *Durgabai.*

('33) 20 AIR 1933 Bom 168 (173) : 149 Ind Cas 293 (DB), *Nilaji* v. *Nagindas.* (Agricultural tenancy—S. 111 (e) held not applicable.)

('95) 20 Bom 354 (361) : 1895 Bom P J 135 (FB), *Venkaji Krishna Nadkarni* v. *Lakshman.*

('99) 4 Cal W N 792 (794) (DB), *Ram Narain Sahu* v. *Maangru Urao.*

('16) 3 AIR 1916 Cal 546 (547) : 28 Ind Cas 267 (DB), *Paruchulla Shaikh* v. *Sital Chandra.*

('33) 20 AIR 1933 Cal 745 (745) : 60 Cal 771 : 146 I.C. 858, *Nabin Chandra* v. *Ramesh Chandra.*

†(1900) 27 Cal 205 (209) : 4 Cal W N 76 (DB), *Umrao Bibi* v. *Mahomed Rojabi.*

('16) 3 AIR 1916 Cal 454 (455) : 33 Ind Cas

agricultural leases from the operation of the provisions of this chapter was to retain in force the special provisions relating to the class of leases dealt with in the various local Rent Acts, and which may be compendiously described as leases for agricultural purposes.[2] In their Report of 1879, the Law Commissioners observed:

> "Local legislation as to the relations of zemindar and raiyat being so copious and elaborate, we think, that the provisions of this chapter should not apply to leases for agricultural purposes, except in so far as the Local Government may declare all or any of such provisions to be so applicable, together with, or subject to, those of any local law for the time being in force."[3]

But, in the absence of any law, usage or custom to the contrary, the principles of this chapter which merely reproduces the well-established rules of English law, have been held applicable to leases for agricultural purposes as rules of justice, equity and good conscience.[4] As observed

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98, *Sakayet Mollah* v. *Alam Mollah.* (*Held* that the tenancy was a non-agricultural one and hence it was governed by the Transfer of Property Act.)

('28) 15 AIR 1928 Pat 354 (355, 356) : 7 Pat 496 : 110 Ind Cas 642 (DB), *Damodar Prasad* v. *Lachimi Prasad.* (Section 106 does not apply to agricultural leases—Notice to quit should be reasonable.)

('25) 12 AIR 1925 Mad 346 (346) : 85 Ind Cas 339, *Jaru Poojari* v. *Somakke.* (Section 106 does not apply to agricultural leases and hence six months' notice to quit not necessary — It is sufficient if it is reasonable.)

('19) 6 AIR 1919 Pat 254 (256) : 53 Ind Cas 180 (DB), *Moore* v. *Makhan Singh.* (Section 117 exempts agricultural leases from the operation of S. 106—Six months' notice to terminate lease held not necessary.)

†(1900) 23 Mad 318 (321, 329) (DB), *Cheekali Zamindar* v. *Ranasooru Dhora.* (Legislature has been careful to save tenancies for agricultural purposes from the immediate operation of S. 106.)

('15) 2 AIR 1915 Cal 182 (183) : 42 Cal 751 : 27 Ind Cas 271 (DB), *Aminussa* v. *Jinnat Ali.*

('32) 19 AIR 1932 Lah 586 (588) : 13 Lah 432 : 140 Ind Cas 474 (DB), *Sohawa Singh* v. *Kesar Singh.* (In the Punjab the provisions of the Punjab Tenancy Act apply in case of agricultural land.)

('37) 24 AIR 1937 Cal 695 (695) : 173 Ind Cas 602 *Panchanan* v. *Sam Atul Chandra.*

('26) 13 AIR 1926 All 432 (435) : 48 All 385 : 95 I.C. 1048 (DB), *Ballabha Das* v. *Murat Narain.* (Primary object not agriculture—S. 108 applies and not the Agra Tenancy Act.)

[*See* ('11) 14 Oudh Cas 204 (205) : 11 Ind Cas 924 (925) (DB), *Gobre Singh* v. *Jwala Prasad.* (Section 111 held inapplicable to agricultural tenancy.)]

2. ('35) 22 AIR 1935 Pat 508 (511) : 15 Pat 8 : 158 Ind Cas 399 (DB), *Ram Chandra Naik* v. *Ajodhya Singh.* (Overruled on another point in AIR 1944 Pat 87 : 23 Pat 185 (FB).)

†('25) 12 AIR 1925 Pat 421 (431) : 4 Pat 404 : 86 Ind Cas 597 (DB), *Broucke* v. *Chhatar Kumar Devi.*

†(1900) 27 Cal 205 (209) : 4 Cal W N 76 (DB), *Umrao Bibi* v. *Mahomed Rojabi.*

3. See Report of the Second Law Commission, 1879 printed on page 68 (78).

4. ('49) 36 AIR 1949 Mad 127 (129) (DB) *Narayanan Nair* v. *Kunhan Mannadiar.* [Agricultural lease from year to year of lands to which Malabar Tenancy Act (XIV [14] of 1930) must be determined by some prescribed notice or at any rate by a notice giving a reasonable time to vacate.]

('48) 35 AIR 1948 Mad 275 (279) : ILR (1948) Mad 757 (FB), *Brahmayya* v. *Sundaramma* [S. 106.]

('47) 34 AIR 1947 Mad 68 (69) : 231 Ind Cas 276, *Umar Pulavar* v. *Dawood Rowther.*

('47) 34 AIR 1947 Nag 48 (51) : ILR (1946) Nag 568 (DB), *Narayan Ramchand* v. *Gokuldas Bholadas.*

('44) 31 AIR 1944 Nag 94 (96) : I L R (1944) Nag 141 : 217 Ind Cas 75 *Mt. Kesharbai* v. *Pandit Rajabhau.* (Agricultural tenancies in Central Provinces—Principles of Ch. V are applicable.)

('10) 33 Mad 253 (253) : 5 Ind Cas 437 (DB), *Gangamma* v. *Bommakka.* (Principle of S. 108 applied.)

('18) 5 AIR 1918 Nag 155 (156) : 14 Nag L R 188 : 43 Ind Cas 970, *Narayandas* v. *Krishnarao. (Do.)*

('14) 1 AIR 1914 Mad 225 (225) : 22 Ind Cas 515 (DB), *Narayanan* v. *Krishna Pattar.* (Do.)

†('40) 27 AIR 1940 Mad 410 (412), *Nanjappa* v. *Rangaswami.* (Do.)

(1900) 24 Mad 47 (56) : 10 Mad L Jour 321 (FB), *V. Nambudripad* v. *Valia Chathu Achan.* (Do.)

by Wallis, C.J., in *Krishna Shetti* v. *Gilbert Pinto*[5]:

> "The Act (i.e., the Transfer of Property Act) was framed by eminent English lawyers to reproduce the rules of English law in so far as they are of general application and rest on principle as well as authority, and its provisions are, in my opinion, binding on us as rules of justice, equity and good conscience, when we have to deal with agricultural leases in the absence of any special reason for not applying them. The Legislature wisely, in my opinion, if I may say so, has refrained from making these sections (i.e., Ss. 105 to 116) applicable *proprio vigore* to agricultural leases for fear of unnecessarily interfering with settled usages which it is undesirable to disturb. But in the absence of special reasons, there is no ground for applying a different rule in the cases of agricultural leases."

Thus, the principles of the following provisions have been applied to agricultural leases:

(AA) Section 106 ([5aa])

(A) Section 108, clauses (b),[5a] (c),[6] (e),[7] (g),[8] (h),[9] (i),[10] (j),[11] and (o).[12]

(AB) Section 110. ([12a])

('16) 3 AIR 1916 Mad 680 (681) : 39 Mad 834 : 30 Ind Cas 596 (DB), *Appayya Setti* v. *Mahammade Beari.* (Per Seshagiri Aiyar, J; Napier, J., dissenting.)
Also see S. 105, Note 1.

5. *('19) 6 AIR 1919 Mad 12 (13) : 42 Mad 654 : 50 Ind Cas 898 (SB).

5aa. ('49) 36 AIR 1949 Mad 127 (129) (DB), *Narayanan Nair* v. *Kunhan Mannadiar.*
('48) 35 AIR 1948 Mad. 275 (279) : ILR (1948) Mad 757 (FB), *Brahmayya* v. *Sundaramma.*

5a. ('10) 33 Mad 499 (501) : 5 Ind Cas 479 (480), *Narainsawmy Naidu* v. *Yerramali Ram Krishnaya.*

6. ('47) 34 AIR 1947 Nag 48 (51) : ILR (1946) Nag 568 (DB), *Narayan Ramchand* v. *Gokuldas Bholadas.*
('15) 2 AIR 1915 Mad 717 (718) : 25 Ind Cas 812 (DB), *Srinivasa* v. *Rangasami.*

7. ('36) 23 AIR 1936 Mad 664 (665) : 165 Ind Cas 855, *Raman Nambiar* v. *Kannan Nambiar.*

8. ('40) 27 AIR 1940 Mad 410 (412), *Nanjappa* v. *Rangaswami.*

9. ('10) 33 Mad 253 (253) : 5 Ind Cas 437 (437) (DB), *Gangamma* v. *Bommakka.*
('22) 9 AIR 1922 Oudh 249 (249) : 25 Oudh Cas 181 : 77 Ind Cas 592, *Chatur* v. *Rukmangad.*

10. ('14) 1 AIR 1914 Mad 225 (225, 226) : 22 Ind Cas 515 (DB), *Narayanan* v. *Krishna Pattar.*

11. ('18) 5 AIR 1918 Mad 928 (930) : 40 Ind Cas 590 (592) (DB), *Bapiraju* v. *Narayanaswami.*
('18) 5 AIR 1918 Nag 155 (156) : 14 Nag L R 188 : 43 I. C. 970 (970), *Narayandas* v. *Krishnarao.*
('07) 30 Mad 410 (412, 413) : 17 Mad L Jour 258 (DB), *Monica Kitheria Saldanha* v. *Subraya Hebbara.*

12. ('10) 33 Mad 253 (253, 254) : 5 Ind Cas 437 (437) (DB), *Gangamma* v. *Bommakka.*
†('42) 29 AIR 1942 Oudh 460 (462) : 18 Luck 390 : 201 Ind Cas 728 (DB), *Gur Prasad* v. *Mehdi Husain.*
[*See* ('36) 23 AIR 1936 Pat 111 (111) : 160 Ind Cas 114, *Ras Behari* v. *Jagdish Chandra.* (It was conceded that the lessee was not entitled to dig or quarry, though he was entitled to collect and remove lime stone on the surface.)]
[*See also* ('87) 1 C P L R 145 (145), *Mahomed Hoosain* v. *Damodar Prasad.* (In the absence of any agreement or custom tenant would be entitled to fruits of trees standing on land covered by his tenancy.)]
[*See however* ('06) 33 Cal 54 (62, 63) : 3 Cal L Jour 59 (DB), *Sriram Chakravarti* v. *Hari Narain Singh.* (Permanent tenure-holders held entitled to underground rights.)]

12a. ('48) 35 AIR 1948 Pat 446 (447, 448) (DB), *Jangal Singh* v. *Mukund Kumar.*
[Agricultural lease — Time of commencement of lease not specified — Lease becomes operative on day it was made — Mere fact that salami had not been paid would not lead to inference that lease was not made on that date — Falsity of recital of receipts of premium not to lead to inference that commencement was postponed.]

(B) Section 111, clause (g),[13] although the notice required by that clause has been held unnecessary.[14]

(C) Section 111, clause (h).[15]

(D) Section 114.[16]

(DD) Section 114A. ([16a])

(E) Section 116.[17]

3. "Agricultural purposes."—"Agriculture," according to the Oxford English Dictionary is "the science and art of cultivating the soil, including the allied pursuits of gathering in the crops and rearing live-stock; tillage; husbandry; farming (in the widest sense)."[1] According to Webster's Dictionary, "agriculture" means "the act or science of cultivating the ground including harvesting of crops and rearing and management of live-stock; tillage; husbandry; farming; in a broader sense, the science and art of the production of plants and animals useful to man including to a variable extent the preparation of these products for man's use. In this broad use it includes farming, horticulture and forestry together with such subjects as butter and cheese making, sugarmaking, etc."[2] It is thus clear that the term has two meanings: one wide and the other limited.

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13. ('19) 6 AIR 1919 Mad 1106 (1106) : 41 Mad 629 : 45 I.C. 743 (DB), *Komalukutti* v. *Muhammad.* (Per Seshagiri Aiyar, J.)
†('19) 6 AIR 1919 Mad 12 (13) : 42 Mad 654 : 50 Ind Cas 898 (SB), *Krishna* v. *Gilbert Pinto.*
('02) 26 Mad 157 (160) : 12 Mad L Jour 189 (DB), *Parameshri* v. *Vittappa Shambhaga.*
('96) 20 Bom 354 (362) : 1895 Bom P J 135 (FB), *Venkaji Krishna* v. *Lakshman Devaji.* (Case before T. P. Act was applied to Bombay Presidency.)
[*See* ('19) 6 AIR 1919 Cal 132 (133) : 53 Ind Cas 545, *Brojobasi* v. *Sarat Chandra.* (Sub-lease in contravention of terms of lease is not void until forfeiture is enforced.)]
[*See also* ('01) 28 Cal 135 (138) : 5 Cal W N 263 (DB), *Nizamuddin* v. *Mamtazuddin.* (In a District where relations of landlord and tenant are regulated by provisions of Bengal Act, VIII of 1869, a tenant denying his landlord's title forfeits his tenancy.)]

14. ('13) 21 Ind Cas 405 (406) (DB) (Mad), *Vidyapurna Thirtha Swamiar* v. *Ranagpayya.*
('15) 2 AIR 1915 Mad 813 (814) : 38 Mad 445 : 20 Ind Cas 930 (DB), *Korapalu* v. *Narayana.*
[*See* ('15) 2 AIR 1915 Mad 85 (85, 86) : 25 Ind Cas 944 (DB), *Abbakka* v. *Seshamma.* (Besides breach of covenant in forfeiture clause, no further act is necessary.)]
('47) 34 AIR 1947 Mad 68 (69) : 231 Ind Cas 276 *Umar Pulavar* v. *Dawood Rowther.*
[But see] Forfeiture by denial of title—Notice to determine lease necessary.

15. ('17) 4 AIR 1917 Cal 37 (38) : 42 Ind Cas 262 (DB), *Paran Chandra* v. *Khazez Mandal.*

16. ('44) 31 AIR 1944 Nag 229 (230) : ILR (1944) Nag 877 : 219 Ind Cas 163 (DB), *Shrikishanlal* v. *Ramnath.*
('10) 7 Ind Cas 565 (565) (DB) (Mad), *Parapurath Kalliani Amma* v. *Chinnan.*
†('16) 3 AIR 1916 Mad 680 (682) : 39 Mad 834 : 30 Ind Cas 596 (DB), *Appayya Shetti* v. *Mahammade Beari.* (Per Seshagiri Aiyar, J.; Napier, J., *contra.*)
[*See also* ('27) 14 AIR 1927 Mad 239 (239) : 98 Ind Cas 851, *Ramakrishna* v. *Fernandez.* (Agricultural lease—Court can relieve against forfeiture but while relieving it is not bound by conditions of Section 114.)]

16a. ('47) 34 AIR 1947 Mad 119 (120) : 231 Ind Cas 344 (DB), *Briget Souza Bai* v. *Maria Louis Bai.*
[Forfeiture incurred by reason of breach of express condition in lease—Relief against forfeiture can be given on equitable principle though notice of forfeiture is not in accordance with S. 114A — Section 114A embodies equitable principle which Court can apply in such a case though not the section itself.]

17. ('19) 6 AIR 1919 Pat 254 (255) : 53 Ind Cas 180 (DB), *Moore* v. *Makhan*
('01) 28 Cal 227 (233) (DB), *Administrator-General of Bengal* v. *Asraf Ali.*
[*See* ('21) 8 AIR 1921 Cal 300 (301) : 64 Ind Cas 118 (DB), *Chandra Nath* v. *Shikh Inamdi.* (When agricultural tenant holds over his tenancy is from year to year.)]

Section 117 Note 3

1. Murray, *Oxford English Dictionary,* cited in ('02) 25 Mad 627 (629) (DB), *King-Emperor* v. *Alexander Allan.*
2. Webster, *New International Dictionary,* 1918 Edition.

According to its wide meaning the term will include horticulture, forestry and even the use of land for pasture.[3] According to its limited but commonly understood meaning, it is confined to the raising of grain or other field crops. In this Act itself there is nothing to indicate that it is intended to limit the denotation of the term in any way[4] and the decisions have interpreted the term as including *horticulture*.[5]

In *Murgesa Chetti* v. *Chinnathambi Goundan*,[6] Bhashyam Ayyangar, J., defined "agriculture" as including "not only all field cultivation by tillage, but also all garden cultivation for the purpose chiefly of procuring vegetables or fruits as food for man or beast and other products fit for human consumption by way of luxury if not as an article of diet." This definition, while it is wide enough to include horticulture, excludes such useful cultivation as cotton, indigo, tobacco, jute, flower, etc. In *Raja of Venkatagiri* v. *Ayyappa Reddi*[7] and *Seshayya* v *Raja of Pittapur*,[8] Sadasiva Ayyar, J., defined "agriculture" as meaning "the raising of annual or periodical grain crops through the operation of ploughing, sowing, etc." This definition too is very narrow as it excludes other field crops like sugarcane, indigo, cotton, etc. In *Pavadai Pathan* v. *Ramaswami Chetti*[9] Spencer, J., disapproved of the above definitions and observed:

> "Agriculture connotes the raising of useful or valuable products which derive nutriment from the soil with the aid of human skill and labour, and thus it will include horticulture, arboriculture and sylviculture in all cases where the growth of trees is effected by the expenditure of human care and attention in such operation as those of ploughing, sowing, palnting, manuring, watering, protecting, etc." Even this definition, though wider than the other definitions, is not wide enough to include all that is suggested by the broader definition given by the Oxford Dictionary and Webster's Dictionary and which meaning it is conceived, has to be adopted for deciding what are and what are not agricultural purposes within the meaning of this section.

It is only a lease for *agricultural purposes* that is exempted from the operation of the provisions of this chapter. It is not the actual use of the land, but the original purpose of the tenancy which determines the question of applicability or otherwise of the Act.[9a] A lease which relates to *agricultural land* is not necessarily one for *agricultural purposes*. Thus, a lease granted to a rent farmer or middle man is not one for agricultural

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3. ('37) 24 AIR 1937 Nag 289 (290) : ILR (1938) Nag 31 : 171 Ind Cas 553, *Imamali* v. *Priyawati Devi.*
4. ('01) 24 Mad 421 (426) (DB), *Muregesa Chetti* v. *Chinnathambi Goundan.* (Per Shephard J.)
5. *('01) 24 Mad 421 (424) (DB), *Muregesa Chetti* v. *Chinnathambi Goundan.*
('26) 96 Ind Cas 89 (89) (Cal), *Rakhya Mani Debi* v. *Paramesh Chakrabarti.*
†('13) 20 Ind Cas 332 (335) (DB) (Cal), *Hedayet Ali* v. *Kalanand Singh.*
('26) 13 AIR 1926 Cal 312 (313) : 92 Ind Cas 411 (DB), *Gopal Chandra* v. *Bhutnath.*
('37) 24 AIR 1937 Nag 289 (290) : ILR (1938) Nag 31 : 171 Ind Cas 553, *Imamali* v. *Priyawati Devi.*
†('22) 9 AIR 1922 Mad 351 (351) : 45 Mad 710 : 70 Ind Cas 657 (DB), *Pavadai Pathan* v. *Ramaswami.*
[*See also* ('21) 8 AIR 1921 Cal 379 (380) : 66 Ind Cas 61 (DB), *Sasibala Debi* v. *Ambala Debi.* (Residential holding—Surplus land being planted with fruit trees — Transfer of Property Act applies.)]
6. ('01) 24 Mad 421 (425) (DB).
7. ('15) 2 AIR 1915 Mad 781 (783) : 38 Mad 738 : 21 Ind Cas 532 (DB).
8. ('17) 4 AIR 1917 Mad 649 (651) : 34 Ind Cas 730 (DB).
9. ('22) 9 AIR 1922 Mad 351 (351, 352) : 45 Mad 710 : 70 Ind Cas 657 (DB).
9a. ('42) 29 AIR 1942 Cal 330 (331) : 200 Ind Cas 314 (DB), *Raj Kumari* v. *Samsuddin.*

purposes though it relates to agricultural land.[10] So also a lease which enables or requires the lessee to sub-let the land for the purpose of bringing it under cultivation is not a lease for agricultural purpose.[10a] On the other hand a lease for agricultural purpose is not confined to one for *cultivation* of the land. A purpose may be connected with agriculture but not necessarily with cultivation.[11] Thus, a lease of land to be used as a yard for ploughing cattle, or stocking hay for such cattle, or for the purpose of storing manure, or crops, or for growing plants to be used as manure for agriculture, or as a habitation to agriculturists will be a lease for agricultural purposes.[12] So also a lease of land for the purpose of grazing the ploughing cattle.[13]

Whether a particular lease is for agricultural purpose must be determined with reference to what the *primary* object of the lease is. If the *primary* object of the lease is a purpose relating to agriculture, the lease will be one for an "agricultural purpose,"[14] otherwise not. Thus, a lease, the primary object of which is the user of the property for

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10. ('47) 34 AIR 1947 Cal 36 (39) : ILR (1945) 2 Cal 642 : 230 Ind Cas 60 (DB), *Abdul Hossain* v. *Salimar Paint Etc. Co.*
[The phrase "agricultural purpose" occurring in S. 117 must be given a narrow and strict interpretation AIR 1930 PC 13, foll.]
('47) 34 AIR 1947 Pat 78 (79) : 229 Ind Cas 394 (DB), *Budhan Mahton* v. *Ramanugrah Singh.*
[AIR 1944 Pat 87 : 23 Pat 185 (FB), *Followed.*]
('44) 31 AIR 1944 Pat 87 (89) : 23 Pat 185 : 212 Ind Cas 473 (FB), *Maheshwari Prasad* v. *Manraji Kuer.* (Thika lease for the purpose of collecting rents from tenants in a village—Lease is not for agricultural purposes and no tenancy is created within the Bihar Tenancy Act. AIR 1935 Pat 508 : 15 Pat 8 overruled.)
†('01) 28 Cal 744 (746, 747) (DB), *Promotha Nath Mitter* v. *Kali Prasanna.*
†('30) 17 AIR 1930 P C 13 (15) : 127 Ind Cas 749 (PC), *Satya Niranjan* v. *Surajubala Debi.*
('37) 24 AIR 1937 Oudh 151 (152) : 12 Luck 514 : 164 Ind Cas 830, *Shiam Sunder* v. *Chootey Lal.*
†('16) 3 AIR 1916 Cal 609 (610, 611) : 29 Ind Cas 797 (DB), *Rash Behari* v. *Tiluckdhari Lal.*
[*See also* ('27) 14 AIR 1927 All 78 (80) : 98 Ind Cas 92 (DB), *Abdul Majid* v. *Nageshar Dat.* (Lease of zamindari share entitling lessee to make collections to the extent of the share—*Held,* lease was not agricultural.)]

10a. ('47) 34 AIR 1947 Cal. 36 (39) : ILR (1945) 2 Cal 642 : 230 Ind Cas 60 (DB), *Abdul Hossain* v. *Salimar Paint Etc. Co.*
[Tenancy is tenure and is governed by Bengal Tenancy Act.]

11. *('13) 20 Ind Cas 332 (334) (DB) (Cal), *Hedayet Ali* v. *Kalanand Singh.*

12. ('16) 3 AIR 1916 Cal 730 (732) : 31 Ind Cas 16 (DB), *Dina Nath Nag* v. *Sashi Mohan Dey.*
('31) 18 AIR 1931 Cal 135 (136, 137) : 130 Ind Cas 219 (DB), *Surendra Kumar* v *Chandratara Nath.* (Lease of land for stacking grass).
('01) 24 Mad 421 (424) (DB), *Murugesa Chetti* v. *Chinnathambi Goundan.*
('02) 25 Mad 627 (631) : 12 Mad L Jour 393 (DB), *King-Emperor* v. *Alexander Allan.* (Lease for rearing live-stock is for agricultural purpose.)

13. ('13) 20 Ind Cas 332 (334) (DB) (Cal), *Hedayet Ali* v. *Kalanand Singh.*
('16) 3 AIR 1916 Cal 118 (120) : 29 Ind Cas 834 (DB), *Brojabasi Koer* v. *Ram Sankar.*
†('31) 18 AIR 1931 Cal 135 (136, 137) : 130 I. C. 219 (DB), *Surendra Kumar* v. *Chandratara Nath.*

14. †('31) 18 AIR 1931 Cal 135 (138) : 130 Ind Cas 219 (DB), *Surendra Kumar* v. *Chandratara Nath.*
('35) 22 AIR 1935 Cal 638 (639) : 159 Ind Cas 235 (DB), *Bir Bikram* v. *Amanaddin.*
†('13) 20 Ind Cas 332 (335) (DB) (Cal), *Hedayet Ali* v. *Kalanand Singh.*
('16) 3 AIR 1916 Cal 118 (120) : 29 Ind Cas 834 (DB), *Brojabasi Koer* v. *Ram Shankar Das.*
('27) 14 AIR 1927 All 78 (79) : 98 Ind Cas 92 (DB), *Abdul Majid* v. *Nageshar Dat.*
†('26) 13 AIR 1926 All 432 (434, 436) : 48 All 385 : 95 Ind Cas 1048 (DB), *Ballabha Das* v. *Murat Narain.*
('37) 24 AIR 1937 Oudh 151 (152) : 12 Luck 514 : 164 Ind Cas 830, *Shiam Sunder* v. *Chootey Lal.*
[*See also* ('02) 25 Mad 627 (631) : 12 Mad L Jour 393 (DB), *King-Emperor* v. *Alexander.* (Case under Madras District Municipalities Act (IV of 1884), S. 63 (3)—Pasture land is used for "agricultural purposes.")]

residential purposes, is not one for agricultural purposes merely because the lessee has also a right to cultivate or raise trees in the compound.[15] Similarly, where the primary object of a lease by a zamindar was merely to secure the proprietary rights of the lessor and not the user of any land for agriculture, though it was open to the lessee to cultivate the land if he so desired, it was held that the lease was not one for agricultural purposes.[15a] Where by a mukanari lease the lessor handed over his entire rights including even the underground rights to the lessee it was held that the object of the lessor was not to grant a lease for agricultural purposes but to hand over his proprietary rights to the lessee.[15b]

The following have been held to be leases for agricultural purposes:

(1) A lease for growing casuarina trees.[16]

Under the Agra Tenancy Act, 1901,[17] and the Madras Estates Land Act, 1908,[18] however, a lease for growing timber or fuel or for a grove has been held to be not one for agricultural purposes.

(2) A reclamation lease granted for the purpose of removing the jungle and bringing the land under cultivation.[19]

(3) A lease for rearing tea plants. The fact that a small portion of the land leased is occupied by a factory for manuturing tea does not change its character.[20]

(4) A lease for working of lac-bearing trees.[21]

(5) A lease for cultivation of indigo.[22] The manufacture of indigo cakes from the indigo plants is, however, not an

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15. ('26) 13 AIR 1926 312 (313) : 92 Ind Cas 411 (DB), *Gopal Chandra* v. *Bhutnath.*
('21) 8 AIR 1921 Cal 379 (380) : 66 Ind Cas 61 (DB), *Sasibala Debi* v. *Ambala Debi.*
('36) 164 Ind Cas 446 (447) (Cal), *Rajani Sutradhar* v. *Baikuntha Chandra.*

15a. (1947) 26 Pat 321 (326) (DB), *Raj-*
All 385 : 95 Ind Cas 1048 (DB), *Ballabha Das* v. *Murat Narain.*

15b. (1947) 26 Pat 321 (326) (DB), *Rajkishore* v. *Ishwardas.*
[Question of limitation for suit for arrears of rent.]

16. ('22) 9 AIR 1922 Mad 351 (351) : 45 Mad 710 : 70 Ind Cas 657 (DB), *Pavadai Pathan* v. *Ramaswamy.* (Dissenting from AIR 1917 Mad 787.)

17. ('13) 17 Ind Cas 656 (656) (DB) (All), *Muhammad Ismail* v. *Mithu Lal.*
('13) 35 All 200 (201) : 19 Ind Cas 416 (417) (DB), *Hadi Hasan Khan* v. *Pati Ram.*
('21) 8 AIR 1921 All 168 (169) : 43 All 606 : 63 Ind Cas 437, *Jalesar* v. *Raj Mangal.*
('14) 1 AIR 1914 All 428 (430) : 25 Ind Cas 169, *Habibullah* v. *Kalyan Das.*
('24) 11 AIR 1924 PC 247 (249) : 46 All 831 : 51 Ind App. 381 : 82 Ind Cas 962 (PC), *Kesho Prasad* v. *Sheo Pargash.*
[*See also* ('37) 24 AIR 1937 All 561 (562) : ILR (1937) All 588 : 171 Ind Cas 203 (DB), *Lachmi Narain* v. *Batuk Singh.* (Permanent lease giving right to plant grove — Lessee not planting grove — Lease is agricultural.)]

18. ('31) 18 AIR 1931 Mad 659 (662) : 54 Mad 900 : 134 Ind Cas 42 (DB), *Bharati Swamigal* v. *Duraiswami.*

19. ('10) 7 Ind Cas 864 (866) (DB) (Cal), *Jagdish Chandra* v. *Lal Mohan.*
('18) 5 AIR 1918 Nag 210 (211) : 48 Ind Cas 354, *Banmali* v. *Nihal Singh.*
('16) 3 AIR 1916 Cal 609 (611) : 29 Ind Cas 797 (DB), *Rash Behari* v. *Tiluckdhari Lal.*
[*See* ('35) AIR 1935 Oudh 90 (92) : 10 Luck 490 : 153 Ind Cas 609 (DB), *Narain Singh* v. *Jagat Jit Singh.* (Lease providing that lessee should pay rent for first three years only for area he brings under cultivation but subsequently to pay rent fixed for whole area — *Held,* it was lease for agricultural purposes.)]

20. ('38) 25 AIR 1938 Cal 589 (592) : ILR (1938) 2 Cal 434 : 181 Ind Cas 657 (DB), *Pravat Chandra* v. *Bengal Central Bank Ltd.*

21. ('37) 24 AIR 1937 Nag 289 (290) : ILR (1938) Nag 31 : 172 Ind Cas 669, *Imamali* v. *Priyavati Devi.* (4 Nag L R 104 no longer good law.)

22. ('04) 31 Cal 174 (176) : 9 Cal W N 87 (DB), *Surendra Narain Singh* v. *Hari Mohan Misser.* (Reversed on another point in 34 Cal 718 : 34 Ind App 133 (PC).

agricultural purpose.[23] But when the land has been let generally for the cultivation of indigo, the erection of an indigo factory on part of the leased land, is not inconsistant with the agricultural purpose of the lease.[24]

(6) A lease of land for the cultivation of potatoes, grain, vegetables, etc.[25]

(7) A lease of land for coffee cultivation.[26]

For other instances, see the undermentioned cases.[27]

The following have been held not to be leases for agricultural purposes:

(1) A lease of a right to receive collections of a village.[28]

(2) A lease merely for gathering fruits from trees.[29]

(3) A lease of the land for building a shop in a bazar.[30]

(4) A *patni* lease in Bengal is generally not a lease for an agricultural purpose, as it is usually granted to a middleman with a view to his sub-letting. In such a case, it is not the *patnidar but his* sub-tenants who take the land for agricul-

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23. ('04) 31 Cal 174 (176) : 9 Cal W N 87 (DB), *Surendra Narain Singh* v. *Hari Mohan Misser.*
24. ('07) 34 Cal 718 (722) : 34 Ind App 133 (PC), *Hari Mohan Misser* v. *Surendra Narayan Singh.*
25. ('02) 25 Mad 627 (630) : 12 Mad L Jour 393 (DB), *King-Emperor* v. *Alexandar Allan.*
26. ('01) 24 Mad 421 (426) (DB), *Murugesa Chetti* v. *Chinnathambi Goundan.* (Dissenting from 17 Mad 98.)
27. ('29) 16 AIR 1929 Oudh 529 (533) : 4 Luck 649 : 118 Ind Cas 841 (DB), *Ambika Prasad* v. *Beni Madho.* (Lease of land on which grass grows spontaneously — Grass preserved and subsequently sold—Lease held for agricultural purposes.)
('25) 12 AIR 1925 Pat 421 (431) : 4 Pat 404 : 86 Ind Cas 597 (DB), *Broucke* v. *Chhatar Kumar Devi.* (In the case of a lease of zerait lands as well as lands settled with raiyats where the lease contemplates direct cultivation of the former by the tenants, the lease is one for agricultural purpose.)
('35) 22 AIR 1935 All 382 (386) : 157 Ind Cas 261 (DB), *Makund Swarup* v. *Kishun Chand.* (Under S. 219 (2), Agra Tenancy Act, 1926 a theka shall be deemed to be a lease for agricultural purposes.)
('35) 22 AIR 1935 Pat 508 (511) : 15 Pat 8 : 158 Ind Cas 399 (DB), *Ram Chandra Naik* v. *Ajodhya Singh.* (Lease covering entire mouza—Patta requiring lessees to cultivate parti and dih lands and entitling them to increase in rent roll—Fixed raiyati rents not to be reduced—Right to plant trees and sink wells given. Lease held to be a lease for agricultural purposes. Overruled on another point in AIR 1944 Pat 87 : 23 Pat 185 (FB).
('28) 15 AIR 1928 Pat 89 (94) : 105 Ind Cas 172 (DB), *Damodar Prasad* v. *Massodan Singh.* (A sub-lease of agricultural lands under which the sub-lease was to hold possession of the property and by making cultivation and proper management to pay the fixed amount of rent regularly, held was one for agricultural purposes.)
('16) 3 AIR 1916 Cal 32 (32) : 28 Ind Cas 839 (DB), *Krishna Kanta* v. *Jadu Kasya.* (Where the holding of a raiyat consisted partly of agricultural and partly of homestead land, and the homestead portion was let out to a sub-tenant—*Held* that, having regard to the nature of the original tenancy, the incidents of the sub-lease would be governed by the provisions of the Bengal Tenancy Act and not by the Transfer of Property Act.)
('03) 8 Cal W N 454 (456) (DB), *Babu Ram Roy* v. *Mahendra Nath Samanta.* (Do.)
('12) 13 Ind Cas 364 (365) (DB) (Cal), *Abdul Karim* v. *Abdul Rahman.* (Do.)
('25) 12 AIR 1925 Cal 202 (203) : 84 Ind Cas 743 (DB), *Rampado* v. *Atore.* (Do.)
('27) 14 AIR 1927 All 657 (658) : 50 All 202 : 104 Ind Cas 292 (DB), *Nisar Husain* v. *Sundar Lal.* (When specific areas are leased and express power is given to lessee to take actual possession of those areas and he has option to cultivate them himself, the lease is one for agricultural purposes.)
28. ('02) 5 Oudh Cas 222 (224), *Raja Jang Bahadur Singh* v. *Ehsan Ali.*
29. ('13) 20 Ind Cas 332 (335) (DB) (Cal), *Hedayet Ali* v. *Kalanan Singh.*
30. ('26) 13 AIR 1926 Cal 373 (374) : 90 Ind Cas 805 (DB), *Purusottam* v. *Panchanan.*

tural purposes.[31] Similarly, a *darpatni* lease is not one for an agricultural purpose.[32]

(5) A lease of a water-tank for sowing water-nuts.[33]

(6) A lease of a water-tank which does not appertain to an agricultural holding but is used only for the preservation and rearing of fish.[34] But the lease of a tank and of the land surrounding it for the purpose of rearing fish, stacking grass and grazing the ploughing cattle was held to be one for agricultural purposes.[35]

See also the undermentioned cases.[36]

4. Agricultural leases may be made orally.—Section 107, like any other provision of this chapter, does not apply to leases for agricultural purposes. Therefore, an agricultural lease from year to year or for a term exceeding one year or reserving a yearly rent, is not required to be made by a registered instrument. Such a lease may be effected by an *oral* agreement.[1] But if it is made in writing, s. 17 of the Registration

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31. ('01) 28 Cal 744 (746, 747) (DB), *Promotho Nath Mitter* v. *Kali Prasanna Chowdhry.*

32. ('38) 25 AIR 1938 Cal 172 (175) : 174 Ind Cas 790 (DB), *Bibhuti Bhusan* v. *Maya Devi.*

33. ('15) 2 AIR 1915 Nag 49 (51) : 11 Nag L R 49 : 28 Ind Cas 869, *Battoo* v. *Narain Prasad.*
('15) 2 AIR 1915 Nag 57 (58) : 11 Nag L R 122 : 31 Ind Cas 294, *Hari* v. *Vanu.*
[*See however* ('69) 1 N W P H C R 254 (255) (DB), *Moolchand* v. *Chutree.* (Right of occupancy can be acquired in a tank producing water-nuts, which do not grow spontaneously, but are the result of sowing or planting.)]

34. ('04) 31 Cal 937 (942) : 8 Cal W N 804 (DB), *Mahananda* v. *Mongala Keotani.*
('73) 19 Suth W R 200 (201) (DB), *Siboo Jelya Chowdhry* v. *Gopal Chunder.*
('15) 2 AIR 1915 Nag 57 (58) : 11 Nag L R 122 : 31 Ind Cas 294, *Hari* v. *Vanu.*

35. ('31) 18 AIR 1931 Cal 135 (137) : 130 Ind Cas 219 (DB), *Surendra Kumar* v. *Chandratara Nath.*
[*See also* ('35) 22 AIR 1935 Cal 638 (639) : 159 Ind Cas 235, *Bir Bikram* v. *Amanaddin.* (True purpose of lease preservation and rearing of fish—Grazing cattle on bank only subsidiary—Lease is for non-agricultural purposes.)]

36. ('14) 1 AIR 1914 Cal 618 (621) : 22 Ind Cas 966 (969) (DB), *Hirendra Nath* v. *Hari Mohan.* (A lease of a mokarari described and registered as a taluk held not an agricultural lease.)
('06) 33 Cal 339 (340) : 3 Cal L Jour 274 (DB), *Anandamoyi* v. *Lakshi Chandra.* Ghatwali service lease.)
('26) 13 AIR 1926 Cal 312 (313) : 92 Ind Cas 411 (DB), *Gopal Chandra* v. *Bhutnath.* (Land leased out for erecting houses and, if lessees liked, planting fruit trees—Lease held not for agricultural purposes.)
('21) 8 AIR 1921 Cal 379 (380) 66 Ind Cas 61 (DB), *Sasibala Debi* v. *Ambala Debi.* (Where the holding was mainly used for residential purposes, the fact that the surplus land was planted with fruit bearing trees, held did not alter the character of the holding.)
('33) 20 AIR 1933 Cal 643 (644) : 146 Ind Cas 540, *Banowari Lal* v. *Gopal Chandra.* (Lease created expressly for residential purposes in favour of non-agriculturist—No indication that lands were put to agricultural use—Lease held not for agricultural purpose.)
('27) 14 AIR 1927 Cal 279 (279) : 100 Ind Cas 614 (DB), *Safar Ali* v. *Abdul Majid.* (Lease relating to homestead land within municipal area—Record of rights showing land as *bagan*—Lessee enjoying home in one of the leased plots for a long time —Lease held not an agricultural lease and governed by the Transfer of Property Act.)
(1900) 27 Cal 205 (209) : 4 Cal W N 76 (DB), *Umrao Bibi* v. *Mahomed Rojabi.* (Lease for purpose of collecting rent.)
('33) 20 AIR 1933 Cal 822 (823) : 37 Ind Cas 209 (DB), *Asutosh Pramanik* v. *Jibandhan Ganguly.* (Lease in respect of garden land with fruit trees standing on part of which tenant is allowed to have his dwelling place—Lessee required to take care not to injure trees while plucking fruits — Stipulation that if tenant injured the orchard, he was liable to eviction—Lease also contained provision for raising crops—Lease held not for agricultural purposes.)

Section 117 Note 4

1. ('48) 35 AIR 1948 Nag 404 (406) : ILR (1948) Nag 73 *Mohammad Alimullakhan* v. *Maruti Janu.*
[Oral lease can be proved by registered *Kabuliats.*]

Act, 1908, requires that it should be registered,[2] unless the Provincial Government has exempted from its operation leases for a term exceeding five years and the annual rents reserved by which do not exceed fifty rupees.[3]

See also Note 1 under S. 105.

CHAPTER VI.

OF EXCHANGES.

118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange."

"Exchange" defined.

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

Synopsis

1. Scope of the section.
2. Distinction between sale and exchange.
3. Transfer of property partly for money and partly for other property—Nature of.
4. Mutual transfer of ownership necessary.
5. Partition is not exchange.
6. Two sale deeds, if may constitute exchange.
7. "Ownership of one thing for the ownership of another."
8. "Both things being money only." See Note 2.
9. Mode of effecting exchange.
10. Remedy of parties to exchange.

('46) 33 AIR 1946 Pat 22 (24) : 24 Pat 429 (DB), *Loknath Singh* v. *Chhotan Bashi.* [Longstanding practice to treat Kabuliat executed by lessee and accepted by lesser as instrument creating tenancy held not affected by T. P. Act]

('45) 32 AIR 1945 Nag 69 (70) : ILR (1944) Nag 704 (DB), *Rajendrasingh* v. *Hulasdass.*

†('33) 20 AIR 1933 Mad 451 (452) : 144 Ind Cas 27 (DB), *Sivasubramania* v. *Theerthapathi.*

('32) 19 AIR 1932 Cal 715 (716) : 142 Ind Cas 81 (DB), *Giribala Dasi* v. *Dwarkanath.*

('29) 16 AIR 1929 Oudh 529 (533) : 4 Luck 649 : 118 Ind Cas 841 (DB), *Ambika Prasad* v. *Beni Madho.*

†('37) 24 AIR 1937 Nag 289 (209) : ILR (1938) Nag 31 : 171 Ind Cas 553, *Imamali* v *Priyawati Devi.* (Agricultural lease for 3 years).

('24) 11 AIR 1924 Pat 641 (643) : 3 Pat 349 : 79 Ind Cas 26 (DB), *Janki Kuer* v. *Birj Bhikhan.*

('23) 10 AIR 1923 Cal 432 (433) : 69 Ind Cas 57 (DB), *Alam Mulla* v. *Surendra Kumar.* (It may be even by conduct of parties.)

('10) 7 Ind Cas 864 (865) (DB) (Cal), *Jagadish Chandra* v. *Lal Mohan.* (Permanent agricultural lease.)

('15) 2 AIR 1915 Mad 1070 (1070) : 28 Ind Cas 599 (DB), *Raghava* v. *Secy of State.* (Mulgeni lease.)

('26) 13 AIR 1926 Nag 9 (9) : 90 Ind Cas 51, *Mahadeo* v. *Shioram.*

[*See also* ('03) 13 Mad L Jour 137 (138) (DB), *Annammal* v. *Venkataragavachari.* (Oral agricultural lease from year to year.)

('13) 19 Ind Cas 930 (931) (DB) (Cal), *Krishna Chandra Jogati* v. *Abhiram Naik.* (Execution of *kabuliat* by tenant and its acceptance by landlord are sufficient to prove agricultural tenancy.)]

2. ('48) 35 AIR 1948 Pat 446 (447) (DB) *Jangal Singh* v. *Mukund Kumar.* [Delivery of possession is not necessary in such a case.]

('46) 33 AIR 1946 Pat 22 (24) : 24 Pat 429 (DB), *Loknathsingh* v. *Chhotan Bashi.* [Kabuliyat registered in accordance with S. 17(d) and accepted by letter — Valid agricultural lease is constituted in law.]

('45) 32 AIR 1945 Nag 69 (70) : ILR (1944) Nag 704 (DB), *Rajendra Singh* v. *Hulasdass.*

†('33) 20 AIR 1933 Mad 451 (452) : 144 Ind Cas 27 (DB), *Sivasubramania* v. *Theerthapathi.*

('24) 11 AIR 1924 Pat 641 (643) : 3 Pat 349 : 79 Ind Cas 26 (DB), *Janki Kuer* v. *Birj Bhikhan.*

('23) 10 AIR 1923 Cal 432 (433) : 69 Ind Cas 57 (DB), *Alam Mulla* v. *Surendra*

('37) 24 AIR 1937 Nag 289 (290) : I L R (1938) Nag 31 : 171 I. C. 553, *Imamali* v. *Priyawati Devi.*

('26) 13 AIR 1926 Nag 9 (9) : 90 Ind Cas 51, *Mahadeo* v. *Shioram.*

†('41) 28 AIR 1941 Pat 577 (583) : 20 Pat 346 : 192 I. C. 451 (DB), *Md. Hanif* v. *Khairat Ali.*

3. ('01) 24 Mad 421 (426) (DB), *Murugesa Chetti* v. *Chinnathambi Goundan.*

TOPIC INDICATOR

Family arrangement is not exchange. See Note 4.
Pre-emption on exchange. See Note 3 and Section 120, Note 2.

1. Scope of the section.—The Contract Act, 1872, enacted in Chap. VII thereof provisions relating to the sale of goods. No provisions were enacted as to the *exchange* of goods. With a view to remedy this defect, this chapter on exchanges has been made to include not only exchanges of *immovable* property, but also *moveable* property. While however, an *agreement for sale of moveable property* will, under the provisions of the Contract Act, transfer the title to the property in certain circumstances, an agreement for the exchange of immovable property will not, under this section, transfer the title in the property. There must be an actual transfer of ownership. "We would define 'exchange' ", said the Law Commissioners in their Report of 1879, "not as an agreement, but as the fulfilment of an agreement by mutual transfer of dominion."

The definition of exchange given in this section has been founded on the provision contained in the New York Civil Code.[1]

2. Distinction between sale and exchange.—A *sale* is a transfer of ownership of property (not being money) for a *price*,[1] i.e., a sum of *money* which the transferor sets as the value of the property transferred.[2] In other words, a sale may be said to be a mutual transfer of ownership of one thing for the ownership of another, *one* of such things being the *price* of the other. An *exchange*, as defined in this section, is similar to a sale in so far as it is also a mutual transfer of ownership of one thing for the ownership of another, but it differs from a sale in that *neither* of the things transferred is the price of the other.[3]

Illustrations

(1) A transfers house x to B and B, in consideration thereof transfers field y to A. Neither field y nor house x can be said to be the *price* of the other. The transaction is an exchange. See the undermentioned cases.[4]

Section 118—Note 1

1. See Statement of Objects and Reasons, dated 10th May 1877, printed on p. 64 (66).

Section 118—Note 2

1. Section 77 of the Contract Act, defines sale as "an exchange of property for a *price*"; Section 4 of the Sale of Goods Act, 1930, defines a contract of sale of goods as a contract "whereby the seller transfers or agrees to transfer the property in goods to the buyer for a *price*"; Section 54 of the Transfer of Property Act defines sale as the transfer of ownership for a *price* paid or promised or part paid and part promised.

2. Webster, *Dictionary*.

See also Section 2 (10) of the Sale of Goods Act, 1930, defining the word "price" as the *money consideration* for a sale of goods.

See also Bonvier, *Law Dictionary*, where "price" is defined as consisting of money to be paid down or at a future time.

†('22) 9 AIR 1922 Mad 311 (312, 313) : 45 Mad 612 : 68 Ind Cas 687 (FB), *Madam Pillai* v. *Badrakali Ammal*. (Overruling AIR 1914 Mad 489 : 37 Mad 483 where it was held that "price" will cover anything which the vendor accepts as tantamount to payment.)

('01) 25 Bom 696 (698) : 3 Bom L R 384 (SB), *Samaratmal Uttamchand* v. *Govind*. (Price is money paid or promised.)

('37) 24 AIR 1937 All 665 (667) : 171 Ind Cas 577 (DB), *Randhir Singh* v. *Randhir*

('86) 9 Mad 141 (142) : 1 Weir 645 (DB), *Queen Empress* v. *Appavu*. (Payment of wages in liquor is not a 'sale' of liquor.)

('10) 34 Bom 287 (290) : 5 Ind Cas 599 (600) (DB), *Madhavrao Moreshwar* v. *Kashibai Dattubhai*.

Also see S. 54, Note 12 and S. 105, Note 58.

3. ('24) 11 AIR 1924 All 390 (391) : 46 All 359 : 79 Ind Cas 495 (DB), *Samar Bahadur* v. *Jit Lal*.

4. ('03) 30 Cal 921 (922) : 7 Cal W N 704 (DB), *Kedar Nath* v. *Emperor*. (Where *A*, a muktyar gave an eight anna court-fee stamp to *B* his client, and was going to have another eight anna stamp from *B in exchange*—Held, it was not a sale of

(2) A gives B one hundred-rupee currency note and B gives one hundred rupees in coins in return. In this case also neither of the things transferred can be said to be the *price* of the other.[5] For the word *price,* which the vendor can charge at his pleasure for his property which is capable of fluctuations according to the rise and fall of the market, cannot be applied to the change of one form of money into another form of money, both forms being legal tender. The transaction is therefore an "exchange."

(3) A transfers field x to B in consideration of B paying Rs. 1,000 to A. This is a sale as the amount of Rs. 1,000 is the *price* of field x.

The distinction between a transfer by way of sale and a transfer by way of exchange thus lies in the *nature of the consideration* for such transfer.[6] If the consideration is the *price* of the property transferred it is a sale. But if it is property (not being price) then it is an exchange.

In all other respects an exchange is akin to a sale.[7]

Where the transaction otherwise amounts to an exchange, the fact that one of the parties to the transaction to sell the land which he takes in exchange after the exchange or that has contracted to do so before the exchange takes place does not affect the real nature of the transaction.[8]

3. Transfer of property partly for money and partly for other property —Nature of.—Where the consideration for a transfer of property is partly money and partly other property, and it is not possible to divide the transaction into separate transactions of sale and exchange, the question has arisen, especially in cases of pre-emption, whether the transaction is to be treated as a sale or an exchange, inasmuch as there is generally a right of pre-emption only where the transaction is a sale[1] though, if there is a custom to that effect, pre-emption is allowed even in cases of exchange.[1a] In the undermentioned case,[2] it has been

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stamp.)

('01) 25 Bom 696 (698) : 3 Bom L R 384 (SB), *Samaratmal Uttamchand* v. *Govind.* (Transfer of cotton for cotton seeds is an exchange.)

5. ('78) 3 Cal 379 (382) : 1 Cal L R 339 (DB), *Empress* v. *Jogessur Mochi.*

6. ('38) 25 AIR 1938 All 229 (230, 231) : 175 Ind Cas 618 (DB), *Ram Badan Lal* v. *Kunwar Singh.*

('20) 7 AIR 1920 Oudh 182 (183) : 60 Ind Cas 725, *Riazat Husain* v. *Ali Bandi.*

7. ('23) 10 AIR 1923 Lah 456 (457) : 73 Ind Cas 709, *Kundan Lal* v. *Anund Sarup.* (The provisions of Ss. 118, 119 and 120 show that the Legislature has put an exchange on the same footing with a sale in almost every respect.)

8. ('44) 31 AIR 1944 Pesh 15 (16) : 212 Ind Cas 306, *Fazal Mohd.* v. *Ghulam Haidar.* (Transaction is not *sale* and no question of pre-emption arises. AIR 1919 Lah 127 : 1918 Pun Re No. 104 dissented from.)

Section 118—Note 3

1. ('24) 11 AIR 1924 All 390 (391) : 46 All 359 : 79 Ind Cas 495 (DB), *Samar Bahadur* v. *Jit Lal.* (No right in case of exchange.)

('15) 2 AIR 1915 Oudh 149 (151) : 18 Oudh Cas 109 : 30 Ind Cas 232 (DB), *Lachhman Prasad* v. *Fida Husain.* (Right of equity of redemption over property transferred for proprietary rights over another property — Transaction is not sale—No right of pre-emption.)

1a. *('85) 7 All 626 (630, 631, 632) : 1885 All W N 183 (FB), *Niamat Ali* v. *Asmat Bibi.*

('66) 1 Agra H C R 144 (146) (DB), *Sewa Ram* v. *Risal Chowdhry.*

('07) 4 All L Jour 756 (758), *Bhagwan Singh* v. *Kharag Singh.*

('09) 31 All 539 (541) : 3 Ind Cas 903 (904) (DB), *Daryao Singh* v. *Jahan Singh.*

[*See also* ('17) 4 AIR 1917 All 302 (303) : 38 Ind Cas 157 (158) (DB), *Bhagwan Singh* v. *Rajwanta Kunwar.* (Wajib-ul-arz providing right of pre-emption only in case of absolute sale or mortgage by conditional sale—*Held,* pre-emption cannot be allowed on an exchange.)]

2. ('47) 1947 All. L. Jour 592 (592) *Tejwant*

held that the transaction would be an *exchange* and not a sale for the purposes of pre-emption and that this would be so even if the purpose of adding the non-pecuniary portion of the consideration is to defeat the the right of pre-emption. According to the Lahore High Court, on the other hand, a permanent transfer of property for a sum of money *plus* something that is not money, does not, merely because of such addition, cease to be a sale.[3] The question must be decided by looking at the *substance* of the transaction. A transfer which is in substance a sale cannot, according to that Court, be converted into an exchange by the mere addition of a non-pecuniary consideration to the price, so as to defeat the right of pre-emption. If the value of the non-pecuniary consideration forms only a negligible portion of the total consideration, the transaction would be a sale.[4] If the parties, in substance, intended to make an exchange of properties, the mere fact that a small sum of money was paid by one to the other by way of adjusting the values, would not alter the nature of the transaction as an exchange.[5] In the undermentioned case[6] where a house worth really Rs. 1,500 was transferred for land worth Rs. 500 and cash Rs. 500, the transaction was held to be an exchange.

4. Mutual transfer of ownership necessary.—A transaction A and B is not an exchange unless:—

(1) there is a *transfer of ownership* by A to B, and

(2) there is a *transfer of ownership* by B to A.[1]

Where a transaction does not constitute a *transfer of property* at all it cannot be an exchange. Thus, a transaction which is a *family*

Singh v. *Ranvir Singh.*

[No hard and fast rule can be laid down as to when two transactions would amount to a sale or an exchange. The true test is furnished by the state of affairs on the date of the transactions. Where *A* sells his property to *B* for Rs. 2000 and on the same date *B* sells his property to *A* for Rs. 4000, which consists of Rs. 2000 for *A's* property, Rs. 1400 in satisfaction of a decree against *B* by *A's* mother and only Rs. 600 in cash, in the event of defect of title or loss of property *A* was to receive Rs. 2000 and not his property from *B*, it was held that the transaction was an exchange with a potentiality for sale only in certain contingencies.]

('38) 25 AIR 1938 All 229 (231) : 175 Ind Cas 618 (DB), *Ram Badan Lal* v. *Kunwar Singh.* (Rupees 6500 cash *plus* transfer of grove land.)

('37) 24 AIR 1937 All 665 (667) : 171 Ind Cas 577 (DB), *Randhir Singh* v. *Randhir Singh.*

('30) 17 AIR 1930 All 426 (427) : 124 Ind Cas 557 (DB), *Fateh Singh* v. *Prithi Singh.*

('07) 3 Nag L R 138 (139, 140), *Bapu* v. *Maruti.*

(Principles of the section were applied to a case from Berar though the Act was not then extended to Berar.)

*('28) 15 AIR 1928 All 204 (205) : 114 Ind Cas 43 (DB), *Rajjo* v. *Lajja.* (Property transferred for some cash *plus* charge against other property for maintenance.)

3. *('93) 1893 Pun Re No. 29, page 154 (157, 158) (DB), *Gul Mahomed* v. *Khan Ahmed.* (Per Plowden, J.)

4. ('36) 23 AIR 1936 Lah 234 (234) : 162 Ind Cas 913, *Nihalu* v. *Bhagwana.* (Sale of an "ahat" for Rs. 900 plus a bigha of land worth Rs. 300—*Held,* a sale.)

('34) 21 AIR 1934 Lah 823 (824) : 154 Ind Cas 643, *Allah Ditta* v. *Haji.* (Land worth Rs. 300 transferred for Rs. 140 due on account plus Rs. 142 cash plus land worth Rs. 18 only—*Held,* a sale.)

('15) 2 AIR 1915 Lah 218 (220) : 1915 Pun Re No. 82 : 31 Ind Cas 221 (DB), *Gul Muhammad* v. *Tota Ram.* (Rs. 3900 cash and land worth Rs. 1100—Not a sale.)

5. ('13) 19 Ind Cas 301 (302) (Lah), *Qazi* v. *Sharfa.* (1900) 1900 Pun Re No. 97 page 391 (392) : 1901 Pun L R No. 16, *Nathu Mal* v. *Har Dial.*

6. ('25) 12 AIR 1925 Lah 326 (327) : 86 Ind Cas 266, *Ismail Shah* v. *Saleh Mahomed.*

Section 118—Note 4

1. ('07) 11 Cal W N 342 (344) (DB), *Dina Nath* v. *Matimala Dassya.*

('20) 7 AIR 1920 Oudh 182 (183) : 60 Ind Cas 725, *Riazat Hussain* v. *Ali Bandi.*

arrangement is not an exchange.[2] As seen in Note 4 on S. 5 such arrangements are merely acknowledgments of pre-existing titles and do not involve any transfer of property from one person to another. Where A allowed B to cultivate his occupancy holding *x* and B allowed A to cultivate his occupancy holding *y* each finding the land of the other more conveniently situated than his own but the record remained unchanged and each paid rent for the land he cultivated in the name of the other, it was held that there was no transfer of *ownership,* by the one to the other and that the transaction was not an exchange.[3]

Where there is a transfer of ownership by *one* of the parties only, and not by the other the transaction is not an exchange, as there is no *mutual* transfer of ownership. Thus, where A and B hold decrees against each other and settle their claims by a document under which A transfers a property to B, and B merely gives up his claim against A under his decree, there is no mutual transfer of ownership and the transaction is not an exchange.[4] Similarly, where A *surrenders* his lease-hold interest to his landlord in consideration of another lease given by the latter of other property, there is no *mutual* transfer of ownership, inasmuch as a surrender is merely acceleration of the reversion and not a *transfer* of any interest.[5] So also, where a husband transfers land to his wife for use by her during her life-time, and he gives up her right to future maintenance.[6]

5. Partition is not exchange.—As seen in Note 4 on S. 5, a partition of undivided property between cosharers or co-owners operates as a "transfer of property" within the meaning of this Act. Each sharer gives up in favour of the others his interests in the portions of the undivided property other than that which falls to his share. In this sense it may be said that a partition operates as a mutual transfer of property. But a partition is nevertheless not an "exchange" within the meaning of the section.[1] The reason for this view has been given by Ameer Ali, J., in *Gyannessa* v. *Mobarakannessa*"[2] as follows:

> "Section 118....is not applicable to cases where some of the co-owners possessing an undivided share in several properties take by arrangement a specific property in lieu of their shares in all. Section 118, as its language shows, refers to cases where two persons owning two specific properties transfer or convey their respective ownership one to the other".

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2. ('28) 15 AIR 1928 All 641 (643) : 51 All 79 : 116 Ind Cas 861 (FB), *Ramgopal* v. *Tulsi Ram.*
3. ('23) 10 AIR 1923 Nag 144 (144, 145) : 83 Ind Cas 946, *Chimna Patil* v. *Indraraj Singh.*
4. ('07) 11 Cal W N 342 (344) (DB), *Dina Nath* v. *Matimala Dassya.*
5. (1900) 6 Cal W N 905 (910, 911) (DB), *Waliul Hassan* v. *Gopal Sarun.*
6. ('49) 36 AIR 1949 All 204 (205) (DB), *Md. Shujaat Walikhan* v. *Mt. Salim Jahan.*

[Transfer of share in villages in favour of wife in lieu of *kharch-i-pandan*—*Held* it was not possible for the vendee to transfer ownership of her *kharch-i-pandan* which in the nature of personal allowance—There was no mutuality about the transaction.]

('22) 9 AIR 1922 Mad 311 (313) : 45 Mad 612 : 68 Ind Cas 687 (FB), *Madam Pillai* v. *Badrakali Ammal.*

Section 118—Note 5

1. †('98) 25 Cal 210 (215) : 2 Cal W N 91 (DB), *Gyannessa* v. *Mobarakannessa.*
('09) 3 Ind Cas 247 (250) (DB) (Cal), *Satya Kumar* v. *Satya Kirpal.*
('15) 2 AIR 1915 Mad 103 (104) : 43 Mad 849 : 26 I.C. 455 (DB), *Alamelu Ammal* v. *Balu Ammal.*
2. ('98) 25 Cal 210 (215) : 2 Cal W N 91 (DB).

The reason so given does not, it is submitted, express the principle correctly. In the under-mentioned case[3] where A and B were co-owners of property *x*, and B was the sole owner of property *y*, and B transferred to A property *y* in consideration for A giving up his rights in property *x* in favour of B, it was held by the same High Court that the transaction was an exchange. Though B in the case was the owner of the specific property *y*, A was not the owner of the property *x* and under the section as interpreted in *Gyannessa's case*[4] the transaction would not be an exchange.

The true reason seems to be that the transaction contemplated by the section is a mutual transfer brought about in pursuance of an *agreement between the parties*[5] and a partition is not such a transaction. The right to partition is a *legal incident* of undivided property and the effect of the definition and specification of the shares in pursuance of that right operates as a mutual transfer between the parties. The mutual transfer of property in such cases is brought about as a consequence of the definition and specification of shares which is a legal incident of undivided property, and not as a consequence of an agreement to transfer property.

Where, under a compromise decree, co-owners of undivided property took specific portions therein in lieu of their undivided interest in the whole property, it was held by the Patna High Court that the compromise did not amount to any transfer of property at all and was therefore not an exchange.[6] Their Lordships purported to follow the decision in *Gyannessa's case* referred to above, though, actually, in that case, it was held that a partition was not an exchange, *notwithstanding it was a transfer of property.*

6. Two sale deeds, if may constitute exchange.—The fact that two deeds, one by A in favour of B and the other by B in favour of A, are described as sale deeds, is not conclusive on the question whether they are really sale deeds or constitute an exchange. The question must be decided having regard to all the circumstances of the case.[1] Where the deeds form part of the *same transaction,* and no cash consideration passes between the parties, the deeds really constitute only a mutual transfer of ownership of *one property for another,* and therefore constitute only an *exchange.*[2] The fact that the *value* of the properties mutually transferred were fixed by the parties does not necessarily make the transaction mutual sales of property, for exchanges of properties are made always only having regard to their value.[3] It has

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3. ('01) 5 Cal W N 724 (726) (DB), *Raj Narain v. Khobdari Rai.*
4. ('98) 25 Cal 210 (215) : 2 Cal W N 91 (DB), *Gyannessa* v. *Mobarakannessa.*
5. ('20) 7 AIR 1920 Oudh 182 (183) : 60 Ind Cas 725, *Riazat Husain* v. *Ali Bandi.*
6. ('37) 24 AIR 1937 Pat 232 (234) : 169 Ind Cas 741 (DB), *Mahomed Yahia* v. *Bibi Soghra.*

Section 118—Note 6

1. ('19) 6 A I R 1919 Lah 246 (247) : 50 Ind Cas 288, *Prabhu Dial* v. *Shadi Ram.*
2. ('38) 25 AIR 1938 All 229 (230) : 175 Ind Cas 618 (DB), *Ram Badan Lal* v. *Kunwar Singh.*

(1900) 1900 Pun Re No. 97, page 391 (393) : 1901 Pun L R No. 16, *Nathu Mal* v. *Har Dial.*

('19) 6 AIR 1919 Lah 246 (247) : 50 Ind Cas 288, *Prabhu Dial* v. *Shadi Ram.*

3. ('38) 25 AIR 1938 All 229 (231) : 175 Ind Cas 618 (DB), *Ram Badan Lal* v. *Kunwar Singh.*

('19) 6 AIR 1919 Lah 246 (247) : 50 Ind Cas 288 *Prabhu Dial* v. *Shadi Ram.*

[*But see* ('14) 1 A I R 1914 Mad 489 (492) : 37 Mad 423 : 15 Ind Cas 343 (DB), *Ariyaputhira Padayachi* v. *Muthukumaraswamy.* (Where values are fixed it is a sale—This decision is no longer good law in view of the Full Bench decision in AIR 1922 Mad 311 : 45 Mad 612.)]

been held by the High Court of Allahabad, that S. 92 of the Evidence Act does not, in view of the decision of their Lordships of the Privy Council in *Hanif-un-nissa* v. *Faiz-un-nissa*,[4] preclude the admissibility of extrinsic evidence to show that two documents purporting to be separate sale deeds are in reality part and parcel of the same transaction.[5] A contrary view has been held by the High Court of Bombay in the undermentioned case.[6] It is submitted that the Allahabad view is correct.

7. "Ownership of one thing for the ownership of another."—A thing is not necessarily "property." Things which are *res nullius* are not property. It is only a thing which is the subject of *ownership* by a person that is, in law, "property". The words "ownership of a thing" in the section are merely equivalent to "property." But the expression "ownership of a thing" is used instead of the word "property" in view of the words "neither *thing* or both *things* being money only." It would be an inappropriate use of words to say "neither *property* or both properties being money only."

The word "thing" includes both *tangible* and *intangible* things. Thus, the transfer of a proprietary interest in certain land for the equity of redemption in respect of another land is an "exchange" within the meaning of this section.[1] So is the transfer of a debt in consideration of the transfer of the equity of redemption in certain property.[2] So also is the transfer of a right to enforce a charge for maintenance for the transfer of ownership of the property.[3] A right to sue or to take proceedings cannot be the subject of ownership and cannot be transferred. A transfer of property in consideration of the transferee forbearing to sue to set aside a certain sale is not a mutual transfer of property and is therefore not an exchange.[4]

8. "Both things being money only."—See Note 2.

9. Mode of effecting exchange.—The second paragraph of the section provides that an exchange of property can be made in the same manner as a *sale* of such property. Thus, where the property is "goods" as defined in the Sale of Goods Act, 1930, an exchange can be effected in the same manner as a sale of goods under that Act, namely, by a *contract* for the exchange of the goods. Such a contract may be made in writing, or by word of mouth or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

Where the property sought to be transferred in completion of exchange is *immovable property*, the formalities necessary to be observed under s. 54 for a *sale* of such property must be observed. Otherwise no title will pass to the transferee under the transfer. The use of the word "only" in the section excludes the possi-

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4. ('11) 33 All 340 (341) : 38 Ind App 85 : 11 Ind Cas 398 (399) (PC).
5. ('27) 14 A I R 1927 All 696 (697) : 50 All 59 : 103 Ind Cas 399 (DB), *Kishen Lal* v. *Ram Lal*.
[*See also* ('29) 16 A I R 1929 All 63 (64) : 113 Ind Cas 753, *Gopi Ram* v. *Durjan*. (On the completion of the transaction of exchange, right to property becomes vested in the parties.)]
6. ('06) 8 Bom L R 283 (287) (DB), *Hanmant* v. *Gobind*. (Case before Transfer of Property Act applied to Bombay.)

Section 118—Note 7

1. ('15) 2 AIR 1915 Oudh 149 (150) : 18 Oudh Cas 109 : 30 Ind Cas 232 (DB), *Lachhman Prasad* v. *Fida Husain*.
2. ('14) 1 AIR 1914 Mad 489 (492) : 37 Mad 423 : 15 Ind Cas 343 (DB), *Ariyaputhira Padayachi* v. *Muthukumarasawmy*.
3. ('28) 15 AIR 1928 All 204 (205) : 114 Ind Cas 43 (DB), *Rajjo* v. *Lajja*.
4. ('31) 18 AIR 1931 Mad 140 (143) : 54 Mad 163 : 135 Ind Cas 17 (DB), *Venkata Jagannatha* v. *Venkata Kumara*.

bility of title being acquired to immovable property within the statutory period by any other process than that laid down in the section.[1] Thus, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, the transfer by way of exchange can be made only by a registered instrument.[2] And in the case of tangible immovable property of a value less than one hundred rupees, a transfer by way of exchange can be made either by a registered instrument or by delivery of the property.[3] Under the old rule of Hindu law, a transfer of property need not be in writing.[4] The Act has, in this respect, abrogated the said rule.

An exchange may be effected by a *single* instrument. It is not necessary that there should be two separate deeds of transfer of property.[5] Where, however, two separate documents are executed, each party acquires a good title as soon as the particular document in his favour is executed and, where necessary, registered. Thus, if A and B agree to execute separate sale deeds by way of exchange, title will pass to B as soon as A has duly executed his deed in favour of B, notwithstanding that B has not executed a similar deed in favour of A.[6]

A deed which simply recities a transaction of exchange that has already taken place and provides for a penalty for failure to carry out the arrangement as agreed, is not itself a deed of exchange required to be executed in the manner provided for by this section.[7]

10. Remedy of parties to exchange.—On the completion, by mutual transfer, of the transaction of exchange, the right to the properties respectively transferred, becomes vested in the parties to whom they have been transferred, and the party who has failed to obtain *possession* must sue for possession of the property and not for the specific performance of a contract, for a completed transaction of exchange is an

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Section 118—Note 9

1. ('16) 3 AIR 1916 Mad 214 (217) : 32 Ind Cas 5 (DB), *Ramanathan Chitty* v. *Ramasami Chetty.*
('11) 33 All 728 (731) : 12 Ind Cas 109 (110) (DB), *Rustam Ali* v. *Gaura.* (Where the law prescribes a particular mode of transfer, such transfer can be effected only in that mode.)
2. ('46) 33 AIR 1946 All 125 (125, 126) : 223 Ind Cas 194, *Debi Prasad* v. *Jaladhar Chaube.*
[A delivery to validate an exchange must be a physical and not a constructive delivery exchange of share of two pies in a mahal.]
†('16) 3 AIR 1916 Mad 821 (821) : 38 Mad 519 : 30 Ind Cas 408 (DB), *Chidambara Chettiar* v. *Vaidilinga Padayachi.*
('25) 12 AIR 1925 Mad 1174 (1174) : 90 Ind Cas 331, *Made Gouda* v. *Chenne Gouda.* (Formalities under the section cannot be avoided by calling a transaction by a particular name under Hindu law.)
('14) 1 AIR 1914 Lah 108 (108) : 24 Ind Cas 894, *Dalip Singh* v. *Munshi.* (Unregistered deed of exchange ineffective.)
('09) 4 Ind Cas 1004 (1004) (Lah), *Mir Haidar Shah* v. *Hussain Shah.* (Do.)
('27) 14 AIR 1927 Lah 90 (91) : 93 Ind Cas 843, *Jawala* v. *Wariyaman.* (Do.)
('40) 27 AIR 1940 Lah 311 (312) : *Babu* v. *Dalip Singh.* (Do.)
See clause (2) of S. 54. (Intangible property—Registered document necessary.)
('14) 1 AIR 1914 Mad 489 (492, 493) : 37 Mad 423 : 15 Ind Cas 343 (DB), *Ariyaputhira Padayachi* v. *Muthukumarasawmy.* (Do.)
3. ('26) 13 AIR 1926 Mad 543 (544) : 92 Ind Cas 672, *Kondayya* v. *Veeranna.*
('32) 19 AIR 1932 Oudh 135 (136) : 135 Ind Cas 689 (DB), *Indar Gir* v. *Balrampur Estate.*
4. (1862) 1 Mad C H R 100 (100) (DB), *Mantena Rayaparaj* v. *Chekuri Venkataraj.*
5. ('29) 16 AIR 1929 All 63 (64) : 113 Ind Cas 753, *Gopi Ram* v. *Durjan.*
6. ('20) 7 AIR 1920 Oudh 182 (184) : 60 Ind Cas 725, *Raizat Husain* v. *Ali Bandi.*
('29) 16 AIR 1929 All 63 (64) : 113 Ind Cas 753, *Gopi Ram* v. *Durjan.*
7. ('91) 1891 Pun Re No. 26 p. 148 (149), *Amiruddin* v. *Jamal-ud-din.*

executed contract and not an *executory* one.[1]

Where A, one of the parties to a contract of exchange, has performed his part of the contract by executing a transfer of his property to B, the other party, but the latter has not done his part of the contract by executing a transfer of his property to A, A's remedy is only to sue B for the *specific performance* of the contract or for damages for breach of the contract. He cannot sue B for *recovery of possession* of the property transferred to B.[2]

Where *neither* party has performed his part of the contract by executing a transfer of his property in favour of the other, it is open to either of them to sue for the specific performance of the contract. But they are not obliged to sue for specific performance, and if one of the parties has been deprived of possession of his property by the other, the former is entitled to sue for a declaration of title to and for possession of the property.[3]

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[a]119. If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.

Right of party deprived of thing received in exchange.

a. This section was *substituted* for the original section by Section 59 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929). For the text of the original section, see Note 1.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Is by reason of any defect in the title of the other party deprived of the thing."
4. Defect in title does not ipso facto render completed exchange inoperative.
5. Party deprived of the thing obtained in exchange—Nature of remedy.
6. Party failing to get possession of property exchanged—Nature of remedy.
7. Exchange void—Property transferred, if can be got back.
8. A contrary intention appearing from the terms of the exchange.
9. Limitation for enforcement of remedy.
10. Retrospective operation of new section.

TOPIC INDICATOR

Consequence of defective title. See Notes 4 and 5.
Measure of compensation. See Note 5.
Right against *bona fide* transferee. See Note 10.
Rule provided by the section is subject to express contract. See Note 8.
Undertaking as to title. See Note 2.

1. Legislative changes.—The old section ran as follows:

"In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation or to the return of the thing transferred by him."

Section 118—Note 10

1. ('29) 16 AIR 1939 All 63 (64) : 113 Ind Cas 753, *Gopi Ram* v. *Durjan*.
2. ('67) 3 Agra H C R 394 (395) (DB), *Nasir Ali* v. *Government*.
3. ('16) 3 AIR 1916 Cal 325 (326) : 33 Ind Cas 762 (DB), *Jaharaddi Mandal* v. *Debnath*.

The provision was defective in several respects. It related to the rights of a party deprived of the thing received in exchange, but did not provide for the rights of *transferees* from such party. Nor did it state whether the right could be exercised by the *heirs* of the party. It did not expressly state whether a return of the thing could be claimed by a party to the exchange against a *transferee* from the other party to the exchange. It gave a right to a party to a return of the thing transferred by him, but obviously the thing could not be returned unless the other party was in possession of it. The new section has now been framed so as to remove these defects.[1]

2. Scope of the section.—Under the old Common Law of England, there was implied in every exchange both a *condition* and a *warranty* as to title. The breach of the *condition* as to title gave a right of *re-entry* on the thing exchanged, and the breach of the warranty gave rise to a right to compensation for the damages sustained.[1] Further, the use of the word "give" or the word "grant" in any deed implied a covenant for title. By the Real Property Act, 1845,[2] it was provided that "an *exchange* or a *partition* of any *tenements* or *hereditaments*, made by deed executed after the 1st day of October 1845 shall not imply any condition in law; and the word 'give' or the word 'grant' in a deed, executed after the same day shall not imply any covenant in law, in respect of any tenements or hereditaments, except so far as the word 'give' or the word 'grant' may, by force of any Act of Parliament, imply a covenant." The Law of Property Act, 1925 (15 Geo. V, Ch. 20), has re-enacted the above provision in a wider form, so as to include *all* conveyances of land.[3]

So far as *sales* of immovable property are concerned, the law in this country does not differ from the English law. No *conditions* are implied in a sale, and S. 55, sub-s. (2) provides for statutory *covenants* of title somewhat similar to those provided for by S. 76 of the Law of Property Act, 1925, in England. So far, however, as *exchanges* are concerned, this section has adopted the old English Common Law rule and implies both a *condition* and a *warranty* of title, the one giving rise to a right of *re-entry* on the thing exchanged and the other giving rise to compensation for damages sustained.[4]

A sale of *movable* property in this country as well as in England, implies, both a *condition* and a *warranty* as to title.[5]

This section is not applicable to the Punjab as the Transfer of Property Act has not been extended to it. But the principles of this section have been applied to cases arising in that Province.[6]

3. "Is by reason of any defect in the title of the other party deprived of the thing."—The deprivation contemplated by the section is an eviction by a title paramount.

Section 119—Note 1

1. See Report of the Special Committee, 1927, printed at page 85 (131).

Section 119—Note 2

1. (1572-1616) 76 E R 1114 (1115) : 4 Coke 121, *Bustard's case*. (Cited in AIR 1917 Mad 390.)
2. 8 and 9 Victoria, Ch. 106, S. 3. Referred in A I R 1917 Mad 390.)
3. See Section 59 of that Act.
4. ('17) 4 AIR 1917 Mad 390 (392) : 35 Ind Cas 92 (DB), *Balusu Veeraraghavalu* v. *Boppana Manikyam*.
5. See Section 14 of the Sale of Goods Act, 1930. Sale of Goods Act, 1893 (56 & 57 Vict., Ch. 71).
   Halsbury, *Laws of England*, Vol. 25, pp. 153, 154.
6. ('34) 21 AIR 1934 Lah 934 (935), *Ganga Singh* v. *Ragho Ram*.
   ('17) 4 AIR 1917 Lah 164 (165) : 1917 Pun Re No. 51 : 41 Ind Cas 248 (DB), *Salabat* v. *Abdul Rahman*.

It has been held in the undermentioned case[1] by the Lahore High Court that the deprivation must be a *complete and permanent* dispossession of the thing. Where, therefore, A and B exchanged certain properties, and the property got by A was entered upon by a *mortgagee* from B's brother under a mortgage given before the date of exchange, it was held that A's dispossession was not complete and permanent, that A was still owner of the property and that the section had therefore no application.

4. Defect in title does not ipso facto render completed exchange inoperative.—The mere fact that there is a defect in the title of one of the parties to the exchange, does not render a completed exchange inoperative. If the other party is deprived of the property by reason of such defect, he would have the remedy provided for by this section, namely, to the return of the thing transferred by him or to compensation, but until such deprivation the exchange remains valid.[1] Where the manager of a joint Hindu family exchanged family property with a third person, it was held that, assuming that the manager was not authorised to make the exchange by reason of its not being advantageous to the family, the exchange could not be considered to be inoperative as long as the transaction was not challenged by other members of the family.[2]

Where the title of a party to an exchange is initially defective, but subsequent to the exchange, such party acquires a full title to the property, the other party is, by virtue of S. 53, entitled to the benefit of such acquisition.[3]

5. Party deprived of the thing obtained in exchange—Nature of remedy.—The party deprived of the thing obtained by him in exchange, by reason of the defect of title to the other party, is entitled to two remedies in the alternative:

(a) *Compensation* from the other party for the loss caused by the deprivation of the property.

(b) *Return of the thing* transferred by him, if it is still in the possession of the other party or his legal representative or a transferee from him without consideration.

(A) Compensation.

The *amount* of compensation would ordinarily be the value of the property of which the party was deprived. If the property has been valued in the deed of exchange itself, such value would furnish a basis for fixing the amount of compensation.[1]

(B) Return of the thing.

The right to a return of the thing transferred by way of exchange implies a *cancellation of the bargain*, so as to place the parties in the position they were before the transaction. *Where* a party is deprived of a *portion* of the property got by him, he must, if he wishes to obtain

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Section 119—Note 3

1. ('34) 21 AIR 1934 Lah 934 (935), *Ganga Singh* v. *Rago Ram.*

Section 119—Note 4

1. ('29) 16 AIR 1929 All 63 (64) : 113 Ind Cas 753, *Gopi Ram* v. *Durjan.*
†('40) 27 AIR 1940 All 478 (480) : 191 Ind Cas 385, *Alimullah* v. *Mahammad Khalil.*
2. ('29) 16 AIR 1929 All 63 (64) : 113 Ind Cas 753, *Gopi Ram* v. *Durjan.*
3. ('21) 8 AIR 1921 Cal 748 (749) : 60 Ind Cas 819 (DB), *Bhairab Chandra* v. *Jiban Krishna.*

Section 119—Note 5

1. ('17) 4 AIR 1917 Lah 164 (166) : 1917 Pun Re No. 51 : 41 I.C. 248 (DB), *Salabat v. Abdul Rahman.*

return of the thing transferred by him, *give up* the portion of the thing got by him of which he was not deprived. He cannot retain such portion and ask for other property equivalent to the portion lost, for he cannot in such a case be said to have cancelled the bargain. If he retains such portion, his only remedy is to claim *compensation* for the loss of the other portion.[2]

Where the guardian of a minor exchanges his property for another, and he is subsequently deprived of the property got by him, the remedy of the minor is not *to set aside* the alienation, but to claim under this section that the thing transferred by the guardian should be returned to him or that he should be compensated for the loss.[3]

6. Party failing to get possession of property exchanged—Nature of remedy.—Where a transaction of exchange is completed, the right to the property exchanged becomes vested in the party to whom it has been transferred. His remedy, if the other fails to give him possession thereof, is to *sue for possession* on the basis of his title. He cannot sue for the specific performance of a contract, as, after a completed exchange, there is no *executory* contract of which specific performance can be ordered.[1]

7. Exchange void—Property, transferred, if can be got back.—Where properties have been mutually transferred by parties by way of exchange, and the exchange is for some reason void, either of them can ordinarily recover from the other the property transferred by him. But where the exchange is void as being prohibited by law, the parties are *in pari delicto* and the Court will help neither party in getting back his property from the other, the maxim applicable in such a case being "*in pari delicto potior est conditio possidentis*" (in equal fault the condition of the possessor is more favourable.)[1]

8. A contrary intention appearing from the terms of the exchange.—The condition and warranty as to title is by virtue of this section implied in an exchange only where *no contrary intention* has been expressed in the terms of the exchange. In fact, the general rule regarding covenants in law is that they are intended to be operative only when the parties themselves have omitted to enter into any contract respecting the matters to which such covenants relate. The moment such a contract is entered into by the parties, the covenants in law cease to have any effect, even though the contract between the parties expressly provides only for *some* of the matters covered by the covenants in law and is silent as to the rest.[1] The principle that "an express covenant will do away the effects of all implied ones"[2] applies in such a case and the contract alone will

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2. ('99) 9 Mad L Jour 137 (138) (DB), *Veera Pillai* v. *Ponnambala Pillai*. (*Obiter.*)
('17) 4 AIR 1917 Lah 164 (165, 166) : 1917 Pun Re No. 51 : 41 Ind Cas 248 (DB), *Salabat* v. *Abdul Rahman*.
3. ('24) 11 AIR 1924 Bom 517 (518) : 76 Ind Cas 636 (DB), *Irangauda* v. *Ningappa*.

Section 119—Note 6

1. ('29) 16 AIR 1929 All 63 (64) : 113 Ind Cas 753, *Gopi Ram* v. *Durjan*.

Section 119—Note 7

1. ('21) 8 AIR 1921 Oudh 132 (132) : 61 Ind Cas 985, *Bisheswar* v. *Rachcha Ram*.

Section 119—Note 8

1. ('98) 21 Mad 69 (73) : 7 Mad L Jour 319 (DB), *Subramania Ayyar* v. *Saminatha Ayyar*.
[*See also* (1838) 44 R R 819 (823) : 4 Bing (N C) 678, *Line* v. *Stephenson*.]
2. (1599) 76 E R 1056 (1057) : 4 Co Rep 80b, *Nokes* v. *James*. (Cited in 21 Mad 69.)
(1799) 5 R R 521 (531) : 2 Bos & P 13, *Browing* v. *Wright*.
('98) 21 Mad 69 (73) : 7 Mad L Jour 319 (DB), *Subramania Ayyar* v. *Saminatha Ayyar*.

regulate and govern the liabilities of the parties.[3] In *Aspdin* v. *Austin*[4] Lord Denman observed:

> "Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all conditions by which they intend to be bound under that instrument..... It is one thing for the Court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as, upon a full consideration, the Court may deem fitting for completing the intentions of the parties, but which they, either purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written, the latter adds to the obligations by which the parties have bound themselves, and is, of course, quite unauthorized, as well as liable to great practical injustice in the application."

Thus, where in an exchange between X and Y, Y executed a security bond in favour of X binding himself to pay an amount not exceeding Rs. 4014-8-6 at the rate of Re. 1-4-0 per kuli for the land that might go out of X's possession, and X, being deprived of the land transferred to him, sued Y to recover his own land, it was held that the express terms of the above security bond superseded the rights of the parties under this section and hence X was not entitled to claim the return of the land given by him.[5]

The intention to abrogate the statutory implied covenant must, however, be clear and unambiguous. Where a clause in a deed of exchange was to the effect that "neither party would have any claim against the other contrary to the terms of the exchange," it was held that the clause did not amount to a clear expression of a contrary intention and did not take away the warranty implied by the section.[6]

9. Limitation for enforcement of remedy.—As has been seen in Note 2, this section implies a *condition* and a *warranty* as to title. A suit for a *return of the thing* exchanged can only be based on a breach of the *condition* as to title implied in the exchange, and will consequently be governed by Art. 143 of the Limitation Act.[1] A suit for *compensation* for the loss suffered by the deprivation of the thing exchanged is really a suit on a *contract to indemnify* and is governed by Art. 83 of the Limitation Act, or, where the exchange is by a registered document, by Art. 116 read with Art. 83 of that Act.[2]

Where there is an *express* contract in the deed of exchange between A and B that each should make good to the other any loss that may be

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3. ('98) 21 Mad 69 (73) : 7 Mad L Jour 319 (DB), *Subramania Ayyar* v. *Saminatha Ayyar.*
4. (1844) 114 ER 1402 (1407) : 5 Q B (N S) 671.
[*See* ('80) 2 Mad 239 (262) : 7 Ind App 83 (PC), *Marcar* v. *Sigg.*]
5. ('98) 21 Mad 69 (73) : 7 Mad L Jour 319 (DB), *Subramania Ayyar* v. *Saminatha Ayyar.*
6. ('17) 4 AIR 1917 Lah 164 (165) : 1917 Pun Re No. 51 : 41 Ind Cas 248 (DB), *Salabat* v. *Abdul Rahman.*

Section 119—Note 9

1. †('07) 30 Mad 316 (319) : 17 Mad L Jour 149 (DB), *Rajagopalan* v. *Somasundara Thambiran.* (In A I R 1920 Mad 634, this case is treated as overruled in A I R 1918 P C 151 : 46 Ind App 52 : 46 Cal 670 (P C) on a different point.)
('20) 7 AIR 1920 Mad 812 (812) : 42 Mad 690 : 51 Ind Cas 939 (DB), *Srinivasa Ayyangar* v. *Kottappakki Johnsa.*
2. ('08) 31 Mad 452 (453) : 41 I.C. 1121 (1121) (DB), *Srinivasa Raghava* v. *Rangaswami Aiyangar.*

sustained by the other, by giving him other property of equal value, a suit by A, on being deprived of his property, against B for compelling the latter to give him other property in performance of the contract is one for the *specific performance* of a contract and will be governed by Art. 113 of the Limitation Act.[3]

10. Retrospective operation of new section.—This section is not retrospective in its operation. It does not affect the terms and incidents of any exchange made or effected before the 1st April 1930 or any right, title, or obligation or liability acquired, created or incurred before such date.[1] Where the exchange was effected before 1st April 1930, but the deprivation of the thing exchanged by a party took place after 1st April 1930, the section that would govern the rights of parties would be the old section and not the new.[2]

In cases where the old section applies, it has been held by the Madras High Court that the remedy for return of the thing is available even against a *bona fide* purchaser for value from the other party to the exchange, on the ground that the transferee could have no better title than his transferor.[3] A contrary view has been taken by the Judicial Commissioner's Court of Nagpur[4] and by the High Court of Lahore,[5] namely that even under the old section, the remedy was not available against a *bona fide* purchaser for value.

So also it has been held in the undermentioned case[6] that the assignee of a party cannot maintain a suit against the other party for the return of the thing which his assignor had transferred to the other party, as the old S. 119 conferred rights on the party himself and not on the assignee.

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120. Save as otherwise provided in this Chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

Rights and liabilities of parties.

Synopsis

1. Principle and scope.
2. Right of pre-emption on exchange.
3. Lien for the purchase-money.

1. Principle and scope.—As has been seen in Note 1 on S. 118, an exchange is, except in certain respects, akin to a sale. Each party to an exchange can be regarded as a buyer in respect of the thing he receives and as a seller in respect of the thing he parts with. It, therefore, naturally

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3. ('99) 9 Mad L Jour 137 (140) (DB), *Veera Pillai* v. *Ponnambala Pillai.*
('88) 11 All 27 (31) : 1888 All W N 254 (FB), *Hari Tiwari* v. *Raghunath Tiwari.*

Section 119—Note 10

1. ('40) 27 AIR 1940 Mad 426 (427) : 191 Ind Cas 23, *Chidambara Thevar* v. *Swaminatha Rao.*
2. ('40) 27 AIR 1940 Mad 426 (427) : 191 Ind Cas 23, *Chidambara Thevar* v. *Swaminatha Rao.*
3. ('40) 27 AIR 1940 Mad 426 (427) : 191 Ind Cas 23, *Chidambara Thevar* v. *Swaminatha Rao.*
('20) 7 AIR 1920 Mad 812 (812) : 42 Mad 690 : 51 Ind Cas 939 (DB), *Srinivasa Ayyangar* v. *Kottappakki Johnsa.*
4. ('34) 21 AIR 1934 Nag 61 (62) : 30 Nag L R 208 : 148 Ind Cas 733, *Sujatkhan* v. *Nazafali.*
5. ('34) 21 AIR 1934 Lah 934 (935, 936), *Ganga Singh* v. *Ragho Ram.*
6. ('49) 36 AIR 1949 Mad 715 (715), *Narayanaswamy* v. *Muthurethnam.*

[S. 120 cannot be construed to confer on an assignee of the "party" within the meaning of S. 119 of the Transfer of Property Act, rights which S. 119 conferred on that party.]

follows that each party should have the rights and be subject to the liabilities of a buyer in respect of the thing he receives and those of a seller in respect of the thing he parts with. The present section accordingly defines the rights and liabilities of each party to an exchange in terms of buyer and seller.[1]

Where the subject-matter of the exchange is *immovable* property, the rights and liabilities of the parties will be governed by S. 55. Where the subject-matter of the exchange is *moveable* property, the rights and liabilities of the parties will be governed by Chap. VII of the Contract Act (IX of 1872), which is now substituted by the Sale of Goods Act (III of 1930).

The rights and liabilities of the buyer and the seller under S. 55 are subject to *contracts to the contrary*, and the rights and liabilities of the buyer and seller under the Sale of Goods Act are subject not only to express contracts to the contrary but also to the *course of dealing* or *usage* to the contrary. (See S. 62 of the Sale of Goods Act.)

Where, in the city of Tuticorin, there was a custom among cotton dealers that dealers delivering cotton to owners of cotton presses with or without a special contract were entitled to get in return the same quality and weight of duly pressed clean cotton, it was held that so soon as the cotton was delivered to the owners of the press, the property in the cotton passed to them and that if it was destroyed by fire thereafter, they should bear the loss, and should pay to the dealers the price of the cotton delivered by them.[2]

2. Right of pre-emption on exchange.—It has been seen in Note 3 on S. 118 that an exchange is not a "sale" and that consequently no right of pre-emption can be claimed on the basis that the transaction is a sale. But the question arises whether the fact that under this section the liability of a party who takes in an exchange is his liability *to the other* in a sale, will enable a third person to claim a right of pre-emption against such party. It has been held that it will not.[1] The reason is that the rights and liabilities of the buyer and seller, referred to in the section are those which are enforceable *inter se* between them and not those which *third parties* may have against the parties to the sale. Consequently, the liability of a party who takes in an exchange is his liability *to the other party to the exchange* and not to any third party.[2]

3. Lien for the purchase-money.—Under S. 55, sub-s. (6), clause (b) a buyer is entitled to a charge on the property sold, for the amount of the purchase-money he has paid to the seller in anticipation of delivery. But in an exchange there cannot arise any question of payment of purchase-money and therefore no party can claim under this section a charge over other's property as provided for in S. 55, sub-S. (6), cl. (b).[1]

Section 120—Note 1

1. ('23) 10 A I R 1923 Lah 456 (457) : 73 Ind Cas 709, *Kundan Lal* v. *Anund Sarup*. (Stamp duty on an exchange is same as that on a sale.)
2. ('88) 11 Mad 459 (468, 469) (DB), *Volkart Brothers* v. *Vettivelu Nadan*.

Section 120—Note 2

1. †('24) 11 AIR 1924 All 390 (391) : 46 All 359 : 79 I.C. 495 (DB), *Samar Bahadur* v. *Jit Lal*.
('37) 24 AIR 1937 All 665 (667) : 171 Ind Cas 577 (DB), *Randhir Singh* v. *Randhir Singh*.
2. ('24) 11 AIR 1924 All 390 (391) : 46 All 359 : 79 I. C. 495 (DB), *Samar Bahadur* v. *Jit Lal*.

Section 120—Note 3

1. ('16) 3 AIR 1916 Mad 821 (822) : 38 Mad 519 : 30 Ind Cas 408 (DB), *Chidambara Chettiar* v. *Vaidilinga Padayachi*.

For the same reason a party to an exchange cannot invoke the principle of S. 55, sub-s. (4), cl. (b) and claim a charge for any money that may be due under such exchange.[2]

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121. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

Exchange of money.

Synopsis

1. Scope of the section.
2. "Money."

1. Scope of the section.—The general principle is that a person cannot convey to another any better title to a *thing* than he himself has to it.[1] The principle does not, however, apply to money which is legal tender. The mere delivery of money to a person conveys a perfectly valid and indefeasible title to it.[2] There is, therefore, no question, in an exchange of money, of any party being deprived of the thing by reason of any defect in the title of the other party, and there is, therefore, no scope for the applicability of S. 119 to such a case.

But a person who gives money as legal tender is, on general principles, answerable for the money being really a legal tender as it purports to be.[3] This is the principle that is found enacted in this section.

2. "Money."—"Money" does not include anything which is not *legal tender*. It includes *current* coin of the realm and all things which are "accustomably transferable in the country in the same manner as *cash*."[1] *Badashahi* coins of Baroda have not by law been made legal tender in British India and are therefore not "money" in British India.[2]

It has been held in the undermentioned case[3] that it is not necessary in order to constitute a thing "money" that it should be a legal tender *receivable at a value in rupees fixed by law*. Where a coin has a *current value*, attaching to it as coin, and not merely by weighing them as lumps of gold or silver, it is money.

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2. ('12) 16 Ind Cas 109 (109) (DB) (Mad), *Krishna Nair* v. *Kundu Nair*.

[*See also* ('37) 24 AIR 1937 All 39 (42) : 166 Ind Cas 619 : ILR (1937) All 153 (DB), *Mt. Razina Khatun* v. *Mt. Abida Khatun*. (Provisions of Ss. 120 and 55 (4) (b) apply to private transfers and not to decrees based on award which itself contains no charge.)]

Section 121—Note 1

1. See Section 27 of the Sale of Goods Act, 1930.
2. †('01) 25 Bom 702 (705) : 3 Bom L R 392 (DB), *In re Mathur Lalbhai*.

('78) 1878 Pun Re No. 73, page 235 (237) (DB), *Mathra Das* v. *Ramanand*. (The title of the *bona fide* holder for consideration of a currency note does not become defective by reason of a defect in the title of a previous holder.)

('90) 1890 Pun Re No. 83, page 259 (261) (DB), *Kanshi Ram* v. *Secy. of State*.

[*See also* ('78) 3 Cal 379 (382) : 1 Cal L R 339 (DB), *Empress* v. *Jogessur Mochi*. (The change of Government currency note for money is not sale.)]

3. (1814) 15 R R 561 (564, 566) : 5 Taunt 488, *Jones* v. *Ryde*.

Section 121—Note 2

1. ('01) 25 Bom 702 (705): 3 Bom L R 392 (DB), *In re Mathur Lalbhai*.
2. ('01) 25 Bom 702 (705, 706) : 3 Bom L R 392 (DB), *In re Mathur Lalbhai*.
3. ('73) 5 N W P H C R 187 (188) (DB), *Queen* v. *Kunj Beharee*.

CHAPTER VII.

OF GIFTS.

122. "Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

"Gift" defined.

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

Acceptance when to be made.

If the donee dies before acceptance, the gift is void.

Synopsis

1. Scope of the section.
2. "Without consideration."
2a. Agreement to give.
3. Competency to give.
4. Competency to receive.
5. "Person."
5a. Gift to Hindu idol, etc.
6. "Existing moveable or immoveable property."
7. "Accepted by or on behalf of the donee."
8. Donor dying before acceptance.
9. Accepted gift is complete though deed is registered later. See Note 6 on Section 123.
10. Donee dying before acceptance.
11. Advancement.
12. Gift to a persona designata.
13. Gift for unlawful objects.
14. What passes under a gift.
15. Gift or trust.
16. Gift or sale.
17. Gift or will.
18. Gift is irrevocable. See S. 126.
19. Muhammadan law.
20. Hindu law.

TOPIC INDICATOR

Acceptance, when to be made. See Notes 8 and 10.
Conditional gift. See Note 1.
Donee, who can be. See Note 3.
Donor, who can be. See Notes 4 to 5a.
Gift of actionable claim. See Note 6 and S. 123, Note 14.
Imperfect gift—Donor not a trustee for donee. See Note 15 and S. 123, Note 13.
Subject matter of gift. See Note 6.
What is sufficient acceptance. See Note 7.

1. Scope of the section.—This section deals with gifts *inter vivos*. A gift is a *gratuitous* transfer of property from one person to another.[1] It is an act whereby anything is voluntarily transferred from the true possessor to another person, with the full intention that the thing shall not return to the donor and with the full intention on the part of the receiver to retain the thing entirely as his own without restoring it to the giver.[2] The fact that the transaction of gift was brought about by undue influence does not necessarily mean that it was not made "voluntarily."[2a] But a gift like any other transfer may be made either absolutely or conditionally. Where it is made conditionally the property can be recovered back by the donor on breach of the condition.[3] The

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Section 122—Note 1

1. "*Gifts* are always gratuitous; *Grants* are upon some consideration or equivalent"—2 Blackstone's Commentaries 440.
2. Halsbury, *Laws of England*, Vol. 15, page 399, Para. 791.
[*See also* ('29) 16 AIR 1929 P C 77 (80) : 114 Ind Cas 565 (PC), *Hari Ram* v. *Madan Gopal*. (In a gift the donor divests himself of property which passes away to the donee.)]
2a. ('45) 32 AIR 1945 P C 54 (56) : 72 Ind App 21 : ILR (1945) Bom 440 : ILR (1945) Kar (PC) 115 : 220 Ind Cas 28 (PC), *Ramchandra* v. *Laxman*.
3. †('27) 14 AIR 1927 P C 123 (124, 127) : 101 Ind Cas 363 (PC), *Mahant Rai* v. *Lachhmina Kunwar*.
('11) 11 Ind Cas 634 (635) (DB) (Cal), *Shyama Charan* v. *Naba Chandra*. (Conditional bequest.)
†('36) 23 AIR 1936 All 197 (199, 200) : 58 All 687 : 161 Ind Cas 507 (DB), *Harish Chandra* v. *H. D. Sewak Mandal*. (Per-

mere fact that a donee happens to be a Hindu female cannot lead to an inference that the gift is a gift for life and not an absolute gift. Each document has to be construed on its own terms.[3a] As to the validity of conditions against alienation, see S. 10. A gift which is complete and absolute at the time it was made cannot, however, be modified by conditions subsequently added.[4]

A *release* of a security in favour of the mortgagor is not a *transfer* of property and is not a gift within the meaning of this section.[5]

A gift of the income of a certain property without any limitation is equivalent to a gift of the property itself.[6]

In the undermentioned case,[7] a relinquishment by one of the two coparceners forming a joint Hindu family, of all his interests in the joint immovable property, was held to amount to a gift. It is doubtful whether this view is correct. (See S. 5, Note 4.)

2. "Without consideration."—This is an essential characteristic of a gift. The word "consideration" is not defined in this Act, but is defined in the Contract Act, 1872. Section 4 provides that the chapters and sections of this Act which relate to *contracts* shall be taken as part of the Contract Act. A gift cannot be said to relate to contracts inasmuch as there cannot be a contract without consideration. The definition of "consideration" in the Contract Act will not, therefore, necessarily apply to interpret the word "consideration" in this section by virtue of S. 4.[1] But it has been held that it has the same meaning under this section as it has under the Contract Act. Thus, it has been held that a transfer in consideration of natural love and affection (which is excluded from the definition of "consideration" under the Contract Act) is only a gift. So also is a transfer in consideration of an expectation of spiritual and moral benefit.[2] But the abandonment of a person's right to future maintenance is a "consideration" within the meaning of the Contract Act and a transfer for such consideration is not a gift.[3]

A transfer purported to be made *for a consideration* will not be a gift by reason merely of the fact that the consideration did not pass or

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formance of conditions rendered impossible—Gift fails.)

('28) 15 AIR 1928 All 699 (702) : 117 Ind Cas 351 (DB), *Hira Mani* v. *Anmol Singh*. (Gift can be made with defeasance clause—Consent of donee is unnecessary for the validity of the clause.)

3a. ('44) 31 AIR 1944 Pat 371 (373) : 23 Pat 404 : 218 Ind Cas 196 (DB), *Haripada* v. *Ichhamayee*.

[Nor will that conclusion necessarily follow from the fact that no estate of inheritance is expressly conferred. Use of word 'malik mastakil' would suggest absolute estate.]

4. ('84) 6 All 313 (321) : 11 Ind App 44 (PC), *Ram Sarup* v. *Bela*.

5. ('26) 13 AIR 1926 Cal 170 (171) : 91 Ind Cas 757 (DB), *Mahim Chandra* v. *Ram Dayal*.

6. ('46) 33 AIR 1946 All 121 (124) : 221 Ind Cas 643, *Mt. Abbasunnisa* v. *Mt. Nisar Fatma*.

[Gift by Pardanashin lady in favour of person standing in position of confidence to her—Donee to prove donor's knowledge about nature of transaction and independent advice.]

See Note 12 on S. 8.

7. ('43) 30 AIR 1943 Sind 177 (181) : ILR (1943) Kar 227 : 210 Ind Cas 35 (DB), *Assudibai Sahijram* v. *Haribai Vasudev*. (It was not a partition—Such relinquishment should be by a registered instrument.)

Section 122—Note 2

1. See Note 3 on S. 4.

2. ('29) 16 A I R 1929 Pat 591 (592, 593) : 125 Ind Cas 127 (DB), *Debi Saran* v. *Nandalal*.

3. ('22) 9 AIR 1922 Mad 311 (311) : 45 Mad 612 : 68 Ind Cas 687 (FB), *Madam Pillai* v. *Badrakali Ammal*. (See the Order of Reference.)

that it is void. The transfer in such case is void. But a transfer which purports to be a sale may be shown to be only really a gift.[4]

The *motive* for a transfer is not the same thing as the consideration for it. A transfer for services rendered will, if the services are merely the motive for the transfer, be a gift.[5] A settlement on a wife will be a gift even if the marriage proves to be invalid.[6]

Where there is any consideration for a transfer it is not a gift.[7]

2a. Agreement to give.—An agreement to make a gift, being one without consideration is not enforceable as a contract. Consequently, the intended donee cannot compel the donor to make the gift, or, where the gift is incomplete, to complete the gift.[1] "If you want the assistance of the Court," said Lord Eldon in *Ellison* v. *Ellison*,[2] "to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*; as upon a covenant to transfer stock, etc., if it rests in covenant, and is purely voluntary, this Court will not execute that voluntary covenant."

3. Competency to give.— *Prima facie* every one who is *sui juris* can dispose of by way of gift any property to which he is absolutely entitled.[1] An alien can dispose of his property in the same way as a British subject.[2] A corporation though a person in the eye of the law is the creature of and derives its power from the statute creating it and cannot make gifts except in conformity with the provisions of such statute.[3]

By virtue of S. 7, it is only a person *competent to contract* that can make *any* transfer of his property. Consequently, a minor,[4] or other person incompetent to contract, cannot make a valid gift.

Persons in fiduciary positions such as trustees cannot, unless they are authorised to do so, make gifts of the property vested in them on behalf of others.[5]

A *pardanashin* lady is not a person incompetent to contract, and is not competent to make a gift. But it is necessary to show very clearly that the lady fully understood the transaction when she made the gift.[6]

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4. ('11) 33 All (341) : 38 Ind App 85 : 11 Ind Cas 398 (399) (PC), *Hanif-un-nissa* v. *Faiz-un-nissa*. (27 All 612 reversed.)
5. ('28) 15 AIR 1928 Bom 250 (252) : 109 Ind Cas 149 (DB), *Hiralal* v. *Gourishankar*.
†('10) 34 Bom 287 (290) : 5 Ind Cas 599 (600) (DB), *Madhavrao Moreshwar* v. *Kashibai Dattubhai*.
('18) 5 A I R 1918 Mad 458 (458) : 42 Ind Cas 265 (DB), *Ranga Rao* v. *Kitori Ammal*.
[*See also* ('28) 109 Ind Cas 562 (563) (Lah), *Farangi* v. *Sukha*.]
6. ('32) 19 AIR 1932 P C 34 (35) : 135 Ind Cas 753 (PC), *Gopal Saran Narain Singh* v. *Sita Devi*.
7. ('28) 15 AIR 1928 All 500 (503) : 50 All 818 : 115 Ind Cas 114 (DB), *Anrudh Kumar* v. *Lachmi Chand*. (Promise to discharge the debt of the transferor is a valid consideration and a transfer for such consideration is not a gift.)

Section 122—Note 2a

1. Halsbury, *Laws of England*, Vol. 15, para. 852.
(1886) 55 L J Q B 462 (463) : 17 Q B D 442 : 34 W R (Eng) 775, *Harding* v. *Harding*.
(1856) 52 E R 1078 (1080, 1081) : 22 Beav 184 : 4 W R (Eng) 523 : 111 R R 323, *Denning* v. *Ware*.
(1845) 50 E R 79 (83) : 8 Beav 201 : 14 L J Ch 145 : 9 Jur 384, *Ward* v. *Audland*.
2. (1802) 31 E R 1243 (1246) : 6 Ves 656 : 6 R R 19 : 2 Wh & Td 7th Ed. 835.

Section 122—Note 3

1. Halsbury, *Laws of England*, Vol. 15, para. 792.
2. Halsbury, *Laws of England*, Vol. 15, para. 793.
3. Halsbury, *Laws of England*, Vol. 15, para. 795.
4. ('03) 30 Cal 539 (547, 548) : 30 Ind App 114 (PC), *Mohori Bibee* v. *Dhurmodas Ghose*.
5. Halsbury, *Laws of England*, Vol. 15, para. 800.
6. †('22) 9 AIR 1922 P C 14 (15) : 43 All 525 : 48 Ind App 381 : 64 Ind Cas 559 (PC), *Kamawati* v. *Digbijai Singh*.

In the undermentioned case,[7] where a gift was alleged to have been made by an old and infirm woman, it was held that the burden of proving that it was executed with full knowledge of its contents and that she did so willingly without any pressure or undue influence is on the donee.

A leper is not incompetent to make a gift under the Hindu law.[8]

As to the powers of a father or manager or of a coparcener of a Hindu family or of a woman having a limited estate under the Hindu law to make a valid gift, see Note 7 on section 7.

See also Notes on section 7 generally.

4. Competency to receive.—In general all persons whether *sui juris* or not are competent to take a transfer of property[1] though a person who is not *sui juris* at the time of the gift may, after he becomes *sui juris*, avoid the gift.[2] A person who is *legally disqualified* from being a transferee cannot, however, take a transfer.[3]

The donee must be alive at the date of the gift. The representatives of a person dead at the date of the gift cannot take under it.[4] Under the Hindu law also the donee must be in existence at the time the gift takes effect.[5]

An agent of a person is not incapacitated from taking a gift from his principal[6] nor is there any prohibition in law against a gift being validly made to an idiot.[7]

Where a gift is made to a class, some of whom are not in existence at the date of the gift, it enures to the benefit of such of them as are capable of taking.[8]

5. "Person."—The donee must be an ascertained or ascertainable person.[1] The "public" cannot be a donee under this section, though apart

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('34) 21 AIR 1934 P C 208 (209) : 151 Ind Cas 45 (PC), *Kalyan Mal* v. *Ahmad Uddin Khan.*

†('14) 36 All 81 (89) : 41 Ind App 23 : 21 Ind Cas 985 (989) (PC), *Kali Bakhsh* v. *Ram Gopal.*

('91) 14 All 8 (12) : 1891 All W N 213 (DB), *Mariam Bibi* v. *Sakina.*

†('12) 39 Cal 933 (946, 947) : 16 Ind Cas 110 (115), *Kamini Dossee* v. *Krishna Chandra.*

('35) 22 AIR 1935 Cal 671 (673) : 159 Ind Cas 133 (DB), *Benoy Krishna* v. *Panchanan.*

('25) 12 AIR 1925 Lah 196 (198) : 5 Lah 465 : 85 Ind Cas 169 (DB), *Sri Ram* v. *Nand Kishore.*

*('25) 12 A I R 1925 P C 204 (209) : 28 Oudh Cas 338 : 47 All 703 : 52 Ind App 342 : 89 Ind Cas 649 (PC), *Fari-unnissa* v. *Mukhtar Ahmad.*

Also see S. 7 Note 3; S. 58 Note 22 and S. 126 Note 10.

7. ('12) 15 Ind Cas 529 (532) (DB) (Bom), *Rajaram* v. *Khandu Balu.*

8. ('66) 6 Suth W R 68 (68) (DB), *Samachurn Audicaree Byragee* v. *Roopdass Byragee.*

Section 122—Note 4

1. See S. 6, Note 36 and S. 7, Note 8. Halsbury, *Laws of England*, Vol. 15, Para 801.
2. Halsbury, *Laws of England*, Vol. 15, Para. 803.
3. See Note 36 on Section 6.
4. Halsbury, *Laws of England*, Vol. 15, Para. 806.
5. *('72) 18 Suth W R 359 (367) (PC), *Tagore* v. *Tagore.* (Child in embryo is a person in existence.)

†('70) 4 Beng L R (OC) 103 (191) (DB), *Tagore* v. *Tagore.*

('33) 20 AIR 1933 Cal 529 (531) : 60 Cal 706 : 146 Ind Cas 312, *Kandarpahoman* v. *Akshayachandra.*

('25) 12 AIR 1925 Lah 648 (649) : 89 Ind Cas 326 (DB), *Bhagwan Singh* v. *Kirpa Ram.*

Also see S. 2, Note 10 and S. 13, Note 5.

6. ('03) 25 All 358 (364) : 1903 All W N 70 (DB), *Phul Chand* v. *Lakhu.*
7. Marsh 357 (360), *Kooldeb Narain Shahee* v. *Wooma Coomaree.*
8. See Notes on Section 15.

Section 122—Note 5

1. ('03) 13 Mad L Jour 364 (366, 367) (DB), *Pallaya* v. *Ramavadhanulu.*

from this section, there may be a dedication in favour of the public.[2] (See also Note 5a.) An unregistered society is a "person" and gift can be made in its favour.[3] (See section 5, Note 3.)

The word "person" will include "persons." A gift can, therefore, be made to two or more persons. Under the English law a gift in favour of two or more persons makes them *joint* tenants. In this country, the presumption is that they take only as tenants in common.[4] Where a gift is to two persons one of whom is capable of taking and the other is not, the former will take the whole of the property.[5]

5a. Gift to Hindu idol, etc.—It is settled that a gift or dedication can be validly made to a Hindu idol whether consecrated or to be consecrated.[1] But there is a conflict of opinion as to whether such a gift or dedication is a gift within the meaning of this Act, and several views have been expressed. The first view is that though a Hindu idol is a *juristic* person capable of holding and acquiring property,[1a] it is not a "living" person within the meaning of S. 5 and, consequently, the gift is not a "transfer of property" at all and is therefore not within this section.[2] The second view is that the notion of *acceptance* by a deity of worldly goods is contrary to Hindu religion and that, therefore, a gift to an idol is not a gift within the meaning of this section as it lacks the element of acceptance, which is an essential requisite for a valid gift.[3] A third view is

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2. ('03) 13 Mad L Jour 364 (366, 367) (DB), *Pallaya* v. *Ramavadhanulu.*
3. ('27) 14 AIR 1927 All 789 (789) : 103 Ind Cas 45 (DB), *Bhagwandas Singh* v. *Pinjra Pole Pashu Anathalaya.*
('35) 22 AIR 1935 All 872 (873) : 158 Ind Cas 762, *Mahabir* v. *Anjuman Wazifatul Muslimin.* (Gift to Anjuman held valid especially where it was made to a definite person on behalf of the Anjuman. AIR 1917 All 94 distinguished.)
[*See however* ('17) 4 AIR 1917 All 94 (94) : 38 Ind Cas 183 (DB), *Mathura Kuer* v. *Dharam Samaj.* (Deed purporting to transfer property to "Dharam Samaj," which was not registered under Societies Registration Act (XXI of 1860)—*Held,* transfer was invalid as there was no person or body who were capable of having the property transferred.)]
4. See Note 6 on Section 45.
('17) 4 AIR 1917 Mad 484 (484) : 34 Ind Cas 744 (DB), *Kapini Gowndan* v. *Saranga-pany.*
('26) 13 AIR 1926 Nag 48 (49) : 89 Ind Cas 991, *Mt. Jirabai* v. *Mt. Ramdularibai.*
[*See also* ('21) 8 AIR 1921 Cal 175 (176) : 62 Ind Cas 436 (DB), *Hemantha Kumar Bahaduri* v. *Sudhansu Gobinda Choudhury.* (Although an annuity to two persons should ordinarily be construed to mean that on the death of one of them the other should get a proportionate amount, where there are indications of a contrary intention the gift may be taken as a joint gift.)]
5. ('89) 16 Cal 677 (682) : 16 Ind App 44 (PC), *Nandi Singh* v. *Sita Ram.*

Section 122—Note 5a

1. *('10) 37 Cal 128 (140, 141) : 3 Ind Cas 642 (647, 656, 660) (FB), *Bhupati Nath* v. *Ram Lal.*
('14) 1 AIR 1914 Cal 200 (201) : 41 Cal 57 : 20 Ind Cas 78 (DB), *Mohatap* v. *Kali Pada.*
('81) 6 Cal 106 (118), *Rajender Dutt* v. *Sham Chand.*
†('24) 11 AIR 1924 All 357 (359) : 46 All 130 : 78 I.C. 1018 (DB), *Sarab Sukh* v. *Ram Prasad.*
('11) 33 All 253 (254) : 8 Ind Cas 832 (832) (DB), *Chaturbhuj* v. *Chatterjit.*
('23) 10 AIR 1923 Cal 60 (62) : 72 Ind Cas 1026 (DB), *Rambrahma* v. *Kedar Nath.*
1a. ('98) 25 Cal 112 (127), *Bhuggobutty* v. *Gooroo Prosonno.*
('88) 12 Bom 247 (264, 265) (DB), *Manohar* v. *Lakhmiram.*
('14) 1 AIR 1914 Oudh 255 (259) : 24 Ind Cas 72 (DB), *Sitaramji* v. *Jadunath.*
See also Note 3 on Section 5.
2. ('19) 6 AIR 1919 Mad 809 (811) : 42 Mad 440 : 49 Ind Cas 742 (DB), *Ramalinga* v. *Shivachidambara.*
†('27) 14 AIR 1927 Mad 636 (638) : 50 Mad 687 : 103 Ind Cas 302 (FB), *Narasimha* v. *Venkatalingum.*
3. ('26) 13 AIR 1926 Nag 469 (470) : 96 Ind Cas 1004, *Bhopat Rao* v. *Shri Ramchandra.*
†('19) 6 AIR 1919 Mad 809 (810, 811) : 42 Mad 440 : 49 Ind Cas 742 (DB), *Ramalinga* v. *Sivachidambara.*
*('10) 37 Cal 128 (155) : 3 I. C. 642 (648) (FB), *Bhupati Nath* v. *Ram Lal.* (25 Cal 405 : 29 Cal 260 : 30 Cal 521, over-

that a gift or dedication to an idol operates only as *renunciation* by the donor of the property and not as a *transfer* by the donor. Consequently, it is not a gift within the meaning of this section.[4] A fourth view is that a gift to an idol is a gift under this section, the acceptance being made by the shebait of the idol.[5]

A dedication by a Hindu for a religious or charitable object is not a *gift* as defined in this section. Such a dedication is permitted under the Hindu law and its validity is not affected by the provisions of this Act. Hence, a dedication of a house for a choultry does not require registration under S. 123.[5a] (See also Mulla, *Principles of Hindu Law*, 9th Edn., 1940, pp. 474-475 and Mayne, *Hindu Law and Usage*, 10th Edn., 1938, pp. 922-923.)

A gift must be for definite purpose. A gift to *dharma*[6] or for wor-

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ruled.)
('24) 11 AIR 1924 Nag 254 (255) : 20 Nag L R 60 : 79 Ind Cas 173, *Vithal Das Marwari* v. *Goma*. (AIR 1919 Mad 809 : 42 Mad 440, referred.)

4. *('10) 37 Cal 128 (155) : 3 Ind Cas 642 (659) (FB), *Bhupati Nath* v. *Ram Lal*.
[*See* ('30) 17 AIR 1930 Pat 610 (612, 613) : 128 Ind Cas 791 (DB), *Harihar Prasad* v. *Sri Gurunath Saheb*. (Oral dedication of immovable property in favour of an idol—In order to constitute a valid gift and dedication, there must be real sankalp and samarpan, that is, the endowed property must be completely given away and the owner must completely divest himself of its ownership.)
('34) 21 AIR 1934 Pat 612 (614) : 13 Pat 356 : 155 Ind Cas 756 (DB), *Birendra Keshri* v. *Bahuria Saraswati*. (Do.)
('25) 12 AIR 1925 Cal 996 (1001) : 88 Ind Cas 616 (DB), *Gopal Jew* v. *Radha Benode*.]

5. ('42) 29 AIR 1942 Cal 386 (389) : 201 Ind Cas 557 (DB), *Purna Chandra* v. *Kali Pada*.
†('36) 23 AIR 1936 Cal 556 (561) : 63 Cal 1098 : 167 Ind Cas 713 (DB), *Bhupati Nath* v. *Basanta Kumari*.
('44) 31 AIR 1944 Nag 33 (35, 36) : I L R (1944) Nag 81 : 212 Ind Cas 312 (FB), *Chief Controlling Rev. Authority, C. P. & Berar* v. *Mt. Sarjubai*. (Case under Stamp Act (1899)—Deed transferring certain property directly to idol of deity —Heirs of owner of property (his widow and reversioners) declaring in the instrument that they give up all their rights in idol's favour and that from the day of instrument, idol would be owner of property—*Held* that complete dedication of property in no way differed from a gift and the deed in question was a gift and not a settlement as the transaction did not involve any trust. AIR 1936 Cal 556 : 63 Cal 1098 relied on.)
('16) 3 AIR 1916 All 302 (303) : 36 Ind Cas 989 (DB), *Mannu Lal* v. *Radha Kishen*.
†('38) 25 AIR 1938 Cal 490 (494, 496) : 179 Ind Cas 847, *Bhabatarini Debi* v. *Ashmantara Debi*.
('31) 18 AIR 1931 Oudh 14 (14) : 131 Ind Cas 442 (DB), *Shaukat Begam* v. *Sri Thakurji*.
('28) 15 AIR 1928 All 699 (702) : 117 Ind Cas 351 (DB), *Hiramani Singh* v. *Anmol Singh*. (A gift by way of sankalp at the time of nuptials.)
[*See also* ('44) 31 AIR 1944 Cal 157 (158) : 213 Ind Cas 234, *Amodelal* v. *Girija Sanker*. (Property endowed by will to family deity—Minor daughter appointed shebait—During daughter's minority her mother to act as guardian and perform debsheba—Mother held competent to accept and did accept gift of property to deity.)]

5a. ('44) 31 AIR 1944 Sind 16 (18) : I L R (1943) Kar 397 : 211 Ind Cas 64 (DB), *Kishindas Jaikishindas* v. *Harkishindas Girdhardas*.
[*See also* ('44) 31 AIR 1944 Nag 33 (35, 36) : ILR (1944) Nag 81 : 212 Ind Cas 312 (FB), *Chief Controlling Rev. Authority, C. P. & Berar* v. *Mt. Sarjubai*.
('04) 6 Bom L R 56 (57) (DB), *Advocate-General* v. *Strangman*.]

6. *('99) 23 Bom 725 (735) : 26 Ind App 71 (PC), *Runchordas* v. *Parbatibai*.
('12) 1912 Pun Re No. 78 : 14 Ind Cas 247 (247) (DB), *Gurudit Singh* v. *Sher Singh*.
†('33) 20 AIR 1933 Lah 833 (835) : 14 Lah 827 : 146 Ind Cas 1013 (DB), *Narain Das* v. *Brij Lal*.
('90) 14 Bom 482 (487), *Cursandas* v. *Vundravandas*.
('94) 18 Bom 136 (140) (DB), *Devashankar* v. *Motiram*.
('02) 26 Bom 632 (636) : 3 Bom L R 902, *Bai Chandunbai* v. *Dady*. (Bequest to some one or more charitable educational or other philanthropic institution or institutions is void for uncertainty.)
('07) 30 Mad 340 (341) : 17 Mad L Jour 379 (DB), *Parthasarathi* v. *Thiruvengada*. (Subramaniya Ayyar, J., contra.)
('10) 6 Ind Cas 141 (144) (DB) (Cal), *Kandarpa* v. *Jogendra*.

ship of God without naming the deity[7] is void for vagueness and uncertainty of the object of the gift.

(See also section 5, Notes 2 and 3 and section 18 Notes 3 and 4.)

6. "Existing moveable or immoveable property."—This chapter, unlike chapters III, IV and V, is not limited to immovable property. It deals with gifts of both movable and immovable property.

A gift can be made only of *existing* property, and the same must be transferable under S. 6. Thus, there cannot be a gift of property that may come into existence in the future, or of the things referred to in section 6.

An actionable claim is an existing property and can be validly gifted.

It has been held in the undermentioned case[1] that, by usage, a Goswami of the Ballavacharya sect has an interest in the property held by him (including the temple and the idol) of which he can make a gift.

A gift of a non-transferable occupancy holding cannot be questioned by the heirs of the donor himself on the ground of its non-transferability, though such transfer may not be binding on the landlord.[2]

A gift of a mortgage is a gift of immovable property within the meaning of this section.[3]

7. "Accepted by or on behalf of the donee."—The acceptance of a gift is an essential element of a gift whether under the English law or under this Act. But, under the English law, the acceptance by the donee is *presumed* until his dissent is signified,[1] and this is so even if the donee is not aware of the gift or even if the gift is onerous.[2] The presumption is made on the principle that a man may be fairly presumed to assent to that to which he, in all probability, would assent if the opportunity, of so doing were given to him. The presumption may be rebutted, and a donee on becoming aware of the gift is entitled to repudiate it.[3] The English rule was applied to a case arising in this country before the Act.[4]

Under this section, however, the law is different.[5] There must be actual acceptance in fact, though it need not be *express*.[6] From the conduct of the donee Courts may, of course, draw a presumption that

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7. ('19) 6 AIR 1919 Cal 199 (199) : 46 Cal 951 : 51 Ind Cas 215 (DB), *Chandi Charan* v. *Haribola.*
('11) 33 All 793 (795) : 11 Ind Cas 260 (261) (DB), *Phundan Lal* v. *Arya Priti Nidhi Sabha.*

Section 122—Note 6

1. ('15) 2 AIR 1915 All 44 (49) : 28 Ind Cas 715 (DB), *Gopal Lalji* v. *Girdhar Lalji.*
2. ('18) 5 A I R 1918 Cal 615 (616, 617) : 45 Cal 434 : 41 Ind Cas 878 (DB), *Behari Lall* v. *Sindhubala.*
3. ('21) 8 AIR 1921 Mad 137 (138) : 44 Mad 196 : 61 Ind Cas 461 (DB), *Perumal Ammal* v. *Perumal Naicker.* (Gift of mortgage therefore must be made by registered instrument under S. 123.)

Section 122—Note 7

1. Halsbury, *Laws of England,* Vol. 15, para. 830.
('33) 20 AIR 1933 Cal 488 (489) : 143 Ind Cas 757 (DB), *Sarba Mohan* v. *Manhoman.*
2. Halsbury, *Laws of England,* Vol. 15, para. 830.
3. Halsbury, *Laws of England,* Vol. 15, para. 830.
4. Marsh 357 (360) : 2 Hay 370, *Kooldebnarain Shahee* v. *Wooma Coomaree.*
5. †('39) 26 AIR 1939 Mad 290 (290) : 183 Ind Cas 631, *Papathi Ammal* v. *Doraiswamy.*
('32) 19 AIR 1932 All 444 (445) : 54 All 534 : 137 Ind Cas 756 (DB), *Anandi Devi* v. *Mohan Lal.*
6. ('32) 19 AIR 1932 All 444 (445) : 54 All 534 : 137 Ind Cas 756 (DB), *Anandi Devi* v. *Mohan Lal.* (AIR 1917 All 43 : 39 All 700 not approved.)

he accepted the gift.[6a] But this is a presumption of *fact* and not of *law* as in England. Where, for instance, it is shown that the donee was not aware of the gift, it cannot be presumed that he accepted the gift, and there is no valid gift.[7] The mere custody of the gift-deed by the donor cannot lead to an inference that the donee did not accept the gift, especially where the entire conduct of the donee shows that he accepted the gift and the gift-deed was kept in a place where the donee had also access.[7a] On the other hand the mere possession of the gift-deed by the donee will not be conclusive proof that the gift deed was accepted by him. Thus it is possible that he may have taken possession of the document without the knowledge and intention of the donor.[7b]

The acceptance may be made *by* or *on behalf of the donee*. An agent may accept the gift on behalf of his principal. A guardian of a minor or other person incompetent to contract may accept a gift in favour of such person on his behalf.[8] It has even been held in the undermentioned case[9] that the minor himself is competent to personally accept a gift without a guardian.

The acceptance of a gift which is onerous is sufficient to constitute a valid gift. It is not necessary that the onerous conditions also should be specifically accepted.[10] But this would not disable the donee from setting up the invalidity of the burden. Thus, where mortgaged property was gifted by A to his sons, the sons were held entitled to question the validity of the mortgage.[11]

8. Donor dying before acceptance.—A gift must be accepted during the lifetime of the donor and while he is still capable of giving. The principle is that it is essential that there should be a transfer of the ownership during the lifetime of the donor;[1] and this will happen in a gift, only when it is accepted by the donee. If he dies or ceases to be capable of giving, before acceptance, the gift becomes void. But where it is *accepted* during the lifetime of the donor, the deed of gift, where there is one, might be got registered after his death.[2]

6a. ('33) 20 AIR 1933 Cal 488 (489) : 143 Ind Cas 757 (DB), *Sarba Mohan* v. *Manmohan*. (Delivery of gift deed to donee—Receipt by donee of same after knowing its bearing—Such receipt is acceptance of gift.)

†('32) 19 A I R 1932 All 444 (445, 446) : 54 All 534 : 137 Ind Cas 756 (DB), *Anandi Devi* v. *Mohan Lal*. (Actual or constructive possession by donee is proof of acceptance.)

('32) 19 A I R 1932 Mad 272 (275) : 136 Ind Cas 343, *Venkataramayya* v. *Nagamma*. (Gift by mother to her son and his wife—All living together—Acceptance was inferred. But the observation in this case that the presumption of English law will apply is, it is submitted, not correct.)

('38) 25 A I R 1938 Oudh 26 (30) : 13 Luck 697 : 171 Ind Cas 481 (DB), *Ram Bharose* v. *Rameswar Prasad*. (Acceptance will be presumed from the possession, actual or constructive, by the donee.)

7. ('27) 14 AIR 1927 P C 42 (43) : 50 Mad 193 : 54 Ind App 89 : 100 Ind Cas 105 (P C), *Kalyansundaram Pillai* v. *Karuppa Mooppanar*.

7a. ('47) 34 AIR 1947 Mad 127 (128) : 231 Ind Cas 305, *Ankamma* v. *Narasayya*. [Donee also had access.]

7b. ('48) 35 AIR 1948 Pat. 130 (133) (DB), *Ram Chander Prasad* v. *Sital Prasad*. [Donee living as an inmate of donor's family.]

8. ('38) 25 AIR 1938 Oudh 26 (30) : 13 Luck 697 : 171 Ind Cas 481 (DB), *Ram Bharose* v. *Rameswar Prasad*.

9. ('16) 3 AIR 1916 Nag 55 (55) : 13 Nag L R 18 : 39 Ind Cas 46, *Ganeshdas Bhivraj* v. *Sitaram*.

Also see Section 127, Note 4.

10. ('33) 20 AIR 1933 Cal 488 (489) : 143 Ind Cas 757 (DB), *Sarba Mohan* v. *Manmohan*.

11. ('26) 95 Ind Cas 406 (406) (DB) (Lah), *Hassan Din* v. *Jagat Singh*.

Note 8

1. ('43) 30 AIR 1943 Bom 7 (9) : 204 Ind Cas 212 (DB), *Keshavlal* v. *Bai Dahi*.

2. See Note 6 on Section 123.

Where the donor has handed over the document of gift to the donee who has received it, it is sufficient acceptance. The fact that it was not stamped properly and the stamp duty and penalty were paid after the death of the donor does not detract from the completeness of the gift during his lifetime.[3]

9. Accepted gift is complete though deed is registered later.—See Note 6 on S. 123.

10. Donee dying before acceptance.—Since a donee must, in order to constitute a valid gift, actually *accept* the gift, the gift will be void where he dies before such acceptance.

11. Advancement.—In English law where a husband or father pays money and purchases property in the name of the wife or child, the presumption is that the purchase was intended to be an *advancement* to the wife or the child.[1] This doctrine has no application to this country.[2] The husband or the father would nevertheless be the beneficial owner of the property purchased.[3] Where A deposited his money in the name of himself and his wife, it was held that there was no presumption of any intended advancement to the wife.[4] As between two persons born of British parents, the English law would, however, apply.[5] But the doctrine does not apply in the case of Indian Christians.[6]

12. Gift to a persona designata.—Where a gift is made to A describing him "as the adopted son of the donor" and it turns out that the adoption is not valid, or that no adoption of A ever took place, the question, whether the gift to A stands, depends upon the further question whether the words "my adopted son" are merely words of description or whether the fact of adoption was the motive and reason for the gift. In the former case, the gift would be valid though the adoption is not valid or did not take place. In the latter case the gift will be invalid.[1] "The

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3. ('42) 29 AIR 1942 Cal 386 (389) : 201 Ind Cas 557 (DB), *Purna Chandra* v. *Kalipada.*

Note 11

1. *('21) 8 AIR 1921 P C 56 (57) : 48 Cal 260 : 47 Ind App 275 : 57 Ind Cas 834 (PC), *Kerwick* v. *Kerwick.*
('25) 12 AIR 1925 PC 181 (182) : 52 Ind App 286 : 48 Mad 605 : 88 Ind Cas 327 (PC), *Lakshmiah Chetty* v. *Kothandarama.*
2. ('47) 34 AIR 1947 All 314 (316) : ILR (1947) All 642 (DB), *Shiva Kumari* v. *Udeya Pratap Singh.*
[Purchase made in the name of concubine but with funds of her paramour—It is for the concubine to establish that it was made for her.]
('42) 29 AIR 1942 All 308 (311) : I L R (1942) All 478 : 206 Ind Cas 275 (DB), *Mt. Siddiga Begam* v. *Abdul Jaffar Khan.*
('17) 4 AIR 1917 Mad 926 (927) : 35 Ind Cas 569 (DB), *Rahiman Beebi* v. *Khathoon Bee.*
*('21) 8 AIR 1921 P C 56 (57) : 48 Cal 260 : 47 Ind App 275 : 57 Ind Cas 834 (PC), *Kerwick* v. *Kerwick.*
(1854) 6 Moo Ind App 53 (75, 79), *Gopeekrist* v. *Gunapersaud.*
('69) 13 Moo Ind App 232 (247), *Moulvies Sayyad* v. *Mt. Bebee Ultaj Fatima.*
('05) 29 Bom 306 (312) : 6 Bom L R 975 (DB), *Bai Motivahu* v. *Purshotum.*
†('25) 12 AIR 1925 P C 181 (182) : 48 Mad 605 : 52 Ind App 286 : 88 Ind Cas 327 (PC), *Lakshmiah Chetty* v. *Kothandarama.*
†('28) 15 AIR 1928 P C 172 (173) : 55 Cal 944 : 55 Ind App 235 : 109 Ind Cas 723 (PC), *Guran Ditta* v. *Ram Ditta.*
3. ('21) 8 AIR 1921 P C 56 (57) : 48 Cal 260 : 47 Ind App 275 : 57 Ind Cas 834 (PC), *Kerwick* v. *Kerwick.*
('25) 12 AIR 1925 P C 181 (182) : 48 Mad 605 : 52 Ind App 286 : 88 Ind Cas 327 (PC), *Lakshmiah Chetty* v. *Kothandarama.*
4. ('43) 30 AIR 1943 Bom 7 (8) : 204 Ind Cas 212 (DB), *Keshavlal Tribhovandas* v. *Bai Dahi.* (AIR) 1928 P C 172 : 55 Cal 944 : 55 Ind App 235 (PC) relied upon.)
5. ('21) 8 AIR 1921 P C 56 (58) : 48 Cal 260 : 47 Ind App 275 : 57 Ind Cas 834 (PC), *Kerwick* v. *Kerwick.*
6. ('42) 29 AIR 1942 Mad 503 (505) : I L R (1942) Mad 844 : 201 Ind Cas 776 (DB), *Palani Mudaliar* v. *Natarajan.* (Religious belief is not a factor in the application of the doctrine in India.)

Note 12

1. *('85) 11 Cal 463 (483, 484) : 12 Ind App 72 (PC), *Fanindra Deb* v. *Rajeswar Das.*

distinction," said their Lordships of the Privy Council in *Fanindra Deb* v. *Rajeswar Das*,[2] "between what is description only and what is the reason or motive of a gift may often be very fine but it is a distinction which must be drawn from a consideration of the language and surrounding circumstances."

See also the undermentioned cases.[3]

13. Gift for unlawful objects.—A gift for an unlawful object would be void under S. 6, cl. (h). Thus, a gift for future illicit cohabitation[1] or in fraud of creditors[2] will not be valid. A gift made in discharge of an agreement consideration for which is past illicit cohabitation has been held to be void.[3]

('24) 11 AIR 1924 Bom 516 (517) : 76 Ind Cas 405 (DB), *Kalliyantai* v. *Shivappa*. (Intention of the donor was to give the property to *R* as his adopted son—Adoption invalid—Gift fails.)

†('22) 9 AIR 1922 Bom 352 (353) : 47 Bom 65 : 68 Ind Cas 504 (DB), *Bai Dhondubai* v. *Laxman*. (Testator made the gift out of natural love and affection and in making his will he merely described the donee as his adopted son in the ordinary course without intending that the gift should be conditional on the validity of his adoption—*Held*, gift valid though adoption failed.)

('30) 17 AIR 1930 Lah 115 (116) . 120 Ind Cas 793 (DB), *Daya Ram* v. *Hansraj*. (Adoption motive of the gift—Adoption found invalid—Gift fails—Subsequent statement by the donor that the words were descriptive only does not help the donee as the Courts have to look to the intention of the donor at the time of the gift.)

2. ('85) 11 Cal 463 (484) : 12 Ind App 72 (PC).

3. ('09) 31 All 5 (6) : 1 Ind Cas 555 (555) (DB), *Lalta Prasad* v. *Saligram*.

†('02) 24 All 195 (207) : 1902 All W N 10 (DB), *Lali* v. *Murlidhar*.

†('34) 21 AIR 1934 Oudh 137 (138) : 9 Luck 530 : 148 Ind Cas 692 (DB), *Ali Bahadur* v. *Hafiz Samiullah*. (Construction—Bequest to adopted son—Adoption invalid—Reference to status as adopted son held merely description of donee and not motive of gift.)

(1900) 11 Mad L Jour 27 (28) (DB), *Venkatasami Reddy* v. *Rangamma*.

('10) 8 Ind Cas 517 (519) (DB) (Mad), *Venkatachariar* v. *Sadagopa*.

('97) 20 Mad 167 (188) : 6 Mad L Jour 218 (DB), *Court of Wards* v. *Venkata Surya*. (Case held to be one of description only.)

('29) 16 AIR 1929 Lah 20 (22) : 10 Lah 558 : 114 Ind Cas 334, *Ibrahim* v. *Sada Bibi*. (Gift to a person described as possessing a particular character or relationship may either be an absolute gift to him as an individual or a gift on account of that relationship in which case if the relationship fails, it will not take effect at all.)

†('01) 24 Mad 214 (218) : 27 Ind App 162 (PC), *Subbarayar* v. *Subbammal*.

('99) 22 Mad 383 (391) : 26 Ind App 83 (PC), *Venkata Surya* v. *Court of Wards*.

*('76) 3 Ind App 253 (257, 258) : 26 Suth W R 91 (93) (PC), *Nidhoomoni Debya* v. *Saroda Pershad*.

('92) 19 Cal 452 (462) : 19 Ind App 101 (PC), *Bireshwar* v. *Ardha Chandra*.

('06) 28 All 488 (495, 496) : 33 Ind App 97 (PC), *Lali* v. *Murlidhar*.

('92) 19 Cal 513 (530) : 19 Ind App 108 (PC), *Surendro Keshub* v. *Doorgasoondery*.

('93) 16 Mad 355 (359, 360) (DB), *Abbu* v. *Kuppammal*.

('92) 2 Mad L Jour 240 (243) (DB), *Chokkammal* v. *Murugathal*.

(1799) 4 Ves 802 (808, 809) : 31 E R 416, *Kennell* v. *Abbott*.

('19) 6 AIR 1919 All 391 (392) : 41 All 666 : 52 Ind Cas 311 (DB), *Khub Singh* v. *Ramji Lal*.

(1883-84) 22 Ch D 597 (602) : 52 L J Ch 239, *Boddington* v. *Clariat*.

('09) 31 All 339 (342) : 1 Ind Cas 687 (687) (DB), *Murarilal* v. *Kundan Lal*.

(1873) 6 H L 265 (280) : 42 L J Ch 702 : 22 W R (Eng) 137, *Hill* v. *Crook*.

Note 13

1. ('47) 34 AIR 1947 Bom 198 (201) : 202 ILR (1947) Bom 206 (DB), *Istak Kamu* v. *Ranchod Zipru*.

[But not gift for post cohabilitation.]

('33) 20 AIR 1933 Bom 209 (215) : 149 Ind Cas 464 (DB), *Sabava Yellappa* v. *Yamanappa*.

[*But see* ('05) 28 Mad 413 (416, 417) : 15 Mad L Jour 286 (DB), *Muthukannu* v. *Shunmugavelu Pillai*. (Transactions intended to be gifts, if amounting to completed transfers of property, cannot be impeached.)]

2. ('20) 7 AIR 1920 Cal 93 (95) : 54 Ind Cas 700 (DB), *Official Assignee* v. *Bidyasundari*.

3. ('47) AIR 1947 Bom 198 (201, 202) : ILR (1947) Bom 206 (DB), *Istak Kamu* v. *Ranchod Zipru*.

14. What passes under a gift.—See Notes on s. 8, and also the undermentioned case.[1]

15. Gift or trust.—An incomplete gift or voluntary transfer of property cannot take effect as a declaration of trust, since the donor's intention to *transfer* the property negatives any suggestion that he might have contemplated *retaining* the property as a trustee upon failure of the gift or voluntary transfer.[1]

16. Gift or sale.—A document purporting to be a gift may be shown to be really a sale. So also a document purporting to be a sale may be shown to be in reality a gift.[1] The test is whether there is any *consideration* for the transaction. If there is consideration the transaction cannot be considered to be a gift, but will operate as a sale. The question must be decided upon a construction of the document in each case.[2]

But under S. 92, Evidence Act, evidence of an *oral agreement* or *statement* will not be admissible, as between the parties, to alter the effect of a document.[3] But a third party can adduce such evidence.[4]

17. Gift or will.—A document purporting to be a will may really be a gift[1] or a document purporting to be a gift may really be a will.[2] The test is when is the document to take effect and whether the power to revoke is reserved by the author expressly or by necessary implication.[3]

Note 14

1. ('85) 11 Cal 121 (131) : 11 Ind App 218 (PC), *Kalidas Mullick* v. *Kanhaya Lal.* (Indefinite words of gift are calculated to convey all the words of the grantor—But it is necessary to read the whole instrument to gather the intention—Where a gift thus expressed "I put a stop to my interest in (certain) taluqs and withdraw my enjoyment thereof, and I make them over to you" was preceded by "in order that you may perform religious (certain) ceremonies, celebrate the festivals satisfactorily and provide for your own support, by having the property under your authority and control," it was held that the words of the gift must be taken to be limited by the purpose of the gift and the donee took the property for life only.)

Note 15

1. Halsbury, *Laws of England,* Vol. 15, Para. 853.

*(1862) 4 De F & J 264 (273, 274) : 45 E R 1185 (1189) : 31 L J Ch 798 : 8 Jur (NS) 806 : 7 L T (NS) 178 : 135 R R 135, *Milroy* v. *Lord.*

('24) 11 AIR 1924 Bom 88 (89) : 87 Ind Cas 312, *Natha Gulab* v. *Shaller.*

†('21) 8 AIR 1921 Cal 148 (149) : 48 Cal 986 : 66 Ind Cas 586, *Amarendra Krishna Dutt* v. *Moni Munjary.*

('85) 9 Bom 115 (122), *Ashabai* v. *Haji Tyed.*

†('08) 10 Bom L R 1209 (1223, 1228), *Manchershaw S. Narielwalla* v. *Ardeshir S. Narielwalla.*

Note 16

1. ('06) 33 Cal 773 (785) : 33 Ind App 86 (PC), *Ismail Mussajee* v. *Hafiz Boo.*

('11) 33 All 340 (341) : 38 Ind App 85 : 11 Ind Cas 398 (PC), *Hafiz-un-nissa* v. *Faiz-un-nissa.* (27) All 612 reversed.)

('70) 7 Bom H C R O C 27 (30), *Rujabai* v. *Ismail Ahmed.*

2. ('91) 13 All 409 (416, 417) : 1891 All W N 159 (FB), *Angan Lal* v. *Muhammad Hussain.* (*Held,* only a sale.)

('10) 34 Bom 287 (290) : 5 Ind Cas 599 (600) (DB), *Madhavrao Moreshvar* v. *Kasibai Dattubhau.*

3. (1900) 28 Cal 70 (73) (DB), *Rahiman* v. *Elahi Bhaksh.*

('19) 6 AIR 1919 Oudh 420 (423) : 22 Oudh Cas 222 : 53 Ind Cas 961, *Azhtaq Husain* v. *Syed Nazir Husain.*

4. ('05) 2 Cal L Jour 338 (339, 340) (DB), *Jagat Mohini* v. *Rakhal Das.*

†('90) 1890 Pun Re No. 117, page 371 (375, 376) (FB), *Tara Chand* v. *Baldeo.*

('13) 21 Ind Cas 60 (61) (Oudh), *Alla Baksh* v. *Hajjin Imdadi.*

('31) 18 AIR 1931 Oudh 424 (425) : 34 Ind Cas 1092, *Narsing Narain* v. *Santram.*

Note 17

1. (1865) 3 Suth W R 200 (202, 203) (DB), *Chunder Mohinee Dossee* v. *Hurrosoondari Dossee.*

2. ('24) 11 AIR 1924 Mad 605 (606) : 78 Ind Cas 156, *P. Venkatachalam Chetty* v. *Govindaswamy Naicker.* (Deed, though in form a deed of gift, held to be in fact a deed of will and not one of gift as there was no disposal of any immediate rights of possession or any immediate interest in property.)

3. ('47) 34 AIR 1947 Bom 49 (51) : ILR (1946) Bom 984 : 229 Ind Cas 227, *Khushalchand* v. *Trimbak.*

[The question whether a certain document is a gift or a will depends not merely upon the form of the document, but upon

The mere reservation of a life-estate by the donor does not necessarily indicate that the document is a will.[3a] Nor does the fact that the donor revoked it within a few months indicate that his intention was to make a will and not a gift.[3b]

See also the undermentioned cases.[4]

18. Gift is irrevocable.—See Section 126.

See also S. 129 and Notes thereon, (gifts in contemplation of death).

19. Muhammadan law.—This section does not, by virtue of s. 129, affect any rule of Muhammadan law. See Notes on section 129.

20. Hindu law.—See Notes on sections 123 and 129.

By virtue of S. 129 as it stood before 1929, this section did not affect any rule of Hindu law. But there was no rule of Hindu law inconsistent with this section. Under the Hindu law, as under this section, acceptance by the donees is neecssary to constitute a valid gift.[1] The amendment of S. 129 in 1929 now makes this section directly applicable to gifts by Hindus also.

Transfer how effected.

[a]123. For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of donor, and attested by at least two witnesses.

For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

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the intention gathered from the words used intention document itself.]

('40) 27 AIR 1940 Mad 236 (238), *Veerabhadrayya* v. *Seethamma.*

†('25) 12 AIR 1925 Mad 471 (472, 473) : 86 Ind Cas 8, *Sengamalam* v. *Logambal.*

†('29) 16 AIR 1929 Lah 143 (144) : 111 Ind Cas 893, *Ganga Ram* v. *Birjo.*

('43) 30 AIR 1943 All 95 (96) : ILR (1943) All 193 : 205 Ind Cas 381 (DB), *D. E. D' Silva* v. *Mrs. Malakin.*

[Gift contemplated by S. 122 is different from gift contemplated by S. 191, Succession Act, which is in the nature of a will.]

[*See also* ('10) 33 Mad 304 (307) : 7 Ind Cas 357 (358) (DB), *Rajammal* v. *Authiammal.*]

3a. ('47) 34 AIR 1947 Bom 49 (51) : ILR (1946) Bom 984 : 229 Ind Cas 227, *Khushalchand* v. *Trimbak.*

3b. ('47) 34 AIR 1947 Bom 49 (51) : ILR (1946) Bom 984 : 229 Ind Cas 227, *Khushalchand* v. *Trimbak.*

4. ('04) 1904 Pun Re No. 74, page 239 (248) (DB), *Murad Baksh* v. *Husain Baksh.* (A document dividing immovable property in specified shares between the heirs of the executant which was intended to give immediate effect to the intention of the alienor contained therein and whereunder possession was actually transferred within a short time of its execution, held to be a deed of gift, although it was called throughout and registered by the executant as a will.)

('30) 17 AIR 1930 Mad 744 (745) : 127 Ind Cas 619, *Kotayya* v. *Varadhanamma.* (i) The documents in question was executed on plain paper (ii) it was styled as marana sasanam (iii) the property was transferred (iv) it was registered as a will. These circumstances are sufficient to indicate that it is a will and not a deed of gift.)

('28) 15 AIR 1928 Nag 308 (310) : 113 Ind Cas 373, *Mahadeo* v. *Ganeshram.* (Whether a certain document is a will and not a gift or a family arrangement, depends upon the right construction of a document and involves a question of law.)

('18) 5 AIR 1918 Oudh 191 (192) : 21 Oudh Cas 312 : 48 Ind Cas 396, *Lachman* v. *Baldevo.*

('17) 4 AIR 1917 Oudh 64 (65) : 37 Ind Cas 69 (DB), *Dip Narain* v. *Hargobind.*

('24) 11 AIR 1924 Nag 236 (238) : 75 Ind Cas 687, *Zuglai* v. *Ratan.* (Document intend to operate after death — *Held* to be a will.)

[*See also* (1900) 1900 All W N 1 (2), *Seth Chand Mal* v. *Lachmi Narain.* (There is no objection to one part of a document operating as a deed of gift and the other part as will.)]

Note 20

1. †('27) 14 AIR 1927 Oudh 278 (283) : 1 Luck 97 : 104 Ind Cas 299, *Krishnapal Singh* v. *Sri Raj Kuar.*

('42) 29 AIR 1942 Lah 243 (246, 247) : 203 Ind Cas 404 (DB), *Madho Singh* v. *Skinner.*

Such delivery may be made in the same way as goods sold may be delivered.

a. As to limitation to the territorial operation of S. 123, *see* S. 1, Section 123 extends to every cantonment in British India: *see* S. 287 of the Cantonments Act, 1924 (II of 1924).

Synopsis

1. Scope of the section.
2. Hindu law.
3. Buddhist law.
4. Muhammadan law.
5. Gifts of immovable property.
6. Registration and operation of gift.
7. "Signed by or on behalf of the donor."
8. "Attested by at least two witnesses."
9. Doctrine of part performance, whether applies to gifts.
10. Donee's possession under invalid gift of immovable property.
11. Section applies to gifts in Cantonment areas.
12. Delivery of property.
13. Incomplete gift does not constitute donor trustee for donee. See Note 15 on S. 122.
14. Gifts of actionable claims.
15. Law in places to which Transfer of Property Act is not extended.
16. Extent.

TOPIC INDICATOR

Delivery, how made. See Note 12.
Gift of moveable property. See Notes 1 and 12.
Gift, when takes effect. See Note 6.
Mode of transfer
Immovable. See Note 5.
Moveables. See Notes 1 and 12.
Whether donor may revoke gift after delivery of deed and before registration. See Note 6.

1. Scope of the section.—This section lays down the modes in which gifts of immovable and movable property are to be effected. With regard to immovable property it provides that *irrespective of the value of the property* the transfer must be effected only by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses.[1] With regard to moveable property it provides two modes

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Section 123 — Note 1

1. ('16) 3 AIR 1916 All 351 (351) : 38 All 212 : 35 Ind Cas 14, *Karam Ilahi* v. *Sharaffuddin.*
('87) 14 Cal 446 (449) (DB), *Dharmodas* v. *Nistarini Dasi.*
('39) 26 AIR 1939 Rang 76 (78) : 1938 Rang L R 678 : 179 Ind Cas 903, *U Thita* v. *U Areseinna.*
('34) 21 AIR 1934 Rang 129 (131) : 150 Ind Cas 966 (DB), *Ma Shin* v. *Ma Thin Kyi.*
('21) 8 AIR 1921 Cal 647 (649) : 67 I. C. 31 (DB), *Jagannath Marwari* v. *Mt. Chandi Bibi.*
('34) 21 AIR 1934 Cal 772 (773) : 61 Cal 525 : 151 I. C. 1063, *Neelama Basu* v. *Jaharilal Sarkar.*
('24) 11 AIR 1924 Pat 657 (660) : 3 Pat 842 : 80 Ind Cas 980 (DB), *Deo Saran Bharthi* v. *Deoki Bharthi.*
('38) 25 AIR 1938 All 452 (454) : ILR (1938) All 638 : 177 Ind Cas 260 (DB), *Sunder Singh* v. *Commissioner of Income-tax.* (Shares in buildings and business which are the self-acquired property of a member of a joint Hindu family can only be distributed among other members of the family by registered instrument.)
('11) 13 Ind Cas 436 (440) (DB) (All), *Ram Prasad* v. *Bedo.*
('99) 1 Bom L R 495 (497) (DB), *Bhiwa* v. *Shivram.*
('17) 4 AIR 1917 Cal 681 (684, 685, 686) : 34 Ind Cas 450 (DB), *Sital Chandra* v. *Mrs. A. J. Delanney.* (No writing was necessary for the imposition of an easement before the Transfer of Property Act was passed; and Ss. 54 and 123 of that Act were not intended to change and did not change the pre-existing law regarding easements so as to require a writing for their creation or imposition where no writing was previously necessary.)
('14) 1 AIR 1914 Low Bur 62 (62) : 25 Ind Cas 495, *Ma Sein Nyun* v. *Maung U.* (A partition of joint family property can be effected by private arrangement without an instrument in writing—The provisions of the Transfer of Property Act do not apply to such a partition.)
('24) 11 AIR 1924 Nag 214 (215) : 76 Ind Cas 218, *Lallu Prasad* v. *Babulal.* (The mutation of names by itself creates no proprietary title.)
('12) 15 Ind Cas 343 (344) (DB) (Mad), *Ariyaputhora Padayachi* v. *Muthu Kumarasamy Padayachi.*
('39) 26 AIR 1939 Mad 290 (290) : 183 Ind Cas 631, *Papathi Ammal* v. *Doraiswamy Naicker.*
('22) 9 AIR 1922 Pat 514 (524) : 2 Pat 52 : 68 Ind Cas 383 (DB), *Baijnath Singh* v. *Brijraj Kuer.*

of transfer, i.e., it may be effected either by a registered instrument as aforesaid or by delivery of the property.[2]

The provisions laid down in the section are mandatory and must be strictly fulfilled.[3]

2. Hindu law.—Under Hindu law writing was not necessary for the validity of a gift.[1] There was, however, some doubt as to whether ac-

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('06) 29 Mad 412 (415) : 1 Mad L Tim 227 (DB), *Ranganath Mudaliar* v. *Baghirathi Ammal.*

[*See also* ('02) 12 Mad L Jour 387 (387) (DB), *Kone Goundan* v. *Bola Naicken.* (Plaintiff who impeaches a gift as invalid under T. P. Act (not being in writing registered) must show that the gift was made at a time when T. P. Act was in force.)

('19) 6 AIR 1919 Nag 100 (101) : 15 Nag L R 93 : 51 Ind Cas 93, *Laxman* v. *Tatya.* (A transaction by which a partition of self-acquired property is effected by a father among his sons is not a gift within Transfer of Property Act and is not required to be effected by a registered deed.)

('14) 1 AIR 1914 Mad 204 (205) : 22 Ind Cas 661 (DB), *Krishnaswamy* v. *Kamalambal* (Per Napier, J.)

('11) 33 All 728 (731) : 12 Ind Cas 109 (110) (DB), *Rustam Ali Khan* v. *Gaura.* (Transfer of property, where registration is compulsory can only be effected by a registered instrument or by a decree of a competent Court.)]

See also cases cited under Note 5.

2. ('43) 30 AIR 1943 Bom 453 (454) : 210 Ind Cas 553, *Usman Abubakar* v. *Chief Accounts Officer, G. I. P. Railway.* (Grant of Gratuity by Railway Company to deceased employee and amount credited to Provident Fund Account of deceased — Gift is not valid as there is no delivery to any living person who is entitled to receive it.)

('87) 14 Cal 446 (449) (DB), *Dharmodas* v. *Nistarini Dasi.*

('84) 6 All 634 (636) : 1884 All W N 210 (DB), *Janki Das* v. *E. I. Railway Co.*

('41) 28 AIR 1941 Mad 154 (157, 158) : ILR (1941) Mad 232 : 195 Ind Cas 507 (DB), *Mrs. Ida L. Chambers* v. *K. H. Chambers.*

†('22) 9 AIR 1922 All 467 (469) : 45 All 115 : 68 Ind Cas 798 (FB), *Lallu Singh* v. *Gur Narain.* (Second clause of S. 123 does away with the provision of Hindu law requiring delivery of possession as regards moveable property.)

('23) 10 AIR 1923 Pat 165 (170) : 67 Ind Cas 451 (DB), *Rameshwar Narain Singh* v. *Reknath Koeri.*

('24) 11 AIR 1924 Pat 657 (660) : 3 Pat 842 : 80 Ind Cas 980 (DB), *Deo Saran Bharthi* v. *Deoki Bharthi.*

('31) 18 AIR 1931 All 596 (597) : 53 All 633 : 132 Ind Cas 573 (DB), *Mrs. T. C. Paul* v. *Nathaniel Gopal Nath.*

('12) 14 Ind Cas 720 (722) (DB) (Cal), *Benode Kishore* v. *Asutosh Mukhopadhya.*

('24) 11 AIR 1924 Bom 88 (88) : 87 Ind Cas 312, *Natha Gulab & Co.* v. *W. C. Shaller & G. I. P. Ry. Co.* (Gratuity payable to Railway servants is in the nature of gift —Mere delivery of cheque to a Bank to send the amount to London does not mean delivery.)

[*See also* (1890) 25 Q B D 57 (74, 75, 76) : 38 W R (Eng) 588 : 59 L J Q B 377 : 63 L T 153, *Cocharne* v. *Moore.* (The delivery of possession of a chattel is necessary for the completion of a gift.)

(1869) 19 L T (NS) 809 (811), *James* v. *James.* (Mere evidence of a motive of a gift where the property is not in the possession of the donee is not sufficient to establish a claim to it.)]

3. ('30) 17 AIR 1930 All 669 (672) : 125 Ind Cas 507 (DB), *Balbhadar Singh* v. *Lakshmi Bai.*

('28) 15 AIR 1928 All 699 (702) : 117 Ind Cas 351 (DB), *Hira Mani Singh* v. *Anmol Singh.* (Gift of immovable property by Hindu by way of sankalap is not valid.)

[*See also* ('31) 18 AIR 1931 All 596 (597) : 53 All 633 : 132 Ind Cas 573 (DB), *Mrs. T. C. Paul* v. *Nathaniel Gopal Nath.* (Where there is joint deposit in the name of a person and his wife the question whether there is a gift of the money by the husband to the wife should be determined according to the provisions of S. 123 and English decisions cannot be considered for that purpose.)]

Note 2

1. (1856) 6 Moo Ind App 267 (278, 279, 288) : 10 Moo P C 140 : 1 Sar 540 (PC), *Doe d. Seebkristo* v. *The East India Company.*

('90) 3 C P L R 37 (38), *Govinda* v. *Malhari.*

('31) 18 AIR 1931 Sind 186 (190) : 134 Ind Cas 388, *Valji Dayabhai* v. *Virji Tulsidas.*

('71) 6 Mad H C R 270 (274) (DB), *Visalatchmi Ammal* v. *Subbu Pillai.*

(1862) 1 Mad H C R 100 (100) (DB), *Mantana Royaparaj* v. *Chekuri Venkata Raj.*

('41) 28 AIR 1941 Pat 354 (357) : 192 Ind Cas 789 (DB), *Ramji Lackhmanji & Jankiji* v. *Mathura Prasad.* (In the case of a dedication made before the passing of

tual delivery of possession was required in every case for the completion of a gift under that law.[2] See the undermentioned cases.[3] But

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the Transfer of Property Act, no registered deed of dedication is necessary even assuming that a gift to an idol is a gift within the meaning of S. 123, T. P. Act.)

2. ('03) 25 All 358 (365) : 1903 All W N 70 (DB), *Phulchand* v. *Lakhu.*
3. ('93) 17 Bom 486 (496, 501) (DB), *Bhaskar Purshottam* v. *Saraswathibai.* (By Hindu law a gift of property, whether movable or immovable, may operate, where no question of resumption arises, to give the donee a right to obtain possession, and is not invalid by reason of its not being immediately followed by possession.)

('85) 11 Cal 121 (135) : 11 Ind App 218 (PC), *Kalidas Mullick* v. *Kanhaya Lal Pundit.* (Do.)

(1900) 2 Bom L R 69 (71) (DB), *Virapaxappa* v. *Muniappa.* (Do.)

('03) 27 Bom 31 (38) : 4 Bom L R 754 (DB), *Joitaram* v. *Ramkrishna.* (Do.)

(1900) 27 Cal 242 (259) : 4 Cal W N 405 (DB), *Ramchandra Mukerjee* v. *Ranjit Singh.* (Do.)

('01) 1901 Pun Re No. 45, page 147 (151) : 1901 Pun L R No. 64 (DB), *Chaudhri Lila Kishen* v. *Chadhri Hoa Ram.* (Do.)

('06) 1906 Pun Re No. 45, page 162 (165) : 1906 Pun L R No. 120 (DB) *Partab Singh* v. *Fatta.* (Do.)

('08) 1908 Pun Re No. 52, page 262 (263) : 1908 Pun W R No. 103, *Ram Charan Das* v. *Bhagwati.* (Do.)

('25) 12 AIR 1925 Lah 648 (649) : 89 Ind Cas 326 (DB), *Bhagwan Singh* v. *Kripa Ram.* (Do.)

('34) 21 AIR 1934 Lah 197 (198) : 149 Ind Cas 1013, *Rullia* v. *Mangla.* (Do.)

('34) 21 AIR 1934 Lah 858 (859, 860), *Dhani Ram* v. *Legha.* (Do.)

('36) 23 AIR 1936 Lah 49 (50) : 161 Ind Cas 592, *Bhagwan Das* v. *Gian Chand.* (Do.)

('02) 26 Bom 449 (470) : 3 Bom L R 857, *Gordhandas* v. *Ramcooverbai.* (Do.)

('99) 23 Bom 131 (134) (DB), *Rajaram* v. *Ganesh.* (Do.)

('03) 1903 Pun Re No. 75, page 314 (316) : 1903 Pun L R No. 125 (DB), *Sanatan Dharm Sabha Hoshiarpur* v. *Mt. Sobhi.* (Do.)

('21) 8 AIR 1921 Cal 647 (649) : 67 Ind Cas 31 (DB), *Jagannath Marwari* v. *Mt. Chandni Bibi* (Do.—11 Cal 121 followed.)

('83) 9 Cal 854 (855) : 12 Cal L Rep 530 (DB), *Dagai Dabee* v. *Mothura Nath Chattopadhya.* (A gift by a Hindu, unaccompanied either by possession on the part of the donee or any symbolical act, such as handing over documents of title, or by permitting the donee to receive rents, or other like act, is not in itself a valid transaction, even though the deed of gift be registered.)

('94) 16 All 185 (186) : 1894 All W N 21 (DB), *Balmakund* v. *Bhagwan Das* (The delivery to the donee of immovable property of the deed of gift is sufficient to pass the title to such property to the donee without actual physical possession of such property being taken by the donee.)

('81) 4 All 40 (45) : 1881 All W N 78 (DB), *Man Bhari* v. *Naunidh.* (Do.)

('72-73) 6 Mad H C R 194 (196) (DB), *Wannathan Kandile Chiruthai* v. *Keyakadath Pydel Kurup.* (A gift is perfectly valid if such delivery is made as the nature of the object permits.)

('21) 8 AIR 1921 All 37 (38) : 43 All 503 : 62 Ind Cas 862 (DB), *Ram Dhan* v. *Prayag.* (Gift prior to T. P. Act—Transfer of possession is essential.)

('83) 7 Bom 131 (132, 133) (DB), *Vasudeo Bhat* v. *Narayan Daji.* (The texts of the Hindu law clearly require delivery and acceptance of the subject of the gift to be effected, in the case of land, by putting the donee into possession in order to give complete validity to the gift as between donor and donee. The mere registration of the deed of gift cannot, in any sense, be regarded as equivalent to the delivery of possession.)

('94) 18 Bom 688 (689, 690) : 1893 Bom P J 497 (DB), *Abaji Gangadhar* v. *Mukta.* (Do.)

('93) 20 Cal 464 (468, 469) (DB), *Lakshmimoni Dasi* v. *Nityananda Day.* (Do.)

('31) 18 AIR 1931 Sind 186 (190) : 134 Ind Cas 388, *Valji Dayabhai* v. *Virji Tulsidar.* (Do.)

('86) 1 C P L R 41 (41, 42), *Dhuria Lodhi* v. *Kadhi Lodhi.* (Under the Hindu law in order that a gift may become complete and effectual the donee must be placed in possession of the property given.)

('90) 3 C P L R 37 (37, 40), *Govinda* v. *Malhari.* (Do.)

('81) 6 Bom 168 (175) (FB), *Laxmandas* v. *Dashrath.* (Do.)

('92) 5 C P L R 63 (64), *Mt. Sani* v. *Pancham Patil.* (Do.)

('72-73) 6 Mad H C R 270 (274) (DB), *Visalatchmi Ammal* v. *Subbu Pillai.* (Do.)

('77) 2 Bom 299 (331, 333) : 1880 Bom P J 57 (DB), *Lalubhai Surchand* v. *Bai Amrit.* (Do.)

('68-69) 4 Mad H. C. R 460 (462) (DB), *Venkatta Chella Maniyakarer* v. *Thathammal.* (Do.)

('84) 1884 All W N 184 (184) (DB), *Murari* v. *Radha Bibi.* (Do.)

('38) 25 AIR 1938 Nag 142 (143) : ILR (1939) Nag 293 : 173 Ind Cas 85, *Chan-*

assuming that delivery of possession was essential to complete a gift under that law, it was abrogated by this section which applied even to gifts by Hindus. A gift of immovable property by a Hindu after the passing of the Transfer of Property Act must now be effected in the manner laid down in the first paragraph of this section. Delivery of possession of the property to the donee is neither necessary[4] nor sufficient.[5] The compliance with the provisions of the section completes the

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drabhaga Bajirao v. *Anandrao.* (Do.)
('05) 29 Bom 267 (276) : 7 Bom L R 45 49), *Moosabhoy* v. *Yakubbhai.* (Possession actual, symbolical or constructive is absolutely necessary to complete a gift under Hindu law.)
('67) 4 Bom H C R A C 31 (34) (SB), *Harjivan Anandram* v. *Naran Haribhai.* (A gift of land is not complete, under Hindu law, without possession or receipt of rent by the donee.)
('68) 5 Bom H C R (O C) 83 (94) (DB), *Bank of Hindustan, China and Japan* v. *Premchand Raichand.* (Do.)
('83) 7 Bom 452 (453, 454) (DB), *Bai Kushal* v. *Lakhma Mana.* (Where the donee is already in physical occupation of the property the declaration by the donor in a registered deed of gift that he has parted with the possession converts the occupation of the donee into possession and amounts to a valid gift.)
('30) 17 AIR 1930 Lah 145 (146) : 119 Ind Cas 271 (DB), *Sarwan Das* v. *Mansa Ram.* (It is not essential that possession of the gifted property should be actually transferred from the donor to the donee especially when the latter is a minor and is living with the former — But before such a gift can be upheld, it must be established that there was a real and *bona fide* intention to pass title and that from the date of the transfer the donor was holding the property in trust for the donee.)
('66) 6 Suth W R 245 (247) (DB), *Moheshur Buksh Singh* v. *Mt. Gunoon Kunwar.* (Do.)
('79) 3 Cal L Rep 247 (250, 252) (DB), *Taro Bebee* v. *Ghasiram.* (Do.)
('28) 15 AIR 1928 Lah 9 (11) : 111 Ind Cas 251 (DB), *Dhannamal* v. *Parmeshari Das.* (Where the donee is the wife of the donor, a gift is not invalid though the donor does not vacate the donated property and put the donee in its exclusive possession. All that is required in such a case to validate the gift is an unequivocal intention to make a gift an effective transfer of control of and power to dispose of the gifted property to the donee, and this may be done by the execution and registration of the deed of gift, though the husband and wife who resided in the house may continue to do so after the gift.)
[*See also* ('86) 1886 All W N 86 (87) (DB), *Raghubansi Kuari* v. *Narbada Ram.* (A gift once completed by delivery or its equivalent is binding upon the donor himself, and upon his representatives and is valid even against creditors, provided it was made *bona fide*, i.e., with the honest intention of passing the property and not merely as a fraudulent contrivance to conceal the ownership.)
('23) 10 AIR 1923 Nag 195 (196) : 71 Ind Cas 409, *Mt. Krishnabai* v. *Debi Singh.* (The question as to delivery of possession being required under the Hindu law to validate a gift can arise only between the donor and the donee and cannot be raised by a third party.)]

4. ('40) 27 AIR 1940 Cal 254 (256) : 189 Ind Cas 249, *Hari Pada* v. *Elokeshi Devi.*
*('87) 14 Cal 446 (448, 449) (DB), *Dharmodas Das* v. *Nistarini Dasi.*
('17) 4 AIR 1917 Pat 551 (553) : 41 Ind Cas 389, *Muhammad Abdul Nayeem* v. *Jhonti Mahton.*
('26) 95 Ind Cas 240 (241) (Nag), *Sahodra* v *Laxmiprasad.* (AIR 1925 Nag 199 : 22 Nag L R 124 followed.)
('02) 5 Oudh Cas 89 (90), *Nandu v. Chandi Dat.*
('07) 34 Cal 853 (858) : 6 Cal L Jour 233 (DB), *Balbhadra Nilmadhub* v. *Mi. Bhowani.*
('99) 23 Bom 234 (236) (DB), *Bai Kambai* v. *Bai Mani.*
†('22) 9 AIR 1922 All 467 (469) : 45 All 115 : 68 Ind Cas 798 (FB), *Lallu Singh* v. *Gur Narain.*
('03) 25 All 358 (366) : 1903 All W N 70 (DB), *Phulchand* v. *Lakhu.*
†('25) 12 AIR 1925 Nag 199 (202) : 22 Nag L R 124 : 83 Ind Cas 41 (DB), *Bhagwan Prasad* v. *Hari Singh.* (3 C P L R 37 and 5 C P L R 63 overruled.)
('42) 29 AIR 1942 Lah 243 (246) : 203 Ind Cas 404 (DB), *Madho Singh* v. *Lieut. James R. R. Skinner.*

5. ('43) 30 AIR 1943 Sind 177 (181) : ILR (1943) Kar 227 : 210 Ind Cas 35 (DB), *Assudibai Sahijram* v. *Haribai Vasudev.* (Where one of the coparceners relinquishes his share in joint immovable property in favour of another coparcener, it amounts to a gift and not a partition and a mere transfer of possession is not sufficient substitute for a registered instrument.)
('29) 16 AIR 1929 Pat 591 (593) : 125 Ind Cas 127 (DB), *Debi Saran* v. *Nandlall.*

title of the donee and if the donor remains in possession of the property thereafter, his possession is that of the donee.[6] As regards gifts of moveable property the second paragraph of the section allows it to be effected either by a registered instrument or by delivery.[7]

As to the validity of gifts in favour of a Hindu idol and dedications for charitable or religious purposes, see Note 5A on section 122.

3. Buddhist law.—Under the Buddhist law delivery of possession to the donee was necessary for the completion of a gift.[1] But the law regards delivery of possession has been abrogated by S. 123 of the Transfer of Property Act[2] which applied to Buddhists even before the Transfer of Property (Amendment) Act, XX of 1929, by virtue of the old S. 129 of the Act which apart from the provisions of S. 123 saved all rules of Buddhist law relating to gifts.

It has been held that the Burmese Buddhists *religious* gifts are not excepted from the operation of this section and must therefore be effected in accordance with its provisions.[3]

('40) 27 AIR 1940 Cal 254 (256) : 189 Ind Cas 249, *Haripada* v. *Elokeshi Debi.*

('28) 15 AIR 1928 All 699 (702, 703) : 117 Ind Cas 351 (DB), *Hira Mani Singh* v. *Anmol Singh.* (Gift by way of sankalap is not valid.)

6. ('05) 27 All 169 (171) : 1 All L Jour 625 (DB). *Pahlwan Singh* v. *Ram Bharose.* (24 All 157 followed.)

('22) 9 AIR 1922 All 44 (45) : 66 Ind Cas 480 (DB), *Debi Singh* v. *Bunsidhar.*

7. ('87) 14 Cal 446 (448, 449) (DB), *Charmodas Das* v. *Nistarini Dasi.*

('89) 3 C P L R 37 (38), *Govinda* v. *Malhari.* (Overruled on another point in AIR 1925 Nag 199 : 22 Nag L R 124.)

Note 3

1. ('10) 8 Ind Cas 1200 (1201) (Low Bur), *Maung Pan U* v. *Ma Kyi Nyo.*

('20) 7 AIR 1920 Upp Bur 8 (10) : 3 Upp Bur Rul 228 : 59 I.C. 999, *Ma Me I* v. *Maung Lauk Hnya.* (Gifts made by grandparents to grandchildren are an exception to the ordinary rule of Buddhist law under which an actual delivery of possession is necessary to validate a gift —Such gifts are valid without any transfer of possession.)

('18) 5 AIR 1918 Upp Bur 40 (42) : 3 Upp Bur Rul 23 : 42 Ind Cas 68, *Ma Tok* v. *Ma Chit.*

('24) 11 AIR 1924 Rang 13 (14) : 1 Rang 351 : 75 I C 166 (DB), *Ma Thin Myaing* v. *Maung Gyi.*

('11) 6 Low Bur Rul 32 (33) : 11 Ind Cas 862 (863), *Ma Hla U* v. *Mg. Aung Dun.*

('12) 6 Low Bur Rul 77 (81) : 18 Ind Cas 466 (469) (DB), *Ma Su* v. *Ma Jin.*

('24) 11 AIR 1924 Rang 309 (310) : 2 Rang 131 : 83 I C 557 (DB), *U Pandawun* v. *U Sandima.*

('15) 2 AIR 1915 Low Bur 142 (143, 144) : 8 Low Bur Rul 190 : 30 Ind Cas 665 (DB), *Ma Pan Nyun* v. *Ma Hla Sein.* (The rule as to Shinbyu gifts is an exception to the ordinary principle of the Buddhist law by which a gift to be valid has to be completed by delivery of possession.)

('24) 11 AIR 1924 Rang 353 (353), *Mi Hla Zan* v. *Pa Pa Ye.*

('17) 4 AIR 1917 Low Bur 23 (24) : 40 Ind Cas 854, *Maung Ba Maung* v. *Maung Pyu.* (Gift made during donor's last illness with the effect of excluding his heirs would be invalid without delivery of possession.)

2. ('24) 11 AIR 1924 Rang 309 (310, 311) : 2 Rang 131 : 83 Ind Cas 557 (DB), *U Pandawun* v. *U Sandima.*

('24) 11 A I R 1924 Rang 353 (353), *Mi Hla Zan* v. *Pa Pa Ye.*

('24) 11 AIR 1924 Rang 13 (14) : 1 Rang 351 : 75 I.C. 166 (DB), *Ma Thin Myaing* v. *Maung Gyi.*

('16) 3 A I R 1916 Low Bur 11 (11, 12) : 33 Ind Cas 129, *Maung Shwe Kho* v. *Ma Mya.* (Kanwin property is the property given by the bridegroom to the bride at the time of marriage for the joint purpose of the married pair. Such a gift, if not in writing and registered as required by S. 123 of the Transfer of Property Act, is not valid.)

('17) 4 A I R 1917 Low Bur 23 (24) : 40 Ind Cas 854, *Maung Ba Maung* v. *Maung Pyu.*

[*See also* ('24) 11 AIR 1924 Rang 260 (261): 80 I. C. 255 (DB), *Mg. Po Thet* v. *Mg. Min Din.*]

3. ('18) 5 AIR 1918 Low Bur 11 (12) : 9 Low Bur 258 : 45 Ind Cas 926 (DB), *U Zayanta* v. *U Naga.* (Gift of a Kyaung is invalid unless registered.)

('20) 7 A I R 1920 Upp Bur 47 (47) : 3 Upp Bur Rul 207 : 57 Ind Cas 809, *U Ne Mein* v. *Ma Hmin On.*

('38) 25 A I R 1938 Rang 303 (306) : 178 Ind Cas 232, *Daw Sein* v. *Ma Mai Ma.*

4. Muhammadan law.—This section does not affect any rule of Muhammadan law. (See section 129.)

A gift by a Muhammadan must comply with the provisions of Muhammadan law.[1] Under that law a *writing* is not necessary for a valid gift *inter vivos*, but there must be a delivery of possession according to the nature of the property given.[2] The mere fact of registration

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Note 4

1. *('27) 14 AIR 1927 Cal 197 (198) : 100 Ind Cas 296 (DB), *Nasib Ali* v. *Wajed Ali.*
('15) 2 AIR 1915 Cal 601 (606) : 26 Ind Cas 466 (DB), *Rahim Baksh Mandal* v. *Sajjad Ahmad.*
('06) 28 All 439 (449) : 9 Oudh Cas 196 : 33 Ind App 68 (PC), *Chaudhri Mehdi Hasan* v. *Muhammad Hasan.*
('29) 16 AIR 1929 Oudh 435 (436) : 5 Luck 384 : 124 Ind Cas 354, *Abdul Rahman* v. *Gaya Prasad.*
†('32) 19 AIR 1932 Cal 497 (498) : 59 Cal 557 : 138 Ind Cas 733 (DB), *Sultan Miya* v. *Ajibakhatoon Bibi.*
('12) 15 Ind Cas 698 (699) (DB) (Cal), *Rahimjan Bibi* v. *Imanjan Bibi.*
('23) 10 AIR 1923 Oudh 214 (215) : 26 Oudh Cas 128 : 74 Ind Cas 390, *Khalil Ullah Shah* v. *Ewaz Ali.*
*('16) 3 AIR 1916 P C 27 (31) : 38 All 627 : 43 Ind App 212 : 19 Oudh Cas 192 : 36 Ind Cas 104 (PC), *Sadik Hussain Khan* v. *Hashim Ali Khan.*
('36) 23 AIR 1936 All 600 (605) : 164 Ind Cas 515 (DB), *Kulsum Bibi* v. *Shiam Sunder Lal.*
†('27) 14 AIR 1927 P C 22 (22, 23) : 54 Ind App 23 : 5 Rang 7 : 100 Ind Cas 32 (PC), *Ma Mi* v. *Kallander Ammal.*
('91) 13 All 409 (414, 418) : 1891 All W N 159 (FB), *Angan Lal* v. *Muhammad Husain.*
('28) 15 AIR 1928 P C 108 (109, 111) : 52 Bom 316 : 55 Ind App 171 : 109 Ind Cas 31 (PC), *Musa Miya* v. *Kadar Bax.*
('29) 16 AIR 1929 Pat 417 (418, 419) : 123 Ind Cas 401 (DB), *Mt. Tabera* v. *Ajodhya Prasad.*
('36) 23 AIR 1936 Rang 522 (523, 525) : 14 Rang 485 : 166 Ind Cas 327, *Rahmat Bibi* v. *Maung Po Sein.*
('14) 1 AIR 1914 Low Bur 152 (154) : 7 Low Bur Rul 123 : 23 Ind Cas 903 (DB), *Annamalay Chetty* v. *Mahomed Ismail.*
('05) 29 Bom 275*n* (276*n*), *Abdul Cadar* v. *Tajoodin.*
('34) 21 AIR 1934 Oudh 163 (165) : 148 Ind Cas 801 (DB), *Abdul Hamid* v. *Abdul Ghani.*
('16) 3 AIR 1916 All 351 (351) : 38 All 212 : 35 Ind Cas 14 (DB), *Karam Ilahi* v. *Sharf-ud-din.*
('28) 15 AIR 1928 Nag 275 (276) : 108 Ind Cas 435, *Mayadad Khan* v. *Hazari Lal.*
†('33) 20 AIR 1933 Mad 86 (91) : 141 Ind Cas 843, *Abdul Razak Saheb* v. *Zainab Bi.*
('10) 8 Ind Cas 38 (39) (DB) (Cal), *Jahedunnessa Bibi* v. *Najibul Islam.*
('15) 2 AIR 1915 Oudh 75 (76) : 18 Oudh Cas 122 : 28 Ind Cas 180, *Ali Bakshi* v. *Ghurai.*
†('37) 24 AIR 1937 All 25 (27) : ILR (1937) All 285 : 166 Ind Cas 439 (DB), *Mt. Kulsum Bibi* v. *Bashir Ahmad.*
('31) 18 AIR 1931 All 237 (237) : 124 Ind Cas 756, *Ali Hasan* v. *Mt. Rashidan.*
†('07) 30 Mad 519 (521, 522) : 17 Mad L Jour 562 (DB), *Vahazullah Sahib* v. *Boyapati Nagayya.* (24 Mad 513 not followed.)
[*See also* ('21) 8 AIR 1921 Nag 84 (85) : 17 Nag L R 103 : 64 Ind Cas 126, *Fahmidun Nisa* v. *Hiralal.* (Transaction found to be a sale and hence required registration.)]
[*But see* ('01) 24 Mad 513 (521, 522) : 11 Mad L Jour 227 (DB), *Alabi Koya* v. *Mussa Koya.* (Per Benson, J.—Not followed in 30 Mad 519.)]

2. ('48) 35 AIR 1948 Bom 114 (115) : ILR 1947 Bom 372, *Jaitunbi* v. *Fatrubhai.*
*('27) 14 AIR 1927 Cal 197 (198) : 100 Ind Cas 296 (DB), *Nasib Ali* v. *Wajed Ali.*
†('32) 19 AIR 1932 Cal 497 (498) : 59 Cal 557 : 138 Ind Cas 733 (DB), *Sultan Miya* v. *Ajibakkatoon Bibi.*
(1841-46) 3 Moo Ind App 245 (257, 258) : 6 Suth W R P C 46 (PC), *Jeswunt Singhjee* v. *Jet Singhee.*
*('22) 9 AIR 1922 P C 281 (288) : 44 All 301 : 25 Oudh Cas 95 : 49 Ind App 195 : 68 Ind Cas 254 (PC), *Md. Abdul Ghani* v. *Mt. Fakhr Jahan Begam.*
('27) 14 AIR 1927 P C 22 (22, 23) : 54 Ind App 23 : 5 Rang 7 : 100 Ind Cas 32 (PC), *Ma Mi* v. *Kallander Ammal.* (Gift to wife—Mutation of wife's name effected—Possession of husband will be presumed to be on behalf of wife.)
*('16) 3 AIR 1916 P C 27 (31, 32) : 38 All 627 : 43 Ind App 212 : 19 Oudh Cas 192 : 36 Ind Cas 104 (PC), *Sadik Husain* v. *Hashim Ali.*
('28) 15 AIR 1928 P C 108 (110, 111) : 52 Bom 316 : 55 Ind App 171 : 109 Ind Cas 31 (PC), *Musa Miya* v. *Kadar Bax.*
('29) 16 AIR 1929 P C 149 (151) : 4 Luck 305 : 56 Ind App 213 : 116 Ind Cas 405 (PC), *Amjad Khan* v. *Ashraf Khan.*
('32) 10 AIR 1932 P C 13 (19) : 6 Luck 556 : 59 Ind App 1 : 136 Ind Cas 385 (PC), *Sadiq Ali* v. *Fakr Jahan Begum.* (Gift to wife—Declaration of delivery of pos-

session in deed and delivery of deed held sufficient to establish transfer of possession.)

('74) 6 N W P H C R 338 (341, 342) (DB), *Nizam-ud-din* v. *Zabeda Bibi.*

('75) 7 N W P H C R 313 (317, 318) (DB), *Kasum* v. *Shaista Bibi.*

('81) 3 All 266 (275) (PC), *Kamar Unnissa Bibi* v. *Hussani Bibi.*

†('88) 11 All 1 (8) : 1888 All W N 266 (DB), *Rahim Baksh* v. *Muhammad Hasan.*

('91) 13 All 409 (413) : 1891 All W N 159 (FB), *Angan Lal* v. *Mohammad Husain.* (Per Mahmood, J.)

('95) 18 All 1 (3) : 1895 All W N 123 (DB), *Sajjad Ahmed* v. *Kadri Begam.*

†('99) 21 All 165 (170) : 1899 All W N 8 (DB), *Anwari Begam* v. *Nizamuddin Shah.* (To constitute valid gift donor should transfer possession of such interest as he has at the time of gift—Transferring possession of corpus of property not necessary.)

†('06) 28 All 439 (449) : 33 Ind App 68 : 9 Oudh Cas 196 (PC), *Mehdi Hasan* v. *Mahomed Hasan.*

('87) 1887 All W N 84 (88) (DB), *Kaniz Fatima* v. *Abbas Ali.*

('11) 11 Ind Cas 534 (535, 536) (All), *Neaz Begam* v. *Manzoor Ahmad.* (In case of gift to wife no presumption as to possession should be made.)

('12) 34 All 465, (467, 468) : 14 Ind Cas 587 (588) (DB), *Ahmad-ud-din* v. *Ilahi Bakhsh.* (Gift of a right to receive a share of the offerings which might be made at a particular shrine — Actual physical possession not necessary.)

('13) 20 Ind Cas 900 (900) (All), *Namdor Khan* v. *Mohammed Saddiq.*

†('36) 164 Ind Cas 720 (720) (All), *Baldeo Prasad Balgovind* v. *Shubratan.*

('16) 3 A I R 1916 All 351 (351) : 38 All 212 : 35 Ind Cas 14 (DB), *Karam Ilahi* v. *Sharfuddin.*

('22) 9 A I R 1922 All 347 (347) : 44 All 580 : 67 Ind Cas 671 (DB), *Mohan Lal* v. *Mahmud Husain.*

('24) 11 AIR 1924 All 370 (371) : 46 All 260 : 78 Ind Cas 222 (DB), *Mt. Mulani* v. *Maula Baksh.*

('27) 14 AIR 1927 All 345 (345, 346) : 49 All 503 : 100 Ind Cas 644 (DB), *Ahmadi Begam* v. *Abdul Aziz.* (Donor not in possession but doing all in his power to complete the gift—Gift is valid.)

('27) 14 AIR 1927 All 414 (415) : 100 Ind Cas 1022 (DB), *Mahomad Yusuf* v. *Mahomed Ismail.* (Gift to minor in custody of donor—Transfer of possession not necessary.)

('30) 77 AIR 1930 All 793 (794) : 124 Ind Cas 728, *Gause Sheikh* v. *Mahommad Sharif.* (A gift of an undivided share of joint property by a co-owner in constructive possession of the same through other co-owner is valid provided he does all that lies in his power to do to wipe himself off and to put his donee into the same kind of possession as he himself had over the property.)

('31) 18 AIR 1931 All 237 (237) : 124 Ind Cas 756, *Ali Hasan* v. *Mt. Rashidan.*

('32) 19 AIR 1932 All 370 (371, 372) : 138 Ind Cas 841, *Mahomed Said* v. *Mahomed Hanif.* (Gift by one cosharer to another —Donee already in possession on behalf of all cosharers—Gift valid.)

('34) 21 AIR 1934 All 179 (188) : 148 Ind Cas 528 (DB), *Iftikar Wali Khan* v. *Sikandar Begam.*

*('36) 23 AIR 1936 All 600 (604, 605) : 164 Ind Cas 515 (DB), *Kulsum Bibi* v. *Shiam Sundar Lal.*

('37) 24 AIR 1937 All 25 (26, 27) : ILR (1937) All 285 : 166 Ind Cas 439 (DB), *Kulsum Bibi* v. *Bashir Ahmad.*

('37) 24 AIR 1937 All 547 (548) : I L R (1937) All 609 : 170 Ind Cas 824 (DB), *Mt. Jamilunnissa* v. *Mohammad Zia.* (Gift by cosharer in exclusive possession to another cosharer—Symbolical possession sufficient.)

('82) 6 Bom 168 (175) (FB), *Lakshman Dass Sarup Chand* v. *Dasrat.*

('82) 6 Bom 645 (648, 649) (DB), *Adam Khan* v. *Alarakhi.*

('82) 6 Bom 650 (661, 662) (DB), *Mohinudin* v. *Mancharsha.* (Donor simply owner of property which was in possession of the mortgagee at the date of gift—Gift held not possible.)

*('85) 9 Bom 146 (150, 151) (DB), *Shaik Ibhram* v. *Shaik Suleman.* (With regard to the delivery of the subject-matter of a gift essential under the Mahomedan law, the principle is that when a person is present on the premises proposed to be delivered to him a declaration of the person previously possessed puts the former into possession.)

('87) 11 Bom 517 (518) (DB), *Mogulsha* v. *Mahomed Saheb.*

('89) 13 Bom 156 (159) (DB), *Meherali* v. *Tajudin.* (Delivery of possession essential—Donor must, therefore, be in possession.)

('89) 13 Bom 264 (274) (DB), *Nizamuddin Gulam* v. *Abdul Gafur.*

('89) 13 Bom 352 (355) (DB), *Emnabai* v. *Hajirabai.*

('99) 23 Bom 682 (684) : 1 Bom L R 177 (DB), *Ismal* v. *Ramji.*

†('05) 29 Bom 267 (275, 276) : 7 Bom L R 45, *Moosabhai* v. *Yacoobhai.*

('05) 29 Bom 275*n* (276*n*) : 6 Bom L R 263, *Abdul Cadar* v. *Tojoodin.*

('05) 29 Bom 428 (434) : 7 Bom L R 477 (DB), *Mahamadunnissa Begum* v. *J. C. Bachelor.*

†('05) 29 Bom 468 (477, 478, 479) : 7 Bom L R 443 (DB), *Bibi Khaver* v. *Bibi Rakhia.*

†('04) 6 Bom L R 983 (992), *Khaver Sultan* v. *Rukha Sultan.*
('04) 6 Bom L R 1043 (1050), *Mahomed* v. *Bai Cooverbai.*
(1864) 1 Bom H C R 157 (160, 161), *Amina Bibi* v. *Khatija Bibi.*
('75) 1875 Bom P J 35 (DB), *Siraj Chanda-Saheb* v. *Bapusaheb.*
('76) 1876 Bom P J 272, *Ghasimia* v. *Bibanbu.*
('98) 1898 Bom P J 402 (DB), *Gahirmal Umaram* v. *Moktambi.* (If donor and donee remain in joint possession, it is not sufficient delivery except in cases of gifts from wife to husband and from guardian to his ward.)
('12) 36 Bom 214 (252) : 12 Ind Cas 225 (240), *Casmally* v. *Currimbhoy Ebrahim.*
('20) 7 AIR 1920 Bom 135 (136) : 55 Ind Cas 952 (DB), *Abdul Majidkhan* v. *Husseinbu.* (Donor and donee in same premises—Delivery cannot be presumed—Some overt act must be shown—Intention depends on circumstances.)
('21) 8 AIR 1921 Bom 248 (249) : 45 Bom 1296 : 64 Ind Cas 21 (DB), *Chandsaheb* v. *Gangabai.* (Actual possession given of some lands but not of others in possession of mortgagee—Gift operates as to latter also.)
†('24) 11 AIR 1924 Bom 410 (411, 412) : 48 Bom 396 : 80 Ind Cas 208 (DB), *Hashimbi Yakubsaheb* v. *Ajamatbi.*
('25) 12 AIR 1925 Bom 305 (308) : 86 Ind Cas 886 (DB), *Hassanalli Degumiya* v. *Ruhulla Ahmad.*
('26) 13 AIR 1926 Bom 559 (562, 563) : 98 Ind Cas 285 (DB), *Kadarbhai* v. *Nanibibi.* (Delivery of possession necessary even when gift is by husband to wife.)
†('34) 21 AIR 1934 Bom 21 (22, 24) : 58 Bom 254 : 149 Ind Cas 225, *Ebrahim Ali Bhai* v. *Bai Asi.* (Test of validity of gift is whether donor or donee reap the benefit.)
('35) 22 AIR 1935 Bom 84 (89) : 155 Ind Cas 334, *Mahomed Hussain* v. *Aishabai.*
('76) 2 Cal 184 (197) : 3 Ind App 291 (PC), *Khajooroennissa* v. *Rowshan Jehan.*
('83) 9 Cal 138 (142) (DB), *Usuf Ali* v. *Collector of Tipperah.*
('84) 10 Cal 1112 (1123, 1124) (DB), *Abdoolgaffoor* v. *Muleka.*
('88) 15 Cal 684 (702) : 15 Ind App 81 (PC), *Mahomed Bukh Khan* v. *Hoseeni Bibi.*
†('98) 25 Cal 9 (17) : 24 Ind App 196 (P C), *Aga Mahomed Jaffer Bindaneem* v. *Koolsom Bibi.*
('04) 31 Cal 319 (330) (DB), *Fatma Bibee* v. *Ahmed Baksh.* (No actual delivery of possession necessary when a parent makes a gift to a minor son.)
('80) 5 Cal L R 91 (93, 94) (DB), *Valayet Hossein* v. *Maniran.*
(1864) 1864 Suth W R Gap No. 121 (123) DB), *Wajeed Ali* v. *Abdool Ali* (Gift by father to minor son—Formal delivery not necessary.)
(1864) 1864 Suth W R Gap No. 185 (186) (DB), *Zohodooreen Sircar* v. *Baharoollah Sirdar.*
('66) 5 Suth W R 4 (19) (DB), *Rashun Jahan* v. *Enaet Hosscin.*
('68) 9 Suth W R 257 (258) (DB), *Abedoonissa Khatoon* v. *Ameeroonissa Khatoon.*
('71) 16 Suth W R 88 (90) (DB), *Obedur Reza* v. *Mahomed Muneer.*
('74) 22 Suth W R 314 (314) (DB), *Shahjan Bibee* v. *Shib Chunder Shaha.*
*('75) 2 Ind App 87 (105, 106) : 23 Suth W R 208 (210) (PC), *Ameeroonissa Khatoon* v. *Abedoonnissa Khatoon.*
('09) 2 Ind Cas 846 (847, 848) (DB) (Cal), *Danoo Darjee* v. *Momatajaddi Bhuiya.*
('10) 8 Ind Cas 38 (39, 40) (DB) (Cal), *Jahedunnessa Bibi* v. *Najibul Islam.*
('12) 13 Ind Cas 434 (436) (DB) (Cal), *Mahamed Farid* v. *Mahomed Abdul Gafur.* (Delivery of one of two distinct properties given—Gift takes effect only as to that property.)
('12) 15 Ind Cas 698 (699, 700) (DB) (Cal), *Rahimjan Bibi* v. *Imanjan Bibi.*
('31) 132 Ind Cas 95 (95) (DB) (Cal), *Abia Khatoon* v. *Omar Ali.*
*('15) 2 AIR 1915 Cal 601 (606) : 26 Ind Cas 466 (DB), *Rahim Baksh* v. *Sajjad Ahmad.*
('19) 6 AIR 1919 Cal 741 (742, 743) : 52 Ind Cas 314, *Shed Ahmed* v. *Ibrahim.*
†('21) 8 AIR 1921 Cal 225 (225, 226) : 59 I.C. 355 (DB), *Samsul Mehar Bibi* v. *Mahiuddin Ahmad.*
('22) 9 AIR 1922 Cal 422 (424, 425, 426) : 49 Cal 68 : 62 Ind Cas 481 (DB), *Tara Prasanna* v. *Shandi Bibi.*
('27) 14 AIR 1927 Cal 808 (811, 812) : 54 Cal 754 : 105 Ind Cas 67 (DB), *Sarafuddin Mohamed* v. *Mohiddin Muhammad.*
†('32) 19 A I R 1932 Cal 497 (501, 502) : 59 Cal 557 : 138 Ind Cas 733 (DB), *Sultan Miya* v. *Ajibakhatoon Bibi.*
('33) 20 AIR 1933 Cal 785 (785, 786) : 146 Ind Cas 803, *Muhara Bibi* v. *Maharulla Mondal.* (Equity of redemption in usufructuary mortgage can be subject of valid gift.)
†('35) 22 AIR 1935 Cal 393 (394, 395, 396) : 156 Ind Cas 563, *Gani Miya* v. *Wajid Ali.*
('68) 1868 Pun Re No. 107, page 274 (275), *Futteh Khan* v. *Allayar Khan.*
('75) 1875 Pun Re No. 76, page 189 (190, 191), *Nizam-uddin* v. *Mahomed Nur.*
('81) 1881 Pun Re No. 19, page 30 (33, 34), *Hyat Muhammad* v. *Dina.*
('82) 1882 Pun Re No. 86, page 251 (253), *Gulam Muhammad* v. *Muhammad Amin.*
('83) 1883 Pun Re No. 51, page 163 (165), *Sher Shah* v. *Jafer Shah.*
('86) 1886 Pun Re No. 3, page 5 (6), *Budhu* v. *Chiragh.*

('95) 1895 Pun Re No. 15, page 54 (57), *Fatta* v. *Bakhra.*
('26) 27 Pun L R 433 (437), *Mustaquim* v. *Diwan Chand.*
('37) 39 Pun L R 1014 (1015), *Sher Dad* v. *Jafar Jan.*
('12) 1912 Pun Re No. 106 : 17 Ind Cas 857 (859, 860) (DB), *Nur Muhammad* v. *Bhagwan Das.*
('26) 93 Ind Cas 334 (335) (DB) (Lah), *Abdul Khaliq* v. *Fateh Mohammad.*
†('17) 4 AIR 1917 Lah 181 (185, 186) : 1917 Pun Re No. 92 : 40 Ind Cas 374 (DB), *Mahomed Hamid* v. *Muhammad Majid.*
('22) 9 AIR 1922 Lah 40 (41) : 70 Ind Cas 493 (DB), *Sharif Hussain* v. *Rukan Din.*
('24) 11 AIR 1924 Lah 562 (563) : 79 Ind Cas 81 (DB), *Feroz-ud-din* v. *Sardar Shah.*
('25) 12 AIR 1925 Lah 501 (502) : 90 Ind Cas 640, *Rahmat Ali* v. *Mt. Daulat Bibi.*
('26) 13 AIR 1926 Lah 286 (287) : 92 Ind Cas 479, *Fateh Mahomed* v. *Mitha.* (Gift by father to son is complete on execution of deed — Delivery of possession not necessary.)
†('29) 16 AIR 1929 Lah 45 (47) : 9 Lah 567 : 108 I.C. 741 (DB), *Alla Rakha* v. *Ali Mahomed.*
('31) 18 AIR 1931 Lah 620 (621) : 132 Ind Cas 859 (DB), *Abdullah Shah* v. *Haji Shah.* (Case of gift of undivided share owned by donor not requiring delivery of possession is an exception to general rule.)
('32) 19 AIR 1932 Lah 316 (318) : 143 Ind Cas 261 (DB), *Mt. Saidunnissa* v. *Inam Ilahi.*
('33) 20 AIR 1933 Lah 601 (605) : 14 Lah 473 : 144 Ind Cas 45 (DB), *Mahomed Hassan* v. *Safdar Mirza.* (Gift to minor son—Transfer of possession not necessary.)
('35) 22 AIR 1935 Lah 795 (796, 798) : 16 Lah 629 : 159 Ind Cas 968 (DB), *Qamarud-din* v. *Mt. Hassan Jan.*
†('36) 23 AIR 1936 Lah 92 (94, 96) : 161 Ind Cas 365 (DB), *Nazir Din* v. *Mahomed Shah.* (Gift being indivisible, delivery of possession of any part of the property would make the whole gift operative.)
('90) 13 Mad 46 (47) (DB), *Hussain* v. *Shaik Mira.*
('93) 16 Mad 43 (48) : 3 Mad L Jour 14 (DB), *Sharifa Bibi* v. *Gulam Mahomed Dastagir.*
('96) 19 Mad 343 (344) (DB), *Bava Saib* v. *Mahomed.*
(1900) 23 Mad 70 (72) : 9 Mad L Jour 185 (DB), *Esuph Ravuthan* v. *Pattamsa Ammal.*
('07) 30 Mad 305 (307) : 2 Mad L Tim 180 (DB), *Veetil Bava* v. *Veetil Pakrukutti.*
†('07) 30 Mad 519 (521, 522) : 17 Mad L Jour 562 (DB), *Vaha Zullah Sahib* v. *Boyapati Nagayya.* (24 Mad 513 not followed.)
('69) 5 Mad H C R 114 (119) (DB), *Khader Hussain* v. *Hussain Begum.*
('70) 6 Mad H C R 455 (463), *Azimunnissa Begum* v. *Dale.*
('10) 8 Ind Cas 431 (432, 433) (Mad), *Bee Jan Bee* v. *Fatima Bee Bee.*
†('12) 35 Mad 120 (128, 129, 130) : 14 Ind Cas 993 (994, 997) (DB), *Nynar Mahomed* v. *Kandasami Kolathi.*
('12) 16 Ind Cas 616 (617, 618) (DB) (Mad), *Abdul Rahman* v. *Hasan Sahib.*
('14) 1 AIR 1914 Mad 264 (266) : 23 Ind Cas 547 (DB), *Abdul Rahiman Nachiyar* v. *Muhamad Nurdin Maracayer.*
('14) 1 AIR 1914 Mad 446 (448) : 23 Ind Cas 802 (DB), *Rasool Bee* v. *Ghulam Kasim Saheb.*
†('15) 2 AIR 1915 Mad 1 (3) : 23 Ind Cas 651 (DB), *Rahiman Bi* v. *Mahomed Fatima Bibi.*
('15) 2 AIR 1915 Mad 921 (923) : 31 Ind Cas 545 (DB), *Rahiman Bi* v. *Fatima Bi.*
('15) 2 AIR 1915 Mad 972 (975) : 29 Ind Cas 439 (DB), *Alamanayakunikari Nabi Sab* v. *Murukuti Papiah.*
('15) 2 AIR 1915 Mad 1056 (1058) : 31 Ind Cas 281 (DB), *Mahammad Sulfalla Sahib* v. *Vajihuddin Sahib.*
('17) 4 AIR 1917 Mad 20 (26) : 38 Ind Cas 248 (DB), *Yacoob Sahib* v. *Pacha Bibi.* (Assignment of insurance policy though not accompanied by delivery of documents is valid.)
('18) 5 AIR 1918 Mad 1337 (1344, 1345) : 42 Ind Cas 684 (DB), *Sabjan Sahib* v. *Abdul Azeez Sahib.*
('19) 6 AIR 1919 Mad 669 (670, 671) : 49 Ind Cas 204 (DB), *Subramania Iyer* v. *Assan Goya.*
('23) 10 AIR 1923 Mad 52 (53) (DB), *Fatima Bibi* v. *Jhairum Bibi.*
†('27) 14 AIR 1927 Mad 572 (574) : 100 Ind Cas 62, *Ajagar Hazar Saheb* v. *Annammah.*
('28) 15 AIR 1928 Mad 613 (613, 614) : 108 Ind Cas 637, *Nabooma* v. *Khedar Hussain* v. *Khedar Hussain.* (Gift of remainder is invalid as such gift cannot be accompanied by possession of property.)
('30) 17 AIR 1930 Mad 593 (593) : 127 Ind Cas 127, *Muhammad Naina Maracair* v. *Ummanaikani Ammal.*
*('33) 20 AIR 1933 Mad 86 (91) : 141 Ind Cas 843, *Abdul Razak* v. *Zainab Bi.*
('28) 15 AIR 1928 Nag 275 (276) : 108 Ind Cas 435, *Mayadad Khan* v. *Hazarilal.*
('10) 13 Oudh Cas 347 (349, 350) : 8 Ind Cas 717 (718), *Muhammad Idris Khan* v. *Iftikhar Ahmad.*
('13) 20 Ind Cas 286 (287) (Oudh), *Mt. Shada Bibi* v. *Ashraf Hussain.*
('37) 167 Ind Cas 299 (300, 301) (Oudh), *Mt. Kadirunnisa* v. *Mt. Tahirunissa.*
('14) 1 AIR 1914 Oudh 167 (168) : 17 Oudh Cas 60 : 23 Ind Cas 453, *Munifa Bibi* v.

of the deed of gift in accordance with the provisions of S. 123 cannot cure the want of such delivery of possession.[3] On the other hand, where a

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Fateh Ali.

('15) 2 AIR 1915 Oudh 75 (76) : 18 Oudh Cas 122 : 28 Ind Cas 180, *Ali Baksh* v. *Ghurai.*

('21) 8 AIR 1921 Oudh 209 (212) : 24 Oudh Cas 374 : 66 Ind Cas 24 (DB), *Mt. Hafizunnisa* v. *Jawahir Singh.*

('22) 9 AIR 1922 Oudh 93 (95) : 24 Oudh Cas 321 : 65 I. C. 132, *Siraj Hussain* v. *Mushaf Hussain.*

('23) 10 AIR 1923 Oudh 80 (83, 84) : 25 Oudh Cas 291 : 70 Ind Cas 253 (DB), *Sharfuzzaman* v. *Sir Henry Stanyon.*

('23) 10 AIR 1923 Oudh 214 (215) : 26 Oudh Cas 128 : 74 Ind Cas 390, *Khalil Ullah Shah* v. *Ewaz Ali.*

('25) 12 AIR 1925 Oudh 568 (576) : 28 Oudh Cas 265 : 87 Ind Cas 445 (DB), *Amjad Khan* v. *Ashraf Khan.*

('26) 13 AIR 1926 Oudh 474 (475) : 94 Ind Cas 392, *Amir Khan* v. *Hakumat Bibi.*

('28) 15 AIR 1928 Oudh 414 (415) : 110 Ind Cas 26 (DB), *Mohammad Hyder* v. *Moti Lal.*

('29) 16 AIR 1929 Oudh 435 (436) : 5 Luck 384 : 124 I.C. 354, *Abdul Rahman* v. *Gaya Prasad.*

('30) 17 AIR 1930 Oudh 71 (73) : 5 Luck 597 : 123 Ind Cas 857 (DB), *Zahuran* v. *Abdur Salam.*

†('31) 18 AIR 1931 Oudh 7 (8, 9) : 129 Ind Cas 161, *Jhumman* v. *Husain.* (Taking of possession even subsequent to gift with donor's consent makes gift valid.)

('31) 18 AIR 1931 Oudh 19 (20) : 6 Luck 403 : 129 Ind Cas 335 (DB), *Khaliq Bux* v. *Mahabir.*

('31) 18 AIR 1931 Oudh 177 (229, 230) : 136 Ind Cas 642, *Mahomed Azim Khan* v. *Sadat Ali Khan.*

('34) 21 AIR 1934 Oudh 27 (29) : 147 Ind Cas 867, *Ewaz Mohammad* v. *Ghafoor Khan.*

('34) 21 AIR 1934 Oudh 163 (165) : 148 Ind Cas 801 (DB), *Abdul Hamid* v. *M. Abdul Ghani.*

('17) 4 AIR 1917 Pat 447 (448) : 40 Ind Cas 856 (DB), *Official Trustee of Bengal* v. *Nimchand Marwari.*

('18) 5 AIR 1918 Pat 291 (293, 294) : 43 Ind Cas 857, *Basirul Haq* v. *Md. Ajmuddin.* (Gift of interest in land—Donor need not transfer corpus but only possession of that interest.)

('23) 10 AIR 1923 Pat 481 (482, 483) : 71 Ind Cas 897, *Dalpheroo Mian* v. *Bangali Mali.*

('27) 14 AIR 1927 Pat 20 (21, 22) : 97 Ind Cas 154 (DB), *Abdul Haque* v. *Mt. Tamizan.* (Donor putting donee in a position to take possession is sufficient delivery for validating gift.)

('28) 15 AIR 1928 Pat 183 (187) : 7 Pat 118 : 114 Ind Cas 204 (DB), *Bibi Bilkis* v. *Wahid Ali.*

('29) 16 AIR 1929 Pat 417 (418, 419) : 123 Ind Cas 401 (DB), *Mt. Tabera* v. *Ajodhya Prasad.*

('14) 1 AIR 1914 Low Bur 208 (209) : 24 Ind Cas 704 (DB), *Ahmed Ghulam Mahomed Sadiq* v. *Mahomed Cassim Makda.*

('33) 20 AIR 1933 Rang 155 (155) : 11 Rang 109 : 143 Ind Cas 828, *Suna Meah* v. *S. A. S. Pillai.*

('36) 23 AIR 1936 Rang 430 (431) : 14 Rang 439 : 164 Ind Cas 934 (FB), *Ma Asha* v. *B. K. Haldar.* (Gift of immovable property in Burma although good under Mahomedan law is not so, it not made according to S. 123.)

('36) 23 AIR 1936 Rang 522 (523) : 14 Rang 485 : 166 Ind Cas 327, *Rahmat Bibi* v. *Maung Po Sein.*

('31) 18 AIR 1931 Sind 17 (20) : 25 Sind L R 72 : 129 Ind Cas 900 (DB), *Mt. Hakim Bibi* v. *Mir Ahmed.*

('70) 7 Bom H C R O C 27 (33), *Ruja Bai* v. *Ismail Ahmad.*

('05) 28 All 147 (152) : 1905 All W N 222 (DB), *Humera Bibi* v. *Najm-un-nissa Bibi.*

[*See also* ('75) 14 Beng L R 307 (309) : 23 Suth W R 131 (131) (DB), *Gungahurry Nundee* v. *Raghubram Nundee. (Obiter.)*

('33) 20 AIR 1933 Oudh 99 (100) : 142 Ind Cas 42 (DB), *Mt. Khairunnisa* v. *Karamatulla.*

('11) 38 Cal 518 (520, 521) : 9 Ind Cas 635 (636) (DB), *Abdul Aziz* v. *Fateh Mahomed Hazi.* (Gift of a share in Kaimi rayati holding—Donee admitted to joint possession—Gift held valid.)

('21) 8 AIR 1921 Nag 84 (85) : 17 Nag L R 103 : 64 Ind Cas 126, *Fahmidun-Nisa* v. *Hiralal.*]

[*But see* ('66) 1 Agra H C R 238 (239) (DB), *Gyazood-Deen Hyder* v. *Fatima Begum.*]

Also see S. 9, Note 1.

3. †('15) 2 AIR 1915 Cal. 601 (606) : 26 Ind Cas 466 (DB), *Rahim Bakhsh Mandal* v. *Sajjad Ahmad Chowdhary.*

('32) 19 AIR 1932 Cal 497 (500) : 59 Cal 557 : 138 Ind Cas 733 (DB), *Sultan Miya* v. *Ajiba Khatoon Bibi.*

('07) 30 Mad 519 (521, 522) : 17 Mad L Jour 562 (DB), *Vahazulla Sahib* v. *Boyapati Nagayya.* (24 Mad 513 not followed.)

†('14) 1 AIR 1914 Mad 264 (266) : 23 Ind Cas 547 (DB), *Abdul Rahiman Nachiyal* v. *Muhammad Nurdin Maracayer.*

('12) 15 Ind Cas 698 (700) (DB) (Cal), *Rahimjan Bibi* v. *Imanjan Bibi.*

('29) 16 AIR 1929 Lah 45 (47) : 9 Lah 567 : 108 Ind Cas 741 (DB), *Allah Rakha* v. v. *Ali Mahomed.*

gift complies with the provisions of that law it will not become invalid by the mere presence of a deed of gift which, owing to some defect, is invalid under S. 123 of the Transfer of Property Act.[4] As held by Suhrawardy, J., in *Nasib Ali* v. *Wejed Ali.*[5]

> "A gift in order to be valid must be made in accordance with the forms stated above, and even if it is evidenced by writing, unless all the essential forms are observed it is not valid according to law. That being so, a deed of gift executed by a Muhammadan is not the instrument effecting, creating or making the gift but a mere piece of evidence. It may so happen after a lapse of time that the evidence of the observance of the above forms might not be forthcoming; so it is sometimes thought prudent to reduce the fact that a gift has been made into writing. Such writing is not a document of title but is a piece of evidence."

It has been held that even where a Muhammadan makes a gift to a Hindu, the gift is governed by the rules of Muhammadan law and not by the provisions of this section.[6]

See also Notes on section 129.

5. Gift of immovable property.—As seen in Note 1, the section requires that a gift of immovable property, *irrespective of its value,* must be effected only by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. The effect of such instrument is that title legally passes from the donor to the donee and any mental reservation or secret intention on the part of the donor to the contrary is ineffective and cannot prevent the legal effect of a validly executed gift deed.[1a] A gift which does not comply with this requirement is bad and cannot pass any title to the donee.[1]

('14) 1 AIR 1914 Low Bur 208 (209) : 24 Ind Cas 704 (DB), *Ahmed Gulam Mahomed Sadiq* v. *Md. Cassim Makda.*

('87) 11 Bom 517 (518) : 1887 Bom P J 118 (DB), *Mogulshah* v. *Mahamad Saheb.*

†('99) 23 Bom 682 (684) : 1 Bom L R 177 (DB), *Ismal* v. *Ramji.* (Registration is not equivalent to possession.)

4. *('27) 14 AIR 1927 Cal 197 (198) : 100 Ind Cas 296 (DB), *Nasib Ali* v. *Wajed Ali.* (Written document of gift is not a document of title but is a piece of evidence.)

('16) 3 AIR 1916 All 351 (351) : 38 All 212: 35 Ind Cas 14 (DB), *Karam Ilahi* v. *Sharf-ud-din.* (Not properly attested.)

†('36) 23 AIR 1936 All 600 (605) : 164 Ind Cas 515 (DB), *Mt. Kulsum Bibi* v. *Shiam Sunder Lal.*

('29) 16 AIR 1929 Oudh 435 (436) : 5 Luck 384 : 124 I. C. 354, *Abdul Rahman* v *Gaya Prasad.*

[*See also* ('26) 13 AIR 1926 All 294 (294) : 92 I. C. 558, *Pancham Lal* v. *Md. Yaqub Khan.*]

5. ('27) 14 AIR 1927 Cal 197 (198) : 100 Ind Cas 296 (DB).

6. ('29) 16 AIR 1929 Pat 417 (418, 419) : 123 Ind Cas 401 (DB), *Mt. Tabera* v. *Ajodhya Prasad.*

Note 5

1a. ('48) 35 AIR 1948 Nag 328 (330) : ILR (1948) Nag 824 *Bhagabai* v. *Ghanshamdas.*

1. ('43) 30 AIR 1943 Sind 177 (180) : ILR (1943) Kar 227 : 210 Ind Cas 35 (DB), *Assudibai* v. *Haribai Vasudev.* (Mere mutation of names will not create a valid gift of immovable property.)

*('19) 6 AIR 1919 P C 44 (46) : 43 Mad 234 : 46 Ind App 285 : 53 Ind Cas 901 (PC), *Varda Pillai* v. *Jivarathnammal.* (Donor presenting a petition to the Collector for transfer of the property in donee's name in pursuance of a gift — Donee also presenting similar petition — Property registered by the Collector in donee's name — *Held,* provisions of S. 123 not complied with.)

('38) 25 AIR 1938 Oudh 97 (98) : 14 Luck 9 : 173 Ind Cas 610, *Wajid Ali* v. *Gangadin.* (When a person is sole owner of property there cannot be any family settlement about it between him and his son and if he wants to give up his rights in the property in favour of his son it must be done by a deed of gift properly registered and attested under Section 123.)

('10) 6 Ind Cas 581 (581) (All) (DB), *Kali-*

A mere delivery of possession without a registered instrument will not cure the defect.[2] On the other hand, if there is a registered document, no delivery of possession is necessary to effect the transfer.[3]

Under S. 49 of the Registration Act a deed of gift not registered as required by this section may be used in evidence for collateral purposes.[4]

As to meaning of the expression "registered" see S. 3, N. 20.

6. Registration and operation of gift.—The mere fact that a deed of gift is registered does not render the gift complete, in the absence of

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charan v. *Utmi*. (Application for mutation cannot be treated as a gift.)

*('34) 21 AIR 1934 P C 67 (68) : 12 Rang 238 : 147 Ind Cas 328 (PC), *Lim Charlie* v. *Official Receiver*.

('27) 14 AIR 1927 Rang 143 (144) : 5 Rang 125 : 101 Ind Cas 634, *Maung Kyan Za* v. *U De Bi*.

('10) 34 Bom 287 (291) : 5 Ind Cas 599 (600) (DB), *Madhavrao Moreshvar* v. *Kasibai Dattubhai*.

('27) 14 AIR 1927 Rang 335 (335) : 101 Ind Cas 590, *Ma E Yin* v. *U Shwe Ni*.

('27) 14 AIR 1927 Sind 206 (207) : 102 Ind Cas 277 (DB), *Bhagwati Bai* v. *Bhagwandas*.

('06) 9 Oudh Cas 113 (116, 117) (DB), *Chhabzaj Koli* v. *Gopal*.

('28) 15 AIR 1928 Bom 250 (252) : 109 Ind Cas 149 (DB), *Hiralal Chimanlal* v. *Gaurishankar*.

('25) 12 AIR 1925 Mad 1174 (1174) : 90 Ind Cas 331, *Made Gouda* v. *Chenne Gouda*. (The formal requirements of the Transfer of Property Act cannot be avoided by calling a transaction by a particular name under the Hindu law. A person cannot by the mere recognition of another as a co-sharer of his convey title to him to immovable property, without observing any of the formalities required by law for it. 17 Ind Cas 885 (Cal) dissented from.)

('12) 17 Ind Cas 885 (886) (DB) (Cal), *Girhi Rani* v. *Chandra Lal*. (If persons actually entitled to a property agree to treat a near relation as a co-shareer out of affection and abandon their claim to an exclusive right, they may do so without a registered deed. If the act is unequivocal, it will create title in favour of the person who is taken in as a co-sharer. Dissented from in AIR 1925 Mad 1174.)

('40) 27 AIR 1940 Cal 254 (256) : 189 Ind Cas 249, *Haripada* v. *Elokeshi Devi*.

('11) 12 Ind Cas 858 (858) (Low Bur), *Mg. Po Than* v. *Ma On Buin*.

('16) 3 AIR 1916 Low Bur 11 (12) : 33 Ind Cas 129, *Mg. Shwe Kho* v. *Ma Mya*. (A Kanwin gift, i.e., a gift by the bridegroom to the bride at the time of marriage for the joint purpose of the married pair, must be in writing and registered as required by S. 123 of the Act.)

('21) 8 AIR 1921 Mad 137 (138) : 44 Mad 196 : 61 Ind Cas 461 (DB), *Perumal Ammal* v. *Perumal Naicker*. (Gifts of mortgages are regarded as gifts of immovable property.)

('26) 13 AIR 1926 Bom 261 (262) : 94 Ind Cas 609 (DB), *Girija Prosad* v. *Purshottam*. (A gift cannot be created by a document signed by the person intended to be benefited by an oral gift, in favour of the owner of the property acknowledging the gift.)

('21) 8 AIR 1921 Bom 198 (198, 199) : 45 Bom 164 : 58 Ind Cas 403 (DB), *Kuverji Kavasji* v. *The Municipality of Lonavala*.

('39) 26 AIR 1939 Pat 258 (259) : 180 Ind Cas 105, *Rup Narain* v. *Sheo Sagar*.

('29) 16 AIR 1929 All 300 (301, 302) : 51 All 629 : 119 Ind Cas 503 (DB), *Bachchi Lal* v. *Debi Din*.

('30) 17 AIR 1930 Pat 610 (612) : 128 Ind Cas 791 (DB), *Harihar Prasad* v. *Siri Gurugranth Saheb*.

('32) 19 AIR 1932 Nag 51 (52, 53) : 28 Nag L R 20 : 137 Ind Cas 153, *Fouzmal* v. *Rajaram*.

('26) 13 AIR 1926 Pat 125 (127) : 90 Ind Cas 769, *Ashloke Singh* v. *Bodha Ganderi*.

('38) 25 AIR 1938 Oudh 97 (98) : 14 Luck 9 : 173 Ind Cas 610, *Wajid Ali* v. *Ganga Din*.

('26) 13 AIR 1926 Oudh 98 (100) : 1 Luck 33 : 91 Ind Cas 927, *Secretary of State* v. *Harcharan Dass*.

('26) 13 AIR 1926 Oudh 371 (377) : 1 Luck 273 : 29 Oudh Cas 378 : 96 Ind Cas 672 (FB), *Maluka Kunwar* v. *Pateshar Singh*.

('22) 1 Bur L Jour 26 (27, 28), *Po Maung* v. *Aung Din*. (A division of property by a father in his life-time to his children except in the case of an orasa is not a partition but in reality a gift.)

2. ('43) 30 AIR 1943 Sind 177 (181) : ILR (1943) Kar 227 : 210 Ind Cas 35 (DB), *Assudibai Sahijram* v. *Haribai Vasudev*. See cases cited in Note 2.

3. See cases cited in Notes 2 and 3.

4. ('43) 30 AIR 1943 Mad 15 (19) : 208 Ind Cas 38 (DB), *Krishnaswami Naidu* v. *Secretary of State*.

[*See also* ('77) 2 Bom 273 (287), *Raju* v. *Krishnarao*. (But not for proving a covenant for title contained in the deed.)]

acceptance by the donee. Consequently, the donour can revoke the gift before such acceptance.[1]

Before the decision of their Lordships of the Privy Council in *Kalyanasundaram* v. *Karuppa*[2] there was a difference of opinion as to whether a gift which had been *accepted* by the donee was suspended in its operation until the *registration* of the deed of gift. According to one view[3] a deed of gift was not complete until it was registered and could therefore be revoked before registration, even if it had been accepted by the donee. Another view was that a donor could not be compelled to register the deed of gift since that would be compelling him to complete an incomplete gift and that therefore the registration of a deed of gift against the wishes of a donor was void.[4] In the undermentioned case[5] it was held that a voluntary registration of a deed of gift by the legal representatives of a donor had the same effect as its voluntary registration by the donor in his lifetime.

The undermentioned cases[6] held that the expression "registered instrument" in this section meant registered in accordance with the provisions of the Registration Act; that there was nothing in the section *which required the donor to register the deed of gift himself* and that the deed of gift was therefore not invalid merely because the registration of it took place against the wishes of the donor or after his death. A Full Bench decision of the Madras High Court in *Venkati Rama Reddi* v. *Pillai Rama Reddi*[7] accepted the last view and a later Full Bench decision[8] of the same High Court followed it. Subsequently, the Bombay High Court also in a full bench decision in *Atmaram Sakharam* v. *Vaman Janardhan*[9] held that once a deed of gift of immovable property was

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Section 123—Note 6

1. †('39) 26 AIR 1939 Mad 290 (290, 291) : 183 Ind Cas 631, *Papathi Ammal* v. *Doraiswami Naicker.*
('24) 11 AIR 1924 Pat 657 (660, 661) : 3 Pat 842 : 80 Ind Cas 980 (DB), *Deo Saran Bharthi* v. *Deoki Bharthi.* (A registered deed of gift as any other such document may be merely a nominal transaction, without any intention on the part of the executant to give effect to the terms falsely or fictitiously set forth in the document.)
2. ('27) 14 AIR 1927 P C 42 (44) : 50 Mad 193 : 54 Ind App 89 : 100 Ind Cas 105 (PC).
3. ('96) 19 Mad 433 (435) : 6 Mad L Jour 207 (DB), *Ramamirtha Ayyan* v. *Gopala Ayyan.*
('24) 11 AIR 1924 Bom 434 (436) : 48 Bom 435 : 80 Ind Cas 477 (DB), *Subba Rama* v. *Venkat Subba.* (Overruled by AIR 1925 Bom 210 : 49 Bom 388.)
('15) 2 AIR 1915 Mad 1145 (1146) : 28 Ind Cas 271 (DB), *Dasi Swarnam* v. *Deivanayagam Pillai.*
4. ('96) 19 Mad 433 (434, 435) : 6 Mad L Jour 207 (DB), *Ramamirtha Ayyan* v. *Gopala Ayyan.* (Overruled in AIR 1917 Mad 27 : 40 Mad 204 (FB).
('03) 13 Mad L Jour 303 (305) (DB), *Amirdan* v. *Muthukumara Chetty.*
[*See also* ('18) 5 AIR 1918 Mad 194 (199, 200) : 44 Ind Cas 483 (DB), *Amba* v. *Shrinivasa Kamathi.* (Deed of gift repudiated by the donor before registration is inoperative.)]
5. ('02) 25 Mad 672 (674) : 12 Mad L Jour 409 (DB), *Meiyyalu Nadan* v. *Anjalay.*
6. ('08) 32 Bom 441 (444) : 10 Bom L R 536 (DB), *Khushaba Mansing* v. *Chandrabhagabai.*
('98) 20 All 392 (393) : 1898 All W N 88 (DB), *Nand Kishore Lal* v. *Suraj Prasad.* (Following 11 All 319.)
('13) 35 All 3 (4) : 16 Ind Cas 406 (406, 407) (DB), *Parbati* v. *Baij Nath.* (Letters Patent Appeal from 14 Ind Cas 61 (All).)
('06) 33 Cal 584 (588, 589) : 4 Cal L Jour 340 (DB), *Bhabatosh Banerjee* v. *Soleman.*
7. ('17) 4 AIR 1917 Mad 27 (30) : 40 Mad 204 : 38 Ind Cas 707 (FB).
8. ('23) 10 AIR 1923 Mad 282 (283) : 73 Ind Cas 206 (FB), *Kalyanasundaram Pillai* v. *Karuppa Muppannar.* (Letters Patent Appeal from AIR 1921 Mad 90—The subsequent birth of a child, the adoption of a child, or the death of the donor has not the effect of defeating a title obtained under an instrument of gift executed before the happening of these events but registered thereafter.)
9. ('25) 12 AIR 1925 Bom 210 (222, 223) : 49 Bom 388 : 87 Ind Cas 490 (FB).

executed by the donor, handed over of the donee and accepted by him, the gift became complete and the donor could not revoke it after such acceptance even if it had not been registered at that time.

The conflict of views has now been set at rest by the decisions of their Lordships of the Privy Council in *Kalyanasundaram* v. *Karuppa*[10] and *Venkatasubba Srinivas Hegde* v. *Subba Rama Hegde*[11] affirming the law as laid down by the said Full Bench decisions. Their Lordships in the first of these cases observed as follows:

> "It has been forcibly argued that, until registration there is no complete gift, and that if the donor dies or revokes or becomes incapable of making the gift before the registration, it cannot take effect. On the other hand attention must be directed to S. 47 of the Indian Registration Act of 1877, which is in these terms:
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> 'A registered document shall operate from the time which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration.'
>
> * * * * * * * * *
>
> They are unable to see how the provision of S. 123 of the Transfer of Property Act can be reconciled with S. 47 of the Registration Act, except upon the view that; while registration is a necessary solemnity in order to the enforcement of a gift of immovable property, it does not suspend the gift until registration actually takes place. When the instrument of gift has been handed by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. Registration does not depend upon his consent, but is the act of an officer appointed by law for the purpose, who, if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it if it is presented by a person having the necessary interest within the prescribed period. Neither death, nor the express revocation by the donor, is a ground for refusing registration, if the other conditions are complied with."[12]

Where a deed of gift has been accepted by the donee its registration after his death cannot invalidate it.[13]

7. "Signed by or on behalf of the donor."—A difficulty has arisen in the interpretation of this expression in view of the fact that the Act has used different expressions in different sections dealing with the mode of transfer. Thus in S. 130 the words used are "signed by the transferor or his duly authorised agent." In S. 59 the expression used is "signed by the mortgagor." And in Ss. 54 and 107, there is no reference to the signature of the transferor. The words "on his behalf" taken literally would seem to include any one signing on behalf of the donor, whether with or without authority. It has, however, been observed by the Alla-

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10. *('27) 14 AIR 1927 P C 42 (43, 44) : 50 Mad 193 : 54 Ind App 89 : 100 Ind Cas 105 (PC).
11. *('28) 15 AIR 1928 P C 86 (87) : 52 Bom 313 : 108 Ind Cas 367 (PC). (AIR 1927 P C 42 : 50 Mad 193 : 54 Ind App 89 (PC) applied.)
12. *See also* ('33) 20 AIR 1933 Cal 212 (213) : 59 Cal 1176 : 142 Ind Cas 452 (DB), *Nabadwipchandra Das* v. *Lokenath Ray.*
('37) 24 AIR 1937 Nag 1 (3) : ILR (1937) Nag 291 : 167 Ind Cas 48 (DB), *Kasturchand* v. *Mt. Wazir Begam.*
13. ('37) 41 Cal W N 1201 (1203) (DB), *Sishir Kumar Chowdhary* v. *Tarangini Debya.*

habad High Court[1] that the words have been loosely used in the section, and must be construed as meaning only a signature by a person *duly authorised* by the donor.

In the undermentioned case[2] A made a gift of a house to B, but did not execute any document of gift. But B passed a document to A reciting that a gift of the house was made to him by A. The document was signed by B. It was held that it could not have the effect of a valid gift under this section.

As to the meaning of the word "signed," see Note 12 on section 3.

8. "Attested by at least two witnesses."—The section requires that the deed of gift must be "attested by at least two witnesses." If there is not attestation as required by the section the deed of gift is null and void,[1] and cannot affect the property which is the subject of the gift.[2] The word "attested" has been defined in S. 3. (See Notes 11 to 19 on that section.) The definition was inserted for the first time in that section by the Transfer of Property (Amendment) Act, XXVII of 1926. According to that definition, the word "attested" itself means "attested by two or more witnesses." So the words "by at least two witnesses" occurring after the word "attested" in this seetion have now become superfluous.

9. Doctrine of part performance, whether applies to gifts.—As to the question whether the plea of part performance is available as a defence to a person who is in possession of immovable property under an unregistered deed of gift, see Note 7 on S. 53A and the undermentioned cases.[1]

10. Donee's possession under invalid gift of immovable property.—A gift of immovable property is invalid if it is not effected in the manner laid down in the first clause of this section. The possession of the donee under such an invalid gift is adverse to the donor and if he remains in possession for a period of twelve years his title becomes perfect by prescription.[1]

Section 123—Note 7

1. ('02) 24 All 319 (325, 327) : 1902 All W N 127 (FB), *Deo Narain* v. *Kukur Bind.* (Per Stanley, C. J.)
2. ('26) 13 AIR 1926 Bom 261 (262) : 94 Ind Cas 609 (DB), *Girjaprasad* v. *Purshottam.*

Section 123—Note 8

1. ('25) 12 AIR 1925 Pat 151 (152) : 86 Ind Cas 676, *Ram Pragash Lal* v. *Mt. Bhikana Kuer.*
('42) 29 AIR 1942 Pat 120 (125) : 196 Ind Cas 837 (DB), *Bhudeb Chandra* v. *Bhikshankar Pattanaik.* (Attestation by one witness not sufficient.)
2. ('34) 21 AIR 1934 Cal 772 (775) : 61 Cal 525 : 151 Ind Cas 1063, *Neelima Basu* v. *Jaharlal Sarkar.*
('22) 9 AIR 1922 Pat 514 (524, 525) : 2 Pat 52 : 68 I.C. 383 (DB), *Baijnath Singh* v. *Brijraj Kuar.*

Section 123—Note 9

1. ('24) 11 AIR 1924 Rang 102 (103) : 1 Rang 651 : 79 Ind Cas 579, *Ma Shin* v. *Maung Hman.*
('24) 11 AIR 1924 Rang 200 (201) : 1 Rang 665 : 79 Ind Cas 485, *M. P. L. M. P. Chetty* v. *Ma Ngwe Sin.*
('27) 14 AIR 1927 Rang 128 (128) : 101 Ind Cas 703, *U Sayainda* v. *U Tha Mngala.*
('25) 12 AIR 1925 Rang 184 (185, 186) : 2 Rang 649 : 88 Ind Cas 66 (DB), *Ma Htay* v. *U Tha Hline.*
('29) 16 AIR 1929 Rang 316 (317, 318) : 123 Ind Cas 142, *Maung Hla Maung* v. *Maung Po Htai.*

Section 123—Note 10

1. *('19) 6 AIR 1919 P C 44 (46, 47) : 43 Mad 244 : 46 Ind App 285 : 53 Ind Cas 901 (PC), *Varada Pillai* v. *Jeevarathnammal.*
('03) 13 Mad L Jour 302 (303) (DB), *Venkatarayudu* v. *Subamma.* (Oral gift.)
('24) 11 AIR 1924 Mad 800 (800) : 82 Ind Cas 67, *Narayanaswamy* v. *Thangavelu.*
('26) 13 AIR 1926 Oudh 371 (377) : 29 Oudh Cas 378 : 1 Luck 273 : 96 Ind Cas 672 (FB), *Mt. Maluka Kunwar* v. *Pateshwar Singh.*
('26) 13 AIR 1926 Oudh 98 (100, 101) : I

11. Section applies to gifts in Cantonment areas.—The section has been extended to every Cantonment in British India by S. 287 of the Cantonments Act, II of 1924 (old S. 32 of the Cantonments Act, XIII of 1889), sub-s. (1) of which enacts as follows:

> "Paragraphs 2 and 3 of S. 54 and Ss. 59, 107 and 123 of the Transfer of Property Act, 1882, with respect to the transfer of property by registered instrument, shall, on and from the commencement of this Act, extend to every Cantonment."

In the undermentioned Lahore case[1] an oral gift was made by a Mahomedan to another in the Cantonment area. It was contended that S. 123 should be read along with S. 129 and that the gift was valid under the Mahomedan law. It was held that, inasmuch as only S. 123 had been extended to the Cantonment area and not S. 129, the Mahomedan law could not be applied to the case and the oral gift was therefore not valid. Abdul Raoof, J., observed:

> "The only question then to determine is whether an oral gift, by a Mahomedan of property situate in the cantonment can be made under S. 32, Cantonments Act. The provisions of S. 123, Transfer of Property Act, IV of 1882, have been made applicable to all gifts whether made by a Hindu, Mahomedan or a Buddhist. It is, however, contended that S. 123 cannot be read without S. 129, Transfer of Property Act. The omission of the inclusion of S. 129, Transfer of Property Act, in S. 32, Cantonments Act, may be intentional or accidental.
>
> "It is not, however, necessary for me to determine what the exact reasons for this omission may be, for I must take the law as it stands and, interpreting it according to the well-recognised rules of statutes relating to construction, I cannot but hold that the effect of S. 32, Cantonments Act, is that a gift must be made in the manner provided by S. 123, Transfer of Property Act."

It is submitted that this view does not appear to be good law in view of the decision of their Lordships of the Privy Council in *Ma Mi* v. *Kallandar Ammal*[2] which was a case in which the *Local Government* had extended S. 123 to a particular area, but not S. 129. Their Lordships held that the Local Government had no power to extend a particular section of the Act so as to give it an effect not contemplated by the Act.

12. Delivery of property.—As seen in Note 1 the section provides two alternative modes of transfer in the case of the gifts of moveable property :(a) a registered instrument signed by or on behalf of the donor

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Luck 33 : 91 Ind Cas 927, *Secretary of State* v. *Harcharan Das.*

('24) 11 AIR 1924 Pat 641 (644) : 3 Pat 349 : 79 Ind Cas 26 (DB), *Janki Kuer* v. *Birj Bhikhan Ojha.*

('41) 28 AIR 1941 Pat 219 (221) : 195 Ind Cas 203 (DB), *Sri Padma Kumari Patto Mahadevi* v. *Nanda Padhan.* (Where a person in wrongful possession of property has transferred it by way of unregistered gift, the possession of the donee is adverse to the donor as well as to the rightful owner.)

('24) 11 AIR 1924 Nag 222 (223) : 79 Ind Cas 117, *Mt. Kasturi* v. *Baliram.*

[*See also* ('02) 5 Oudh Cas 345 (350, 351, 354) (DB), *Itraj Kuar* v. *Bacha Mahadeo Kuar.*]

See the A. I. R. Commentaries on the *Limitation Act*, 2nd (1942) Edn., Arts. 142 & 144, Note 60.

Section 123—Note 11

1. ('20) 7 AIR 1920 Lah 249 (251) : 54 Ind Cas 829, *Mahammad Beg* v. *Amar Nath.*
2. ('27) 14 AIR 1927 P C 22 (22, 23) : 54 Ind App 23 : 5 Rang 7 : 100 Ind Cas 32 (PC).

and attested by at least two witnesses; and (b) delivery of the property. With regard to delivery of the property the section says that it may be made in the same way as goods sold may be delivered. Thus, delivery of movable property under this section is the delivery described in S. 33 of the Sale of Goods Act, 1930 (old S. 90 of the Contract Act, 1872),[1] which provides for delivery of goods sold. It runs as follows :

> "Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf."

Where a certain sum was bestowed as gratuity on one X, a servant in the employment of a Railway Company, and the same was sanctioned to be paid to X and the order for payment was received by the pay-master, but before payment was made to X the amount was attached in execution of a decree obtained against him by K, it was held that the receipt of the order to pay was not equivalent to a delivery of the money to X as he was not put in possession of the money, that the money was not therefore at the disposal of X, and could not be attached by K before it was received by X.[2] In the undermentioned case[2a] a certain sum of money was sanctioned as gratuity in favour of the deceased employee of a Railway Company and the amount was credited to the Provident Fund account of the deceased. It was held that there was no delivery of possession within the meaning of this section as the amount was not credited to the account of any living person who was entitled to receive the gratuity. Where the property gifted is handed over to the Court of Wards on account of a minor donee and the Court of Wards assumed superintendence of the property, there is a sufficient delivery so as to pass the property to the donee.[2b]

Where the property gifted is in the possession of a third person and the third person consents to hold the property on behalf of the donee when asked by the donor to deliver the property to the donee, there is no sufficient delivery of the property to the donee if the third person is not authorised by the donee to hold the property on his behalf. In such a case the transaction does not operate to transfer the property to the donee.[3]

Section 123—Note 12

1. †('23) 10 AIR 1923 Pat 165 (170, 171) : 67 Ind Cas 451 (DB), *Rameshwar Narain* v. *Reknath Koeri.* (Section 90, Contract Act, 1872.)
('14) 1 AIR 1914 Cal 566 (567) : 22 Ind Cas 500 (DB), *Akhoy Kumar* v. *Haridas.* (Do.)
('84) 6 All 634 (636) : 1884 All W N 210 (DB), *Jankidas* v. *East Indian Railway Co.* (Do.)
2. ('84) 6 All 634 (636) : 1884 All W N 210 (DB), *Janki Das* v. *East Indian Railway Co.*
[*See also* ('24) 11 AIR 1924 Bom 88 (88) : 87 Ind Cas 312, *Natha Gulab* v. *W. C. Sheller.* (The delivery of the cheque by the Railway Company to the Mercantile Bank, though coupled with the request to send the amount to their London Office to be paid to defendants is not equivalent to delivery to the defendants.)]
2a. ('43) 30 AIR 1943 Bom 453 (455) : 210 Ind Cas 553, *Usman Abubakar* v. *Chief Accounts Officer, G.I.P. Railway.* (The gift not being valid the amount of gratuity could not be attached in execution of a decree against the deceased.)
2b. ('43) 30 AIR 1943 Sind 177 (181) : ILR (1943) Kar 227 : 210 Ind Cas 35 (DB), *Assudibai Sahijram* v. *Haribai Vasudev.*
3. †('23) 10 AIR 1923 Pat 165 (170, 171) : 67 Ind Cas 451 (DB), *Rameshwar Narain Singh* v. *Rani Reknath Koeri.*
('84) 6 All 634 (636) : 1884 All W N 210 (DB), *Jankidas* v. *East Indian Railway Co.*
('24) 11 AIR 1924 Bom 88 (88) : 87 Ind Cas 312, *Natha Gulab & Co.* v. *W. C. Sheller.*
See also illustration (f) to the old S. 90 of the Indian Contract Act, 1872.

Where the property gifted is already in the possession of the donee, a fresh delivery at the time of the gift is not necessary. It is sufficient if the conduct of the parties shows that the ownership in the property has changed.[4] Thus, where a person is in possession of a barge as servant of his master at the time of the gift of the barge, but after the gift, works the barge as an owner, there is sufficient delivery of possession and the property becomes vested in him.[5]

Where the goods are stored and locked up in a warehouse the delivery of the key to the donee giving exclusive control over the goods is sufficient delivery of the goods.[6]

In the undermentioned case[7] a deposit was made in a bank by the husband in the joint names of himself and his wife in the following terms : "Mr. and Mrs. Hope, payable to either or survivor." It was held that there was no gift of the money by the husband to the wife as there was no delivery of the money by the husband to the wife within the meaning of S. 123 and that the English law which presumed a gift by the husband to the wife, in such a case, defeasible on the death of the wife in the life-time of the husband, was not applicable in India.

A fixed deposit in a bank is not a deposit of specie but a debt or an actionable claim and a gift of such a deposit is not a gift of movable property but a gift of an actionable claim. The handing over of a fixed deposit receipt, therefore, is not enough to pass title to the deposit. The gift must comply with the requirements of S. 130[7a].

See also the undermentioned cases.[8]

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4. (1861) 4 L T (NS) 639 (640) : 9 W R (Eng) 747 : 127 R R 925, *Winter* v. *Winter.*
(1891) 64 L T 645 (646, 647) : 7 Ir L R 418, *Alderson* v. *Peel.* (Delivery first and gift afterwards of a chattel capable of delivery is as effectual as gift first and delivery afterwards.)
(1896) 2 Q B 283 (288) : 74 L T 728 : 65 L J Q B 587, *Cain* v. *Moon.*
(1892) 1 Q B 582 (585) : 40 W R (Eng) 479 : 66 L T 797, *Kilpin* v. *Ratley.*

5. (1861) 4 L T (NS) 639 (640) : 9 W R (Eng) 747 : 127 R R 925, *Winter* v. *Winter.*

6. (1888) 39 Ch D 669 (676) : 36 W R (Eng) 762 : 57 L J Ch 973 : 59 L T 172, *Hilton* v. *Tuker.*

7. ('31) 18 AIR 1931 All 596 (597) : 53 All 633 : 132 Ind Cas 573 (DB), *Mrs. T. C. Paul* v. *Nathaniel Gopal Nath.*
[*See also* ('43) 30 AIR 1943 Bom 7 (9) : 204 Ind Cas 212 (DB), *Keshavlal Tribhavandas* v. *Bai Dahi.* (Deposit of money in joint names of husband and wife—Deposit payable to wife only after husband's death—*Held* that the deposit did not operate as a gift to the wife as there was no such delivery as was required to make a valid gift and as the doctrine of advancement was not applicable in India.)]

7a. ('45) 32 AIR 1945 All 409 (411) : ILR (1945) All 315 (DB), *Rajeshwari Debi* v. *Mohan Bikram Sah.*

8. ('15) 2 AIR 1915 P C 96 (97) : 37 All 557 : 42 Ind App 202 : 30 Ind Cas 299 (PC), *Mt. Bilas Kunwar* v. *Desraj Ranjit Singh.* (Where a husband purchases property in the name of his wife the presumption is that it is benami—There is no presumption of advancement in India.)
('25) 12 AIR 1925 P C 181 (182) : 48 Mad 605 : 52 Ind App 286 : 88 I.C. 327 (PC), *Lukshmiah Chetty* v. *Kothandarama Pillai.* (Do.)
('29) 16 AIR 1929 Oudh 97 (108) : 3 Luck 521 : 117 Ind Cas 385 (DB), *Mirza Md. Sadiq Ali Khan* v. *Fakhr Jahan Begam.* (Do.)
('29) 16 AIR 1929 Oudh 134 (145, 146) : 117 Ind Cas 456 (DB), *Ameer Hasan* v. *Muhammad Ejaz Husain.* (Do.)
('05) 29 Bom 306 (314) : 6 Bom L R 975 (DB), *Bai Motivahoo* v. *Purshottam Dayal.* (According to the law, as it prevails in Bombay, a purchase by a husband in the name of his wife does not raise any presumption of a gift to the wife or of an advancement for her benefit.)
(1854) 6 Moo Ind App 53 (75, 76) : 1 Sar 493 (PC), *Gopeekrist Gosain* v. *Gungapersaud Gosain.* (Under Hindu law when a Hindu purchases real property in the name of his son the presumption is that the purchase is benami.)
('69) 13 Moo Ind App 232 (246, 247) : 13 Suth W R P C 1 (P C), *Moulvie Sayyud Azhar Ali* v. *Mt. Bebee Ultaf Fatima.* (The practice of holding land and buy-

13. Incomplete gift does not constitute donor trustee for donee.—See Note 15 on Section 122.

14. Gifts of actionable claims.—A gift of an actionable claim is governed by S. 130 and not by this section. See Notes on that section.

A deed of gift of immovable property and actionable claims which fails as a gift of immovable property for non-compliance with the requirements of this section does not fail also as a gift of actionable claims unless the gift of the latter is made conditional on the gift of the former taking place.[1]

As to whether a gift of a fixed deposit in a bank is a gift of movable property or actionable, see Note 12.

15. Law in places to which Transfer of Property Act is not extended. — This section will not affect gifts effected in places to which the Transfer of Property Act is not extended.[1] But if there is a deed of gift of immovable property it is compulsorily registrable under S. 17 of the Registration Act, and if not so registered will not under S. 49 of that Act, affect the property comprised therein or be received in evidence of any transaction affecting such property. It will, however, be admissible in evidence for the purposes mentioned in the proviso to that section. See also the undermentioned cases.[2]

16. Extent.—As to limitations to the territorial operation of the section, see the last paragraph of section 1.

Gift of existing and future property.

124. A gift comprising both existing and future property is void as to the latter.

Synopsis

1. Scope of the section.
2. Gift of future property, if operrates as contract to give future property.
3. Muhammadan law.

1. Scope of the section.—By its very definition a gift is a transfer of *existing* property. And indeed, as has been seen in Note 7 on S. 5 there can be no *transfer of any kind* of what is not in existence. It follows that a gift of property that may come into existence in the future is void.[1]

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ing lands in the name of another exists in India as much among Mahomedans as among Hindus and the rule laid down in 6 Moo Ind App 53 (PC) would apply.)

Section 123—Note 14

1. ('21) 8 AIR 1921 Mad 137 (139, 140) : 44 Mad 196 : 61 Ind Cas 461 (DB), *Perumal Ammal* v. *Perumal Naiker.*

Section 123—Note 15

1. ('21) 8 AIR 1921 Cal 647 (649) : 67 Ind Cas 31 (DB), *Jagannath* v. *Chandni Bibi.* (Gift before Transfer of Property Act came into force.)
('37) 39 Pun L R 1014 (1015), *Sher Dad* v. *Zafar Jan.*
('26) 13 AIR 1926 Lah 286 (287) : 92 Ind Cas 479, *Fateh Mahomed* v. *Mitha.* (Section 123 does not apply to the Punjab.)
2. ('21) 8 AIR 1921 Cal 647 (649) : 67 Ind Cas 31 (DB), *Jagannath* v. *Chandni Bibi.*
('25) 12 AIR 1925 Lah 183 (183) : 78 Ind Cas 113, *Hira Singh* v. *Punjab Singh.* (A document by which rights in immovable property are surrendered without any consideration is in effect a deed of gift.)
('26) 13 AIR 1926 Lah 372 (372) : 94 Ind Cas 7 (DB), *Maula Buksh* v. *Hafiz-ud-din.* (Gift to mosque is valid and deed of gift is not admissible without registration under S. 17 (1) (d) of Registration Act.)
('33) 20 AIR 1933 Pesh 67 (69) : 146 Ind Cas 363, *Totaram* v. *Mt. Isri Bai.*
('13) 1913 Pun Re No. 83 : 18 Ind Cas 918 (919) (DB), *Jaman* v. *Chandiya Ram.*

Section 124—Note 1

1. ('47) 34 AIR 1947 All 179 (180) : ILR (1947) All 8 (DB), *Brindaban Behari* v. *Oudh Behari.*

[Owners of property cannot transfer by way of gift the future income of property before it has accrued.]

Where a gift purports to be of existing property as well as future property, this section provides that the whole gift is not void but only so much of the gift as relates to the future property.

2. Gift of future property, if operates as contract to give future property.—It has been seen in Note 7 on S. 5 that if a person purports to make a transfer of what may come into existence in future, it will be regarded only as a *contract* to assign the property when it comes into existence in future. This rule, however, applies only to attempted transfer for *consideration,* of future property, for a contract must be supported by consideration; otherwise it will be void. A gift is a transfer *without consideration,* and there can be no *contract,* therefore, to make a gift. A transfer by way of gift, of future property is thus void not only as a transfer, but also as a *contract* to transfer the property.

3. Muhammadan law.—This section does not affect any rule of Muhammadan law (see S. 129). But there is no inconsistency between this section and any rule of Muhammadan law. Even under that law, there cannot be a gift of future property.[1]

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125. A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

Gift to several, of whom one does not accept.

1. Scope of the section.—The general principle that where a transfer of property is made in favour of A and B and the transfer fails with regard to B, the whole transfer does not fail, but only fails in regard to B, has been recognised by the Indian Legislature in various provisions. Thus, S. 115 of the Succession Act provides that where a bequest is made to a *class* of persons with regard to some of whom the interest fails by reason of the rule against perpetuities, such interest fails in regard to *those persons only* and not in regard to the whole class. A similar provision is found in Ss. 15 and 22 of this Act.

This section also is in accordance with the said general principle and provides that the failure of a gift as regards one of two or more donees by reason of non-acceptance operates as a failure only to the extent of the interest which he would have taken had he accepted.

The section does not appear to be limited in its operation to cases where a gift is made to two or more persons as *joint tenants.* It would seem to apply to all transfers whether made jointly or severally to two or more persons. But the effect of the failure of the gift as regards one of them by reason of non-acceptance, on the interest of the other donees, would differ according as the gift was made to them as *joint tenants or tenants in common.* In the former case, the donees who accept the gift would *take the whole*[1] while in the latter case, their shares will not be increased, by the share of the other who does not accept the gift.

As to whether and when two or more donees take as joint tenants or as tenants-in-common, see Note 6 on section 45.

Section 124—Note 3

1. ('05) 7 Bom L R 306 (307), *Abdoola* v. *Mahomed.*
('98) 22 Bom 489 (492) (DB), *Amtul Nissa* v. *Mir Nurudin.*

Section 125—Note 1

1. ('89) 16 Cal 677 (682) : 16 Ind App 44 (PC), *Nandi Singh* v. *Sita Ram.* (*Humphrey* v. *Taylour,* 27 E R 89, followed.)

126. The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be.

When gift may be suspended or revoked.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Illustrations.

(a) A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's lifetime. A may take back the field.

(b) A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000, which continue to belong to A.

Synopsis

1. Scope of the section.
2. Agreement for revocation.
2a. Conditional assignment of insurance policy.
3. Gift revocable at the will of the donor.
4. Resumability of service tenures. See Note 69 on S. 105.
5. Paragraph 2—General.
6. Coercion.
7. Fraud.
8. Misrepresentation.
9. Undue influence.
10. Pardanashin women.
11. Mistake.
12. Limitation for suit to revoke gifts. See Notes on Art. 91 of the A. I. R. Commentaries on the Limitation Act, 2nd (1942) Edn.
13. Right to revoke gift—When may be lost.
14. Who may suspend or revoke gifts.
15. Revocation, if need be express.
16. "Save as aforesaid, a gift cannot be revoked"—Paragraph 3.
17. "Transferees for consideration without notice"—Paragraph 4.

1. Scope of the section.—This section deals with the circumstances under which a gift may be suspended or revoked. The first paragraph provides that a gift may be suspended or revoked by *agreement* of parties. The second paragraph provides that a gift may be revoked on grounds on which *contracts might be rescinded.* The words "save as aforesaid, a gift cannot be revoked" show that the section is exhaustive of the way in which a gift can be revoked. The contrary observation in the undermentioned case[1] is, it is submitted, not correct.

Before the amendment of S. 129 in 1929, this section did not affect any rule of Hindu law. Under that law, if a person made a gift to another in expectation that the donee will do some work in consideration of the gift, and the donee failed to do it, the gift was revocable.[2] This will not be good law after the amendment of S. 129, rendering this section applicable to Hindu gifts also.

This section does not affect any rule of Muhammadan law. As to the revocability of gifts under that law, see Mulla's *Principles of Muhammadan Law.*

Section 126—Note 1

1. ('30) 17 AIR 1930 All 669 (674) : 125 Ind Cas 507 (DB), *Balbhadar Singh* v. *Lakshmibai.*
2. ('73) 5 N W P H C R 5 (7) (DB), *Mahadeo Pundit* v. *Mt. Badamo.*

('30) 17 AIR 1930 All 669 (674) : 125 Ind Cas 507 (DB), *Balbhadar Singh* v. *Lakshmibai.*

2. Agreement for revocation.—The first paragraph of the section refers to *agreements* for the suspension or revocation of gifts. As has been seen in Note 14 on S. 10, this section does not deal with *conditions* imposed by the donor in the gift and it is incorrect to speak of agreements for revocation under this section as "conditions," as has been done in some cases.[1] But apart from this section, however, a person can make *conditional* gifts. The conditions in such cases must be valid conditions under the various provisions of Chapter II.[2]

An agreement for revocation under this section must, of course, be a *valid* agreement. Further the event on which the parties agree to revoke the gift must not depend upon the will of the donor. In other words, an agreement for revocation of a gift must satisfy two conditions :

(1) it must be valid as an agreement under the law of contracts, and

(2) the event, on the happening of which the gift is to be suspended or revoked, must not depend upon the will of the donor.

Where A made a gift of funds for the specific purpose of founding a college for a particular community, and the founding of such college became impossible by the passing of the University Act, it was held that the promoters of the scheme and the donors must be deemed to have agreed within the meaning of this section that on the failure of the scheme, the gift shall be revoked.[3]

2a. Conditional assignment of insurance policy.—Where a policy of life insurance is assigned with the provision that if the assignee should pre-decease the assignor, the benefit under the policy should revert to the assignor and form part of his estate, the latter provision is valid under this section. The contingency on which the assignment is to be revoked not depending on the assignor's will, is covered by the first part of the first paragraph of this section.[1]

3. Gift revocable at the will of the donor.—Where the gift is revocable wholly or in part *at the mere will of the donor* the gift is void wholly or in part as the case may be.[1] The reason is that where a party declares his intention to make a gift and then annexes to such a declaration a stipulation that he will revoke it when he wills it, the declaration of the gift is contradictory in itself and there is no gift at all.[2]

Section 126—Note 2

1. ('90) 17 Cal 826 (828) (DB), *Nilmadhab* v. *Narattam.*
('23) 10 AIR 1923 Mad 67 (69) : 69 Ind Cas 673 (DB), *Venkatarama Ayyar* v. *Aiyasami Aiyar.*
('07) 4 All L Jour 708 (709) (DB), *Thakur Prasad* v. *Rajrup Singh.*
('39) 26 AIR 1939 All 221 (223) : ILR (1939) All 298 : 181 Ind Cas 407 (DB), *Brij Devi* v. *Shiva Nanda Prasad.*
('29) 16 AIR 1929 Rang 226 (227) : 7 Rang 306 : 119 Ind Cas 737, *Ma Yin Hu* v. *Ma Chit May.*
2. ('34) 21 AIR 1934 Rang 129 (131) : 150 Ind Cas 966 (DB), *Ma Shin* v. *Ma Thin Kyi.* (A condition that donee should allow the donor to enjoy the usufruct during his lifetime is not contrary to law.)
('82) 4 Mad 200 (202, 203) (DB), *Anantha* v. *Nagamuthu.* (Condition against alienation in a gift of land to Brahmins is inoperative.)
(1844) 49 E R 1134 (1137) : 7 Beav 437 : 64 R R 111, *Ridgway* v. *Woodhouse.* (Condition itself held not illegal.)
3. ('34) 21 AIR 1934 Oudh 329 (333) : 150 I. C. 713 (DB), *Audesh Singh* v. *Commissioner, Lucknow.*

Section 126—Note 2a

1. ('44) 31 AIR 1944 Nag 185 (186), 187 : 219 Ind Cas 190 : ILR (1944) Nag 871 *Soma Shekharrao* v. *K. S. Mishra.*

Section 126—Note 3

1. ('10) 34 Bom 604 (617) : 6 Ind Cas 513 (518), *Jaina Bai* v. *Sethna.*
2. ('82) 5 Mad 173 (179) (DB), *Secretary of State* v. *Arathoon.*

4. Resumability of service tenures.—See Note 69 on Section 105.

5. Paragraph 2—General.—As has been seen in Note 3 on S. 4, sales, *mortgages, leases* and *exchanges* are all transfers of property based initially on *contracts* and the chapters of the Act dealing with those transfers must be taken as part of the Contract Act.

The chapter on gifts cannot, however, be said to relate to contracts inasmuch as a gift is a transfer *without consideration.* Consequently, this chapter cannot, by virtue of S. 4, be read as part of the Contract Act. The special provision in the second paragraph has, therefore, been inserted in this section making a gift revocable in cases in which, if it were a contract it might be rescinded. A contract may be rescinded where it is *voidable* under the provisions of the Contract Act, these provisions being Ss. 19, 19A, 39, 53 and 55. By virtue of this paragraph, a gift also can be revoked on the grounds referred to in the said sections. Thus, a gift can be revoked on the ground of coercion, fraud, misrepresentation or undue influence.[1]

6. Coercion.—A contract brought about by coercion is voidable under S. 19 of the Contract Act. Consequently, a gift brought about by coercion would under this section be revoked.

"Coercion" is defined in S. 15 of the Contract Act as follows :

" 'Coercion' is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation. — It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed."

In *Chikkam Ammiraju* v. *Seshamma,*[1] where a husband attempted to commit suicide in consequence of which he obtained a deed of release from his wife and the son, it was held that his act amounted to "threatening to commit an act forbidden by the Penal Code" and therefore to "coercion" and that the deed was, therefore, liable to be set aside.

7. Fraud.—Since a contract procured by fraud is voidable under S. 19 of the Contract Act, a gift obtained by fraud would, under this section, be revocable at the option of the donor.[1] As to the meaning of "fraud," see S. 6, Note 32.

8. Misrepresentation.—A gift may be revoked if it had been caused by a misrepresentation of fact.[1] As to the meaning of "misrepresentation" see S. 78, Note 3.

9. Undue influence.—A contract is, under S. 19A of the Contract Act, voidable on the ground of undue influence. A gift brought about by undue influence will, accordingly, under this section, be revocable by the donor.

Section 126—Note 5

1. ('18) 5 AIR 1918 Cal 615 (617) : 45 Cal 434 : 41 Ind Cas 878 (DB), *Behari Lal* v. *Sidhu Bala.*

Section 126—Note 6

1. ('18) 5 AIR 1918 Mad 414 (416) : 41 Mad 33 : 40 Ind Cas 352 (SB).

Section 126—Note 7

1. *See* (1886) L R 2 Eq 319 (322) : 35 L J Ch 684 : 14 L T 394, *Wilkinson* v. *Joughin* (Fraudulent bequest held void.)

Section 126—Note 8

1. (1900) 1 Ch 354 (362) : 69 L J Ch 278 : 82 L T 412, *In re Glubb.*

"Undue influence" is the most common ground on which a gift is generally sought to be revoked. It has been defined in S. 16, Contract Act, 1872, as follows :

> "*Section 16.* (1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
>
> (2) In particular and without prejudice to the generality of the foregoing principle a person is deemed to be in a position to dominate the will of another —
>
> (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other, or
>
> (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
>
> (3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.
>
> Nothing in this sub-section shall affect the provisions of S. 111 of the Indian Evidence Act, 1872.
>
> *Illustrations.*
>
> (a) A, having advanced money to his son, B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.
>
> (b) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B, an unreasonable sum for his professional services. B employs undue influence.
>
> (c) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.
>
> (d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence."

In *Sital Prasad* v. *Prabhu Lal,*[1] Straight, J., observed as follows :

> "It is of the most serious public importance that the free and voluntary contracts of persons in favour of others should, in no way, be interfered with or disturbed by the Courts of law, and it is not

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Section 126—Note 9

1. *('88) 10 All 535 (544, 545) : 1883 All W N 221 (DB).

> because a man chooses to make an ill-considered or foolish contract, that therefore the Courts of law are to step in and relieve him of the consequences of his act.....But what the Courts in this country will do, is to see that, where one person is so situated as to be under the control and influence of another, such other does not unduly or unfairly exercise that influence and control over such person for his own advantage or benefit."

In *Allcard* v. *Skinner*,[2] Lindley, L. J., explains the principle as follows :

> "What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? or is it that it is right and expedient to save them from being victimised by other people? In my opinion, the doctrine of undue influence is founded on the second of these two principles. Courts of equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of the donors. The Courts have always repudiated any such jurisdiction.....On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws."

The relation of dependence arises (a) from a special authority or confidence reposed in the donee, or (b) from the feebleness in mind or body of the donor. There are many classes of influence in which the donee from his position is presumed to be likely to have exercised special influence over the mind of the donor, though the Courts have refused to enumerate exhaustively the cases in which the presumption of undue influence will *prima facie* be made.[2a] Some examples of such influence are, the influence of a solicitor over his client,[3] of a medical attendant over his patient,[4] of a spiritual adviser over his disciple,[5] of a trustee over his *cestui que trust*,[6] of an executor over the beneficiary under the

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2. *(1887) 36 Ch D 145 (182, 183) : 56 L J Ch 1052 : 57 L T 61 : 36 W R (Eng) 251.

2a. ('27) 14 AIR 1927 P C 148 (150) : 103 Ind Cas 239 (PC), *Daing Soharah Binte* v. *Chabak Binte*.

[*See also* ('14) 1 AIR 1914 Low Bur 278 (280) : 8 Low Bur Rul 235 : 26 Ind Cas 39 (DB), *Maung Pu* v. *Lucy Moss*. (Under the English law there is no presumption of undue influence in the case of a gift to a son, grandson or son-in-law even if made during the donor's illness and a few days before his death—The Indian law in this respect would be the same —Otherwise no gift by an old father to his son would be valid, unless the son could show that the confidential relationship, i.e., the intimate relationship of the father and son, had ceased.)]

3. †(1903) 1 Ch 27 (50) : 51 W R (Eng) 106 : 72 L J Ch 138 : 87 L T 624 : 19 T L R 29, *M. Wright* v. *Carter*.

('68) 10 Suth W R 469 (472) (DB), *Fuzeelun Beebee* v. *Omdah Beebee*.

('30) 17 AIR 1930 Mad 317 (320, 321) : 120 Ind Cas 882 (DB), *Vasi Reddi Balachandra* v. *Subbaya*.

(1902) 1902 App Cas 271 (276, 277) : 71 L J Ch 609 : 86 L T 805 : 18 T L R 602, *Willis* v. *Barron*.

('95) 5 Mad L Jour 233 (237) (DB), *Sri Raja Papamma Row* v. *Sitarammayya*.

(1895) 2 Q B 679 (683) : 44 W R (Eng) 116 : 65 L J Q B 34 : 73 L T 428, *Liles* v. *Terry*.

[*See* (1889) 61 L T 8 (9) : 37 W R (Eng) 339 : 53 J P 212, *Tyars* v. *Alsop*.]

4. ('37) 172 Ind Cas 527 (528) (PC), *James Augustus Williams* v. *Patience Pratt Johnson*.

(1881) 8 Q B D 587 (591) : 29 W R (Eng) 558 : 50 L J Q B 460 : 45 L T 694, *Mitchell* v. *Homfray*.

5. ('90) 12 All 523 (529) : 1890 All W N 56 (DB), *Mannu Singh* v. *Umadat Pande*.

(1868) 6 Eq 655 (674) : 16 W R (Eng) 824 : 18 L T 451 : 37 L J Ch 674, *Lyon* v. *Home*.

(1764) 28 E R 908 (910) : 2 Eden 286, *Norton* v. *Relly*.

(1860) 66 E R 103 (113) : 2 Giff 246 : 29 L J Ch 857 : 6 Jur (NS) 1066 : 8 W R (Eng) 742, *Nottidge* v. *Prince*.

[*See also* (1807) 14 Ves 273 (300) : 33 E R 526 (536), *Huguenin* v. *Baseley*.]

6. ('06) 30 Bom 578 (589) : 8 Bom L R 525 (DB), *Raghunath* v. *Varjivandas Madanji*.

will,[7] of a guardian over his ward,[8] of a parent over his child,[9] of an agent over his principal,[10] and of a paramour over his mistress.[10a] In all such cases, and other cases of dependence the relationship itself does not necessarily preclude the making of the gift; but the burden is on the donee to show that there was no such influence. He can discharge the burden by showing that the gift was the spontaneous act of the donor, acting under circumstances which enabled the donor to exercise an independent will and which justifies the Court in holding that the gift was the result of the free exercise of the donor's will.[11]

There is no rule of law that the gift is invalid in the absence of competent independent advice.[12] The possession of competent independent

7. (1893) 1893 W N 128 (128), *Wheeler* v. *Sargeant.*
8. (1804) 9 Ves 292 (297, 298) : 32 E R 615 (617) : 1 Smith K B 226, *Hatch* v. *Hatch.*
(1754) 28 E R 349 (350) : 2 Ves Sen 547, *Hylton* v. *Hylton.*
9. (1855) 114 R R 60 (64, 70) : 8 De G M & G 133 : 25 L J Ch 753 : 4 W R (Eng) 410 : 2 Jur (NS) 599, *Wright* v. *Vanderplank.*
(1856) 5 H L C 627 (655, 663) : 10 E R 1046 (1058, 1061) : 25 L J Ch 482 : 2 Jur (NS), 503 : 4 W R (Eng) 471, *Savery* v. *King.*
('05) 30 Mad 169 (174) : 17 Mad L Jour 19 (FB), *Lakshmi Doss* v. *Roop Laul.*
(1900) 1 Ch 243 (245, 246) : 69 L J Ch 164 : 82 L T 84, *Powell* v. *Powell.*
10. *('27) 14 AIR 1927 P C 148 (150) : 103 I. C. 239 (P C), *Daing Soharab Binte* v. *Chabak Binte.*
('03) 25 All 358 (364) : 1903 All W N 70 (D B), *Phulchand* v. *Lakkhu.*
10a. ('38) 25 AIR 1938 Bom 304 (306) : 176 Ind Cas 187 (DB), *Shivgangawa* v *Basangouda.*
[*See also* ('48) 35 AIR 1948 Pat 130 (133) (DB) *Ramchander Prasad* v. *Sital Prasad.* Gift of entire property by donor in favour of his only daughter's paramour—Gift held brought about by undue influence.]
11. *('29) 16 AIR 1929 P C 3 (6) : 115 Ird Cas 733 (PC), *Inche Noriah* v. *Shaikh Allie.*
('27) 14 AIR 1927 P C 148 (150) : 103 Ind Cas 239 (PC), *Daing Soharah Binte* v. *Chabak Binte.*
('91) 18 Cal 545 (548) : 18 Ind App 144 (PC), *Wajid Khan* v. *Ewaz Ali Khan.*
*(1887) 36 Ch D 145 (171) : 56 L J Ch 1052 : 57 L T 61 : 36 W R (Eng) 251, *Allcard* v. *Skinner.*
('12) 15 Ind Cas 529 (532) (Bom), *Rajaram* v. *Khandu Balu.*
('34) 21 AIR 1934 All 507 (509) : 152 Ind Cas 146 (DB), *Mt. Azizunnissa* v. *Suraj Husain.*
('30) 17 AIR 1930 Sind 25 (29) : 118 Ind Cas 737 (DB), *Safdar Ali* v. *Nur Mahomed.*
('37) 172 Ind Cas 527 (528) (PC), *Williams* v. *Johnson.*
('92) 5 C P L R 44 (45), *Mt. Chimnabai* v. *Paiku.*
('22) 9 AIR 1922 Oudh 59 (71, 73) : 65 Ind Cas 380 (DB), *Mt. Chauras Kuar* v. *Mt. Abhairaj Kuar.*
('88) 10 All 535 (545) : 1888 All W N 221 (DB), *Sital Prasad* v. *Parbhu Lal.*
('03) 25 All 358 (363, 364) : 1903 All W N 70 (DB), *Phul Chand* v. *Lakhu.*
('31) 18 AIR 1931 Oudh 34 (38) : 130 Ind Cas 119 (DB), *Tribhuwan Datt* v. *Someshwar Datt.*
('91) 15 Bom 549 (563), *Bai Manigavri* v. *Narandas Calliandas.*
('70) 7 Bom H C R O C 27 (34), *Rujabai* v. *Ismail Ahmed.*
(1903) 1 Ch 27 (50) : 51 W R (Eng) 106 : 72 L J Ch 138 : 87 L T 624, *Wright* v. *Carter.*
(1881) 8 Q B D 587 (589) : 29 W R (Eng) 558 : 50 L J Q B 460 : 45 LT 694, *Mitchell* v. *Hamfray.*
(1902) 1 Ch 765 (770) : 71 L J Ch 374 : 50 W R (Eng) 444 : 86 L T 663, *Re Haslam and Hier Evans.*
(1893) 1 Ch 736 (752) : 62 L J Ch 515 : 68 L T 619, *Moreley* v. *Loughman.*
(1844) 7 Beav 551 (560) : 8 Jur 761, *Archer* v. *Hudson.*
[*See also* ('21) 8 AIR 1921 Mad 394 (397) : 68 Ind Cas 352 (DB), *Rajarajeswara Sethupathi Avergal* v. *Kuppusami Iyer.*]
12. ('38) 25 AIR 1938 PC 38 (40) : 32 Sing L R 285 : 172 Ind Cas 720 (PC), *Sinkandar Begam* v. *Zulfikar Wali Khan.*
*('14) 36 All 81 (91, 92) : 41 Ind App 23 : 16 Oudh Cas 378 : 21 Ind Cas 985 (988) (PC), *Kali Baksh Singh* v. *Ram Gopal Singh.*
*('29) 16 AIR 1929 P C 3 (7) : 115 Ind Cas 733 (PC), *Inche Noriah* v. *Sheikh Allie.*
('34) 21 AIR 1934 All 179 (181, 182) : 148 Ind Cas 528 (DB), *Iftikhar Wali Khan* v. *Sikandar Begam.*
('13) 20 Ind Cas 717 (720) (DB) (Cal), *Kashab Lal* v. *Radha Raman.*
('18) 5 AIR 1918 Cal 363 (371) : 48 Ind Cas 561 (SB), *Mariam Bibi* v. *Mahomed Ibrahim.*

advice or the absence of it, no doubt, a fact relevant to the issue, whether the donor thoroughly comprehended and deliberately, and of his own free will, carried out the transaction. But if upon review of the facts, the conclusion is reached that the obtaining of independent advice would not have made any difference in the result, then the deed ought to stand even when no independent advice was obtained.[13] Similarly, the absence of the power of revocation in the gift deed is merely a circumstance to be weighed with the other circumstances of the case.[14] Nor will the Courts consider the propriety or impropriety of the clauses except as evidence that the settlor did not understand what he was doing.[14a]

In *Muhammad Baksh* v. *Hoseini Bibi*,[15] Lord Macnaghten pointed out the following questions as being those which a Court should consider in deciding the issue of undue influence :

(a) whether the gift in question is one which a right minded person might be expected to make ;

(b) whether the gift is or is not an improvident act on the donor's part ;

(c) whether the gift is such as to have required advice if not obtained by the donor ; and

(d) whether the intention to make the gift originated with the donor.

10. Pardanashin women.—Pardanashin women have always been treated as a class of persons specially exposed to undue influence. In the case of deeds taken from them, the burden of proof rests, as in the case of all improvident transactions by persons who are dependent upon or subject to the influence of others, on those who found their claim on them[1] and the Courts have been careful to see that the strongest and

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('29) 16 AIR 1929 Lah 309 (311) : 10 Lah 761 : 116 Ind Cas 899 (DB), *Fayyazuddin* v. *Kulabuddin*.

('25) 12 AIR 1925 P C 204 (209) : 47 All 703 : 28 Oudh Cas 338 : 52 Ind App 342 : 89 Ind Cas 649 (PC), *Mt. Faridunissa* v. *Mukhtar Ahmad*.

13. *('14) 36 All 81 (92) : 16 Oudh Cas 378 : 21 Ind Cas 985 (987, 988) (PC), *Kali Bakhsh Singh* v. *Ram Gopal Singh*.

('34) 21 AIR 1934 All 179 (181) : 148 Ind Cas 528 (DB), *Iftikhar Wali Khan* v. *Sikandar Begam*.

('18) 5 AIR 1918 Cal 363 (371) : 48 Ind Cas 561 (SB), *Mariam Bibi* v. *Mahomed Ibrahim*.

('36) 1936 Oudh W N 273 (277) (DB), *Rajjan Khatun* v. *Ibrar Bano*.

(1866) L R 1 Ch App 252 (257) : 14 W R (Eng) 292 : 13 L T 778 : 12 Jur (NS) 178 : 35 L J Ch 267, *Rhodes* v. *Bate*.

14. †(1873) 8 Ch App 430 (438) : 42 L J Ch 444 : 28 L T 383 : 21 W R (Eng) 373, *Hall* v. *Hall*.

(1871) L R 7 Ch App 244 (247) : 20 WR (Eng) 129 : 41 L J Ch 211, *Phillips* v. *Mulings*.

(1881) 18 Ch D 688 (670) : 44 L T 918 : 30 W R (Eng) 472, *Henry* v. *Armstrong*.

('12) 15 Ind Cas 529 (533) (DB) (Bom), *Rajaram* v. *Khandu Balu*.

(1863) 8 L T (NS) 777 (778) : 31 Beav 629 : 9 Jur (NS) 370, *Toker* v. *Toker*.

14a. (1883) 23 Ch D 278 (281) : 31 W R (Eng) 596 : 52 L J Ch 661 : 49 L T 109, *Dutton* v. *Thompson*.

15. *('88) 15 Cal 684 (698, 700) : 15 Ind App 81 (PC).

Section 126—Note 10

1. ('22) 9 AIR 1922 P C 14 (16) : 43 All 525 : 48 Ind App 381 : 64 Ind Cas 559 (PC), *Kamawati* v. *Digbijai Singh*.

('91) 18 Cal 545 (548) : 18 Ind App 144 (148) (PC), *Wajid Khan* v. *Ewaz Ali*.

('86) 8 All 267 (269, 270) : 1886 All W N 91 (DB), *Behari Lal* v. *Habiba Bibi*.

('95) 17 All 1 (12) : 21 Ind App 148 (PC), *Deo Kuar* v. *Man Kuar*.

('31) 18 AIR 1931 Nag 69 (71) : 134 Ind Cas 259, *Vithal* v. *Narayan*.

('18) 5 AIR 1918 Pat 356 (358) : 45 Ind Cas 691 (DB), *Zakir Raza* v. *Madhusudhan Dass*.

('16) 3 AIR 1916 Oudh 10 (13) : 35 Ind Cas 395 (DB), *Nisar Hussain* v. *Mt. Ashrafun-nissa*.

[*See also* ('68) 1 Beng L R (OC) 28 (32, 33, 34) (DB), *Manohar Das* v. *Bhagabati Dasi*. (Suit by a *parda* lady to set aside a bill of sale, execution of which by her

most satisfactory proof is given by the person who claims under a sale or gift from them, that the transaction was a real or *bona fide* one and fully understood by the woman whose property is dealt with.[2] In *Kali*

had been obtained by collusion and fraud—Court admitted parole evidence to show that the bill of sale was intended by her to operate only as a mortgage, and to vary the rate of interest therein stipulated for.)]

2. ('44) 31 AIR 1944 All 42 (53) : 212 Ind Cas 168 (DB), *Mt. Sunder Kuer* v. *Shah Udey Ram.* (Sale.)

*('12) 34 All 455 (462) : 15 Oudh Cas 271 : 39 Ind App 156 : 16 Ind Cas 197 (200) (PC), *Sajjad Husain* v. *Abid Husain.*

('22) 9 AIR 1922 P C 14 (15) : 43 All 525 : 48 Ind App 381 : 64 Ind Cas 559 (PC), *Kamawati* v. *Digbijai Singh.*

('74) 1 Ind App 192 (206) : 21 Suth W R 340 (342) (PC), *Taccordeen Tewari* v. *Ali Hossein.*

('95) 17 All 125 (134) : 1895 All W N 24 (DB), *Achhan Kuar* v. *Thakur Das,* (Affirmed in 21 All 71 (PC).)

('29) 16 AIR 1929 Cal 77 (78) : 111 Ind Cas 746 (DB), *Kalamjan Bibi* v. *Sahajana Bibi.* (In the case of an absolute gift or an absolute sale by a *pardanashin* woman it is not always necessary that there should be proof of explanation of the terms of the document—It would be sufficient in many cases to show that the *pardanashin* woman knew that it was an absolute conveyance of title by which she was divesting herself of all interest in the property.)

('70) 13 Suth W R P C 3 (3) (PC), *Sookyaboye* v. *Latchmi.*

('72) 17 Suth W R 523 (524) (PC), *Fuzzul Hossein* v. *Amjud Ali.*

('18) 5 AIR 1918 Oudh 62 (70) : 44 Ind Cas 645 (DB), *Ganga Baksh Singh* v. *Gokul Prasad.*

('95) 18 Mad 257 (262) (DB), *Badi Bibi* v. *Sami Pillai.*

('75) 23 Suth W R 453 (456) (DB), *Delroos Banoo* v. *Syud Ashgur.*

('10) 37 Cal 526 (540) : 5 Ind Cas 539 (545) (DB), *Sururjigar* v. *Baroda Kanta.*

('13) 20 Ind Cas 717 (720) (DB) (Cal), *Kesablal* v. *Radha Raman.*

('14) 1 AIR 1914 Cal 223 (227) : 23 Ind Cas 401 (DB), *Badiatannessa* v. *Ambikacharan.*

('78) 3 Cal 324 (327) (PC), *Ashgar Ali* v. *Delroos Banoo.*

('69-70) 13 Moo Ind App 419 (431) : 14 Suth W R PC 7 (PC), *Geresh Chunder* v. *Bhugobutty Debia.* (Deed of gift passed by Hindu widow in favour of her brothers' wives to the exclusion of her husband's adopted son—Circumstances raising suspicion of fraud and absence of satisfactory proof that she knew nature of deed—Gift set aside.)

('10) 6 Ind Cas 689 (691) (DB) (All), *Kubra* v. *Ajodhia Prasad.*

('31) 18 AIR 1931 P C 303 (305) : 11 Pat 227 : 58 Ind App 450 : 134 Ind Cas 1076 (P C), *Tara Kumaree* v. *Chandra Mauleshwar.*

('38) 25 AIR 1938 P C 38 (40) : 32 Sind L R 285 : 172 Ind Cas 720 (PC), *Sikandar Begam* v. *Zulfikar Wali Khan.*

('66-67) 11 Moo Ind App 139 (168) : 10 Suth W R P C 3 (PC), *Mt. Thakoor Deyhee* v. *Baluk Ram.*

('92) 14 All 8 (12) : 1891 All W N 213 (DB), *Mariam Bibi* v. *Sakina.*

('14) 1 AIR 1914 All 320 (320) : 36 All 333 : 24 I.C. 34 (DB), *Maqbul Hussain* v. *Ghafurunissa.*

('24) 11 AIR 1924 All 362 (363) : 46 All 310 : 78 I.C. 180 (DB), *Aisha Bibi* v. *Mahfuz-un-Nissa.*

('34) 21 AIR 1934 All 179 (181, 182) : 148 Ind Cas 528 (DB), *Iftikar Wali Khan* v. *Sikandar Begum.*

('81) 7 Cal 245 (250) : 8 Ind App 39 (PC), *Sudisht Lal* v. *Sheobarat Koer.*

('91) 18 Cal 545 (548) : 18 Ind App 144 (PC), *Wajid Khan* v. *Ewaz Ali.*

('19) 6 AIR 1919 P C 24 (26) : 47 Cal 175 : 46 Ind App 272 : 53 Ind Cas 131 (PC), *Soonitibala Debi* v. *Dhara Soondari.*

('71) 16 Suth W R 32 (33) (PC), *Kumeeroonissa* v. *Syuffoollah.*

('74) 22 Suth W R 443 (444) (DB), *Rukhun* v. *Ahmed Hossein.*

('68) 1 Beng L R (OC) 31*n* (32*n*), *Kanailal* v. *Kamini Debi.*

(1900) 5 Cal W N 505 (507) (FB) *Khaz Mehal* v. *Administrator General of Bengal.*

('67) 7 Suth W R 98 (99) (DB), *Ram Pershad* v. *Phool Puttee.*

('02) 29 Cal 749 (757) : 29 Ind App 127 (PC), *Shambati Koeri* v. *Jago Bibi.*

('68) 9 Suth W R 297 (298) (DB), *Roop Narain* v. *Gugadkar Pershad.*

('25) 12 AIR 1925 Lah 196 (198) : 5 Lah 465 : 85 Ind Cas 169 (DB), *Sri Ram* v. *Nand Kishore.*

('36) 23 AIR 1936 Cal 721 (722) : 168 Ind Cas 137 (DB), *Khatejan Bibi* v. *Haji Mahomed Yusuf.*

('35) 23 AIR 1935 Cal 671 (673) : 159 Ind Cas 133 (DB), *Benoy Krishna* v. *Panchanan Sadhukhan.*

('25) 12 AIR 1925 Cal 239 (240) : 84 Ind Cas 490 (DB), *Bhola Nath* v. *Bhuth Nath.*

('89) 12 Mad 380 (384, 385) (DB), *Khatija* v. *Ismail.* (Conveyance held operative as it was voluntarily executed and was real and *bona fide* one.)

('81) 3 Mad 215 (220) (DB), *Sivithri Andarjanom* v. *Vasudevan Nambudripad.*

Baksh Singh v. *Ram Gopal Singh*[2a] the Privy Council observed :

"The law throws around her special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by but was explained to, and was really understood by, the grantor."

If, however, *pardanashin* lady understands the transaction and acts as a free agent, the absence of competent independent advice will not invalidate the gift.[3] While it is important to maintain the principles of law laid down for the protection of *pardanashin* ladies, it is also important not to transmute such a legal protection into a legal disability.[4]

11. Mistake.—Under S. 20 of the Contract Act an agreement, both the parties to which are under a mistake of fact, is *void* and not merely voidable.[1] Again under S. 22 of that Act it is provided that the fact that *one* of the parties to a contract is under a mistake of fact does not render the contract voidable.

Thus, on the wording of the sections of the Contract Act no question of the rescission of the contract arises in such cases. It would seem to follow that a gift cannot be revoked merely on the ground that the donor was under a mistake of fact.[2] Section 36 of the Specific Relief Act,

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('27) 14 AIR 1927 P C 84 (86) : 101 Ind Cas 29 (PC), *Mt. Barkat-unissa* v. *Debi Baksh.*

*('25) 12 AIR 1925 P C 204 (209) : 47 All 703 : 28 Oudh Cas 338 : 52 Ind App 342 : 89 Ind Cas 649 (PC), *Mt. Faridunnissa* v. *Munshi Mukhtar Ahmad.*

('09) 3 Ind Cas 330 (333) (DB) (Cal), *Bindubashini Dasi* v. *Girdhari Lal Roy.*

('12) 39 Cal 933 (945) : 16 Ind Cas 110 (113), *Kamini Dassee* v. *Krishna Chandra.*

('28) 15 AIR 1928 P C 303 (303, 304) : 110 Ind Cas 260 (PC), *Ruhulla* v. *Hassanalli Degumia.*

('14) 1 AIR 1914 Oudh 348 (348) : 25 Ind Cas 861 (DB), *Mt. Miro* v. *Lachhman Prasad.*

('15) 2 AIR 1915 All 466 (467) : 26 Ind Cas 500 (DB), *Badri Pershad* v. *Gambhir Kunwar.*

('21) 8 AIR 1921 PC 118 (122) : 47 Ind App 265 : 61 Ind Cas 486 (PC), *Mati Lal Das* v. *Eastern Mortgage and Agency Co., Ltd.*

[*See also* ('66) 5 Suth W R 246 (247) (DB), *Soondur Kommaree Debia* v. *Kishoree Lal Sein.*]

Also see S. 58 Note 22 and S. 122 Note 3.

2a. *('14) 36 All 81 (89) : 41 Ind App 23 : 16 Oudh Cas 378 : 21 Ind Cas 985 (987) (PC).

3. See the cases cited under Note 9.

4. ('44) 31 AIR 1944 All 42 (53, 54) : 212 Ind Cas 168 (DB), *Mt. Sunder Kuer* v. *Shah Udey Ram.* (It is not and cannot be the law that a *pardanashin* woman, merely because she is a *pardanashin*, is exempt from the operation of all legal rules, even when it is clearly established by the evidence that she is an intelligent and competent person, capable of understanding and conducting business, and that she had voluntarily, deliberately, intelligently and after fully realising the nature and effect of what she was doing, done things on which other people are, under the law, entitled to rely.)

('28) 15 AIR 1928 P C 303 (305) : 110 Ind Cas 260 (PC), *Ruhulla* v. *Hasan Alli.*

*('14) 36 All 81 (92) : 41 Ind App 23 : 16 Oudh Cas 378 : 21 Ind Cas 985 (989) (PC), *Kali Bakhsh Singh* v. *Ram Gopal Singh.*

('16) 3 AIR 1916 Oudh 10 (13) : 35 Ind Cas 395 (DB), *Nisar Husain* v. *Mt. Ashrafunnissa.*

Also see Section 7 Note 3.

Section 126—Note 11

1. ('30) 17 AIR 1930 All 252 (254) : 132 Ind Cas 39 (DB), *Mt. Rani Kuwar* v. *Mahabub Baksh.*

('20) 7 AIR 1920 Sind 59 (60) : 14 Sind LR 22 : 58 Ind Cas 591 (DB), *Hemumal Harpalmal* v. *Committee of Management, Hyderabad.*

[*But see* ('11) 10 Ind Cas 343 (343) (All), *Khuda Bux* v. *Fateh Chand.* (Submitted not correct.)]

2. (1863) 1 Mad H C R 393 (395) (DB), *Abhachari* v. *Rama Chandrayya.*

[*See also* ('75) 24 Suth W R 397*n* (398*n*) (DB), *Pubitra Dossee* v. *Damoodur Jana.*]

1877, would, however, seem to suggest that a contract may be rescinded for mere mistake. That section runs as follows :

> "Rescission of a contract in writing cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made."

As pointed out by Pollock and Mulla in their work on "The Indian Contract and Specific Relief Acts," it is difficult to reconcile the language of that section (S. 36, Specific Relief Act, 1877) with Ss. 20 and 22 of the Contract Act, 1872.[3]

As to gifts to *persona designata*, see Note 12 on section 122.

12. Limitation for suit to revoke gifts.—See Notes on Art. 91 of the A.I.R. Commentaries on the Limitation Act, 2nd (1942) Edn.

13. Right to revoke gift—When may be lost.—A right to revoke a gift under the second paragraph of the section may be lost by the donor's conduct amounting to an election by him not to revoke the gift,[1] though mere laches or delay in suing for relief will not destroy the right so long as it is not barred by limitation.[2]

14. Who may suspend or revoke gifts.—A right to revoke a gift under the provisions of this section may, of course, be exercised by the donor himself. It also survives after his death to his legal representatives who may therefore revoke the gift.[1] But being a mere right to sue, it cannot be transferred by the donor and, consequently, a transferee from the donor cannot claim to exercise such right.[2]

15. Revocation, if need be express.—The revocation of gift must, as in the case of rescission of contracts,[1] be by an express and unequivocal act. In the undermentioned case[2] where it was argued that the power of revocation was an incident of a gift by a Burmese Buddhist parent to his children, it was observed by the Lower Burma Chief Court that, assuming that such a power existed, it must be done by an *express* act, and could not be inferred merely from the fact that the donor conveyed the gifted property subsequently to another person.

16. "Save as aforesaid a gift cannot be revoked."—Paragraph 3.—It has been seen in Note 6 on S. 123 that an *incomplete gift* which has not been accepted by the donee, may be revoked by the donor before its ac-

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3. Pollock and Mulla, *Indian Contract and Specific Relief Acts*, 6th Edn., page 830. [*But see* ('34) 21 AIR 1934 All 507 (511) : 152 Ind Cas 146 (DB), *Mt. Azizunnissa* v. *Siraj Husain*. (Right of revocation is personal to the donor—Submitted not correct.)]

Section 126—Note 13

1. (1881) 8 Q B D 587 (592) : 50 L J Ch 460 : 45 L T 694 : 29 W R (Eng) 558, *Mitchell* v. *Humfray*.
2. See the A.I.R. Commentaries on the *Limitation Act*, 2nd (1942) Edn., Vol. 1, Preamble Note 5.

Section 126—Note 14

1. ('25) 12 AIR 1925 All 437 (438) : 47 All 619 : 88 I. C. 411 (DB), *Ghumna* v. *Ram Chandra Rao*.
('27) 14 AIR 1927 Bom 384 (387) : 51 Bom 133 : 100 Ind Cas 932 (DB), *Shravan* v. *Kashiram*.
(1893) 1 Ch 736 (752) : 62 L J Ch 515 : 3 R 592 : 68 L T 619, *Morley* v. *Loughman*.
Halsbury, *Laws of England*, Vol. XV, para 209 (cited in AIR 1927 Bom 384 (387) : 51 Bom 133.)
2. ('22) 9 AIR 1922 Pat 514 (525) : 2 Pat 52 : 68 Ind Cas 383 (DB), *Brijnath Singh* v. *Mt. Baijraj Kuer*.

Section 126—Note 15

1. Pollock and Mulla, *The Indian Contract Act*, 6th Edition, page 367.
2. ('15) 2 AIR 1915 Low Bur 86 (87) : 8 Low Bur Rul 185 : 30 Ind Cas 20, *Lal Mahommed* v. *Mra Tha Aung*.

Also see S. 42, Note 1.

ceptance.[1] But where a gift is *complete* and the donor has done all in his power to give effect to it, it is irrevocable except in the circumstances mentioned in this section.[1a] The provision in this section to that effect is merely a legislative recognition of the doctrine enunciated more than two centuries ago by Lord Nottingham in the case of *Villers* v. *Beaumont*[2]:

> "If a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this Court will not loose the fetters he hath put upon himself, but he must lie down under his own folly; for, if you would relieve in such a case, you must consequently establish this proposition, namely, that a man can make no voluntary disposition of his estate, but by his will only, which would be absurd."

17. "Transferees for consideration without notice"—Paragraph 4.—A right of revocation under this section cannot be exercised against a transferee for consideration without notice of the existence of such right.[1] A *volunteer* or a person who takes with notice of the existence of the right, cannot get the benefit of the saving clause.[2] As was observed by Mukherji, J., in *Forman Ali* v. *Uzir Ali Shek*[3]:

> "It is a well-established proposition of law that in case of a gift tainted by undue influence and imposition of the person procuring the gift, even an innocent third party cannot retain the gift, if he is a mere volunteer. But if he is a purchaser for value without notice, there is no obligation of restitution on his part."

As to what amounts to notice, see Notes on section 3.

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127. Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless she accepts it fully.

Onerous gift.

Section 126—Note 16

1. Halsbury, *Laws of England*, Vol. XV, para. 852.

[*See also* ('24) 11 AIR 1924 Oudh 164 (165) : 74 Ind Cas 818, *Nanhun* v. *Ram Dayal*.]

1a. ('47) 34 AIR 1947 Bom 49 (52) : ILR (1946) Bom 984 : 229 Ind Cas 227, *Khushalchand* v. *Trimbak*.

('47) 34 AIR 1947 Mad 127 (128) : 231 Ind Cas 305 *Ankamma* v. *Narasayya*.

('71) 8 Bom H C R (AC) 1 (5) (DB), *Collector of Ratnagiri* v. *Vyankatrao*.

('99) 23 Bom 131 (134) (DB), *Rajaram* v. *Ganesh*.

†('18) 5 AIR 1918 Cal 615 (617) : 45 Cal 434 : 41 Ind Cas 878 (DB), *Behari Lall Ghose* v. *Sindhubala Dassi*.

('81) 5 Bom 630 (636) (DB), *Rambhat* v. *Lakshman Chintaman*.

('33) 20 AIR 1933 Rang 418 (422) : 149 Ind Cas 1113 (DB), *Lucy Moss* v. *Mah Nyein May*.

('86) 1886 All W N 86 (89) (DB), *Raghubansi Kuari* v. *Narbada Ram*.

[*See* (1854) 69 E R 279 (281) : 23 L J Ch 736 : 2 W R (Eng) 630 : 101 R R 796, *Tate* v. *Leithead*.]

[*See also* ('99) 23 Bom 518 (521) : 1 Bom L R 19 (DB), *Secretary of State* v. *Sitaram Shivram*.

('28) 15 AIR 1928 Oudh 35 (36): 105 Ind Cas 132, *Sibta Din* v. *Biraj Rani*.]

2. (1682) 23 E R 342 (342) : 1 Vern 100. Halsbury, *Laws of England*, Vol. XV, para. 831.

('47) 34 AIR 1947 Mad 127 (129) : 231 Ind Cas 305, *Ankamma* v. *Narasayya*.

[*See also* In the absence of any express reservation of a power of revocation in the gift-deed a donor does not continue to have the right to revoke a gift.]

Section 126—Note 17

1. ('38) 25 AIR 1938 Cal 157 (160) : 175 Ind Cas 712 (DB), *Ali Miji* v. *Uzir Ali Shek*. (Fact that purchaser was co-villager of donor held did not raise presumption of his having notice of undue influence.)

2. ('38) 25 AIR 1938 Bom 97 (106) : 173 Ind Cas 817 (DB), *Lingo* v. *Dattaraya*.

('07) 30 Mad 169 (178) : 17 Mad L Jour 19 (SB), *Lakshmi Doss* v. *Roop Laul*.

('23) 10 AIR 1923 Mad 67 (69) : 69 Ind Cas 673 (DB), *Venkatarama Aiyar* v. *Aiyasami Aiyar*.

3. ('38) 25 AIR 1938 Cal 157 (160) : 175 Ind Cas 712 (DB).

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

Onerous gift to disqualified person.

A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

Illustrations.

(*a*) A has shares in X, a prosperous joint stock company, and also shares in Y, a joint stock company, in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.

(*b*) A having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money.

Synopsis

1. Analogous law.
2. Scope of the section.
3. Gifts subject to conditions.
4. Onerous gift to disqualified person.
5. Effect of acceptance of onerous gift.

1. Analogous law.—The first *two* paragraphs of this section correspond to Ss. 122 and 123 of the Succession Act, 1925, which run as follows:

"122. Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully.

Illustration.

A, having shares in (*x*), a prosperous joint stock company and also shares in (*y*), a joint stock company in difficulties, in respect of which shares heavy calls are expected to be made, bequeaths to B all his shares in joint stock companies; B refuses to accept the shares in (*y*). He forfeits the shares in (*x*).

"123. Where a will contains two separate and independent bequests to the same person, the legatee is at liberty to accept one of them and refuse the other, although the former may be beneficial and the latter onerous.

Illustration.

A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is higher than the house can be let for, bequeaths to B the lease and a sum of money. B refuses to accept the lease. He will not by this refusal forfeit the money."

There is no provision in the Succession Act corresponding to the third paragraph of this section. The reason lies in the fact that *acceptance* is an essential element of a valid gift (see S. 122), whereas a bequest is valid independent of the acceptance thereof by the legatee. A person who has *accepted* a gift in his favour and thus completed the gift cannot however, the Legislature has in the third paragraph of section pro-

vided an exception to the rule by giving such person an option to repudiate his own act under particular circumstances.

No such question of repudiation of the legatee's own act arises in the case of bequests, inasmuch as a valid bequest does not depend upon its being accepted by the legatee.

2. Scope of the section.—As has been seen in Note 2 on S. 35 the doctrine of election is based on three broad principles: *firstly*, that every person who affects by a legal instrument to dispose of property must be taken to intend all that he has expressed and that such intention must be given effect to; *secondly*, that a man shall not be permitted to blow "hot and cold" with reference to the same transaction; and *thirdly*, that he who receives advantage must bear the burden also : *qui sentit commodum sentire debet et onus.* This section is also based on the same principles.[1] Where a gift is in the form of a *single* transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, *prima facie* the intention of the donor is that the gift shall go as a whole[2] and this intention must be given effect to by the donee.[3] The first paragraph accordingly provides that in such cases, the donee can take nothing unless he accepts the gift fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, it cannot be said *prima facie* that the donor intended that the gift should go as a whole.[4] The principles stated above do not, therefore, apply to such case and the donee can accept one of the gifts and refuse the other.[5] This is provided for in the second paragraph of the section.

3. Gifts subject to conditions.—The burden contemplated by the section is one that *attaches to thing gifted*, e.g., shares in a company, subject to heavy calls. This section does not apply where the thing gifted is itself not burdened by any obligation, but the instrument of gift imposes a *condition* that the donee should discharge certain liabilities. In such cases, the donee accepting the gift will take it subject to the condition and is bound to perform the condition.[1] This, however, is not by virtue of this section, but under general principles of law.

4. Onerous gift to disqualified person.—It has been seen in Note 8 on S. 7, that a person incompetent to contract cannot *transfer* property but can be a *transferee* of property. The third paragraph of this section shows that even a gift *subject to a burden* can be accepted by a person

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Section 127—Note 2

1. *See* ('40) 27 AIR 1940 Lah 285 (288) : 190 Ind Cas 463 (DB), *Ram Sarup* v. *Shiv Dayal.*
2. (1883) 31 W R (Eng) 285 (285) : 22 Ch D 573 (577), *Guthrie* v. *Walford.*
3. (1834) 40 E R 96 (97) : 3 Myl & K 252, *Talbot* v. *Earl of Radnor.* (A legatee of a lease hold property held by the testator at a higher rent than it could be let after his death, cannot respect the gift of the property and retain an annuity under the will but must carry out the intention of the testator.)
4. (1860) 1 John & H 1 (12, 13) : 128 R R 242, *Warren* v. *Rundall.*
5. (1857) 3 Sm & G 468 (474) : 107 R R 149, *Mofett* v. *Bates.*
(1804) 32 E R 706 (709) : Ves 525 (534), *Andrew* v. *Trinity Hall Cambridge.*

Section 127—Note 3

1. ('33) 20 AIR 1933 Cal 488 (489) : 143 Ind Cas 757 (DB), *Sarba Mohan* v. *Manmohan.*
('25) 12 AIR 1925 Nag 29 (30) : 80 Ind Cas 405, *Mt. Janki* v. *Mohanlal.*
(1828) 38 E R 885 (887) : 4 Russ 478, *Messenger* v. *Andrews.* (Bequest with a condition to pay debts of the testator—The legatee accepting the bequest must pay the debts.)
(1830) 1830 Taml 393 (396) : 32 R R 302, *Attorney-General* v. *Chril'i Hospital.*
(1856) 23 Beav 33 (39) : 113 R R 20, *Gregg* v. *Coates.*

incompetent to contract without the intervention of a guardian.[1] But inasmuch as the incompetency of a person to contract prevents him from creating obligation as against himself, the law has reserved to him an option, on his becoming competent to contract, to repudiate his acceptance. If then he does repudiate his acceptance, he will of course have to return to the donor the thing gifted. If not, he will be bound to fulfil the obligation by which the gift is burdened.

The gift is complete from the moment of its acceptance. It is not in abeyance until the donee becomes competent to contract. Thus, the fact that the donee, after accepting the gift, dies before becoming competent to contract, will not affect the completeness of the gift.[2]

Until the donee actually repudiates his acceptance of the gift, he will be liable to fulfil the obligation imposed by the gift.[3]

5. Effect of acceptance of onerous gift.—Once onerous gift is accepted the donee becomes bound to fulfil the obligation by which the property gifted is burdened.[1]

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128. Subject to the provisions of section 127, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by [a][and liabilities of] the donor at the time of the gift to the extent of the property comprised therein.

Universal donee.

a. These words were *inserted* by Section 60 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Where a gift consists."
4. "Of the donor's whole property."
5. Liability of universal donee.
6. Muhammadan law.
7. Onus of proof.

TOPIC INDICATOR

Distinction between this section and section 53. See Note 2.
Surrender by Hindu widow whether universal gift. See Note 3.
Universal donee. See Note 2.

1. Legislative changes.—The words "and liabilities of" have been newly added by S. 60 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929). The reason for the addition has been given by the Special Committee as follows :

> "The scope of this section is made clear by the addition of the word "liabilities" after the word 'debts.' A donee should be liable to the extent of the property in his hands not only for the debts of the donor, but also for his other liabilities."[1]

2. Scope of the section.—Where the whole extent of a right which A has, is transferred to B, the "translative" fact is called a "succession"

Section 127—Note 4

1. ('16) 3 AIR 1916 Nag 55 (55) : 13 Nag L R 18 : 39 I.C. 46, *Ganeshdas Bhiwaraj* v. *Suryabhan*. Also see Section 122, Note 7.
2. ('97) 20 Mad 147 (148) (DB), *Subramania Ayyar* v. *Sitha Lakshmi*.
3. ('37) 24 AIR 1937 Oudh 517 (520) : 171 Ind Cas 296 (DB), *Bikham Lal* v. *Mt. Janak Dulari*.

Section 127—Note 5

1. ('37) 24 AIR 1937 Oudh 517 (520) : 171 I.C. 296 (DB), *Bhikham Lal* v. *Mt. Janak Dulari*.
('36) 23 AIR 1936 Oudh 47 (48) : 159 Ind Cas 54 (DB), *Nisar Ahmad* v. *Manzur Ahmad*.

Section 128—Note 1

1. See the Report of the Special Committee printed on page 85 (131).

and B is said to *succeed* to the right of A.[1] A *universal* succession takes place when the sum total of a man's rights and liabilities, called in Roman law, *universitates juris,* is transferred to another. The Roman law recognised many forms of universal succession under which the whole of a man's property, whether consisting of rights in *rem* or rights in *personam* or of both combined, passed to another; and with the property or assets, *bona activa,* passed also the liabilities, *bona passiva.*[2] Under the English law, a universal succession is recognised only in the case of the *death* or *bankruptcy* of a person or the confiscation of his estate by the State. It cannot be brought about by the act of parties. This section is a departure from the English law in that it recognises a universal succession by gift.

The object of this section, like that of S. 53, is to prevent the rights of creditors from being defeated by their debtors disposing of their properties. But there are important differences between the two provisions :

(1) Section 53 deals with a transfer of *immovable property* by a debtor, whereas this section deals with gifts of both *moveable* and immovable property.

(2) Section 53 deals with transfers made *with intent to defeat or delay creditors,* whereas this section does not require any such intention.

(3) Under S. 53 the transfer itself is voidable at the option of the creditor or creditors defeated or delayed whereas under this section the gift cannot be avoided but the creditors can recover their debts from the donee.

As the Law Commissioners observed in their Report of 1879 :

> "Gifts of one's whole property to a relation or friend are not uncommon before an execution or in anticipation of insolvency. For such cases of fraud S. 53 of the revised bill would provide when the property is land. But an universal gift may *conceivably be honest* and comprise moveable property. It should therefore, we think, be specially provided for."

This section is also in accordance with the principle enunciated by the maxim of equity, *qui sentit commodum sentire debet et onus* (he who derives the advantage ought to sustain the burden). There is no compulsion on the donee to accept a gift made to him. If he finds that the property is burdened with too much debts he is free to reject the gift. But if he accepts the entire assets of the donor, it is only just and equitable that he should share the liabilities of the donor.[3]

3. "Where a gift consists."—A gift is clearly different from a *trust.* In a trust, the trustees get no benefit for themselves and even if the deed of trust comprises all the property of the author of the trust, the trustees would not be liable personally for the debts of the author of the trust.[1]

A *surrender* by a Hindu widow in favour of the next reversioner is not a transfer of property.[1a] It is therefore not a gift by the surren-

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Section 128—Note 2

1. Holland, *Jurisprudence,* 6th Edition, page 141.
2. Holland, *Jurisprudence,* 6th Edition, page 142.
3. ('33) 20 AIR 1933 All 146 (147) : 140 Ind Cas 120, *Shahzad Singh* v. *Madan Gopal.*

See also the Report of the Second Law Commission, 1879, printed at page 63 (79).

Section 128—Note 3

1. ('39) 26 AIR 1939 Oudh 161 (174) : 14 Luck 548 : 181 Ind Cas 155 (DB), *Matinuzzaman Khan* v. *H. Hunter.*

1a. See Note 4 on Section 5.

derer and this section cannot apply to such a transaction.[2] But the mere fact that the word "surrender" is used in an instrument is not conclusive on the question. It may really be a gift under the guise of a surrender. Thus, where a Hindu widow purported to surrender her interest in favour of a person who was *not the next reversioner* jointly with the next reversioner, it was held that the transaction was really a universal gift within the meaning of this section, and not merely a surrender as contemplated by the Hindu law.[3] In the undermentioned case,[4] the High Court of Calcutta has, however, assumed that a surrender by a Hindu female in favour of her next reversioners is a universal gift within the meaning of this section. It is submitted that this view is not correct. But the actual decision in the case holding the reversioners liable for the debts of the surrenderer, may be supported independently of this section, on the ground that they had expressly *undertaken* to pay such debts.

4. "Of the donor's whole property."—The section applies only where the gift is of the donor's *whole property*. If *any* portion of the donor's property is excluded from the gift the section will not apply, no matter what the value of the property excluded is or whether it is moveable or immovable property.[1] It was held in the undermentioned case,[2] where *after* a gift of the whole of the properties of the donor, there was a compromise between the donor and the donee, whereby the former was given back a land for which he was to pay rent to the donee, and which was to return to the donee in the event of the donor dying without issue, that this fact did not prevent him from being a universal donee. Mukerji, J., rested his decision on the fact that "for all *practical purposes* the applicant holds the entire property of Kumar Singh (donor)." The decision may also be supported on the ground that transactions *subsequent* to the gift will not affect the nature of the gift when made.

5. Liability of universal donee.—The liability of a universal donee under this section is similar to that of the legal representative of a deceased person in respect of the liabilities of the latter, under Ss. 50 and 52 of the Code of Civil Procedure. It is limited *to the extent of the property received by him.*[1] The words "*personally* liable....*to the extent of the property* comprised therein" show that the liability is to be enforced in the first instance against the property received under the gift, but that if the donee has disposed it of to any extent, for purposes

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2. ('36) 161 Ind Cas 412 (414) (Nag), *Dayaram* v. *Saku Bai.*
3. ('36) 161 Ind Cas 412 (414) (Nag), *Dayaram* v. *Saku Bai.* (Surrender in favour of daughter and her son.)
4. ('37) 24 AIR 1937 Cal 226 (228, 229) : 172 Ind Cas 121, *Sudhamoyee Bose* v. *Bhujendra Nath.*

Section 128—Note 4

1. ('30) 17 AIR 1930 All 180 (182) : 123 Ind Cas 324 (DB), *Shyam Behari Mal* v. *Maha Prasad.*
('32) 19 AIR 1932 Oudh 40 (43) : 7 Luck 411 : 135 Ind Cas 369 (DB), *Mt. Brij Raj Kuar* v. *Ram Dayal.*
('28) 15 AIR 1928 All 500 (502) : 50 All 818 : 115 Ind Cas 114 (DB), *Anrudh Kumar* v. *Lachhmi Chand.*
('41) 28 AIR 1941 Oudh 205 (210) : 192 Ind Cas 619 (DB), *Ram Raj Singh* v. *Lal Chandra Protap.* (Donor retaining equity of redemption in property otner than gifted and owning house and moveables—Donee is not universal donee.)
[See however ('44) 31 AIR 1944 Nag 225 (227) : ILR (1945) Nag 194 : 220 Ind Cas 99 (DB), *Bapurao* v. *Bulakidas.* (A donee of almost all the property of the donor who retained only a very insignificant part for her maintenance, is a universal donee.)]
2. ('33) 20 AIR 1933 All 146 (147) : 140 Ind Cas 120, *Shahzad Singh* v. *Madan*

Section 128—Note 5

1. ('33) 20 AIR 1933 All 146 (147) : 140 Ind Cas 120, *Shahzad Singh* v. *Madan Gopal.*
('35) 22 AIR 1935 Oudh 432 (432, 433) : 11 Luck 199 : 155 Ind Cas 303 (DB), *Krishna Behari* v. *Mt. Ahmadi.*
('40) 27 AIR 1940 Lah 285 (288) : 190 Ind Cas 463 (DB), *Ram Sarup* v. *Shiv Dayal.*
('28) 15 AIR 1928 All 234 (235) : 116 Ind Cas 86 (DB), *Sachitanand* v. *Radhapat.*

other than the discharge of such liability, it is to be enforced against the donee *personally*.

The liability under this section is independent of any *condition expressed* in the gift that the donee should pay the debts of the donor.[1a] Where such a condition is expressed in the instrument of gift (which need not be of the donor's whole property), the donee will be bound, if he accepts the gift to pay the debts, and this liability is not limited to the extent of the property received by him.[2]

A universal donee cannot escape liability by reason merely of the fact that the donor has, after the date of the gift, made part payments towards the debt or acknowledged it, and thus kept the debt alive.[3]

In the undermentioned case[4] where the donor owed two debts to the same person, one a mortgage-debt and the other an unsecured debt and the donee of the whole of the donor's property sought to redeem the mortgage-debt only, it was held that the mortgagee was entitled to tack on the unsecured debt also to the mortgage-debt and claim that both should be paid.

Where after a valid gift of his whole property, the donor was adjudicated an insolvent, it was held that the fact that the donee was liable for the debts of the insolvent would not authorise the Court acting under S. 4 of the Provincial Insolvency Act, to sell the properties in the hands of the donee for payment of the debts.[5]

Where a Hindu widow gifts her whole property to her reversioners, who make a part payment towards the mortgage-debt of the donor, the universal donees cannot take advantage of the widow's death and challenge the mortgage as reversioners. The reason is, they do not succeed to the property as reversioners; the property was theirs before the death of the widow.[6]

Position of universal legatee compared with that of universal donee : As far as the liability is concerned the position of a universal legatee and that of a universal donee are practically the same. In the case of a universal donee it was necessary to provide for his liability under this section as otherwise in case of personal liabilities where the persons making the gift were still alive, the transferee by gift of his property would escape all liability. It was not necessary to make a similar provision in the Succession Act where the estate of the deceased must be deemed to be the balance after all the liabilities are paid up.[7]

6. Muhammadan law.—By virtue of S. 129 this section does not affect any rule of Muhammadan law. But there is no rule of Muhammadan law in conflict with this section. The section will, therefore, apply to gifts by Muhammadans or in favour of Muhammadans.[1]

A *hiba-bil-ewaz* i.e., a gift for consideration is really not a gift at all and consequently this section has no application to such gifts.[2]

1a. *See* ('44) 31 AIR 1944 Nag 225 (227) : ILR (1945) Nag 194: 220 I C 99 (DB).

2. (1828) 38 E R 885 (887) : 4 Russ 478, See also Note 3 on Section 127.

3. ('12) 17 I C 619 (620, 621) (DB) (Mad), *Velayudam* v. *Vaithyalingam.*
('37) 1937 Mad W N 395 (396), *Satyanarayana* v. *Venkatanarasimham.* (Renewal of pronote after gift.)

4. ('83) 7 Bom 101 (106) (DB), *Ragho Govind* v. *Balwant Amrit.*

5. ('30) 17 AIR 1930 Pat 305 (306) : 124 Ind Cas 639 (DB), *Radhika Kuar* v. *Sushil Chandra.*

6. ('44) 31 AIR 1944 Nag 225 (227, 228) : ILR (1945) Nag 194 : 220 Ind Cas. 99.

7. ('45) 32 AIR 1945 All 433 (439) : ILR (1946) All 1 (DB) *Joti Prasad* v. *Bahal Singh.*

Section 128—Note 6

1. ('30) 17 AIR 1930 Oudh 268 (270) : 127 Ind Cas 865 (DB), *Abid Husain* v. *Ram Nidh.*
('35) 22 AIR 1935 Oudh 432 (433) : 11 Luck 199 (DB) *Krishna* v. *Mt. Ahmadi.*

2. ('27) 14 AIR 1927 Oudh 176 (176) : 101 Ind Cas 690 (DB), *Ramcharan* v. *Mt. Abida Begum.*

7. Onus of proof.—The onus of showing that a transaction in favour of a particular person is a universal gift so as to render him liable under this section, is on the person setting it up.[1]

Saving of donations *mortis causa* and Muhammadan law.

[a]129. Nothing in this Chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law [b][* * *].

a. Home Department No. 61/40—Judicial, Dated 16th November 1940.—In exercise of the powers conferred by the fourth paragraph of Section 1 of the Transfer of Property Act, 1882 (IV of 1882), the Central Government is pleased to extend Section 129 of the said Act to the following areas in the Province of Delhi, namely:
(a) Area within the jurisdiction of the Delhi Municipal Committee;
(b) Area within the jurisdiction of the New Delhi Municipal Committee;
(c) Area within the jurisdiction of the Notified Area Committee, Civil Lines; and
(d) Area within the jurisdiction of the Notified Area Committee, Fort.
—Gazette of India, Part I, dated 23-11-1940.

b. The words "or, save as provided by Section 123, any rule of Hindu or Buddhist law" were *omitted* by Section 61 of the Transfer of Property (Amendment) Act, 1929 (XX 1929)).

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Gift in contemplation of death.
4. Hindu and Buddhist law—Gifts in contemplation of death.
5. "Any rule of Muhammadan law."

1. Legislative changes.—The words "or, save as provided by S. 123, any rule of Hindu or Buddhist law" were omitted from the original section, by S. 61 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929). The reasons for the omission were stated by the Special Committee :

> "Apart from the provisions of S. 123, S. 129 saves all rules of Hindu and Buddhist law relating to gifts. The provisions of Chapter VII relating to gifts are based on general principles and do not conflict with the rules of Hindu or Buddhist law. The Government of Burma does not object to the omission of the word 'Buddhist' from the section. We propose to omit the reference to Hindu and Buddhist law."

See also the undermentioned case.[1]

2. Scope of the section.—This section saves from the operation of the provisions of this chapter gifts in contemplation of death and declares that such provisions shall not affect any rule of Muhammadan law. Where there is *no* rule of Muhammadan law inconsistent with any of the provisions of the chapter, those provisions will directly apply even where the transaction is between Muhammadans.[1] But where a rule of the Muhammadan law is in conflict with any provision in this chapter, the former will prevail over the latter.[2]

A Provincial Government has, under S. 1 of the Act, power to extend any part of this Act, to any territory under its administration, to which the Act did not originally apply. But the Provincial Government cannot under that provision extend *particular sections* of the Act

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Section 128—Note 7

1. ('28) 15 AIR 128 All 500 (502, 503) : 50 All 818 (DB), *Anrudh* v. *Lachhmi.*

Section 129—Note 1

1. ('27) 14 AIR 1927 Oudh 278 (283) : 104 Ind Cas 299, *Krishnapal Singh* v. *Sri Raj Kuar.* (Unless there is conflict between the T. P. Act and Hindu law, former applies to Hindus—Case before the amendment of 1929.)

Section 129—Note 2

1. ('30) 17 AIR 1930 Oudh 268 (270) : 127 Ind Cas 865 (DB), *Abid Husain* v. *Ram Nidh.* (No rule of Muhammadan law conflicts with the provisions of S. 128, T. P. Act.)
2. ('34) 147 Ind Cas 504 (505) (DB) (Pat) *Bishun Prasad Shoeratan Prasad* v. *Muhammad Nayim.*

so as to give them an operation different from that which they have in the Act itself read as a whole. Where it was argued, that the Burma Government had extended only S. 123 of the Act to Burma and not S. 129, and that, therefore, even a gift by a Muhammadan was governed by S. 123 of the Act, their Lordships of the Privy Council observed[3]:

> "The power to extend any part of the Act to Burma did not authorise the Local Government to extend particular sections of the Act, so as to give those sections a different operation from that which they had in the Act itself read as a whole and to abrogate in the area to which the extension applied a rule of Muhammadan law till then in force there as to which the Legislature had expressly provided that it was to remain unaffected by the Act."

It may be noted that this section has been, by a notification dated 16th November 1940, extended to the areas within the jurisdiction of the Delhi Municipal Committee, the New Delhi Municipal Committee, the Notified Area Committee, Civil Lines and the Notified Area Committee, Fort.[4]

3. Gift in contemplation of death.—A gift in contemplation of death is known in the Roman Civil law as *donatio mortis causa.* Such gifts are now governed entirely by the Succession Act, 1925. Section 191 of that Act provides as follows :

> "(1) A man may dispose, by gift made in contemplation of death, of any moveable property which he could dispose of by will.
>
> (2) A gift is said to be made in contemplation of death where a man, who is ill and expects to die shortly of his illness, *delivers*[1] to another the possession of any moveable property to keep as a gift in case the donor shall die of that illness.
>
> (3) Such a gift may be resumed by the giver; and shall not take effect if he recovers from the illness during which it was made; nor if he survives the person to whom it was made."[1a]

A gift of the above nature is the middle point between a gift *inter vivos* and a legacy.[2] "It is like gift *inter vivos* in presupposing an immediate increase in the potentiality of the donee by the donor, and hence sharply distinguishes itself from the legacy. But added to this distinctive mark is another which not less sharply distinguishes it from the ordinary donation and approximates it to the legacy—that of being actually perfected by the death of the giver."[3]

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3. ('27) 14 AIR 1927 PC 22 (23) : 54 Ind App 23 : 5 Rang 7 : 100 Ind Cas 32 (PC), *Ma Mi* v. *Kallander Ammal.*

4. See 'Gazette of India' Part I, dated 23rd November 1940, Notification No. 61 of 1940.

Section 129—Note 3

1. (1874) 18 Eq 474 (485) : 43 L J Ch 617 : 30 L T 752 : 22 W R (Eng) 729, *Moore* v. *Moore.* (Gift of deposit note is a good *donatio mortis causa.*)
(1868) 6 Eq 198 (200) : 37 L J Ch 633 : 16 W R (Eng) 835, *Hewitt* v. *Kaye.* (Delivery of the donor's cheque—Cheque not presented to be cashed in donor's lifetime—Not a good *donatio mortis causa.*)
†(1827) 1 Bligh (NS) 497 (543) : 4 E R 959, *Duffield* v. *Eleves.* (Mortgage security delivered—Good donatio mortis causa.)
(1789) 2 Bro C C 612 (613) : 1 Ves Jun 407 : 29 E R 337, *Hill v. Chapman.*
(1793) 2 Ves Jun 111 (116) : 30 E R 548 : 4 Bro C C 286, *Tate* v. *Hilbert.*
(1880) 43 LT 117 (119) : 15 Ch D 651 : 50 L J Ch 30 : 28 W R (Eng) 891, *In re Mead; Austin* v. *Mead.*

1a. (1896) 2 Q B 283 (286, 288) : 65 L J Q B 587 : 74 L T 728, *Cain* v. *Moon.*
(1921) 1 Ch 343 (348) : 90 L J Ch 192 : 124 L T 500, *In re Korvine's Trust; Levashoff* v. *Block.*
('71) 6 Mad H C R 270 (273, 274) (DB), *Visalatchmi Ammal* v. *Subbu Pillai.*
('69) 3 Beng L R (O C) 113 (121, 122) (DB), *Upendra Krishna* v. *Nabin Krishna* (Per Sir Barnes Peacock C. J.)

2. ('71) 6 Mad H C R 270 (278) (DB), *Visalatchmi Ammal* v. *Subbu Pillai.*

3. ('71) 6 Mad H C R 270 (276) (DB), *Visalatchmi Ammal* v. *Subbu Pillai.*

A gift in expectation of *suicide* cannot be said to be one made in contemplation of death for the purposes of this section.[4]

Whatever strictness is required in the proof of a testamentary disposition is at least equally required in cases of gifts in contemplation of death."[5]

4. Hindu and Buddhist law—Gifts in contemplation of death.—Under the strict Hindu law, a gift or a gratuitous contract made by a person afflicted with an incurable distemper is void. The incapacity is attached to the mind agitated with fever, anger or lust or the pain of an incurable disease.[1] The idea is that under the above circumstances a person cannot form a rational estimate as regards the consequences of his action.[2] But this strict rule of Hindu law was never followed in practice. In the undermentioned case[3] Mr. Justice Holloway held that a gift even during a mortal illness was valid provided it fulfilled all the requisites of a valid gift under the Hindu law. He observed : "To allow a gift in form of a will to be valid and deny that validity to one much nearer the nature of a gift *inter vivos*, would be logically impossible. To reject the nearer and accept the more remote cannot, certainly, be vindicated."

Under the Buddhist law also a death-bed gift was invalid,[4] the underlying idea of the rule being that if such gift is recognised it would enable a Buddhist to defy his own personal law and practically to dispose of his property by methods which in effect would be equivalent to and operate as a will.[5]

These cases are now of no importance in view of the amendment of the section by the omission of the words "or, save as provided by S. 123, any rule of Hindu or Buddhist law" and also by the enactment of S. 191 of the Succession Act, 1925.

5. "Any rule of Muhammadan law."—As to the rules of Muhammadan law governing gifts, see Mulla's *Principles of Mahomedan Law*.

The provisions of the Succession Act, 1925, relating to gifts in contemplation of death do not apply to Muhammadans. As to the rules of Muhammadan law relating to such gifts (known as *marz-ul-maut*), see Mulla's *Principles of Mahomedan Law*.

In some Provinces the Muhammadan law of gifts has been specifically declared by Provincial Acts to be applicable as between Muhammadans.[1] In cases where there is no such legislative declaration, the

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4. (1925) 1925 Ch 553 (555) : 95 L J Ch 204 : 133 L T 465, *In re Dudman; Dudman* v. *Dudman*.
(1896) 2 Ir R 204, *Agnew* v. *Befast*.
5. ('66) 11 Moo Ind App 139 (168) : 10 Suth W R P C 3 (PC).

Section 129—Note 4

1. ('71) 6 Mad H C R 270 (277) (DB), *Visalatchmi Ammal* v. *Subbu Pillai*.
('02) 4 Bom L R 883 (890), *Bachoo* v. *Khushal Das*. (A Hindu father cannot, on the point of death, make gifts to his children out of joint family, as the power to make gifts or presents must be confined to such occasions as are usual and to such presents as are customary.)
[*See* ('25) 12 AIR 1925 Oudh 383 (384) : 87 Ind Cas 900, *Sat Narain* v. *Krishna Datt*. (The principles of the Muhammadan law of Marz-ul-maut are not applicable to the Hindu law—Under the Hindu law a deed of gift made by a person during disease is valid.)]
2. ('38) 25 AIR 1938 Cal 157 (159) : 175 Ind Cas 712 (DB).
3. ('71) 6 Mad H C R 270 (278) (DB). *Visalatchmi Ammal* v. *Subbu Pillai*.
4. ('15) 1915 L B 122 (123) : 29 I C 888.
('29) 1929 R 243 (244) : 122 I C. 897, (DB).
('19) 1919 L B 47 (47) : 50 I C 522 (DB).
('32) 1932 Rang 104 (106) : 10 R 224.
5. ('32) 1932 R 104 (106) : 10 R 224. (under Buddhist law a person could not dispose of his property by will — A death-bed gift on the analogy of will was treated invalid.)

Section 129—Note 5

1. See Bengal, Agra and Assam Civil Courts Act (XII of 1887), Section 37.

Muhammadan law of gifts is applied as being in accordance with justice, equity and good conscience. There is a difference of opinion as to whether the "rule of Muhammadan law" referred to in this section, refers to the rules of Muhammadans specifically declared by the Legislature to be applicable to Muhammadans or whether it includes also the rules which are applied as being in accordance with justice, equity and good conscience. In *Ma Asha v. B. K. Haldar*,[2] it was held by a Full Bench of the High Court of Rangoon that S. 129 did not except from the operation of the chapter those rules of Muhammadan law which were applied by Courts only as being in accordance with justice, equity and good conscience. In a subsequent decision of the same Court in *Maung Gyi v. Maung Saung*,[3] Mr. Justice Leach, while feeling himself bound by *Ma Asha's case*, observed as follows :

> "The operation of S. 129, Transfer of Property Act, is not limited. It says that nothing in the chapter shall be deemed to affect any rule of Muhammadan law. It does not differentiate between rules of Muhammadan law made specifically applicable under a local statute and rules of Muhammadan law which can be applied on the ground that they are in accordance with justice, equity and good conscience. The intention of the Legislature in inserting S. 129 was to preserve the Muhammadan law of gifts so far as gifts by Muhammadans were concerned, and the section has, in my opinion, this effect. I consider that the Legislature could never have intended the section to apply only in cases where Muhammadan law was made expressly applicable by local statute. But the matter does not rest there. There are the decisions of the Privy Council in the cases to which I have referred and unanimity of opinion in the High Courts of India on the question. For these reasons I should have been prepared to hold that Muhammadan law applied without any restriction to gifts by Muhammadans in this Province, but I consider that I am bound by the decision in *Ma Asha's case*."[4]

See also the undermentioned cases.[5]

Where the Muhammadan law was, under the Bengal, Agra and Assam Civil Courts Act, 1887, declared applicable, it was held by the High Court of Patna, that this section did not affect any rule of Muhammadan law, so declared applicable.[6]

The Muslim Personal Law (Shariat) Application Act, XXVI of 1937, now declares *inter alia* that in all matters of gift, the personal law of the Muhammadans shall be the rule of decision in cases where the parties are Muslims. This Act is applicable to the whole of British India except the N.-W. Frontier Province[7] and renders the conflict of views above referred to, of little importance.

C. P. Laws Act (XX of 1875), S. 5.
Oudh Laws Act (XVIII of 1876), S. 3.

2. ('36) 23 AIR 1936 R 430 (433) : 14 R 439 : 164 Ind Cas 984 (FB).
3. ('37) 24 AIR 1937 Rang 240 (244) : 171 Ind Cas 752 (DB).
4. ('36) 1936 R 430 (433) : 14 R 439.
5. ('01) 24 Mad 513 (520) : 11 Mad L Jour 227 (DB), (Muhammadan law applies without any restriction.)
('38) 25 AIR 1938 Rang 435 (437) : 180 Ind Cas 675 (DB).
('36) 1936 Rang 522 (525) : 14 Rang 485. (When the question is before the High Court in its exercise of ordinary original civil jurisdiction, Muhammadan law applies.)
6. ('29) 1929 Pat 417 (419) : 123 I C 401 (DB).
7. For a similar law applicable to the North-West Frontier Province, see the N.-W. F. P. Muslim Personal Law (Shariat) Application Act, VI of 1935,

(a) CHAPTER VIII

TRANSFER OF ACTIONABLE CLAIMS.

Transfer of actionable claim.

130. (1) The transfer of an actionable claim [b][whether with or without consideration] shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, [c][* * *] shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

***Exception.*—Nothing in this section applies to the transfer of a marine or fire policy of insurance, [d][or affects the provisions of section 38 of the Insurance Act, 1938].**

Illustrations.

(*i*) A owes money to B, who transfers the debt to C. B then demands the debt from A, who, not having received notice of the transfer, as prescribed in section 131, pays B. The payment is valid, and C cannot sue A for the debt.

(*ii*) A effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If A dies, the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of A's executor, subject to the proviso in sub-section (*1*) of section 130 and to the provisions of section 132.

a. This Chapter was *substituted* for original Chapter VIII by the Transfer of Property Act, 1900 (II of 1900).

b. These words were *inserted* by S. 62 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

c. The words "and notwithstanding anything contained in Section 123" were *omitted*, *ibid.*

d. These words and figures were *added* by the Insurance Act, 1938 (IV) of 1938. [26-2-1938].

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Transfer."
4. There must be present transfer of an existing actionable claim.
5. Distinction between transfer of a debt and a novation.
6. Assignment of rents and profits and assignment of lessor's right of reversion under a lease.
7. Assignment of beneficial interest in movable property.
8. Assignment of part of debt.
8a. Assignment of rights under a contract: See Note 17 under S. 6.
9. Debts due to a joint Hindu family.
10. Transfer by operation of law.
11. "Whether with or without consideration."
12. Form of assignment.
13. No particular words are necessary to constitute assignment.
14. Registration not necessary.
15. Agreement between debtor and creditor that debts would be paid from a fund in the hands of a third person, if assignment.

16. "Duly authorized agent."
17. Completeness of the transfer and notice to the debtor.
18. Transfer of mortgage debt — Equities between mortgagor and mortgagee, if available against transferee.
19. "All the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee."
20. Assignor's liability after the assignment.
21. The right of a tenant in Malabar to compensation.
22. Sub-section (2).
23. Exception.
24. The principle of 'caveat emptor' applies to the purchase of an actionable claim.
25. Law in the Punjab.

1. Legislative changes.

(1) By the Transfer of Property Act, II of 1900, the whole of this chapter was substituted for the original chapter on actionable claims.

(2) Section 130 of the original chapter defined "actionable claim" and S. 131 provided as follows:

"No transfer of any debt or any beneficial interest in moveable property shall have any operation against the debtor or against the person in whom the property is vested, until express notice of the transfer is given to him, unless he is a party to or otherwise aware of such transfer; and every dealing by such debtor or person not being a party to or otherwise aware of, and not having received express notice of, a transfer, with the debt or property, shall be valid as against such transfer.

Illustration.

A owes money to B, who transfers the debt to C. B then demands the debt from A who, having no notice of the transfer, pays B. The payment is valid, and C cannot sue A for the debt."

By the Transfer of Property Act, II of 1900, the definition of "actionable claim" was taken over to S. 3, and a new S. 130 was introduced which ran as follows:

"The transfer of an actionable claim shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not."

By the Transfer of Property (Amendment) Act, XXXVIII of 1925, the words "notwithstanding anything contained in S. 123" were added after the words "authorized agent and" in sub-s. (1). But by the Transfer of Property (Amendment) Act, XX of 1929, those words were omitted and the words "whether with or without consideration" were inserted after the words "actionable claim" occurring in the beginning of the sub-section. (See Note 11.)

By S. 121 of the Insurance Act, IV of 1938, the following words and figures were added to the exception of the section: "or affects the provisions of S. 38 of the Insurance Act, 1938." (See Note 23.)

2. Scope of the section.—This chapter enacts the general principles of law regarding transfers of actionable claims[1] and its principal provisions are presumably intended to discourage traffic in litigation.[2]

Section 130—Note 2

1. ('07) 1907 Pun Re No. 9, p. 46 (49) : 1908 Pun L R No. 25, *Nihal Chand* v. *Ali Baksh.*
('38) 25 AIR 1938 All 544 (545) : 177 Ind Cas 700, *Agrenath Misir* v. *Ram Ratan.*
('30) 17 AIR 1930 Sind 77 (79) : 24 Sind L R 160 : 123 Ind Cas 297, *Official Assignee* v. *Fakirji Cowasji.*
('24) 11 AIR 1924 Pat 551 (552) : 3 Pat 575 : 78 Ind Cas 705 (DB), *Jai Narayan*

English law—

Choses in action in English law are classified as legal or equitable according to the mode of procedure necessary for reducing them into possession.[3] Legal choses in action are those that can be recovered or enforced by action at law, such as a debt or a claim on a policy of Insurance. Equitable choses in action, on the other hand, are those which were formerly enforced by a suit in equity and arise out of the property and rights in respect of which the Court of Chancery formerly had, and the Chancery division of the High Court now has, the exclusive or peculiar jurisdiction.[4]

At Common Law originally a chose in action, except in cases of annuity, was not assignable.[5] This rule was broken in from time to time and several cases of assignment were recognised as valid.[6] Courts of equity on the other hand recognised assignment of choses in action from the earliest times.[7] If the chose in action was equitable the assignee could sue in equity without joining the assignor as a party to his suit,[8] but if the chose in action was legal, the assignee was required to join the assignor either as a plaintiff or defendant to his suit in equity even when the assignment was absolute on the face of it. This was necessary in order, primarily, to bind him and prevent his suing at law and also to allow him to dispute the assignment if he thought fit. This was *a fortiori* the case when the assignment was by way of security or charge because the assignor, in that case had a right to redeem.[9] Further, the assignee could not give a valid discharge for the claim unless expressly empowered by the assignor in that behalf.[10]

In order to remove this state of affairs and to simplify the remedy in favour of the assignee and to protect the original debtor or other person from whom the assignor would have been entitled to claim the chose in action, sub-s. (6) of S. 25 of the Supreme Court of Judicature Act, 1873[11] provided as follows:

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v. *Kishun Dutta.*

('94) 1894 Pun Re No. 12, p. 21 (23), *Jhoki Ram* v. *Malick Kadar Baksh.*

2. ('96) 18 All 265 (267) : 1896 All W N 80 (FB), *Shib Lal* v. *Ajmat Ullah.*

3. Halsbury, *Laws of England*, Vol. 4, page 361.

4. Halsbury, *Laws of England*, Vol. 4, page 362.

5. Halsbury. *Laws of England* (Hailsham Edition), Vol. 4 Para. 790 Footnote.

6. Snell, *Principles of Equity*, 11th Edn., page 82.

7. ('25) 12 AIR 1925 Mad 753 (754) : 87 Ind Cas 382, *Doraisami* v. *Doraiswami.*
('12) 14 Ind Cas 769 (772, 773) (Bom), *Haridas Lalji* v. *Narotam.*
('26) 13 AIR 1926 Cal 447 (448) : 89 Ind Cas 735 (DB), *Kishen Gopal* v. *L. J. Bavin.*
('24) 11 AIR 1924 Pat 551 (552) : 3 Pat 575 : 78 Ind Cas 705 (DB), *Jai Narayan* v. *Kishun Dutta.*
('68) 9 Suth W R 243 (243) (DB), *Jug Mohan* v. *Buddun Koer.*
('10) 5 Ind Cas 834 (834) (DB) (Mad), *Ramasamy Pillai* v. *Muthu Chetty.*
('38) 25 AIR 1938 Sind 24 (28) : 32 Sind L R 640 : 123 Ind Cas 591, *Jhangaldas Chimandas Firm* v. *Firm Chetumal Bulchand.*
(1749) 27 E R 1074 (1083) : 1 White & Tud L C 96 : 1 Ves Sen 348 : 1 Atk 165, *Ryall* v. *Rowles.*
(1749) 27 E R 1064 (1064) : 1 White & Tud L C 93 : 1 Ves Sen 331, *Row* v. *Dawson.*
(1789) 100 E R 517 (522) : 3 T R 174, *Tatlock* v. *Harris.*
(1867) 36 L J C P 173 (176) : L R 2 C P 305 : 15 L T 663 : 15 W R (Eng) 581, *Gerard* v. *Levis.*
(1838) 9 Sim 327 (332) : 59 E R 383 (385) : 7 L J Ch 310 : 2 Jur 655, *Hammond* v. *Messenger.*
(1898) 67 L J Q B 484 (486) : (1898) 1 Q B 765 : 48 L T 438, *Durham Brothers* v. *Robertson.*

8. Halsbury, *Laws of England*, Vol. 4, page 391.
(1841) 160 E R 1064 (1067) : 4 Y & C Ex 405, *Cator* v. *The Croydon Canal Co.*
(1827) 38 E R 694 (698) : 3 Russ 583 : 27 R R 127, *Goodson* v. *Ellisson.*

9. Halsbury, *Laws of England.* Vol. 4, page 391.
(1898) 67 L J Q B 484 (486) : (1898) 1 Q B 765 : 48 L T 438, *Durham Brothers* v. *Robertson.*
(1910) 79 L J K B 664 (668) : 102 L T 29, *Forster* v. *Baker.*
(1884) 53 L J Q B 222 (223, 224) : 12 Q B D 347 : 50 L T 723 : 32 W R (Eng) 492, *Burlinson* v. *Hall.*
('07) 1907 Pun Re No. 9 p. 46 (53) : 1908 Pun L R No. 25, *Nihal Chand* v. *Ali Bakhsh.*

10. (1898) 67 L J Q B 484 (486) : (1898) 1 Q B 765 : 48 L T 438, *Durham Brothers* v. *Robertson.*

"Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor: Provided always, that if the debtor, trustee or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or anyone claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees."

(The sub-section has now been repealed and re-enacted with verbal changes in S. 136 of the Law of Property Act, 1925 (15 Geo. V, C. 20).)

Section 25 (6) of the Supreme Court of Judicature Act, however, did not create any new rights. It only afforded a new mode of enforcing old rights. It enabled the assignee to sue in his own name in a Court of law without the concurrence of the assignor. It did not make assignable choses in action which were not assignable in equity before. Nor did it impair the efficacy of equitable assignments which would previously have been valid.[12] So even after the passing of the sub-section equitable assignments are given effect to.[13]

The words "debt or other legal chose in action" used in the sub-section mean "debt or right which the common law looked on as not assignable by reason of its being a chose in action but which a Court of equity dealt with as being assignable."[14]

It will be noted that *statutory assignment* under the Act must be *absolute* and not by way of a charge[15] and must be in writing.[16] It takes effect only from the

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11. (1898) 67 L J Q B 484 (486) : (1898) 1 Q B 765 : 48 L T 438, *Durham Brothers* v. *Robertson.*
12. (1898) 67 L J Q B 484 (486) : (1898) 1 Q B 765 : 48 L T 438, *Durham Brothers* v. *Robertson.*
(1884) 53 L J Q B 280 (282) : 12 Q B D 511 : 32 W R (Eng) 645, *Walker* v. *Bradford Old Bank.*
(1905) 74 L J K B 898 (902) : (1905) A C 454 : 93 L T 495, *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*
(1902) 71 L J K B 949 (960), *Associated Portland Cement Manufacturers, Ltd.* v. *Tolhurst.*
(1902) 71 L J K B 712 (716) : (1902) 2 K B 427, *Torkington* v. *Magee.*
(1919) 88 L J Ch 392 (397) : (1919) 2 Ch 104 : 122 L T 264, *In re Westerton.*
('25) 12 AIR 1925 Mad 753 (754) : 87 Ind Cas 382, *Doraisami Mudaliar* v. *Doraisami Iyangar.*
13. (1905) 74 L J K B 898 (902) : 1905 App Cas 454, *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*
14. (1902) 2 K B 427 (430) : 71 L J K B 712 (714) : 87 L T 304, *Torkington* v. *Magee.*
15. ('07) 1907 Pun Re No. 9, p. 46 (51) : 1908 Pun L R No. 25, *Nihalchand* v. *Ali Baksh.*
As to what amounts to absolute assignment see the undermentioned cases:
(1898) 67 L J Q B 484 (488) : (1898) 1 Q B 765 : 48 L T 438, *Durham Brothers* v. *Robertson.* (Sum assigned by way of security for certain advances until the repayment of such advances—Assignment not absolute.)
(1884) 53 L J Q B 222 (223) : 12 Q B D 347 : 50 L T 723 : 32 W R (Eng) 492, *Burlinson* v. *Hall.* (Assignment by *A* to *B* upon trust that *B* should receive the debt and after deducting the amount due by *A* to *B* should pay the balance to *A*— *Held*, assignment was absolute.)
(1884) 33 W R (Eng) 163 (164), *Knill* v. *Prowse.* (*A* borrowed money from *B* and gave him a letter addressed to his tenants to pay *B* rent until the order should be countermanded by *B* — *Held*, assignment was absolute.)
(1889) 58 L J Q B 459 (460) : 61 L T 229 : 38 W R (Eng) 15 : Q B D 239, *Tancred* v.

date of notice of the assignment to the debtor[17]. Further the assignee can sue in his own name for recovery of the claim. An equitable assignment, on the other hand, need not be absolute[18] or in writing.[19] It takes effect from the *date of the assignment*, notice being necessary only for the purpose of binding the debtor.[20]

The section contains a special scheme which has some of the features both of the English Common Law and of the principles of equity.[21] In *Sadasook* v. *Hoare Miller*,[22] Rankin, J., observed as follows:

> "In construing Ss. 130 and 131 of the Transfer of Property Act, it has to be remembered that they contain a very special scheme which must be regarded as a whole in itself. At common law a chose in action was not assignable, in equity it was freely assignable upon certain principles as to notice. The Indian Legislature in 1900 has composed a new scheme which has some of the features of both, and, as I read S. 130 it says this that the law while regarding the transfer of an actionable claim as valid if effected in a certain manner, will not undertake to enforce against a debtor the assignment except upon the terms that the debtor may arrange with his original creditor unless and until he has received, in writing a particular kind of notice."

This section is not inapplicable to Muhammadans so as to take a *gift* by a Muhammadan of an actionable claim, out of the operation of the section.[23]

3. "Transfer."—The word "transfer" is used in this section in the same wide sense as that which is attributed to the word "convey" by the definition to be found in S. 205 (ii) of the English law of Property Act, 1925.[1] Thus, the section covers absolute transfers of actionable claims as well as transfers by way of security.[2] This is also made clear by the second illustration to the section in which the

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Delagoa Bay Co. (Assignment of debt as security for advances made with a proviso for redemption and reconveyance or repayment of the advances creates absolute assignment.)

(1881) 50 L J Q B 437 (440) : 6 Q B D 626 : 44 L T 585 : 29 W R (Eng) 564, *National Provincial Bank* v. *Harle.* (An assignment of a mortgage debt to secure the repayment of a sum due from the assignor to the assignee was held not absolute but to be by way of charge only. Disapproved in (1889) 58 L J Q B 459.)

16. Halsbury, *Laws of England*, Vol. 4, page 371.

17. (1921) 90 L J Ch 116 (119) : (1921) 1 Ch 349 : 124 L T 664, *In re Steel Wing Co.*
('35) 22 AIR 1935 Mad 1003 (1005) : 159 Ind Cas 127 (DB), *Subramania Ayyar* v. *Ramasubba Ayyar.*

18. (1898) 67 L J Q B 484 (486) : (1898) 1 Q B 765 : 48 L T 438, *Durham* v. *Robertson.*

19. ('30) 17 AIR 1930 Sind 77 (79) : 24 Sind L R 160 : 123 Ind Cas 297, *Official Assignee* v. *Fakirji Cowasji.*

20. (1823) 38 E R 475 (484) : 27 R R 1 : 3 Russ 1 : 2 L J (O S) Ch 62, *Dearle* v. *Hall.*
(1886) 56 L J Ch 85 (87) : 34 Ch D 128 : 55 L T 572 : 35 W R (Eng) 86, *Gorringe* v. *Irwell India Rubber and Gutta Parcha Works.*
[*See also* (1804) 32 E R 659 (660, 661) : 9 Ves 407, *Jones* v. *Gibbons.*]

21. † ('23) 10 AIR 1923 Cal 719 (722) : 80 Ind Cas 632 (DB), *Sadasook Ramprotap* v. *Hoare Miller & Co.*
('35) 22 AIR 1935 Cal 218 (219, 220) : 62 Cal 1 : 155 I. C. 193 (DB), *Ranjit Roy* v. *D. A. David.*

22. ('23) 10 AIR 1923 Cal 719 (722) : 80 Ind Cas 632 (DB).

23. ('17) 4 AIR 1917 Mad 20 (26) : 38 Ind Cas 248 (DB), *Yacoob Sahib* v. *Pacha Bibi.*
† ('36) 23 AIR 1936 Pat 527 (530) : 165 Ind Cas 298, *Mt. Bibi Alimunnisa* v. *Shaikh Abdul Aziz.*
('42) 29 AIR 1942 Pat 210 (211) : 20 Pat 798 : 197 Ind Cas 241 (DB), *Mohammad Zobair* v. *Bibi Sahidan.* (Wife wishing to release husband from dower debt—Release must be in writing.)

See the Report of the Special Committee, 1927, Clause 61, printed on page 85 (131).

Section 130—Note 3

1. ('38) 25 AIR 1938 Rang 1 (3) : 175 Ind Cas 786, *In the matter of Aviet Stephen.*
Under S. 205 of the Law of Property Act, 1925 "conveyance" includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument except a will; "convey" has a corresponding meaning.

2. ('45) 32 AIR 1945 Bom 11 (12), *Santuram Hari* v. *Trust of India Assurance Co.*
[37 Bom 198 : 40 Ind App 24 (PC), Rel. on.]
* ('13) 37 Bom 198 (210) : 40 Ind App 24 : 17 Ind Cas 627 (628) (PC), *Mulraj*

assignment of a life policy for *securing* the payment of an existing or future debt is assumed to be valid.[3] The transfer of an actionable claim, like any other transfer, may also be made conditionally.[3a] In the undermentioned case[4] an endowment policy was assigned by the assured in favour of his wife by an endorsement on it and the assignment was duly communicated to the insurance company. The endorsement recited that in the event of the wife predeceasing the assured or in the event of his surviving the date on which the policy was to become mature, the benefits of the policy together with the rights to recover the money thereunder would revert to the assured. It was held that this section applied to such a transfer, because, so long as the assignee's interest existed she had the whole interest and there was nothing in the terms of the section or in the principles underlying it to exclude the transfer of such a kind from its scope.

4. There must be present transfer of an existing actionable claim. —The word "transfer" means a *present* transfer.[1] A promise by the debtor to pay money to his creditor, when he, the debtor, might receive a debt due to him by a third person, does not constitute an assignment of the debt so as to charge the debt in the hands of the third person.[2] An undertaking by the debtor in the following terms: "I will deposit at your shop all cheques that I may get from the P.W. Department" or "I will be giving you cheques in satisfaction of the money due to you" has been held not to constitute a present assignment of the debt but to be merely an agreement to assign in future; the person in whose favour the agreement is made has no lien on the cheques.[3]

Khatau v. *Visvanath Prabhuram Vaidya.* ('11) 11 Ind Cas 964 (967) (DB) (Bom), *Vishvanath Vaidya* v. *Mulraj Khatau.* (Reversed in 37 Bom 198 : 40 Ind App 24 (PC) on other grounds.)

('10) 7 Ind Cas 952 (954) (Bom), *Vishvanath* v. *London & Lancashire Life Assurance Co.*

('29) 16 AIR 1929 Rang 318 (319) : 7 Rang 365 : 120 Ind Cas 238 (DB), *Sidambaram Nadar* v. *Moganlal Brothers.*

('10) 5 Ind Cas 834 (834) (DB) (Mad), *Ramaswamy Pillai* v. *Muthoo Chetty.*

† ('15) 2 AIR 1915 Mad 1031 (1031) : 38 Mad 297 : 21 Ind Cas 316 (FB), *Muthukrishna Iyer* v. *Veeraraghava Iyer.* (Hypothecation of promissory note is transfer of actionable claim.)

('18) 5 AIR 1918 Mad 172 (178) : 43 Ind Cas 385 (SB), *Rama Aiyar* v. *Parathasarathy.*

('09) 33 Bom 610 (628) : 4 Ind Cas 804 (807) (DB), *Ardeshir Bejanji Surti* v. *Syed Sirdar Ali Khan.* (The mere fact that parties have described a transaction as a "lien or charge" cannot deprive it of its real nature, if in substance the transaction is an assignment — Where a creditor purports to create a lien or charge on the debt due to him in favour of another person the word 'lien' or 'charge' has no meaning except as giving the latter a right to recover the debt from the debtor — The transaction is in reality one whereby the owner of what in English law is called a chose in action transfers it to another.)

('20) 7 AIR 1920 Mad 426 (426) : 56 Ind Cas 146 (DB), *Arunachallam Chettiar* v. *Madaswami.*

† ('35) 22 AIR 1935 Cal 756 (758) : 63 Cal 578 : 160 Ind Cas 219 (DB), *Bhupati Mohan* v. *Fanindra Chandra.*

('07) 1907) Pun Re No. 9, p. 46 (53) : 1908 Pun L R No. 25, *Nihal Chand* v. *Ali Bakhsh.* (Assignment may be absolute though by way of mortgage.)

† ('40) 44 Cal W N 593 (595), *Kali Mohan Shaha* v. *Empire of India Life Assurance Co.*

('41) 28 AIR 1941 Mad 147 (148) : I L R (1941) Mad 378 : 195 Ind Cas 422 (DB), *Official Assignee, Madras* v. *Hukumchand.*

('40) 27 AIR 1940 Pat 683 (691, 692) : 19 Pat 715 : 192 Ind Cas 187 (DB), *Karnidan Sarda* v. *Sailaja Kanta.*
[But see ('12) 14 Ind Cas 769 (773) (Bom), *Haridas Lalji* v. *Narotam.*]

3. ('13) 37 Bom 198 (210) : 40 Ind App 24 : 17 Ind Cas 627 (628) (PC), *Mulraj* v. *Vishwanath.*

3a. ('44) 31 AIR 1944 Nag 185 (187), *Soma Shekharrao* v. *K. S. Mishra.* (A clause in a deed of assignment of a life insurance policy that in case the assignee predeceased the assured the benefit of the policy was to revert to the assured is valid.)

4. ('39) 26 AIR 1939 Mad 411 (413) : ILR (1939) Mad 415 : 185 Ind Cas 173 (DB), *Lakshmikutty Kettilamma* v. *Vishnu Nambisan.*
[*See also* ('44) 31 AIR 1944 Nag 185 (187) : ILR (1944) Nag 871 : 219 Ind Cas 190, *Soma Shekharrao* v. *K. S. Mishra.* (Clause providing for reverter of benefit to assured in case assignee predeceased him is valid under S. 126.)]

Section 130—Note 4

1. ('26) 13 AIR 1926 Nag 206 (207) : 90 Ind Cas 323, *Ballabh Das* v. *Narain Prasad.*

2. ('73) 1873 Pun Re No. 63 page 99 (100) (DB), *Mool Chand* v. *Jumyut Singh.*
('84) 1884 Pun Re No. 60 page 158 (160) (DB), *Guruditta Mal* v. *Sultan Muhammad.*

It is necessary not only that there should be a *present* transfer, but also that the actionable claim transferred is in *existence*, at the time of the transfer.[4] As was observed by Braund, J., in *In the matter of Aviet Stephens*.[5]:

> "Section 130 (1) in its terms appears to point to an immediate interest of some sort passing. And that while it is in every way appropriate to an accruing, conditional or contingent debt, it cannot be reconciled with a debt which does not exist at all. In the three first cases an interest already exists which may or may not become a present debt . . . . . But a non-existent debt in the sense of a liability to become due in future from an unascertained person and to arise out of a relationship not yet established obviously imports no present interest at all and is not easy to fit into the intention of S. 130 (1) of the Act."

A share of a partner in a partnership and the right to recover it is an actionable claim which is assignable under this section. But a right of a partner to a rendition of accounts is not an actionable claim and cannot be assigned.[6]

A vendor's right to recover purchase-money from the purchaser is an actionable claim transferable under this section.[7] Similarly the buyer's right under S. 61 of the Sale of Goods Act (1930) to recover back the price paid under a contract of a sale on failure of its consideration is an actionable claim transferable under this section.[8]

A fixed deposit in a bank is not a deposit of specie but a debt or an actionable claim and a transfer of the same can only be made by an instrument in writing as required by this section.[9]

5. Distinction between transfer of a debt and a novation.—A transfer of a debt must be distinguished from a novation of contract. Section 62 of the Contract Act deals with novation of contracts and runs as follows :

> "If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.
>
> *Illustrations.*
>
> (a) *A* owes money to *B* under a contract. It is agreed between *A*, *B* and *C* that *B* shall thenceforth accept *C* as his debtor, instead of *A*. The old debt of *A* to *B* is at an end, and a new debt from *C* to *B* has been contracted.
>
> (b) *A* owes *B* 10,000 rupees. *A* enters into an arrangement with *B*, and gives *B* a mortgage of his (*A*'s) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.
>
> (c) *A* owes *B* 1,000 rupees under a contract. *B* owes *C* 1,000 rupees. *B* orders *A* to credit *C* with 1,000 rupees in his books, but *C* does not assent to the arrangement. *B* still owes *C* 1,000 rupees, and no new contract has been entered into."

The effect of a novation is thus not *to make any* assignment[1] but *to extinguish*

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3. ('26) 13 AIR 1926 Nag 206 (207) : 90 Ind Cas 323, *Ballabh Das* v. *Narain Prasad.*
4. ('38) 25 AIR 1938 Rang 1 (4) : 175 Ind Cas 786, *In the matter of Aviet Stephens.*
5. ('38) 25 AIR 1938 Rang 1 (4) : 175 Ind Cas 786.
6. (41) 28 AIR 1941 Sind 73 (78) : 194 Ind Cas 380 (DB), *Mulchand Tagiomal* v. *Shamdas Jethanand.*
7. ('42) 29 AIR 1942 Mad 209 (210) : 201 Ind Cas 258, *Chinnapareddi* v. *Venkataramanappa.*
8. ('43) 30 AIR 1943 Nag 332 (332) : ILR (1943) Nag 762 : 210 Ind Cas 625, *Damodhar Jhingoojee* v. *Allabux Sheikh Yewraj.* (Applying the principle laid down in AIR 1932 P C 32 : 11 Pat 266 : 59 Ind App 41 (PC).)
('45) 32 AIR 1945 All 409 (418, 419) : ILR (1945) All 315 (DB), *Rajeshwari Debi* v. *Mohan Bikram Sah.*

Section 130—Note 5

1. ('25) 12 AIR 1925 Mad 753(754) : 87 Ind Cas 382, *Doraiswami Mudaliar* v. *Doraiswami Iyengar.*
('32) 19 AIR 1932 Bom 446 (447, 448) : 56 Bom 462 : 139 Ind Cas 582 (DB), *Jivraj Joharmal* v. *Lalchand Shreekison & Co.*
[*See also* ('03) 5 Bom L R 373 (376),

the old contract, and bring about a new one either between the same parties or between one of them and a third party. It is a matter of consent of all the parties concerned.[2]

In a transfer of an actionable claim under this section, the liability of the debtor is neither substituted by any new liability nor is it transferred to any one else. The claim against the debtor is merely transferred to a third person, and is not a matter of any consent on the part of the debtor at all.[3]

6. Assignment of rents and profits and assignment of lessor's right of reversion under a lease.—A transfer of the rents and profits due to a person will be an assignment of an actionable claim requiring a document in writing under this section. But where the *reversion* in a lease is transferred by the lessor to another person, the latter's right to collect the rents and profits due by the lessee is part of the reversionary right transferred and can be claimed by him without a separate transfer in writing of such rents and profits. As observed by Venkataramana Rao, J., in the undermentioned case[1]:

> "There is always a distinction between an assignment of the rents and profits and a lease of a reversion. In the case of an assignment of rents and profits, all that the assignee will be entitled to is the right to realize the rents and profits by virtue of the assignment in his favour, but in the case of a reversion it is not merely the right to recover the rents and profits that are transferred to him but also the rights which the lessor had on the date of the reversion, for example, his right to recover possession immediately on the expiry of the previous term and if before the expiry of the term by virtue of any forfeiture, the lessor had the right to re-enter, the right of such re-entry."

7. Assignment of beneficial interest in moveable property.—See Note 24 on S. 3 and the undermentioned cases.[1]

8. Assignment of part of debt.—In England there is a difference of opinion as to whether *at law* a part of a debt can be validly assigned, though the general trend of opinion is that it cannot be so assigned. In equity, however, such an assignment is valid and constitutes the assignee a creditor of the original debtor[1], and he can enforce his rights against the debtor provided he makes the persons entitled to the other portion of the debt, parties to the suit.[2]

There is nothing in this section which prohibits the transfer of a part of a debt. But there is a conflict of opinion on the point. In the undermentioned cases[3] it was held that a part of the debt cannot be validly assigned for the reason

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Jiwan Vurjung v. *Haji Oosman.*]

2. ('19) 6 AIR 1919 Mad 1076 (1077) : 47 Ind Cas 749 (DB), *Seetharama Iyer* v. *Narayanswamy Pillay.*

3. *See* (1900) 27 Cal 827 (834) : 4 Cal W N 357 (FB), *Sirish Chandra* v. *Nasim Quazi.* (The character of the debt is not changed by the assignment.)

Section 130—Note 6

1. ('38) 25 AIR 1938 Mad 100 (102) : 176 Ind Cas 402 (DB), *Ratnaswami Moopanar* v. *Navaraja Moopanar.*

Section 130—Note 7

1. ('14) 1 AIR 1914 Low Bur 200 (201) : 7 Low Bur Rul 95 : 22 Ind Cas 940, *Dickman Brothers & Co* v. *Sulaiman Haji Brothers & Co.* (Though the benefit of a contract (an actionable claim) can be assigned, the burden or obligations under a contract cannot be assigned without the consent of the promisor.)

('08) 9 Bom L R 114 (118), *Nathu* v. *Hansraj.* (33 Cal 702 followed.)

('92) 16 Bom 441 (449), *J. H. Tod* v. *Lakhmidas.*

('03) 5 Bom L R 373 (376), *Jiwan* v. *Haji Oosman.*

Section 130—Note 8

1. ('40) 27 AIR 1940 Pat 170 (173) : 18 Pat 839 : 185 Ind Cas 514 (DB), *Durga Singh* v. *Kesho Lal.*

* (1910) 79 L J K B 664 (668) : (1910) 2 K B 636 : 102 L T 29, *Forster* v. *Baker.* (Per Bray, J.)

* (1921) 1 Ch 349 (354, 355) : 90 L J Ch 116 : 124 L T 664, *In re Steel Wing Co.*

2. (1921) 90 L J Ch 116 (119, 121) : (1921) 1 Ch 349 : 124 L T 664, *In re Steel Wing Co.*

3. ('25) 12 AIR 1925 Mad 753 (756) : 87 Ind Cas 382, *Doraisami Mudaliar* v. *Doraiswami Ayangar.*

that a debtor cannot be harassed by different creditors attempting to enforce parts of a single debt. In the case noted below[4] the High Court of Patna has held that where *A* transfers a part of a debt to *B* who enforces the same in a suit against the debtor, O.2 R.2 of the Civil Procedure Code will prevent *A* from suing the debtor for the remaining portion of the debt, that *A*'s right to the remaining portion of the debt is not therefore an actionable claim since it is not a claim which the Civil Courts recognise as affording grounds for granting relief, and that *A* cannot transfer the remaining part as an actionable claim. A contrary view, namely, that an assignment of even a part of the debt is valid, has been held in other cases.[5] It is submitted that the last view is to be preferred.

8a. Assignment of rights under a contract .—See Note 17 under S.6.

9. Debts due to a joint Hindu family.—It is the essential characteristic of a joint Hindu family that no member is entitled to a definite share in the joint family property. No assignment is therefore necessary where one coparcener retires from the membership of the joint family business and renounces his share therein. Any member can drop out of the business and the business will thenceforward belong to the other members who remain in the family. Thus, if there are debts due to a joint Hindu family from a certain person, the member renouncing his share in the debts need not execute a formal deed of transfer in favour of the remaining members.[1] So also, where in a partition of a joint Hindu family, a debt evidenced by a pronote falls to the share of a particular member, he can sue to recover the amount due under the pronote without an assignment under this section. The right to sue is not dependent upon the assignment and the suit, in such a case, is regarded as a suit on the original debt irrespective of the pronote.[2]

10. Transfer by operation of law.—The section does not affect a transfer of an actionable claim by operation of law or by, or in execution of, a decree or order of Court, as such transfers are expressly saved by S. 2, cl. (d).[1] See also Note 6 under section 2.

11. "Whether with or without consideration."—In English law, an assignment *at law*, may validly be made without consideration. But equitable assignments not falling within the statute are given effect to in Courts of Equity only if supported by consideration.[1]

('38) 25 AIR 1938 Cal 377 (381) : 62 Cal 510 : 164 Ind Cas 111 (DB), *Ghisulal* v. *Gumbhirmull.*

4. ('40) 27 AIR 1940 Pat 170 (174) : 18 Pat 839 : 185 Ind Cas 514 (DB), *Durga Singh* v. *Kesho Lal.*

5. ('28) 15 AIR 1928 Mad 1201 (1207) : 52 Mad 465 : 116 Ind Cas 827 (DB), *S. A. Rajamier* v. *Subramaniam Chettiar.* (AIR 1925 Mad 753 not approved.)

('40) 27 AIR 1940 Mad 258 (265), *Travancore National Bank Subsidiary Co. Ltd.* v. *T. N. & Q. Bank Ltd.*

† ('41) 28 AIR 1941 Lah 337 (338) : 197 Ind Cas 735 (DB), *Firm Ram Kishen Mohanlal* v. *Firm Gurdial Mal-Sagar Mal.*

[*See also* ('18) 5 AIR 1918 Mad 1337 (1345) : 42 Ind Cas 684 (DB), *Subjan Sahib* v. *Abdul Azeez Sahib.* (*Quaere.*).]

Section 130—Note 9

1. ('36) 63 Cal 194 (204) : 40 Cal W N 808 (813), *Brijmohan* v. *Mahabeer.*

2. ('37) 1937 Mad W N 134 (134), *Chinna Chenchu Reddi* v. *Subbaroya Chetti.* (AIR 1934 Mad 529 : 57 Mad 1082, followed.)

('10) 8 Ind Cas 33 (34) (DB) (Mad), *Chandana* v. *Majati.*

('34) 21 AIR 1934 Mad 529 (532) : 57 Mad 1082 : 153 Ind Cas 916 (DB), *Gopalu Pillai* v. *Kothandarama Ayyar.*

[*But see* ('07) 17 Mad L Jour 393 (393) : 3 Mad L Tim 7 (DB), *Arunachala Reddi* v. *Subba Reddi.*]

Section 130—Note 10

1. ('43) 30 AIR 1943 Pat 218 (223) : 22 Pat 114 : 206 Ind Cas 126 (DB), *Mani Devi* v. *Anpurna Dai.* (Order of Court, allowing ward's prayer to assign in his favour a security bond executed by the guardian in favour of Court — *Held* that there was valid assignment even though there was no assignment in writing signed by the Court on the back of the bond.)

('39) 26 AIR 1939 Sind 288 (289) : ILR (1939) Kar 344 : 185 Ind Cas 28 (DB), *Virbhandas Shamsing* v. *Dasumal Keshodas.* (AIR 1926 Sind 78 distinguished.)

('26) 13 AIR 1926 Sind 78 (79, 80) : 90 Ind Cas 111, *Mulibai* v. *Shevaram Menghraj.*

The words "whether with or without consideration" in this section make it clear that a *gift* of an actionable claim can validly be made under this section.[2] The said words did not exist in the section before the year 1929.

It was, however, held that the section was wide enough to cover transfer with or without consideration[2a] and that gifts of actionable claims were not governed by Chap. VII which relates to *gifts generally* but by the special rules laid down in Chap. VIII for the transfer of actionable claims.[3] Chapter VII was held inapplicable to gifts of actionable claims for another reason also. An actionable claim, though a moveable property, was not such a moveable property as could be transferred by mere delivery under S. 123. The provisions in S. 123 that delivery may be made in the same way as goods sold and delivered showed that what was dealt with under that section was a gift of tangible property such as a horse or a book and not an intangible property like a book-debt.[4]

By the Transfer of Property (Amendment) Act, XXXVIII of 1925, the clause "notwithstanding anything contained in S. 123" was inserted after the words "authorised agent and," the object of the amendment being to give effect to representations made by certain insurance companies that gifts of life policies involved considerable hardships, as, under section 123 they were required to be made by registered instruments. By the insertion of the above words, however, doubts appear to have arisen as to whether the words applied to gifts of actionable claims made by Muhammadans. In order to remove these doubts, therefore, the words "notwithstanding anything contained in S. 123" were omitted from the section by the Transfer of Property (Amendment) Act, XX of 1929, and the words "whether with or without consideration" were inserted after the words "The transfer of an actionable claim."[5]

An idol not being a living person within the meaning of S. 5, a dedication of property to an idol is not a gift within the meaning of the Transfer of Property Act. A dedication of an actionable claim to an idol, therefore, is not governed by this section and may be made orally.[6] (See section 5 also.)

12. Form of assignment.—The section requires that the transfer of an actionable claim shall be effected only by the execution of an instrument in writing.[1]

Section 130—Note 11

1. Halsbury, *Laws of England*, (Hailsham Edition) Vol. 4 Paras. 797 and 805.
('21) 8 AIR 1921 Mad 137 (139) : 44 Mad 196 : 61 Ind Cas 461 (DB), *Perumal Ammal* v. *Perumal Naicker.*
('14) 1 AIR 1914 Cal 566 (567) : 22 Ind Cas 500 (DB), *Akhoy Kumar Pal* v. *Hari Dasi Basak.*
('37) 24 AIR 1937 All 424 (427) : 169 Ind Cas 836 (DB), *Ram Govind* v. *Brij Ratan Das.*
('14) 1 AIR 1914 All 279 (280) : 36 All 507 : 24 Ind Cas 385 (DB), *Gur Prasad* v. *Gorakhpur Bank, Ltd.*
2. ('38) 25 AIR 1938 Mad 236 (238) : 176 Ind Cas 617 (DB), *Ramaswami Chettiar* v. *Manickam Chettiar.*
2a. ('21) 8 AIR 1921 Mad 137 (138) : 44 Mad 196 : 61 Ind Cas 461 (DB), *Perumal Ammal* v. *Perumal Naicker.*
3. ('17) 4 AIR 1917 Mad 20 (26) : 38 Ind Cas 248 (DB), *Yacoob Sahib* v. *Pacha Bibi.*
('21) 8 AIR 1921 Mad 137 (138) : 44 Mad 196 : 61 Ind Cas 461 (DB), *Perumal Ammal* v. *Perumal Naicker.*
4. ('21) 8 AIR 1921 Mad 137 (138) : 44 Mad 196 : 61 Ind Cas 461 (DB), *Perumal Ammal* v. *Perumal Naicker.*
5. See the Report of the Special Committee, 1927, printed on page 85 (131).
6. ('26) 13 AIR 1926 Nag 469 (470) : 96 Ind Cas 1004, *Bhopatrao* v. *Shri Ramachandra Sansthan Kund Sarjapur.*

Section 130—Note 12

1. ('44) 31 AIR 1944 Cal 335 (339) : ILR (1943) 2 Cal 325 : 218 Ind Cas 260, *Official Trustee* v. *Chippendale.*
('32) 19 AIR 1932 Bom 446 (448) : 56 Bom 462 : 139 Ind Cas 582 (DB), *Jivraj Joharmal* v. *Lalchand Shreekison and Co.*
('36) 23 AIR 1936 Pat 527 (530) : 165 Ind Cas 298, *Alimunnisa Bibi* v. *Abdul Aziz.*
('23) 10 AIR 1923 Pat 165 (166) : 67 Ind Cas 451 (DB), *Rameshwar Narain Singh* v. *Riknath Koeri.*
('26) 13 AIR 1926 Cal 447 (448) : 89 Ind Cas 735 (DB), *Kissen Gopal* v. *L. J. Bavin.*
('38) 25 AIR 1938 Sind 24 (27) : 32 Sind L R 640 : 173 Ind Cas 591, *Jhangaldas Chimandas Firm* v. *Firm Chetumal Bulchand.*
('40) 27 AIR 1940 Mad 157 (159) : 187 Ind Cas 531, *In re Travancore National and Quilon Bank, Ltd.*

Under the old S. 131 it was held that a transfer in writing was not necessary as there were no words to that effect in the section.[2] An assignment by way of a trust deed is valid.[2a]

The object of reducing the transfer to writing is to put the arrangement entered into between the parties beyond dispute.[3] Thus, in *Raman Chetty* v. *Nagarathna Naicker*,[4] it was observed:

> "The intention of the Legislature in amending this chapter of the Transfer of Property Act, was to bring the law in India generally into conformity with the law in England, which under the Judicature Act requires assignments of chose in action to be in writing, a provision which is, in my opinion, highly necessary for the benefit of the other party to the contract who ought not to be embarrassed by mere oral allegations of transfer which may easily be distinguished and upon which it may be very difficult for him to act with any degree of safety to himself."

As transfers by way of charge on or hypothecation of actionable claims fall under this section, such transfers also must be effected by execution of an instrument in writing.[5] Thus, a mere deposit of a life policy[6] or a deposit of securities lying with the creditor, by the creditor[7] will not create any charge on the life policy or debts due by the debtor.

13. No particular words are necessary to constitute assignment.— Although a transfer of an actionable claim is required to be in writing, the section does not require the transfer to be in any particular form or to be couched in technical language, provided the words used sufficiently indicate the transferor's intention to transfer the claim due to him to the transferee.[1] In *William Brandt's Sons* v. *Dunlop Rubber Co.*,[2] Lord Macnaughten observed:

> "The Lord Chief Justice came to the conclusion that the document did not on the face of it, purport to be an assignment nor use the language of an assignment. An equitable assignment does not always take that form. It may

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('10) 9 Ind Cas 287 (288) (DB) (Mad), *Velayutham* v. *Pillaiyar Chetty.*

[*But see* ('37) 24 AIR 1937 All 424 (425) : 169 I. C. 836 (DB), *Ram Govind* v. *Brij Ratan Das.*]

2. ('87) 9 All 249 (251) : 1887 All W N 27 (DB), *Autu Singh* v. *Ajudhia Sahu.*

2a. (44) 31 AIR 1944 Cal 335 (339) : ILR (1943) 2 Cal 325 : 218 Ind Cas 260, *Official Trustee* v. *Chippendale.*

3. ('39) 26 AIR 1939 Mad 543 (546) : 188 Ind Cas 878 (DB), *Govardhandas* v. *F.D.T. Co. Ltd.*

4. ('12) 15 Ind Cas 380 (381) (Mad).

5. * ('13) 37 Bom 198 (210) : 40 Ind App 24 : 17 Ind Cas 627 (628) (PC), *Mulraj Khatau* v. *Vishwanath.*

('29) 16 AIR 1929 Rang 318 (319) : 7 Rang 365 : 120 Ind Cas 238 (DB), *Sidambaram Nadar* v. *Maganlal Bros.*

6. * ('13) 37 Bom 198 (210) : 40 Ind App 24 : 17 Ind Cas 627 (628) (PC), *Mulraj* v. *Vishwanath.*

('41) 28 AIR 1941 Mad 147 (148) : I L R (1941) Mad 378 : 195 Ind Cas 422 (DB). *Official Assignee Madras* v. *Hukumchand.* (An instrument evidencing the deposit of the policy of insurance by way of pledge does not amount to an assignment. 37 Bom 198 : 40 Ind App 24 (PC) followed.)

7. ('29) 16 AIR 1929 Rang 318 (319) : 7 Rang 365 : 120 Ind Cas 238 (DB), *Sidambaram Nadar* v. *D. R. Maganlall Bros.* (37 Bom 198 : 40 Ind App 24 (PC) followed.)

Section 130—Note 13

1. ('38) 25 AIR 1938 Mad 236 (238) : 176 Ind Cas 617 (DB), *Ramaswami Chettiar* v. *Manikkam Chettiar*, (30) Mad 75 followed.)

('84) 1884 Pun Re No. 60 p. 158 (159) (DB), *Gurditta Mal* v. *Sultan Muhammad.* (Equitable assignments or as they are called in the Transfer of Property Act, transfers of actionable claims, are recognized in India.)

('24) 11 AIR 1924 Lah 684 (685) : 78 Ind Cas 163, *Nanak Chand Kishori Lal* v. *Ram Sarup Gujar Mal.*

('26) 13 AIR 1926 Cal 447 (448, 449) : 89 Ind Cas 735 (DB), *Kishen Gopal* v. *L. J. Bavin.*

('19) 6 AIR 1919 Mad 1076 (1076) : 47 Ind Cas 749 (DB), *Seetarama Ayyar* v. *Narayanaswami Pillai.*

('37) 24 AIR 1937 All 424 (427) : 169 Ind Cas 836 (DB), *Ram Govind* v. *Birj Ratan.*

('41) 28 AIR 1941 Mad 147 (148) : I L R (1941) Mad 378 : 195 Ind Cas 422 (DB), *Official Assignee, Madras* v. *Hukum Chand.*

2. (1905) 74 L J K B 898 (902) : 1905 App Cas 454.

be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person."

The following are all illustrations of valid assignments of actionable claim:

(1) Endorsement on an instrument which represents the debt.[3]

(2) Endorsement on a money bond to the effect 'I have sold the document,'[4] or to the effect, 'the balance due should be paid into the hands of my son.'[5]

(3) A direction in writing to pay the amount due on an instrument endorsed on the instrument by the payee thereof coupled with the delivery of the instrument so endorsed to the person to whom the payment is directed.[6] But a mere acknowledgment of the payment by the payee is not an assignment under the section, there being no operative words of transfer.[7]

(4) A partition list allotting a pronote to a particular member of a joint family.[8]

(5) An assignment by way of an entry made in a statement of accounts is sufficient.[9]

(6) A letter given by a person to another, directing the latter to receive from the former's debtor the amount due to him under an instalment bond.[10]

(7) Where there is a verbal transfer of an actionable claim on a certain date and the transfer is reduced to writing the next day and the instrument refers to the transfer as having been made on the previous day, the instrument is a deed of transfer and cannot be held otherwise simply because it is expressed in the past tense.[11]

(8) An arrangement by all the partners, on the dissolution of a firm, that some of them would be entitled to the debt due to the firm.[12]

(9) Where a sum of money is lying with a banker as a deposit in the name of one *A* but by a subsequent arrangement in writing between *A* and *B* it is agreed that a portion of the deposit should be transferred to *B* while the other portion should go to the benefit of *A*, the arrangement operates as an assignment of an actionable claim.[13]

(10) *A* was awarded compensation in a Magistrate's Court and the money was kept in Court deposit. *B* brought a suit against *A* for a certain

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3. ('35) 22 AIR 1935 All 837 (838) : 158 Ind Cas 525, *Gopi Nath* v. *Mt. Bekali.*
('37) 24 AIR 1937 Sind 181 (183) : 31 Sind L R 98 : 170 Ind Cas 225 (DB), *Shamdas* v. *Savitribai.*
4. ('24) 11 AIR 1924 Lah 684 (685) : 78 Ind Cas 163, *Nanak Chand Kishori Lal* v. *Ram Sarup Gujar Mal.*
5. ('09) 1 Ind Cas 212 (213) (DB) (Mad), *Saminatha Pillai* v. *Doraiswami Naick.* (30 Mad 75 followed.)
6. ('26) 13 AIR 1926 Cal 447 (449) : 89 Ind Cas 735 (DB), *Kissen Gopal Bogree* v. *L. J. Bavin.*
('06) 30 Mad 75 (77, 78) : 16 Mad L Jour 554 (DB), *Rama Iyen* v. *Venkatachellam.*
('21) 8 AIR 1921 Mad 122 (124) : 59 Ind Cas 943 (DB), *Chandu* v. *Ramunni.*
7. ('21) 8 AIR 1921 Mad 122 (123) : 59 Ind Cas 943 (DB), *Chandu* v. *Ramunni.*
8. ('10) 8 Ind Cas 33 (34) (DB) (Mad), *Chandana* v. *Majati.*
9. ('19) 6 AIR 1919 Mad 1076 (1076) : 47 Ind Cas 749 (DB), *Seetarama Ayyar* v. *Narayanaswami Pillai.*
10. ('12) 16 Ind Cas 708 (708) (DB) (Mad), *Konijetti Veerasami* v. *Varada Veerasami.*
11. ('32) 19 AIR 1932 Bom 446 (448) : 56 Bom 462 : 139 Ind Cas 582 (DB), *Jivrai Joharmal* v. *Lalchand Shreekison.*
12. ('39) 26 AIR 1939 Sind 288 (289) : ILR (1939) Kar 344 : 185 Ind Cas 288 (DB), *Virbhandas Shamsingh* v. *Dasumal Keshowdas.*
Also see Section 5, Note 4.
13. ('38) 25 AIR 1938 Mad 236 (238) : 173 Ind Cas 955 (DB), *Ramaswami Chettiar* v. *Manikkam Chettiar.*

amount and effected an attachment before judgment of the deposit. On the date of hearing, *A* admitted the claim of *B* and requested the Court that out of the deposit in the Magistrate's Court, the amount of *B*'s claim be sent for and given to *B* in satisfaction of his claim. Thereupon, the Court passed an order that a decree under O. 12 R. 6, Civil Procedure Code, be passed, and the sum be requisitioned from the Court of the Magistrate. It was held that the declaration made by *A* and given effect to by the Court amounted to assignment.[14]

(11) A member of a Provident Fund executed a trust-deed whereby he assigned to himself and another person, as trustees, the amount of money standing to his credit at that time and other monies to which he might become entitled as a subscriber of the fund on retirement from service. The deed further provided that the trustees would receive the money and pay the income thereof to the settlor during his life-time and after his death the whole sum was to be distributed among certain persons. The settlor had reserved the right to revoke or alter the trust at any time. It was held that there was a valid assignment by way of a trust-deed and that therefore the trust property passed to the trustees.[14a]

(12) An application by the assignor to the Court of Wards to take over management of the property including debts due to assignor, on behalf of the minor assignee is sufficient.[14b]

It is a well settled rule that title cannot pass by mere admission or relinquishment where the statute requires a *deed of transfer*. Therefore, under the section a mere admission or relinquishment by a person of his rights in an actionable claim would not be sufficient.[15] Thus, where *A* and *C* were partners of a firm and *C* executed a deed of release whereby he gave up his claim to the business of the firm and declared that thenceforth the partnership would be conducted by *A* and *D*, it was held that no title vested in *A* and *D* under this section as a deed of transfer was necessary.[16]

14. Registration not necessary.—The section only requires that the transfer should be in *writing* signed by the transferor, and not that it should be *registered*. No registration is therefore necessary for the transfer of an actionable claim.[1] The contrary view expressed in the undermentioned case,[2] without any reasons being assigned for the view, is not correct.

15. Agreement between debtor and creditor that debts would be paid from a fund in the hands of a third person, if assignment.—Under the English law an agreement between the debtor and the creditor that the debt owing shall be paid out of a *specific fund* coming to the debtor or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, operates as an equitable assignment of that part of the debt or funds to which the agreement or order relates.[1] Such an order or agreement would operate under this

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14. ('37) 24 AIR 1937 All 424 (426) : 169 Ind Cas 836 (DB), *Ram Govind* v. *Brij Ratan Das*.
14a. ('44) 31 AIR 1944 Cal 335 (339) : ILR (1943) 2 Cal 325, 218 Ind Cas 260, *Official Trustee* v. *Chippendale*.
14b. ('43) 30 AIR 1943 Sind 177 (181) : ILR (1943) Kar 227 (DB), *Assudibai Sahijram* v. *Haribai Vasudev*.
15. ('12) 16 Ind Cas 440 (440) (DB) (Cal), *Dharam Chand Boid* v. *Mauji Shahu*.
16. ('12) 16 Ind Cas 440 (440) (DB) (Cal), *Dharam Chand Boid* v. *Mauji Shahu*.

Section 130—Note 14

1. ('21) 8 AIR 1921 Mad 137 (139) : 44 Mad 196 : 61 Ind Cas 461 (DB), *Perumal Ammal* v. *Perumal Naicker*.
2. ('27) 14 AIR 1927 Rang 39 (40) : 99 Ind Cas 735, *K. V. of Tiruvarur* v. *P. L. P. K. R. M. K. Chettiar*.

Section 130—Note 15

1. Chitty on *Contracts*, 18th Edn., page 970.

section also as a transfer of an actionable claim provided the requirement of this section as to writing is satisfied. Thus, an agreement between a debtor and a creditor that a particular debt should be paid from and out of a particular fund or money in the hands of a third person, would be an assignment of the debt.[2] So also, where, on an instrument executed by *B* in favour of *A*, *A* makes an endorsement directing *B* to pay *C*, and then delivers the instrument so endorsed to *C*, the transaction will be an assignment of the debt.[3] See also the undermentioned cases[4]. But a mere direction by *A* to his debtor *B* that he should pay *C*, does not amount to a transfer of the debt to *C* in the absence of any *agreement between A and C* that he should get the amount. It is merely an order for payment.[5] *A* applied to a credit society for loan and in his application gave his salary bills which would be due to him from his employee, as security. The society granted the application and a bond was executed by *A* in favour of the society, which, however, did not state that the loan would be paid up from his salary. *A* also wrote to his employer to pay the society such sums out of his salary as the society may apply for. It was held that this was not an equitable assignment of the salary in favour of the society.[6]

16. "Duly authorized agent."—The instrument of transfer under this section may be signed by the transferor or his duly authorised agent. The word "duly" must be taken to mean "lawfully." Where at the time of the transfer by the agent, he was not authorised to do so, but subsequently the principal ratifies the act, the ratification dates back retrospectively to the date of the transfer and cures the defect in the transfer. The transfer must be taken to have been made by an agent duly authorised in that behalf.[1]

17. Completeness of the transfer and notice to the debtor.—Under S. 131 as it stood prior to 1900,[1] transfer of an actionable claim was *not complete* until express notice was given to the debtor unless he was a party to the transfer or was otherwise aware of such transfer. In other words, the operation of the transfer was *suspended* until the required notice was given.[2] This was also the English

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2. † ('40) 27 AIR 1940 Mad 258 (261, 263), *Travancore National Bank Subsidiary Co., Ltd.* v. *T. N. & Q. Bank Ltd.* (Where a subscriber to a chit fund conducted by a company deposits money in a bank and authorises the bank to pay the future instalments or subscriptions in respect of the chit to the company as and when they fall due from and out of the deposit in the bank, it operates as an assignment of the moneys in favour of the company under S. 130 of the T. P. Act.)
('33) 20 AIR 1933 Lah 102 (103) : 14 Lah 325 : 144 Ind Cas 6 (DB), *Thakar Das Bhatia* v. *Malik Chand.*
('18) 5 AIR 1918 Mad 172 (177) : 43 Ind Cas 385 (SB), *Rama Aiyar* v. *Partha Sarathy Chetty.*
('97) 1897 Pun Re No. 43, p. 195 (200, 201) (DB), *Jhaman Lal* v. *Sant Lal.*
('30) 17 AIR 1930 Cal 782 (785) : 57 Cal 1101 : 127 Ind Cas 545 (DB), *Probodh Chandra Mitra* v. *Road Oils (India) Ltd.*
3. ('07) 30 Mad 75 (77, 78) : 16 Mad L Jour 554 (DB), *Rama Iyen* v. *Venkatachellam Pattar.*
4. ('84) 1884 Pun Re No. 60, p. 158 (161) (DB), *Gurditta Mal* v. *Sultan Muhammad.*
('14) 1 AIR 1914 Mad 281 (284) : 38 Mad 500 : 22 Ind Cas 566 (DB), *Navajee* v. *Administrator-General of Madras.* (Agreement to pay money out of cheques coming into possession in future creates valid equitable assignment.)
('14) 1 AIR 1914 All 279 (280) : 36 All 507 : 24 I. C. 385 (DB), *Gur Prasad* v. *Gorakhpur Bank Ltd.*
5. † ('26) 13 AIR 1926 Cal 447 (449) : 89 Ind Cas 735 (DB), *Kisen Gopal* v. *L. J. Bavin.*
('25) 12 AIR 1925 Mad 753 (756) : 87 Ind Cas 382, *Doraisami Mudaliar* v. *Doraiswami Iyengar.*
6. ('42) 29 AIR 1942 Pat 307 (308) : 201 Ind Cas 342 (DB), *B. N. Ry. Employees' Urban Bank Ltd.* v. *E. W. Seager.*

Section 130—Note 16

1. ('39) 26 AIR 1939 Mad 543 (545) : 188 Ind Cas 878 (DB), *Govardhandas Jamnadas* v. *Friedman's Diamond Trading Co. Ltd.*

Section 130—Note 17

1. See Note 1 where the old section is reproduced.
2. ('88) 10 All 20 (25, 26, 27) : 1887 All W N 270, *Kalka* v. *Chandan Singh.*
('11) 10 Ind Cas 510 (511) (DB) (Cal), *Ismail Mollah* v. *Jadu Nath.*
('97) 21 Bom 60 (62, 63) (DB), *Ragho* v. *Narayan.*
('10) 33 Mad 123 (129) : 4 Ind Cas 420 (423) (DB), *Gopala krishna Iyer* v. *Gopala Krishna Iyer.*
('71) 8 Bom H C R (O C) 169 (177), *Megji*

law, under which the title of the assignee of a chose in action was not complete until the required notice was given, so that a subsequent assignee could obtain priority over a prior one, by the mere fact of his giving notice to the debtor.[3]

The present section has changed the law in this respect. A transfer of an actionable claim is now complete *on the execution* of the instrument signed by the transferor[4] and does not depend upon the giving of notice to the debtor.[5] The result under the present section is that if there are several transfers of the debts in favour of different persons, they take in the order of the dates of these transfers and not in the order of the dates on which notices were given to the debtor.[6]

A subsequent transferee without notice of the earlier transfer may, however, even now, obtain priority over the earlier transferee if the latter has been guilty of gross negligence or is barred by estoppel from setting up his rights.[7]

Although the title of the transferee becomes perfect on the execution of instrument of transfer without any notice to the debtor, a dealing by the debtor with the debt without notice of the transfer will, under the second paragraph of the section, be valid against the transferee.[8] Under the repealed S. 131, a dealing by the debtor, after the transfer was not valid against the transferee, if he was a *party* to the transfer or even if he was *aware otherwise* of the transfer, although he had received no express notice of the transfer.[9] Under the present section, however, a

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Hansraj v. *Ramji Jotia.*
('02) 26 Bom 577 (587, 588) : 4 Bom LR 180, *Ebrahim* v. *Ful Bai.*
('87) 2 C P L R, 1 (5), *Aba Balaji* v. *Nilkant.*
[*See also* ('85) 1885 All W N 282 (283), *Vilayat Ali* v. *Gullo.*]
[See however (1900) 24 Bom 502 (503) : 2 Bom L R 414 (DB), *Dagdu* v. *Vanji.*]

3. ('86) 12 Cal 505 (509) (DB), *Lala Jagdeo Sahai* v. *Brij Behari Lal.*

4. ('35) 22 AIR 1935 Cal 756 (758) : 160 Ind Cas 219 (DB), *Bhupati Mohon Das* v. *Phanindra Chandra.*

5. † ('12) 11 Ind Cas 964 (968) (DB) (Bom), *Vishwanatha* v. *Mulraj.*
† ('38) 25 AIR 1938 Rang 426 (428) : 1938 Rang L R 480 : 179 Ind Cas 541 (DB), *Balthazar & Son* v. *Official Assignee.*
('12) 14 Ind Cas 144 (145) (DB) (Mad), *Venkatachalam Iyer* v. *Subramania Iyer.*
('19) 6 AIR 1919 Mad 1076 (1077) : 47 Ind Cas 749 (DB), *Seetharama Ayyar* v. *Narayanaswami Pillai.*
('35) 22 AIR 1935 Mad 1003 (1005) : 59 Mad 141 : 159 Ind Cas 127 (DB), *Subramania Ayyar* v. *Ramasubba Ayyar.*
('40) 27 AIR 1940 Pat 683 (691) : 19 Pat 715 : 192 Ind Cas 187 (DB), *Karnidan Sarda* v. *Sailaja Kanta.*

6. ('11) 11 Ind Cas 964 (968) (DB) (Bom), *Vishwanatha* v. *Mulraj.* (The English rule permitting assignees to obtain priority by giving notice does not find a place in the present section.)
† ('35) 22 AIR 1935 Mad 1003 (1005) : 59 Mad 141 : 159 Ind Cas 127 (DB), *Subramania Ayyar* v. *Ramasubba Ayyar.*

7. ('35) 22 AIR 1935 Mad 1003 (1005) : 59 Mad 141 : 159 Ind Cas 127 (DB), *Subramania Ayyar* v. *Ramasubba Ayyar.*

8. ('38) 25 AIR 1938 Rang 1 (5) : 175 Ind Cas 786, *In the matter of Aviet Stephens.*
('87) 3 C P L R 147 (149), *Jugraj Hemraj* v. *Kisan Singh.*
(1866) 35 L J Q B 99 (100, 101) : 1 Q B 372, *Jeffs* v. *Day.*
('11) 11 Ind Cas 964 (968) (DB) (Bom), *Vishwanath* v. *Mulraj Khatau.*
('24) 11 AIR 1924 Pat 118 (119) : 2 Pat 754 : 76 Ind Cas 55 (DB), *Tata Iron and Steel Co., Ltd.* v. *Baidyanath Laik.*
[*See also* (1888) 58 L J Q B 75 (79, 80) : 37 W R (Eng) 513 : 13 App Cas 523 : 60 L T 62, *Tailby* v. *The Official Receiver.*
('87) 10 All 20 (25, 26, 27) : 1887 All W N 270, *Kalka Prasad* v. *Chandan Singh.*
('86) 12 Cal 505 (509) (DB), *Lala Jugdeo Sahai* v. *Brij Behari Lal.*]

9. ('87) 10 All 20 (25, 26, 27) : 1887 All W N 270, *Kalka Prasad* v. *Chandan Singh.* *As to what amounted to sufficient notice under the old section see the undermentioned cases:*
('11) 10 Ind Cas 510 (511) (DB) (Cal), *Ismail Mollah* v. *Jadu Nath.* (Constructive notice was held sufficient but actual knowledge of the transfer need not have been brought home to the debtor.)
('05) 29 Bom 199 (202) : 6 Bom L R 836 (DB), *Sahadev* v. *Papa Miya.* (Registration not sufficient notice.)
('78) 1 All 732 (734) (DB), *Kanhaiya Lal* v. *Domingo.* (Filing of suit against the debtor was held sufficient notice.)
('97) 21 Bom 60 (62, 63) (DB), *Ragho* v. *Narayan.* (Do.)
('94) 1894 Pun Re No. 12 p. 21 (24), *Jhoki Ram* v. *Malik Kadir Baksh.* (Do.)
('86) 12 Cal 505 (510) (DB), *Judgeo Sahai* v. *Brij Behari Lal.* (Do.)
(1889) 2 C P L R 1 (4), *Aba Balaji* v. *Nilkanth.* (Notice not given by the transferor but given by the transferee not held sufficient.)

dealing by the debtor after the transfer will not be binding on the transferee only if the debtor was either a *party* to the transfer or had been given *express notice* of the transfer. A mere knowledge of the transfer is not sufficient.

The notice required by this section must be an *express notice* conforming to the provisions of S. 131.[9a] If the notice does not conform to the provisions of that section the debtor is not bound by it and is not debarred from treating the debt as payable to the original creditor.[10] After the receipt of notice, the debtor cannot refuse to pay the debt to the transferee; if he still makes payment to the transferor he is not absolved from liability to make payment to the transferee.[11] It was held in the undermentioned case[12] that after a notice is given to the debtor of the assignment he cannot make any payment to anyone else even under the order of the Court unless the assignee was a party to the proceeding in which the order is passed.

A conditional or qualified notice is, however, not invalid.[13] Thus, where *A* transfers a debt due to him by *B* to *C* and gives notice of the transfer to *B* but requests him to pay *C* only if the liability which forms the consideration of the transfer has not already been discharged by *A* himself the notice is 'valid' and *B* would be justified in paying *A*, if *A* after giving notice, represents to *B* that he has satisfied the claim of *C* and *C* himself takes no steps to realise the debt from B.[14]

The section, however, does not make any provision as to what the debtor is to do when the fact of the transfer or its validity and operation is disputed. The only safe course for him, in such a case, is not to pay the debt to anyone but to ask the claimants to interplead. If he pays one of them he does so at his peril and will be obliged to pay over again to the right person if the person to whom he paid the amount is found to have no title.[15]

The notice of transfer must be given to the debtor himself or some person duly authorised by him to receive such notice.[16]

The provisions of S. 130, however, presuppose a *valid* transfer. If the procedure laid down in this section is strictly followed but the transfer contravenes some other provisions of law, no rights under this section can pass from the transferor to the transferee.[17] Thus, if the object or consideration of the transfer is unlawful within the meaning of S. 23, Contract Act, the transfer will fail. (See S. 6.) So also where a debt is transferred with the object of defeating the creditors of the transferor, the creditors are not bound by the transfer and can treat the debt as still being the property of the transferor.[18]

18. Transfer of mortgage debt—Equities between mortgagor and

('87) 10 Mad 289 (290) (DB), *Subbamal* v. *Venkatarama.* (Filing of suit sufficient notice. Overruled on another point in 13 Mad 225 (FB).)

9a. † ('23) 10 AIR 1923 Cal 719 (720) : 80 Ind Cas 632 (DB), *Sadasook Ramprotap* v. *Hoare Miller & Co.*

('38) 25 AIR 1938 Rang 1 (5) : 175 Ind Cas 786, *In the matter of Aviet Stephens.*

('10) 33 Mad 123 (129) : 4 Ind Cas 420 (423) (DB), *Gopalakrishna Aiyar* v. *Gopalakrishna Aiyer.*

10. ('15) 2 AIR 1915 Low Bur 10 (11) : 8 Low Bur Rul 288 : 30 Ind Cas 278, *Basant Singh* v. *Burma Railways Co., Ltd.*

11. ('10) 33 Mad 123 (130) : 4 Ind Cas 420 (424) (DB), *Gopalakrishna Ayer* v. *Gopalakrishna Iyer.*

12. ('43) 30 AIR 1943 Mad 244 (245) : ILR (1943) Mad 587 : 207 Ind Cas 317 (DB), *Burma Shell Oil Storage and Distributing Co.* v. *Official Receiver, Tinnevelly.*

13. ('10) 33 Mad 123 (129) : 4 Ind Cas 420 (424) (DB), *Gopalakrishna* v. *Gopalakrishna.*

14. ('10) 33 Mad 123 (129) : 4 Ind Cas 420 (424) (DB), *Gopalakrishna Iyer* v. *Gopalakrishna Iyer.*

15. ('10) 33 Mad 123 (130) : 4 Ind Cas 420 (424) (DB), *Gopalakrishna Iyer* v. *Gopalakrishna Iyer.*

16. ('15) 2 AIR 1915 Low Bur 10 (11) : 8 Low Bur Rul 288 : 30 Ind Cas 278, *Basant Singh* v. *Burma Railways Co.*
[*See also* (1880) 49 L J Ch 465 (468) : 28 W R (Eng) 681 : 14 Ch D 406 : 43 L T 3, *The Saffron Walden Building Society* v. *Rayner.*]

17. ('36) 23 AIR 1936 Oudh 275 (276) : 12 Luck 150 : 162 Ind Cas 229 (DB), *Sitla Bux Singh* v. *Mahabir Prasad.*

18. ('12) 15 Ind Cas 193 (193) (Mad), *Subramania Pillai* v. *Dakshnamurti Mudaliar.*

mortgagee, if available against transferee.—A mortgage debt is not an actionable claim,[1] and a transfer thereof is not governed by this section. A notice to the mortgagor is not necessary in order to render its assignment valid.[1a] But it is well recognised in England, that until he receives notice of the transfer, the mortgagor may validly make payments to the mortgagee (transferor) and to have credit for them against the transferee.[2] The same principle has been held to apply in this country also.[3] But other equities, such as a right to set off an independent claim against the mortgagee, have been held not to be available to the mortgagor.[4]

19. "All the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee."—All rights and remedies of the transferor, whether by way of damages or otherwise, in respect of the actionable claim vest in the transferee.[1] In the undermeintioned case,[2] one Mangal Ram had executed in favour of one Mt. Suraj, a bond for Rs. 150. The bond contained a stipulation that the loan was to be repaid in yearly instalments of Rs. 5 without interest. It was also provided that if the debtor made default in payment of any instalment, the creditor could sue only for the one instalment. It was held that these stipulations were voidable by Mt. Suraj on the ground of undue influence and that a transferee of the bond from Mt. Suraj was also entitled to exercise the same option and avoid the stipulations.

As all the rights and remedies of the transferor in respect of the actionable claim transferred pass to the transferee, the transferee is after the date of the transfer, the only party entitled to sue the debtor or the other person for the recovery of the actionable claim.[3] The contrary view taken in the undermentioned case[4] to the effect that the transferor can maintain an action against the debtor or the other person for the benefit of the transferee appears to be incorrect in view of the express terms of the section.

Section 135 of the repealed Chapter VIII[5] provided that a buyer of an actionable claim could not, except in certain specified cases, claim from the debtor

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Section 130—Note 18

1. See section 3.
[*See also* ('85) 1885 All W N 282 (283) (DB), *Shyam Kaur* v. *Sumar Singh.* (Case under the old section 131.)]

1a. ('11) 11 Ind Cas 778 (778) (DB) (Low Bur), *Maung Kyaw Ywe* v. *Ranganatham Chetty.*

2. Halsbury, *Laws of England*, Vol. 21, Para. 334.

3. † ('20) 7 AIR 1920 Mad 742 (743) : 43 Mad 803 : 60 Ind Cas 255 (DB), *Neelamani Patnaik* v. *Sukadua Behara.*
('24) 11 AIR 1924 Nag 401 (404) : 78 Ind Cas 127. *Basantrao* v. *Narayan.*
('80) 2 Mad 212 (214) (DB), *Chinnayya Rawuthan* v. *Chidambaram Chetti.*
Also see S. 58, Note 5 and S. 60, Note 13.

4. ('17) 4 AIR 1917 Mad 928 (930) : 40 Mad 683 : 34 Ind Cas 859 (DB), *Subramania Aiyar* v. *Subramania Pattar.*

Section 130—Note 19

1. ('36) 23 AIR 1936 Oudh 105 (106) : 159 Ind Cas 320 (DB), *Ram Sahai* v. *Bhagwan Din.*
('19) 6 AIR 1919 Mad 1076 (1077) : 47 Ind Cas 749 (DB), *Seetharama Ayyar* v. *Narayanswami Pillai.*
('35) 22 AIR 1935 Cal 218 (221) : 62 Cal 1 : 155 Ind Cas 193 (DB), *Ranjit Roy* v. *D. A. David.*

2. ('36) 23 AIR 1936 Oudh 105 (106) : 159 Ind Cas 320 (DB), *Ram Sahai* v. *Bhagwan Din.*

3. ('45) 32 AIR 1945 Bom 11 (13), *Santuram Hari* v. *Trust of India Assurance Co.*
[AIR 1915 Mad 1031 : 38 Mad 297 (FB), Foll.]
('19) 6 AIR 1919 Mad 1076 (1077) : 47 Ind Cas 749 (DB), *Seetharama Ayyar* v. *Narayanswami Pillai.* (AIR 1915 Mad 1031 : 38 Mad 297 (FB), followed.)
('20) 7 AIR 1920 Mad 426 (427) : 56 Ind Cas 146 (DB), *Arunachellam Chettiar* v. *Madaswami.*

4. ('27) 14 AIR 1927 Mad 817 (818) : 104 Ind Cas 409, *Chandrasekaralingam* v. *Nagabhushanam.*

5. The old Section 135 ran as follows:
"Where an actionable claim is sold, he against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it.
Nothing in the former part of this section applies:—
(a) where the sale is made to the co-heir to, or co-proprietor of, the claim sold;
(b) where it is made to a creditor in payment of what is due to him;
(c) where it is made to the possessor of a property subject to the actionable claim;

anything more than what he paid for his purchase.[6] Under the present section it is clear that the transferee can claim the full amount due under the actionable claim even though he obtained his transfer in consideration of a lesser amount.

See also S. 134 Note 5.

20. Assignor's liability after the assignment.—Even though a payment made by the debtor, before notice of the assignment of the debt, to the assignor is valid against the assignee, the assignor has no right, as between himself and his assignee, to receive the debt after the date of the transfer. If he receives it he will be liable to pay it up to the assignee.[1] Nor can the assignor do anything in derogation of his transfer,[2] the principle being that a grantor cannot derogate from his own grant. Thus, in the undermentioned case[3] *A* and *B*, co-partners transferred to *C* all the co-partnership stock, debts, sums of money, etc. At the time of such transfer *A* had in his possession a bill of exchange payable to his order, the property of *A* and *B* as such co-partners. *A* made default in transferring the bill to *C* and later on incapacitated himself from so doing by parting with the bill. It was held that there was an implied covenant on the part of *A* not to do anything in derogation of the deed of transfer and that, as he acted in derogation of it, *C* could recover the amount of the bill from *A*. In another case[4] a deed of transfer of an actionable claim contained a clear and unambiguous statement that no part payment of any sort had ever been made to the transferor; there was also a provision that the transferee should collect the amount of the claim by recourse to litigation if he could not recover it otherwise. The transferee having failed to recover the debt from the debtor sued the transferor for the price he paid for the transfer and for the costs

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(d) where the judgment of a competent Court has been delivered affirming the claim or where the claim has been made clear by evidence and is ready for judgment."

6. ('88) 11 Mad 56 (63) (FB), *Rathnasami v. Subramanya.*
('90) 13 Mad 225 (227, 228) (FB) *Nilakanta* v. *Krishnasami.*
('87) 9 All 476 (479) (DB), *Jani Begam* v. *Jehangir Khan.*
('91) 13 All 102 (106, 108) (DB), *Hakim-un-nisa* v. *Deonarain.*
('97) 21 Bom 572 (575), *In re Runchod Khushal.*
('91) 5 C P L R 13 (18), *Deochand* v. *Maniram.*
('99) 22 Mad 301 (302) (DB), *Rama Sastri* v. *Narasimha Ayyar.*
('10) 7 Ind Cas 871 (872) (DB) (Mad), *Burle Jaganna* v. *Yelugula Latchanna.*

See also the following cases under that section:
('98) 22 Bom 761 (763) (DB), *Anandrao Babaji* v. *Durgabai.*
('91) 18 Cal 510 (513, 514) (DB), *Rajendra Narain* v. *Watsan & Co.*
('96) 23 Cal 713 (722), *Debendra Nath* v. *Pulin Behary.*
('86) 13 Cal 145 (146) (DB), *Grish Chandra* v. *Kashisauri Debi.*
('88) 15 Cal 436 (437) (DB), *Khoshdeb Biswas* v. *Satar Mondol.* (This section did not apply where the money was recovered by a suit after a contest as to the liability of the defendant.)
('95) 19 Bom 290 (292) (DB), *Vishnu* v. *Dagadu.* (Assignee can recover the whole debt and not the price he paid.)
('98) 2 Cal W N 147 (150) (DB), *Charan Sarkar* v. *Gangadhar Das.*
('92) 15 Mad 382 (383), *Krishnan* v. *Perachan.*
('11) 9 Ind Cas 729 (730) (DB) (Mad) *Palaniappa* v. *Shadagopa.*
('06) 29 Mad 155 (159) (DB), *Chinnam Rajamannar* v. *Tadikonda Ramachandra Rao.*
('02) 24 All 517 (518, 519) : 1902 All W N 150, *Mathura Das* v. *Murlidhar.*
('99) 3 Oudh Cas 18 (19), *Azim Ali* v. *Chowharja Bakhsh.*
('98) 21 Mad 253 (255) (DB), *Suryanarayana Sastri* v. *Ramamurti Pantulu.*
('98) 20 All 327 (335, 336) : 1898 All W N 54 (DB), *Phul Chand* v. *Chhoote Lal.*

Section 130—Note 20

1. ('27) 14 AIR 1927 Rang 129 (129) : 101 Ind Cas 202, *Toyam Gulal* v. *Sheo Mullock.*
(1891) 60 L J Ch 111 (114) : 39 W R (Eng) 113 : (1891) 1 Ch 82 : 63 L T 752, *In re Patrick Bills* v. *Tatham.*
(1834) 3 My & K 36 (43) : 40 E R 14 : 4 L J (NS) Ch 106 : 41 R R 5, *Fortiscue* v. *Barnett.*
(1866) 35 L J Q B 99 (100, 101) : 1 Q B 372, *Jeffs* v. *Day.*

2. (1856) 25 L J C P 229 (232) : 2 Jur (NS) 812 : 27 L T (OS) 135 : 107 R R 277, *Aulton* v. *Atkins.*
(1867) 36 L J C P 173 (176) : L R 2 C P 305 : 15 L T 663 : 15 W R (Eng) 581, *Gerard* v. *Lewis.*

3. (1856) 25 L J C P 229 (232) : 2 Jur (NS) 812 : 27 L T (OS) 135 : 107 R R 277, *Aulton* v. *Atkins.*

4. ('27) 14 AIR 1927 Rang 129 (129) : 101 Ind Cas 202, *Toyam Gulal* v. *Sheo Mullock.*

of litigation against the debtor. It was held that the statement in the deed of transfer was a guarantee that the claim was in full force and it was also clear that the litigation was within the contemplation of parties and so the costs of litigation also. The transferee was, therefore, entitled to get a decree against the transferor not only for the price he paid but also for the costs of the suit against the debtor, and of the appeal and second appeal.

21. The right of a tenant in Malabar to compensation.—The right of a tenant in Malabar to compensation for improvements made on the tenancy land, is of a peculiar nature. It is dependent on the state of accounts existing at the time the question of compensation comes to be settled between the tenant and the landlord as to the claims which the landlord has against the tenant on account of rents or other dues payable under the lease. Such a right, however, is analogous to an actionable claim and a transfer of such right by the tenant to a third person cannot affect the rights of the landlord unless he has notice of the transfer when he accepts the surrender of the property leased and settles the account with the tenant[1]

22. Sub-section (2).—As seen in Note 19 after the execution of the instrument of transfer the transferee is the only party entitled to maintain action against the debtor or other person for the recovery of the actionable claim. The sub-section makes it clear that the transferee is not required to obtain the consent of the transferor to the suit or proceeding against the debtor or other person and need not make the transferor a party to such suit or proceeding.[1]

23. Exception.—Transfers of fire and marine policies have been excepted from the general provisions of this section.[1] A transfer of fire insurance policy is governed by the special rule contained in S. 135, while a transfer of marine insurance policy is now specifically provided for in Ss. 130A and 135A which have been inserted by the Transfer of Property (Amendment) Act, VI of 1944.

Until the amendment of the Exception in 1938 (See Note 1) transfers of life policies were required to be made in accordance with the provisions of this section.[2] But by the amendment of 1938 it is now provided that this section will not affect the provisions of S. 38 of the Insurance Act, 1938, which now provides for the transfer of life policies. However the rights and remedies of a transferee of a life policy existing prior to the commencement of the Insurance Act, 1938, are not affected by the provisions of S. 38 of the Act[3] (see cl. (6) of S. 38, Insurance Act, 1938).

24. The principle of "caveat emptor" applies to the purchase of an actionable claim.—It has been held that the principle of "*caveat emptor*" applies to the purchase of an actionable claim.[1] Thus, where a person held a promissory note for a certain amount and was paid off by the executant, but after the death of such person his widow sold it in good faith, not knowing that it was paid off, it was held that the principle of "*Caveat emptor*" applied, and that the pur-

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Section 130—Note 21

1. ('99) 23 Mad 86 (88) (DB), *Vasudeva Shenoi* v. *Damodaran.*
('26) 13 AIR 1926 Mad 650 (651) : 95 Ind Cas 3, *Vishwanath Iyer* v. *Chimmukutti Amma.*
('84) 7 Mad 545 (547) (DB), *Achuta* v. *Kali.*

Section 130—Note 22

1. ('35) 22 AIR 1935 Cal 756 (758) : 160 I. C. 219 (DB), *Bhupati Mohan* v. *Phanindra Chandra.*

Section 130—Note 23

1. ('37) 24 AIR 1937 Sind 181 (183) : 31 Sind L R 98 : 170 Ind Cas 225 (DB), *Shamdas Govindram* v. *Mt. Savitribai.*
2. ('13) 37 Bom 471 (478) : 19 Ind Cas 736 (737) (DB), *Shankar Vishwanath* v. *Umabai Sadasiva.*
('37) 24 AIR 1937 Sind 181 (183) ; 31 Sind L R 98 : 170 Ind Cas 225 (DB), *Shamdas Govindram* v. *Mt. Savitribai.*
3. ('44) 31 AIR 1944 Nag 185 (186) : ILR (1944) Nag 871 : 219 Ind Cas 190, *Soma Shekharrao* v. *K. S. Mishra.*

Section 130—Note 24

1. ('15) 2 AIR 1915 Lah 86 (86) : 29 Ind Cas 887, *Kishen Sarup* v. *Tara Chand.*

chaser had no remedy; he should have inquired from the executant whether the note was not paid off, as he was purchasing a *mere claim.*[2]

25. Law in the Punjab.— The Act does not apply to the Punjab.[1] The technical provisions contained in this section as to the requirement of writing for the transfer of an actionable claim have not been applied in that province.[2] The Courts are guided in such matters by the rules of justice, equity and good conscience.[3] In the undermentioned case[4] the Court applied the provisions of S. 25, sub-s. (6) of the English Judicature Act, 1873, as being in consonance with justice, equity and good conscience. In another case where a part of a debt was assigned, it was held that if this section enabled the transfer of a part of the debt, the principle underlying the section may be applied to the cases arising in the Punjab also, and that if it did not, then even according to the rules of justice, equity and good conscience, the assignee's rights were enforceable where the assignor and all other persons interested were made parties and there was no question of any harassment of the debtor by a multiplicity of proceedings.[5]

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[a]130A. (1) A policy of marine insurance may be transferred by assignment unless it contains terms expressly prohibiting assignment, and may be assigned either before or after loss.

Transfer of policy of marine insurance.

(2) A policy of marine insurance may be assigned by endorsement thereon or in any other customary manner.

(3) Where the insured person has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative:

Provided that nothing in this sub-section affects the assignment of a policy after loss.

(4) Nothing in clause (*e*) of section 6 shall affect the provisions of this section.

a. This section was newly *inserted* by S. 2 of the Transfer of Property (Amendment) Act, VI of 1944. [7-3-1944.]

1. Legislative changes.—Before the insertion of this section and S. 135A by the Transfer of Property (Amendment) Act, VI of 1944, assignment of rights under marine or fire policy of insurance was governed by the old S. 135. The reference to marine insurance policy was omitted from S. 135 by the above amending Act. Regarding the change, the reasons given were as follows:

> "The rules and principles governing a marine insurance policy being materially different from those governing a fire insurance policy, it is very unsatisfactory to accord the same treatment in the matter of assignment to

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2. ('15) 2 AIR 1915 Lah 86 (86) : 29 Ind Cas 887, *Kishen Sarup* v. *Tara Chand.*

Section 130—Note 25

1. † ('07) 1907 Pun Re No. 9, p. 46 (49, 53) : 1908 Pun L R No. 25, *Nihal Chand* v. *Ali Bakhsh.*
('94) 1894 Pun Re No. 12, p. 21 (23), *Jhoki Ram* v. *Malik Kadir Bakhsh.*
2. ('36) 23 AIR 1936 Lah 547 (548) : 164 Ind Cas 271, *Brij Lal* v. *Dhanna Ram.*
('25) 12 AIR 1925 Lah 575 (575) : 91 Ind Cas 784, *Teja Singh* v. *Firm Kalyan Das Chet Ram.*
('32) 19 AIR 1932 Lah 30 (31) : 134 Ind Cas 121, *Lacha Ram* v. *Hem Raj.*
3. ('07) 1907 Pun Re No. 9, p. 46 (53) : 1908 Pun L R No. 25, *Nihal Chand* v. *Ali Bakhsh.*
4. ('07) 1907 Pun Re No. 9, p. 46 (52) : 1908 Pun L R No. 25, *Nihal Chand* v. *Ali Bakhsh.*
5. ('41) 28 AIR 1941 Lah 337 (337, 338) : 197 Ind Cas 735 (DB), *Kishen Mohan Lal* v. *Gurdial Mal Sagar Mal.*

both categories of policies. To take but one instance, a fire insurance policy is not assignable after loss, but the nature of a marine insurance contract is such as to require that marine insurance policies should be assignable even after loss. In the United Kingdom, assignability of marine insurance policies after loss is placed beyond doubt by S. 50 of the Marine Insurance Act. But in the absence of a similar provision here, it is doubtful if Courts in British India would hold that they are so assignable."[1]

2. Scope of the section.—This section provides for the transfer of a policy of marine insurance while S. 135A deals with the rights, etc., arising in consequence of such assignment of rights under a policy of marine insurance. A policy of marine insurance can be assigned either before or after loss by endorsement thereon or in any other customary manner unless it is expressly prohibited by the terms of the policy.

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131. Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

Notice to be in writing, signed.

Synopsis

1. Legislative changes.
2. Scope.
3. Notice by transferee or by his agent.
4. "Shall state the name and address of the transferee."
5. Notice with a condition or qualification.
6. Waiver of defects in the notice.

1. Legislative changes.—The corresponding section in Chap. VIII, as it stood before 1900 was S. 132 which ran as follows :

"Every such notice must be in writing signed by the person making the transfer or by his agent duly authorised in this behalf."

The section made no provision for a notice by the transferee and it was, therefore, held in the undermentioned case[1] that a notice sent by the transferee could not, under the terms of S. 131 (now S. 130), make the transfer of a debt operative. The change introduced by the present section seems to have been suggested by the decision of Farran, C. J., in *Ragho* v. *Narayan*.[2] His Lordship observed in that case:

"Before the passing of the Transfer of Property Act, it was the assignee upon whom it was incumbent for his own protection to give notice of his assignment to the debtor. There was no particular reason why the assignor should give it. We cannot help thinking that there has been a slip made in S. 132 in throwing *upon the person making the transfer* the obligation of giving express notice to the debtor. The English Act 36 & 37 Vict. C.66, S. 25, only requires that express notice in writing shall be given. It does not enact who is to give it. It may even be given after the death of the assignor. (*Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511.) But, however this may be (and the attention of legislature may well be directed to the point), we must construe the Act as it stands. No provision is made in it for the assignee giving notice in any particular way."

Regarding the change the Select Committee observed in their report :

"In S. 132 (now 131) we propose to enact that a notice of transfer shall

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Section 130A—Note 1

1. See Statement of Objects and Reasons in L. A. Bill No. 9 of 1944; Gazette of India Part V, 19th February 1944.

Section 131—Note 1

1. ('89) 2 C P L R 1 (3, 4); *Aba Balaji* v. *Nilkant*.
2. ('97) 21 Bom 60 (62) (DB).

be signed by the transferor, or his agent, or, in case of the transferor's refusal, by the transferee, and shall state the name and address of the transferee. The latter part of this rule goes beyond the requirements of the English law, but we submit that a notice in general terms, not stating the name and address of the transferee, would not be sufficient as a safeguard against fraud. A debtor is, we think, entitled to know the name and address of the person to whom he becomes liable on a transfer of the claim against him."

2. Scope.—This section deals with the form and essentials of the notice required to be given under S. 130. In order that the saving provision in the second paragraph of Sub-S. (1) may be operative, the requirements of this section must be strictly complied with.[1]

3. Notice by transferee or by his agent.—The transferee or his agent can sign the notice only if the transferor refuses to sign it.[1] The fact of such refusal need not be mentioned in the notice.[2] The section does not require that the debtor must have knowledge of the refusal by the transferor to sign, either from the notice or otherwise, in order that the debtor may be liable to the transferee. In the undermentioned case[3] where a notice was served by the transferee on the debtor and it was not proved that the transferor refused to sign the notice, it was held that a payment made by the debtor to the transferor was valid.

4. "Shall state the name and address of the transferee."—The notice must state both the name and address of the transferee. So where the notice states the name of the transferee but does not state his address the provisions of this section are not complied with and the notice is not effective to bring the exception mentioned in the proviso to Sub-S. (1) of S. 130 into operation.[1] Similarly, the name and address of the solicitor of the transferee cannot be substituted for the name and address of the transferee himself,[2] as the word "shall" in the section means the very same thing and not a substitute for it.[3]

5. Notice with a condition or qualification.—It has been held by the High Court of Madras[1] that a notice under this section will not be bad merely because it is coupled with a condition or qualification, provided the other requirements of the section are complied with. Thus, where the transferor, a contractor, in a notice to the debtor, a railway company, asked the company to pay to the transferee, one G, the amount due on his final bill when the bill would be ripe for payment in due course, *unless in the meantime, the contractor had himself otherwise paid off the debt due by him to* G, it was held that the notice, though conditional or qualified, was valid and the company, therefore, could not deal with the contractor after the receipt of the notice.

6. Waiver of defects in the notice.—Where the notice does not strictly

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Section 131—Note 2

1. * ('23) 10 AIR 1923 Cal 719 (719) : 80 I. C. 632 (DB), *Sadasook Ramprotap* v. *Hoare Miller & Co.*
('07) 9 Bom L R 838 (843) (DB), *Hunsraj* v. *Nathoo.*

Section 131—Note 3

1. ('10) 33 Mad 123 (130) : 4 Ind Cas 420 (424) (DB), *Gopalakrishna Iyer* v. *Gopalakrishna Iyer.* (Transferor giving an invalid notice and subsequently refusing to give proper notice—Transferee is entitled to give a legal notice.)
2. ('10) 33 Mad 123 (130) : 4 Ind Cas 420 (424) (DB), *Gopalakrishna Iyer* v. *Gopalakrishna Iyer.*
3. ('15) 2 AIR 1915 Low Bur 10 (11) : 8 Low Bur Rul 288 : 30 Ind Cas 278, *Basnt Singh* v. *Burma Railways Co., Ltd.*

Section 131—Note 4

1. ('23) 10 AIR 1923 Cal 719 (719, 720) : 80 Ind Cas 632 (DB), *Sadasook Ramprotap* v. *Hoare Miller and Co.*
2. ('23) 10 AIR 1923 Cal 719 (720) : 80 I. C. 632 (DB), *Sadasook Ramprotap* v. *Hoare Miller & Co.*
3. ('23) 10 AIR 1923 Cal 719 (721) : 80 Ind Cas 632 (DB), *Sadasook Ramprotap* v. *Hoare Miller & Co.* (Per Rankin, J.)

Section 131—Note 5

1. ('10) 33 Mad 123 (129) : 4 Ind Cas 420 (424) (DB), *Gopalakrishna Iyer* v. *Gopalakrishna Iyer.*

comply with the provisions of this section and is defective in form a question arises, whether the debtor himself can waive the defects in a notice. It was observed by Mukerjee, J., in *Sadasook Ramprotap* v. *Hoare Miller & Co.*[1]:

> "The answer to the question whether it is permissible to waive a particular provision depends upon its true nature. If the object of the Legislature is to protect or benefit an individual litigant, it is open to him to waive the positive provisions of the statute. On the other hand, if the provision has been enacted from reasons of public policy, he cannot be permitted to waive it. The provisions of S. 131 fall, in my judgment, within the latter category, but I am not prepared to maintain as an abstract proposition of law, that under no conceivable circumstance can the provisions of S. 131 be waived by the debtor."

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132. The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

Liability of transferee of actionable claim.

Illustrations.

(*i*) A transfers to C a debt due to him by B. A being then indebted to B. C sues B for the debt due by B to A. In such suit B is entitled to set off the debt due by A to him, although C was unaware of it at the date of such transfer.

(*ii*) A executed a bond in favour of B under circumstances entitling the former to have it delivered up and cancelled. B assigns the bond to C for value and without notice of such circumstances. C cannot enforce the bond against A.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Liabilities and equities.
4. Assignee need not be aware of the liability or equity.
5. Debtor may lose the benefit of the section by his own conduct.
6. Mortgage-debt. See Note 18 on S. 130.
7. Assignment in execution of decree.

1. Legislative changes.—The corresponding section of the old Chapter VIII, section 137, ran as follows:

> "The person to whom a *debt or charge* is transferred, shall take it subject to all the *liabilities* to which the transferor was subject in respect thereof at the date of the transfer.
>
> *Illustration.*
>
> A debenture is issued in fraud of public company to A. A sells and transfers the debenture to B who has no notice of the fraud. The debenture is valid in the hands of B."

2. Scope of the section.—It is a general principle of law that no one can transfer to another a right or title greater than he himself has, the maxim being *nemo plus juris ad alium transferee potest quam ipse habe.*[1] It is also a principle of equity that the assignee of a chose in action takes it subject to all the equities which subsist against the assignor.[2] This section is based on the above principles.[3]

Section 131—Note 6

1. ('23) 10 AIR 1923 Cal 719 (720) : 80 Ind Cas 632 (DB).

Section 132—Note 2

1. (1863) 32 L J C P 161 (163, 164) : 14 C B (NS) 248 : 8 L T 317 : 11 W R (Eng) 648, *Whistler* v. *Forster.* (Bill of exchange assigned without endorsement—Assignor guilty of fraud—*Held,* assignee is affected by the same as assignor cannot give a better title than himself.)
2. † (1874) 23 W R (Eng) 286 (287) : 10 Eq 302 : 44 L J Ch 450 : 31 L T 747; *In re Hercules Insurance Co.; Ex parte Brunton's Claim.*
('38) 25 AIR 1938 Sind 24 (27) : 32 Sind LR

and merely enacts the law as it existed before the Act was passed.[4] Other provisions of law in which the same principles are found enacted are S. 49 of the Code of Civil Procedure[5] and Ss. 231 and 232 of the Contract Act.

The section, of course, has no application where the transfer is not of *an actionable* claim, but of an interest in immovable property. Where the right to recover arrears of profits was assigned to a co-sharer in a conveyance of a village share and the cosharer sued the *lambardar* to recover the arrears, and the *lambardar* claimed to set off against the claim, amounts due to him, it was held that the right to recover the profits was an interest in immovable property and not an actionable claim, and that this action had no application to the case.[6]

3. Liabilities and equities.—Where no amount is due to the assignor the assignee can get nothing. Where only a portion of the debt is due, the assignee can get nothing more. Where the debtor is entitled to set off against the assigned debt another debt due to him, the assignee can, as the first illustration shows, take the assignment only subject to this right of set off.[1] A debtor can also claim as against the assignee a right of *equitable set off*.[2] Thus, where the debtor is entitled to claim *unliquidated damages* from the assignor *arising out of the same transaction* as the assigned debt, he can set off the same against the assigned debt, even as against the assignee.[3] Where A executes a bond in favour of B under circumstances in which it is voidable by A on the ground of undue influence, fraud, etc., the option of avoiding the bond is available not only against the original creditor but also his assignee.[4] This is, in fact, illustration (ii) to the section.

But the liability or equity must be existing at the time of the assignment. In *Brice* v. *Bannister*[5] G had contracted to build a ship for the defendant, to be paid for in four instalments. G owed money to the plaintiff, and, before the completion of the contract gave the plaintiff an order upon the defendant for the defendant to pay the plaintiff £100 out of the moneys due to G from the defendant. Notice was given of this to the defendant. The defendant, however, made subsequent advances to G

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640 : 173 Ind Cas 591, *Firm Jhangaldas Chimandas* v. *Firm Chetumal Bulchand.*

(1856) 25 L J Ch 896 (898) : 2 Jur (NS) 981 : 4 W R (Eng) 533, *Brandon* v. *Brandon.*

('17) 4 AIR 1917 Mad 928 (929) : 40 Mad 683 : 34 Ind Cas 859 (DB), *Subramania Iyer* v. *Subramania Pattar.*

(1868) 16 W R (Eng) 637 (639) : 3 Ch 355 : 37 L J Ch 362 : 18 L T 171, *In re Natal Investment Co.* (But the depositary of debentures though not an assignee of actual claim is held to be bound by the equities and liabilities of the depositor.)

(1858-59) 121 R R 128 (133) : 3 De G & J 294 : 5 Jur (NS) 129 : 28 L J Ch 119 : 7 W R (Eng) 167, *Athenoeum Life Assurance Society* v. *Pooley.* (The rule is not subject to his having made proper enquiries.)

('16) 3 AIR 1916 Mad 242 (246) : 31 Ind Cas 152 (DB), *Venkata Subbiah Chetty* v. *Subba Naidu.*

[*See* (1848-52) 88 R R 296 (314) : 3 H L C 702, *Mangles* v. *Dixon.*]

[*See also* ('44) 31 AIR 1944 Nag 98 (99) : ILR (1944) Nag 170 : 216 Ind Cas 73, *Ramchandra* v. *Shanker.* (Section 49 and O. 21 Rr. 18 and 19, C. P. C., are based on the same principle.)]

3. ('78) 1 All 732 (734) (DB), *Kanhaiya Lal* v. *Domingo.* (Whatever defences were available against assignor are available against assignee.)

4. ('12) 16 Ind Cas 686 (687) (DB) (Mad), *Subramania Pattar* v. *Kiradadasan.*

5. (1900) 10 Mad L Jour 211 (212), *Subbaraya Aiyar* v. *Srinivasa Raghavaiyangar.*

[See also ('14) 1 AIR 1914 Bom 299 (299) : 38 Bom 631 : 25 Ind Cas 375 (DB), *Tyaballi* v. *Atmaram.*]

6. ('36) 23 AIR 1936 Nag 217 (218) : 165 Ind Cas 414, *Kamal Narayan* v. *Shyam Lal Udairam.*

Also see Section 3 Note 2.

Section 132—Note 3

1. (1869) L R 4 Ch 242 (245) : 17 W R (Eng) 423 (424) : 38 L J Ch 396 : 10 L T 155, *Tooth* v. *Hallet.*

† ('07) 30 Mad 235 (238) : 17 Mad L Jour 87 (DB), *Arunachellam* v. *Subrahanian.*

2. As to the right of equitable set-off between a debtor and creditor, see generally Note 5 on O. 8 R. 6 of the A. I. R. Commentaries on the *Code of Civil Procedure.*, 5th (1950) Edn.

3. (1878) 26 W R (Eng) 403 (404) : 3 Ex D 127 : 47 L J Ex 579, *Young* v. *Kitchin.*

†. (1888) 57 L J P C 35 (41) : 13 App Cas 199 : 58 L T 285, *Government of Newfoundland* v. *Newfoundland Rly. Co.*

4. (1869) 17 W R (Eng) 810 (811) : L R 8 Eq 36 : 38 L J Ch 374 : 20 L T 77, *Graham* v. *Johnson.*

5. (1878) 3 Q B D 568 (569) : 47 L J Q B 722 : 38 L T 739 : 26 W R (Eng) 670 (671).

to enable him to complete the contract, with the result that at the completion of the contract G had no more to receive on account of the contract. It was held that the advances made by the defendant to G, after notice of the assignment to plaintiff was not an equity existing at the date of the assignment and could not be set up against the plaintiff's claim for the amount assigned to him.

See also the undermentioned cases.[6]

4. Assignee need not be aware of the liability or equity.— The fact that the assignee of the actionable claim is *not aware* at the date of the assignment, of the existence of the liability or equity, does not, as the illustrations show, affect the rule that he takes it only subject to such liabilities or equities.[1] It is the duty of the assignee before he takes the assignment to make enquiries as to any equities or liabilities affecting the subject-matter of the assignment.[2] It is not the duty of the debtor to inform the assignee, on the receipt of notice of assignment, that the assignment is burdened with liabilities, unless there are circumstances leading him to think that the assignee is being defrauded and is likely to sustain further loss.[3]

5. Debtor may lose the benefit of the section by his own conduct.— A debtor may by his conduct be stopped from raising against an assignee an equity which would have availed him against the original obligee. Thus, where his conduct has been such that it may be regarded as representation that there were no equities affecting the subject-matter of the assignment, and the assignee has taken the assignment on the faith of such representation, he cannot set up the equity against the assignee.[1] Where the debtor, on receiving notice of the assignment, sees that the assignee has been deceived and stands by and allows him to be defrauded, he cannot be allowed to set up his equity against the assignee.[2]

6. Mortgage-debt.—See Note 18 on Section 130.

7. Assignment in execution of decree.—The principle of this section has been held applicable even where the transfer of the actionable claim is by way of sale in execution of a decree. Where A owed a debt to B, and B owed another debt to A and in execution of a decree against B, the debt due by A to B was sold and was purchased by C, it was held that in a suit by C against A to enforce the debt, A can set off the debt due by B to him.[1]

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6. (1893) 41 W R (Eng) 475 (477) : 2 Ch 175 : 3 R 404 : 68 L T 638, *Christie* v. *Taunton Delmard, Lane & Co.*
(1863) 11 W R (Eng) 803 (803) : 4 B & S 243 : 8 L T 502, *Wilson* v. *Gabriel.*
(1880) 50 L J Ch 772 (773) : 17 Ch D 520 : 45 L T 225 : 30 W R (Eng) 74, *Roxburgh* v. *Cox.*

Section 132—Note 4

1. (1856) 25 L J Ch 896 (898) : 2 Jur (NS) 981 : 4 W R (Eng) 533, *Brandon* v. *Brandon.*
† (1848-52) 88 R R 296 (311, 312) : 3 H L C 702, *Mangles* v. *Dixon.*
2. (1848-52) 88 R R 296 (312) : 3 H L C 702, *Mangles* v. *Dixon.*
† ('16) 3 AIR 1916 Mad 242 (246) : 31 Ind Cas 152 (DB), *Venkata Subbias* v. *Subba Naidu.* (Onus lies upon assignee to show that the assignment is free from an existing right.)
3. (1848-52) 88 R R 296 (313) : 3 H L C 702, *Mangles* v. *Dixon.*

Section 132—Note 5

1. (1870) 19 W R Eng 430 (430) : 11 Eq 157 : 40 L J Ch 153, *In re South Essex Estuary Co.; Ex parte Chorley.*
† (1874) 23 W R (Eng) 286 (287) : 10 Eq 302 : 44 L J Ch 450 : 31 L T 747, *In re Hercules Insurance Co. : Ex parte Brunton's Case*
(1837) 45 R R 538 (541) : 6 Ad & El 469 (474), *Pickard* v. *Sears.*
2. (1848-52) 88 R R 296 (317) : 3 H L C 702, *Mangles* v. *Dixon.*

Section 132—Note 7

1. † ('12) 16 Ind Cas 686 (687) (DB) (Mad), *Subramanian Pattar* v. *Kiradadasan.*
('23) 10 AIR 1923 Lah 261 (262) : 3 Lah 414 : 69 Ind Cas 720 (DB), *Ram Bhanj Datta* v. *Ram Das.*
('44) 31 AIR 1944 Nag 98 (99) : ILR (1944) Nag 170 : 216 Ind Cas 73, *Ramchandra* v. *Shanker.* (S. 49 and O. 21 Rr. 18 and 19, C. P. C., are also based in the same principles as S. 132.)
[*See also* ('14) 1 AIR 1914 Bom 299 (299) : 38 Bom 631 : 25 Ind Cas 375 (DB), *Tayabali Gulam Hussain* v. *Atmaram Sakharam.*]

133. Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

Warranty of solvency of debtor.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Debt," meaning of.
4. "Solvency" and "warranty" meaning of.
5. "In the absence of a contract to the contrary."

1. Legislative changes.—This section was originally numbered as S. 134 of the Transfer of Property Act, 1882. By Act II of 1900 certain amendments and alterations were effected in the chapter relating to actionable claims and this section was then numbered as 133 of the Act.

2. Scope of the section.—This section deals with a case of transfer of a debt accompanied by a warranty of the solvency of the debtor. It declares that, in the absence of a contract to the contrary, the warranty will apply only to the solvency of the debtor *at the date of the transfer* and not to his continued solvency after the date of the transfer. It further declares that the liability under the warranty is limited *to the extent of the consideration* for the transfer, where the transfer is one for consideration.

Just as title to property is important in transfers of immovable property, and title to goods, in the sale of goods, the solvency of a debtor is important in the transfer of a debt. But while, in the case of immovable property[1] and of goods,[2] the law *implies* a warranty of title to the property or the goods as the case may be, there is no warranty by implication of the solvency of the debtor in the case of transfers of debts.

As to warranty in various other transfers of property, see the undermentioned provisions.[3]

3. "Debt," meaning of.—The word "debt" has not been defined in this Act or in the General Clauses Act. Wharton in his *Law Lexicon*, defines it as "a sum of money due from one person to another." In *Webb* v. *Stenton*,[1] Lord Justice Lindley defined it as a sum of money which is now payable or which will become payable in the future by reason of a present obligation.

The section speaks of the transfer of a *debt* and not of the transfer of an *actionable claim*. It is conceived, however, that the word debt must be taken to be a debt which is an *actionable claim*, inasmuch as the whole chapter in which this section occurs deals only with actionable claims.

See also section 3, note 22.

4. "Solvency" and "warranty," meaning of.—The "solvency" of a debtor means his ability to discharge all his debts and obligations in full.[1]

The term "warranty" is not defined in this Act. It has been held to be a stipulation collateral to the main purpose of a contract, the breach of which will give rise to claim for damages,[2] against the warrantor. Section 12, sub-s. (3) of the Sale of Goods Act which follows generally the English Sale of Goods Act[3] defines "warranty" as follows:

Section 133—Note 2

1. Section 55 (2).
2. Section 14 of the Sale of Goods Act, 1930.
3. Sections 55 (2), 65 (a) and 108 (c); Negotiable Insruments Act, Section 35; Sale of Goods Act, Section 14.

Section 133—Note 3

1. (1883) 52 L J Q B 584 (588) : 11 Q B D 518 : 49 L T 532.

Section 133—Note 4

1. Wharton's *Law Lexicon*, 9 Edn., page 699.
2. (1911) 80 L J K B 1058 (1060, 1062) : 1911 A C 394 : 105 L T 146 : 55 S J 496, *Wallis* v. *Prath*.
3. (1893) 56 & 57 Victoria, Ch. 71, Section 62.

"A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated."

A warranty is in the nature of a guarantee though all the incidents of a contract of guarantee are not applicable to the case of a warranty. The liability of the transferor who warrants the solvency of his debtor is not *co-extensive* with that of the debtor as in the case of a guarantor. Further, the liability of the warrantor transferor arises on the date of the transfer itself, whereas the liability of a guarantor on the non-payment of the debt by the debtor.[4]

5. "In the absence of a contract to the contrary."—Parties can contract so as to create rights and liabilities other than those contemplated under this section. When they so contract, they will be bound by the terms of their contract and this section will not be applicable.

Under the English law, an implied convenant, on the part of the transferor, that he will not do anything in derogation of his transfer, will be presumed; thus, if a debt is rendered irrecoverable by any act of the transferor, subsequent to the transfer he will be held liable on the basis of a breach of such implied convenant.[1] He will, however, not be liable to pay the entire amount due under the debt transferred but only such amount as has been rendered irrecoverable.[2]

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134. Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the costs of such recovery: secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor or other person entitled to receive the same.

Mortgaged debt.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Transfer of a secured debt.
4. "Existing or future debt."
5. Rights and duties of the transferee.
6. "The residue, if any, belongs to the transferor or other person entitled to receive the same."

1. Legislative changes.—This section corresponds to S. 138 of the old Chap. VIII. That section ran as follows :

"When a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if recovered by either the transferor or transferee, is applicable, first, in payment of the cost of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue (if any) belongs to the transferor."

2. Scope of the section.—It has already been seen in Note 3 on S. 130 that the word "transfer" in this chapter is wide enough to include a transfer by way of security also. This section deals with such cases[1] and provides for the mode of

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4. Sections 126 to 128 of the Contract Act, 1872.

Section 133—Note 5

1. (1845) 153 E R 1441 (1447) : 16 Mee & W 862 : 73 R R 745, *Ward* v. *Audland*.
(1810) 104 E R 290 (296, 297) : 13 East 63 : 12 R R 299, *Seddon* v. *Senate*.
(1674) 86 E R 772 (772, 773) : 1 Mod 113, *Deering* v. *Farington*.
(1856) 25 L J C P 229 (232) : 18 C B 249 : 2 Jur (NS) 812 : 4 W R (Eng) 592, *Aulton* v. *Atkins*.
(1867) 36 L J C P 173 (176) : 2 C P 305 : 15 L T 663 : 15 W R (Eng) 581, *Gerard* v. *Lewis*.
2. (1856) 25 L J C P 229 (232) : 18 C B 249 : 2 Jur (NS) 812 : 4 W R (Eng) 592, *Aulton* v. *Atkins*.

Section 134—Note 2

1. ('35) 22 AIR 1935 Cal 218 (221) : 62 Cal 1 : 155 I. C. 193 (DB), *Ranjit Ray* v. *D. A. David*.

application of the amount of the transferred debt when it is received by the transferor or recovered by the transferee.

In cases of transfers of a book-debt for the purpose of securing a debt the transfer sometimes takes the form of an absolute assignment but it can be shown that the transfer was not absolute, but was intended to be merely by way of security.[2]

3. Transfer of a secured debt.—It has been seen in Note 22 on S. 3 that a debt separated from the security given therefor is a "debt" within the meaning of this Act. A claim to a debt is an "actionable claim" within the definition of that expression. It follows that where a debt is due to A from C and it is secured by pledge or hypothecation of C's property, A can transfer such a debt, *separated from* the security given therefor, to B in order to secure the debt which is due to him (B) by A; the result, in such a case, will be that though B will get no right or interest in the property of C which is hypothecated with A, he (B) will be entitled to the benefit of all the sums received by A from C in reduction of his own debt whether recovered from the secured property or otherwise.[1]

4. "Existing or future debt."—As to the meaning of this expression, see Note 13 on S. 58.

5. Rights and duties of the transferee.—After a debt is transferred by way of security, the remedy of the transferor as a creditor regarding the recovery of the debt passes to the transferee and what remains in the transferor is only the right to redeem the transferee.[1] Consequently, the transferor cannot proceed against his debtor,[2] and the only person who can sue for the recovery of the debt in his own name being the transferee himself,[3] it is his duty to use reasonable diligence to recover the debt from the debtor.[4] If he fails to do so owing to his own default he will be deemed to have recovered the amount and will not be allowed to claim it again from the transferor on the ground that he could not recover it.[5] The transferor

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('10) 33 Mad 123 (129) : 4 Ind Cas 420 (424) (DB), *Gopalakrishna* v. *Gopalakrishna.*

2. ('35) 22 AIR 1935 Cal 218 (220, 221) : 62 Cal 1 : 155 Ind Cas 193 (DB), *Ranjit Ray* v. *D. A. David.* (When there is an assignment of a book-debt by way or security in order to secure re-payment of a debt, it amounts to a mortgage of the debt and S. 134 of the Transfer of Property Act applies to the case.)

('1913) 29 T L R 579 (580) : *Sanderson & Co.* v. *Clarke.*

Section 134—Note 3

1. ('31) 18 AIR 1931 P C 245 (247, 248) : 59 Cal 377 : 58 Ind App 323 : 134 Ind Cas 651 (PC), *Imperial Bank of India* v. *Bengal National Bank.*

[See however ('21) 8 AIR 1921 Mad 681 (681) : 68 Ind Cas 752 (DB), *Official Receiver, Trichinopoly* v. *Lakshman Aiyar.* (A mortgage debt can be validly transferred only in accordance with S. 54 of the T. P. Act. Section 134 has no application.)]

Section 134—Note 5

1. ('15) 2 AIR 1915 Mad 1031 (1032) : 38 Mad 297 : 21 Ind Cas 316 (FB), *Muthukrishna Aiyer* v. *Veeraraghava Aiyer.*

2. ('45) 32 AIR 1945 Bom 11 (13), *Santuram Hari* v. *Trust of India Assurance Co.*

('20) 7 AIR 1920 Mad 426 (427) : 56 Ind Cas 146 (DB), *Arunachellam Chettiar* v. *Madaswami.*

3. ('45) 32 AIR 1945 Bom 11 (13), *Santuram Hari* v. *Trust of India Assurance Co.* (AIR 1915 Mad 1031 : 38 Mad 297 (FB), Fole.)

† ('15) 2 AIR 1915 Mad 1031 (1031, 1032) : 38 Mad 297 : 21 Ind Cas 316 (FB), *Muthu-Krishna Aiyar* v. *Veeraraghava Aiyar,* (Letters Patent Appeal from 16 Ind Cas 604 (Mad).)

('11) 34 Mad 53 (54) : 5 Ind Cas 834 (834) (DB), *Ramasamy Pillai* v. *Muthoo Chetty.*

('97) 20 Mad 35 (38) : 6 Mad L Jour 235 (DB), *Muthu Vijaya* v. *Venkatachellam Chetti.* (It is a recognised rule of Roman law that when what is hypothecated is a claim the hypothecatee may alienate it or enforce it in the action instituted in his own name.)

('20) 7 AIR 1920 Mad 426 (426) : 56 Ind Cas 146 (DB), *Arunachellam Chettiar* v. *Madaswami.*

[*See also* ('09) 3 Ind Cas 311 (314) (DB) (Cal), *Isri Prosad* v. *Gangu Prosad.* (A sub-mortgagor is entitled to sue the mortgagor of his mortgagor as well as his own mortgagor; and this is so whether a mortgage debt or a simple debt is mortgaged.)]

4.* (('04) 32 Cal 27 (35) : 31 Ind App 176 (PC), *Shyam Kumari* v. *Rameswar Singh.*

5* ('04) 32 Cal 27 (35) : 31 Ind App 176 (PC), *Shyam Kumari* v. *Rameswar Singh.*

('15) 2 AIR 1915 Mad 1031 (1032) : 38 Mad 297 : 21 Ind Cas 316 (317) (FB), *Muthukrishna Aiyar* v. *Veeraraghava Aiyar.*

('20) 7 AIR 1920 Mad 426 (427) : 56 Ind Cas

can file a suit against the transferee for redemption and can get the debt re-assigned to him in which case he would be entitled to sue his debtor; or if the security is lost by reason of the transferee not enforcing it, the transferee could be sued for damages by the transferor for his default.[5a]

Where a charge is created on a debt by way of security it amounts to a transfer and the charge-holder can sue to recover the debt from the transferor's debtor.[6]

When the transferee brings a suit against the transferor's debtor for the recovery of his debt, he must implead the transferor as a party to the suit, so that the matter may be settled in his presence.[7]

6. "The residue, if any, belongs to the transferor or other person entitled to receive the same."—The residue remaining after the payment of the costs of recovery and the debt secured, belongs to the transferor. The reason is that when a debt is transferred by way of security only, the transferee does not become the absolute owner thereof. He becomes entitled to recover out of the transferred debt only the amount which is secured, the residuary interest being still left in the transferor[1] who can at any time pay off the debt due to the transferee and have the security released.[2]

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[a]**135. Every assignee, by endorsement or other writing, of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.**

Assignment of rights under policy of insurance against fire.

a. This section was *substituted* for the old S. 135 by S. 3 of the Transfer of Property (Amendment) Act, VI of 1944. [7-3-1944.]

Synopsis

1. Legislative changes.
2. Scope.
3. "By endorsement or other writing."

1. Legislative changes.—There was no section corresponding to this in the old chapter VIII. It was introduced for the first time in this Act by the Transfer of Property Act (II of 1900) and was a re-enactment, with verbal alterations, of the provisions in S. 15 of the Policies of Insurance (Marine and Fire) Assignment Act (V of 1866) which was repealed. The reference to marine insurance policy has been omitted from the section by the Transfer of Property (Amendment) Act (VI of 1944), as the rules and principles governing a marine insurance policy are materially different from those governing a life insurance policy. Sections 130A and 135A inserted by the same Act now specifically provide for transfer of and assignment of rights under a policy of marine insurance. (See Note 1 under S. 130A.)

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146 (DB), *Arunachellam Chettiar* v. *Madaswami.*
[*See also* ('11) 35 Bom 1 (12) : 7 Ind Cas 972 (976) (DB), *Ganpatrao Balkrishna* v. *Madhavrao Shide.*]
('45) 32 AIR 1945 Bom 11 (13), *Santuram Hari* v. *Trust of India Assurance Co.*

6. ('11) 34 Mad 53 (54) : 5 Ind Cas 834 (834) (DB), *Ramaswami Pillai* v. *Muthoo Chetty.*
('09) 33 Bom 610 (627, 628) : 4 Ind Cas 804 (807) (DB), *Ardesir* v. *Sirdar Ali.*

7. ('20) 7 AIR 1920 Mad 426 (427) : 56 Ind Cas 146 (DB), *Arunachellam* v. *Madaswami.*
[*See also* ('11) 34 Mad 53 (54) : 5 Ind Cas 834 (834) (DB), *Ramaswami Pillai* v. *Mutha Chetty.* (Where the original creditor is added as a party, the charge-holder, though not entitled to the whole amount, may recover the amount.)]

Section 134—Note 6

1. ('35) 22 AIR 1935 Cal 218 (221) : 62 Cal 1 : 155 Ind Cas 193 (DB), *Ranjit Roy* v. *David.*

2. ('35) 22 AIR 1935 Cal 218 (221) : 62 Cal 1 : 155 Ind Cas 193 (DB) *Ranjit Roy* v. *David.*
('40) 27 AIR 1940 Mad 258 (264), *Travancore National Bank Subsidiary Co. Ltd.* v. *T. N. & Q. Bank Ltd.*

2. Scope.—A policy of insurance is a contract of indemnity. It is not an incident to the property insured, and does not pass, as such, with the transfer of the property to the transferee. In order that the latter should get the benefit of the policy it must be assigned to him by endorsement or other writing. In the undermentioned case[1] where A mortgaged certain property to B and then insured the same against fire it was held that B, who did not take an assignment of the policy, was not entitled to claim the insurance amount from the insurer, when the property was destroyed by fire. As to the right of a transferee of immovable property insured against fire, to claim the insurance money from his *transferor*, see S. 49 and notes thereon.

3. "By endorsement or other writing."—The word 'endorsement' means "anything written or printed upon the back of a deed or writing."[1] A policy of fire insurance can, therefore, be assigned by writing the words of transfer on the back of the policy, itself or by executing a separate document.

Assignment of rights under policy of marine insurance.

[a]**135A. (*1*) Where a policy of marine insurance has been assigned so as to pass the beneficial interest therein, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.**

(*2*) Where the insurer pays for a total loss, either of the whole, or, in the case of goods, of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the insured person in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the insured person in and in respect of that subject-matter as from the time of the casualty causing the loss.

(*3*) Where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the insured person as from the time indemnified by such payment for the loss.

(*4*) Nothing in clause (*e*) of section 6 shall affect the provisions of this section.

a. This section was newly *inserted* by S. 4 of the Transfer of Property (Amendment) Act, VI of 1944. [7-3-1944.]

1. Statement of objects and reasons.—See section 130A, Note 1.

Incapacity of officers connected with Courts of Justice.

136. No Judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claim, so dealt with by him as aforesaid.

Section 135—Note 2

1. ('23) 10 AIR 1923 Rang 6 (7, 8) : 11 Low Bur Rul 294 : 67 Ind Cas 777 (DB), *P. V. Chetty Firm* v. *Motor Union Insurance Co.*

Section 135—Note 3

1. Wharton, *Law Lexicon.*

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Buy or traffic in . . . . actionable claim."
4. Legal practitioner.
5. This section does not apply to purchases in execution.

1. Legislative changes.—Section 136 of the old Chap. VIII for which this section was substituted by the Transfer of Property Act, II of 1900, ran as follows:

> "No Judge, pleader, mukhtar, clerk, bailiff or other officer connected with Courts of Justice can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his functions."

2. Scope of the section.—This section prohibits a Judge, a legal practitioner or an officer connected with any Court of Justice from trafficking or dealing in any actionable claim[1] and further provides that an actionable claim so dealt with cannot be enforced in any Court.[2] The class of persons named hold a privileged position in the administration of justice and the law imposes on them certain restrictions and disabilities in order to safeguard the interests of the litigants and the pure administration of justice.[3] "It is of great importance in all countries and more particularly in a country like India" observed their Lordships of the Privy Council in *Kerakoose* v. *Serte*,[4] "that no officer of a Court of Justice should be even exposed to the suspicion, that in the discharge of his official duties his conduct may be influenced by any personal consideration."

The prohibition being absolute, any transfer in defiance of it, is void.[5]

The section as it now stands is wider in its scope than the section as it originally stood. The prohibition under the old section was restricted only to *buying* and in respect of those actionable claims, which fell under the jurisdiction of the Court in which the transferor exercised his functions. Under the present section, the prohibition extends to trafficking in, or stipulating for or agreeing to receive any share of or any interest in, any actionable claim, whether the claim is within the jurisdiction of the Court with which the transferor is connected or of any other Court. The view[6] under the old section, that a pleader or an officer who did not practise or exercise his functions in the Court by which the claim was cognizable, was not prevented from purchasing it, is no longer law.

This section may be compared to O.21 R. 73 of the Code of Civil Procedure, 1908.

3. "Buy or traffic in . . . . . actionable claim."—The prohibition under this section extends to buying, or trafficking in or stipulating for, or agreeing to receive any share of or interest in, any actionable claim. Thus, a sale[1] or an

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Section 136—Note 2

1. ('14) 1 AIR 1914 Mad 512 (519) : 37 Mad 238 : 17 Ind Cas 544 (FB), *Muni Reddi* v. *Venkat Rao.*
2. ('13) 40 Cal 650 (651) : 19 Ind Cas 129 (129) (FB), *Hari Lal Sinha* v. *Tripura Charan Roy.* (Per Stephen and Richardson, JJ, in order of reference.)
('36) 23 AIR 1936 Oudh 275 (276) : 12 Luck 150 : 162 I. C. 229 (DB), *Sitla Bux Singh* v. *Mahabir Prasad.* (Transfer to a Special Magistrate and Honorary Assistant Collector.)
('14) 1 AIR 1914 Mad 512 (519) : 37 Mad 238 : 17 Ind Cas 544 (FB), *Muni Reddi* v. *Venkata Rao.*
3. ('14) 1 AIR 1914 Mad 512 (525) : 37 Mad 238 : 17 Ind Cas 544 (FB), *Muni Reddi* v. *Venkata Rao.*
4. (1846) 3 Moo Ind App 329 (346) (PC).
5. ('32) 19 AIR 1932 All 345 (347) : 54 All 499 : 136 Ind Cas 833 (DB), *Amir Hasan* v. *Md. Nazir.*
6. ('88) 11 Mad 56 (61) (DB), *Ratnasami* v. *Subramanya.*
('88) 11 Mad 498 (499) (DB), *Singaracharlu* v. *Sivabai.*

Section 136—Note 3

1. ('25) 12 AIR 1925 Pat 310 (312) : 4 Pat 43 : 83 Ind Cas 81 (DB), *Sheo Govind Singh* v. *Gowri Prasad.*
('32) 19 AIR 1932 All 345 (347) : 54 All 499 : 136 Ind Cas 833 (DB), *M. Amir Hasan Khan* v. *H. Mohammad Nazir Hasan.*
('13) 40 Cal 650 (677) : 19 Ind Cas 129 (137) (FB), *Hari Lal Singh* v. *Tripura Charan.*
('14) 1 AIR 1914 Mad 512 (519) : 37 Mad 238 : 17 Ind Cas 544 (FB), *Muni Reddy* v. *Venkata Rao.*
[*See also* ('87) 11 Mad 56 (61) (DB), *Rathnasami* v. *Subramanya.*
('88) 11 Mad 498 (499) (DB), *Singaracharlu* v. *Sivabai.*]

assignment by way of security[2] of an actionable claim to any of the persons named in the section comes within the prohibition and is therefore void. In the undermentioned case[3] where a Judge made a gift to his nephew, a Barrister, of his rights under the contract to purchase certain immovable property, it was held by the High Court of Lahore that there was no buying or trafficking in or stipulation for any share of or interest in an actionable claim.

The section does not prohibit a mere sale by any of the persons named.[4] The words "traffic in" may in certain circumstances include the transaction of sale, but it connotes something more than a mere sale.[5]

Where a pleader advanced money to the client on a usufructuary mortgage, for the purpose of paying off a redemption decree passed in the client's favour, it was held that the transaction of mortgage did not in any way amount to the taking of a transfer of an actionable claim.[6]

4. Legal practitioner.—The old section was limited to legal practitioners who were *pleaders* or *mukhtars*. This section is wider and includes *all* legal practitioners. The term "legal practitioner" has not been defined by this Act, or by the General Clauses Act. Section 3 of the Legal Practitioners Act, XVIII of 1879, defines it to mean, "an advocate, a vakil, or attorney of any High Court, a pleader, a mukhtar or revenue agent." It is conceived that the term "legal practitioner" in this Act will also include an advocate, a vakil, attorney of a High Court, a pleader, a mukhtar or revenue agent.[1]

A pleader's clerk,[2] however, is not disqualified from dealing in actionable claim.

5. This section does not apply to purchases in execution.—By virtue of S. 2 (d), this section does not affect transfers in execution of a decree. But by O. 21 R. 73 of the Code of Civil Procedure "no officer or other person having any duty to perform in connexion with any sale shall either directly or indirectly bid for, acquire or attempt to acquire any interest in the property sold." A purchase by a *pleader* of an actionable claim under a life insurance policy in execution of a decree is not vitiated by this section.[1]

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137. Nothing in the foregoing sections of this Chapter applies to stocks, shares or debentures, or to instruments which are for the time being, by law or custom, negotiable, or to any mercantile document of title to goods.

Saving of negotiable instruments, etc.

***Explanation.*—The expression "mercantile document of title to goods" includes a bill of lading, dock-warrant, warehouse-keeper's certifi-**

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2. ('35) 22 AIR 1935 Cal 756 (759) : 63 Cal 578 : 160 Ind Cas 219 (DB), *Bhupati Mohan* v. *Phanindra Chandra.*
3. ('24) 11 AIR 1924 Lah 709 (710) : 78 Ind Cas 87 (DB), *Akhtar Beg* v. *Haq Nawaz.*
4. ('27) 14 AIR 1927 Pat 2 (4) : 97 I. C. 373 (DB), *Hirday Narain Singh* v. *Jugal Prasad Singh.*
5. ('27) 14 AIR 1927 Pat 2 (4) : 97 I. C. 373 (DB), *Hirday Narain Singh* v. *Jugal Prasad Singh.*
6. ('16) 3 AIR 1916 Oudh 219 (220) : 19 Oudh Cas 60 : 34 Ind Cas 360 (361), *Mt. Shibunnissa* v. *Abdul Ghaffar.*

Section 136—Note 4

1. ('32) 19 AIR 1932 All 345 (347) : 54 All 499 : 136 Ind Cas 833 (DB), *Amir Hasan Khan* v. *Mahomed Nazir.* (Vakil.)
('25) 12 AIR 1925 Pat 310 (311, 312) : 4 Pat 43 : 83 Ind Cas 81 (DB), *Sheogobind Singh* v. *Gauri Prasad.* (Mukhtar)
('13) 40 Cal 650 (651) : 19 Ind Cas 129 (129) (FB), *Hari Lal Singh* v. *Tripura Charan Roy.* (Pleader—Per Richardson and Stephen, JJ., in Order of Reference.)
2. ('96) 9 C P L R 35 (35), *Hira Lal* v. *Mt. Dhammo Kurmin.*

Section 136—Note 5

1. ('27) 14 AIR 1927 Cal 691 (692) : 104 I.C. 729 (DB), *National Insurance Co* v. *Haridas Basu.*

See also Notes on O. 21 R. 73 of the AIR Commentaries on the *Code of Civil Procedure*, 4th (1944) Edn.

Also see Section 2, Note 6.

cate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Stocks and shares.
4. "Instruments which are for the time being, by law or custom, negotiable."
5. "Any mercantile document of title to goods."

1. Legislative changes.—The present section was substituted for S. 139 of the old Chap. VIII, by the Transfer of Property Act, II of 1900. The old S. 139 ran as follows:

"Nothing in this section applies to negotiable instruments."

Under the section as it now stands, the exemption is extended to stocks, shares or debentures and mercantile documents of title to goods.

2. Scope of the section.—This section provides that nothing in this chapter will apply to stocks, shares or debentures, or to instruments which are for the time being negotiable by law or custom or to any mercantile document of title. It enables the transfer of the things specified in the section, to be made otherwise than in the manner provided by S. 130 and the effect of such transfer is not controlled by the subsequent sections. Transfers of these things mentioned in the section have been provided for by special Acts of the Legislature or by the Law Merchant. Thus, the Negotiable Instruments Act, 1881, deals with the mode and the effect of the transfers of certain negotiable instruments such as promissory notes, bills of exchange and cheques. These instruments, though in themselves actionable claims within the meaning of S. 3 of the Act, are thus differentiated from other kinds of actionable claims by this section.

As seen in Note 3 on S. 4, this section, as it relates to contracts, forms part of the Indian Contract Act by virtue of section 4.

3. Stocks and shares.—In England a share is regarded as a chose in action.[1] It is not a chose in action in India.[2] A share is a moveable property within the meaning of the Indian Companies Act, 1913, and is transferable in the manner stated in that Act.[3] The Sale of Goods Act, 1930, also expressly includes shares in the definition of "goods" in that Act[4]. They have been exempted by this section from the operation of this chapter.

Under S. 2 (16) of the Indian Companies Act, "share" includes "stock". It has also been exempted by this section from the provisions of this chapter.

4. "Instruments which are for the time being, by law or custom, negotiable."

Section 137—Note 3

1. ('26) 13 AIR 1926 P C 38 (40) : 50 Bom 360 : 53 Ind App 92 : 94 Ind Cas 824 (PC), *Maneckji Pestonji* v. *Wadilal Sarabhai & Co.*
('43) 30 AIR 1943 Mad 74 (76) : ILR (1943) Mad 115 : 205 Ind Cas 210 (DB), *Elaya Nayar* v. *P. N. Krishna Pattar.* (Reversing AIR 1941 Mad 394 : ILR (1941) Mad 419.)
2. ('26) 13 AIR 1926 PC 38 (40) : 50 Bom 360 : 53 Ind App 92 : 94 Ind Cas 824 (PC), *Maneckji Pestonji* v. *Wadilal Sarabhai & Co.*
('43) 30 AIR 1943 Mad 74 (76) : ILR (1943) Madi 115 : 205 Ind Cas 210 (DB), *Elaya Nayar* v. *Krishna Pattar.*
3. See Section 28 of the Indian Companies Act (VII of 1913).
[*See* (1902) 2 K B 427 (430) : 71 L J K B 712 (714) : 87 L T 304 : 18 T L R 703, *Torkington* v. *Magee.*]
4. See Section 2 (7) of the Sale of Goods Act, 1930.
[*See also* ('26) 13 AIR 1926 P C 38 (40) : 50 Bom 360 : 53 Ind App 92 : 94 Ind Cas 824 (PC), *Maneckji Pestonji* v. *Wadilal Sarabhai & Co.* (In India, by the terms of the Contract Act, choses in action are goods and equitable considerations are not applicable to them.)]

(A) "Negotiable Instrument"—Meaning of.

An instrument is negotiable when it is, by the custom of trade, transferable like cash by delivery, and is also capable of being sued upon by the person holding it *pro tempore* in his own name.[1] The two essentials of negotiability are (i) that the instrument is transferable like cash, merely by delivery, and (ii) that the person holding it is able to sue, in due course, in his own name.[1a] Thus, a *bona fide* transferee for value of negotiable instrument acquires a good title thereto, even though his transferor had none, just as a *bona fide* transferee of cash obtains a good title to it, although his transferor might have stolen it.[2] It has, therefore, been remarked that "negotiable" is a term which, perhaps should be strictly reserved for instruments which may give to a transferee a *better title* than that possessed by the transferor.[3] A negotiable instrument partakes of the nature of a contract also, as it contains either an order or promise to pay money.[4]

(B) Negotiable instruments under statutes.

The Negotiable Instruments Act, 1881, deals as it states in its Preamble, only with promissory notes, bills of exchange and cheques, and such instruments are "negotiable" within the meaning of that statute when they are payable either to order or to bearer.[5]

(C) Negotiable instruments under custom or Law Merchant.

The Negotiable Instruments Act is, however, not exhaustive of all instruments which are negotiable. Apart from the instruments recognised by that Act as "negotiable," there are other instruments such as various kinds of hundis,[6] debentures payable to bearer,[7] or scrips or bonds,[8] which have been regarded as negotiable instruments by the custom of trade. Indeed, with the growth of the trade and wide expansion of commerce, new kinds of securities emerge and claim recognition from the Courts of law as negotiable instruments. These instruments owe their validity to the Law Merchant which is "nothing more nor less than the usages of merchants and traders in different departments of trade, ratified by the decisions of Courts of Law, which upon such usages being proved before them have adopted them as settled law,

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Section 137—Note 4

1. Halsbury, *Laws of England*, Vol. 2, page 429, Para 776.

1a. ('38) 25 AIR 1938 Sind 24 (27) : 32 Sind L R 640 : 173 Ind Cas 591, *Firm Jhangaldas Chimandas* v. *Firm Chetumal Bulchand.*

2. ('18) 5 AIR 1918 Low Bur 122 (128) : 9 Low Bur Rul 143 : 40 Ind Cas 86 (DB), *Khoo Eo Khwet* v. *Nanigram Jagannath Firm.*
(1863) 32 L J C P 161 (164) : 8 L T 317 : 14 C B (NS) 248 : 11 W R (Eng) 648, *Whistler* v. *Forester.*

3. Scrutton on *Charter Parties*, Note 1, page 155.

4. ('34) 21 AIR 1934 Cal 549 (549) : 61 Cal 425 : 150 I.C. 925 (DB), *Surath Chandra* v. *Kripanath.*

5. Section 13, Negotiable Instruments Act, 1881.
('70) 14 Suth W R (OC) 5 (6) : Bourke O C 157 (DB), *Mohendro Lall Bose* v. *Jadub Kissen Singh.* (A bill of exchange.)
('34) 21 AIR 1934 Bom 356 (358) : 153 Ind Cas 352 (DB), *Virappa* v. *Mahadevappa.* (Pronote payable to bearer or order.)
('20) 7 AIR 1920 Low Bur 42 (43) : 10 Low Bur Rul 96 : 55 Ind Cas 718, *T. A. R. A.R.M. Chetty Firm* v. *S. E. Solomon.* (Do.)
('31) 18 AIR 1931 Cal 387 (388) : 58 Cal 752 : 131 Ind Cas 570 (DB), *Harkishore Barua* v. *Gura Mia.* (Do.)
('69) 3 Beng L R (O C) 130 (132) : 12 Suth W R (O C) 9 (10) (DB), *Ramlal Mookerjee* v. *Haran Chandra Dhar.* (Do.)
(1836) 4 Add & E 785 (790, 791) : 111 E R 979, *Wise* v. *Charlton.* (Do.)
('93) 17 Mad 85 (86) (DB), *Ramchandra* v. *Sesha.* (Do.)
('10) 8 Ind Cas 796 (797, 798) (DB) (Cal), *Hira Lal* v. *Raj Kumar.* (Do.)
('35) 22 AIR 1935 Rang 156 (157) : 156 Ind Cas 788, *Mangaban* v. *B. B. Upadhaya.* (Do.)

6. ('19) 6 AIR 1919 Lah 85 (86) : 1919 Pun Re No. 29 : 51 Ind Cas 250 (DB), *Panna Lal Lachman Das* v. *Hargopal Khubi Ram.*

7. (1898) 67 L J Q B 986 (995) : (1898) 2 Q B 658 : 3 Com Cas 285 : 79 L T 270, *Bechuanaland Exploration Co.* v. *London Trading Co.*
[*See* ('31) 18 AIR 1931 Cal 223 (231) : 58 Cal 136 : 131 Ind Cas 689 (DB), *Imperial Bank of India* v. *Bengal National Bank.* (Rankin, C. J.—Section 137 does not make reference to debentures considered as transfers, but only as the subject-matter of a transfer.)]

8. ('18) 5 AIR 1918 Low Bur 122 (128) : 9 Low Bur Rul 143 : 40 Ind Cas 86 (DB), *Khoo Eo Khwet* v. *Nanigram Jagannath Firm.*

with a view to the interests of trade and public convenience".[9] In order to be included in the category of negotiable instruments, these instruments must possess the essentials stated above. Otherwise, they will not be recognised as negotiable instruments.[9a] Thus, a document of title to goods cannot be negotiable in the strict sense of the word as the endorsee of it does not get a better title than his assignor.[10] See also the undermentioned cases in which the instruments were held not to be "negotiable instruments".[11]

(D) Transfer of negotiable instruments.

The usual mode of transfer of a negotiable instrument is by endorsement or by delivery.[12] Such instruments, however, may be transferred otherwise than by *negotiation*.[13] What the Negotiable Instruments Act does is to prohibit *negotiation* except in the manner specified by it, but it does not prohibit assignment in any of the several ways allowed by law.[14] Negotiable instruments are actionable claims and

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9. Halsbury, *Laws of England*, Vol 2, Para. 775.

9a. ('38) 25 AIR 1938 Sind 24 (27) : 32 Sind L R 640 : 173 Ind Cas 591, *Firm Jhangaldas Chimandas* v. *Firm Chetumal Bulchand.* ("Pahunch" is ordinary receipt and not negotiable instrument.)

10. Scrutton on *Charter Parties* Note 1, page 155.
('18) 5 AIR 1918 Low Bur 122 (128) : 9 Low Bur Rul 143 : 40 Ind Cas 86 (DB), *Khoo Eo Khwet* v. *Nanigram Jagannath Firm.*
[But see (1869) L R 2 P C 393 (405, 406) : 38. L J P C 30 (34) : 21 L T 33 : 3 Moo P C (NS) 538, *Rodger* v. *The Comptoir D' Escompte De Paris.*]

11. ('75) 1 All 732 (734) (DB), *Kanhaiyalal* v. *Domingo.* (A promissory note made payable simply to the payee is not negotiable.)
('02) 12 Mad L Jour 351 (353), *Sugappa* v. *Govindappa.* (Pronote.)
('97) 7 Mad L Jour 231 (232) (DB), *Udayar Pillai* v. *Muthia Pillai.* (Do.)
('06) 1906 Pun Re No. 144, p. 516 (518) : 1907 Pun L R No. 106, *Parfitt* v. *Chain Sukh.* (Promissory note made payable to the payee.)
('14) 1 AIR 1914 Bom 286 (287) : 38 Bom 618 : 28 Ind Cas 114 (DB), *R. D. Sethna* v. Hemmingway. (A deposit receipt is not a negotiable instrument.)

12. ('35) 22 AIR 1935 Bom 343 (346) : 59 Bom 573 : 158 Ind Cas 145, *Kamalakant* v. *Madhavji.* (Transfer by endorsement and transfer by assignment—Difference pointed out.)
• ('37) 24 AIR 1937 Pat 100 (102) : 16 Pat 74 : 167 Ind Cas 57 (FB), *Ghanshyam Das* v. *Ragho Sahu.* (Transfer of pronote by means of registered instrument is valid.)
[*See* ('26) 13 AIR 1926 Cal 447 (449, 450) : 89 Ind Cas 735 (DB), *Kisen Gopal* v. *L. J. Bavin.*
('27) 14 AIR 1927 Lah 89 (90) : 95 Ind Cas 704 (DB), *Ram Jas* v. *Shahabuddin.*
('07) 17 Mad L Jour 393 (393, 394) : 3 Mad L Tim 7 (DB), *Arunachela Reddi* v. *Subba Reddi.* (The assignee cannot sue unless the assignment be in writing as required by S. 130.)
('09) 36 Cal 493 (508) : 2 Ind Cas 553 (559) (DB), *Shamaldhone Dutt* v. *Lakshimani Debi.*
('10) 5 Low Bur Rul 93 (94) : 4 Ind Cas 288 (288) (DB), *Aw Nin* v. *Raman Chetty.* (Equitable mortgage created before application of T. P. Act—It can be assigned by delivery of title deeds.)]

13. † ('37) 24 AIR 1937 Oudh 405 (405, 406) : 13 Luck 373 : 168 Ind Cas 922 (DB), *Jailal* v. *Jagmohan Lal.* (Written assignment of pronote—Endorsement not necessary to make assignment valid.)
• ('37) 24 AIR 1937 Pat 100 (102) : 16 Pat 74 : 167 Ind Cas 57 (FB), *Ghanshyam Das* v. *Ragho Sahu.* (Transfer by registered instrument. AIR 1934 Pat 382 : 13 Pat 655 overruled.)
('39) 26 AIR 1939 Lah 501 (502) : ILR (1940) Lah 84 : 185 Ind Cas 426, *Ram Rattan* v. *Govind Ram.* (Oral assignment is valid in the Punjab.)
('19) 6 AIR 1919 Lah 85 (86) : 1919 Pun Re No. 29 : 51 Ind Cas 250 (DB), *Panna Lal Lachman Das* v. *Hargopal Khubi Ram.* (Do.)
('25) 12 AIR 1925 Lah 575 (575) : 6 Lah 487 : 91 Ind Cas 778, *Teja Singh* v. *Kalyan Das Chet Ram.* (Do.)
('32) 19 AIR 1932 Lah 30 (31) : 134 Ind Cas 121, *Lacha Ram* v. *Hemraj.* (Do.)
('41) 28 AIR 1941 Pesh 45 (47) : 195 Ind Cas 185 (DB), *Kaluram* v. *Feroze Shah.* (In the Punjab and N. W. F. P. hundis can be assigned orally.)
('21) 8 AIR 1921 Low Bur 92 (93) : 11 Low Bur Rul 174 : 66 Ind Cas 501, *Palawan* v. *B. Kanu.* (Assignment in writing is valid under the general law apart from T. P. Act.)
† ('10) 8 Ind Cas 881 (882) (DB) (Mad), *Lodd Govind Das* v. *Munuswamy Pillai.*
[*See* ('43) 30 AIR 1943 Sind 67 (72) : ILR (1942) Kar 516 : 208 Ind Cas 51 (DB), *Dowlat Ram Mohandas* v. *Vasdeo Manghumal.* (But not by a mere book entry.)]
[*See also* ('12) 14 Ind Cas 720 (721) (DB) (Cal), *Binode Kishore Goswami* v. *Ashutosh Mukherjee.*]

14. ('33) 20 AIR 1933 Mad 133 (133) : 138 Inl Cas 262, *Venkatarama Ayyar* v. *Krishnaswami Chettiar.*

as such they can also be transferred by assignment under S. 130.[15] The view, that they could be transferred only by endorsement or by delivery[16] is no longer good law.

The incidents, however, of a transfer by assignment and of a transfer by endorsement are different. In the former case, the assignee acquires all the right, title and interest of the assignor, while an endorsee is clothed with the rights and advantages of a holder in due course.[17] Similarly, in the former case the assignment being subject to the rules in Chap. VIII the transfer is subject to all the equities and liabilities to which the transferor was subject, while in the latter case it is not.[17a] The assignee, on the other hand, being an assignee of the *debt*, can sue all the persons liable for the debt, while an endorsee who gets only the property in the "instrument" by the endorsement, has merely the rights on the instrument and, therefore, can sue only the person whose name appears thereon.[17b]

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15. ('05) 28 Mad 544 (545, 546) : 15 Mad L Jour 384 (DB), *Muthar Sahib* v. *Kadir Sahib.*
('01) 24 Mad 654 (656) (DB), *Muhammad Khumarali* v. *Ranga Rao.*
('14) 1 AIR 1914 Cal 566 (566) : 22 Ind Cas 500 (DB), *Akhoy Kumar Pal* v. *Hari Das Basack.*
('21) 8 AIR 1921 Low Bur 92 (93, 94) : 11 Low Bur Rul 174 : 66 Ind Cas 501 (502), *Palawan* v. *B. Kanu.*
† ('33) 20 AIR 1933 Mad 133 (133) : 138 Ind Cas 262 (DB), *Venkatarama Ayyar* v. *Krishnaswami Chettiar.*
† ('35) 22 AIR 1935 Bom 343 (346) : 59 Bom 573 : 158 I. C. 145, *Kamalakant Gopalji* v. *Madhavji Vaghji.* (Transfer by endorsement and transfer by assignment—Difference pointed out.)
† ('32) 19 AIR 1932 Nag 23 (24) : 27 Nag L R 327 : 137 Ind Cas 33, *Gulabgir* v. *Nathmal.*
('34) 21 AIR 1934 Cal 549 (549) : 61 Cal 425 : 150 Ind Cas 925 (DB), *Surat Chandra Saha* v. *Kripanath Chowdhury.*
('12) 15 Ind Cas 380 (381, 382) (Mad), *Raman Chetty* v. *P. Nagarathna Naicker.*
('21) 8 AIR 1921 Mad 137 (139) : 44 Mad 196 : 61 Ind Cas 461 (DB), *Perumal Ammal* v. *Perumal Naicker.*
('15) 2 AIR 1915 Mad 1031 (1031, 1032) : 38 Mad 297 : 21 Ind Cas 316 (FB), *Muthukrishna Aiyar* v. *Veeraraghava Iyer.*
('06) 9 Oudh Cas 174 (177) (DB), *Jagan Nath* v. *Allahabad Bank Ltd.*
('07) 17 Mad L Jour 393 (393, 394) (DB), *Arunachella Reddi* v. *Subba Reddi.*
('21) 8 AIR 1921 Mad 122 (122, 123) : 59 Ind Cas 943 (DB), *Kunhi Koramath Chandu* v. *A. T. Ramunni.* (Mere acknowledgment of payment is neither endorsement nor assignment.)
('12) 14 Ind Cas 279 (281) (DB) (Mad), *Kattick Ramunni* v. *Udayamangalath Mithale.*
('26) 13 AIR 1926 Nag 206 (207) : 90 Ind Cas 323, *Ballabh Das* v. *Narain Prasad.* (Deposit of cheques without authority to draw money payable under them is not assignment of debt.)
[*See* ('34) 21 AIR 1934 Mad 529 (533) : 57 Mad 1082 : 153 Ind Cas 916 (DB), *Gopalu Pillai* v. *Kothandarama Ayyar.*]
[*See also* ('48) 35 AIR 1948 Mad 171 (172), *Venkata Krishniah* v. *Manikyarow.* There is nothing in law which makes it incumbent upon an assignee of a promissory note to issue notice to the promisor forthwith after the date of assignment. Nor can there be any rule of thumb to find out what is a reasonable time within which the assignee should have intimated to the maker the fact of the assignment.]

16. ('94) 17 Mad 461 (462), *Abboy Chetti* v. *Ramachandra Rau.* (11 Mad 290 followed which is overruled in 24 Mad 654.)
('80) 5 Bom 268 (277), *Merbai* v. *Perozbai.*
[*See* ('20) 7 AIR 1920 Low Bur 42 (43) : 10 Low Bur Rul 96 : 55 Ind Cas 718, *T. A. R. A. R. M. Chetty Firm* v. *Solomon.*]

17 † ('35) 22 AIR 1935 Bom 343 (346) : 59 Bom 573 : 158 I.C. 145, *Kamalakant* v. *Madhavji.*
('32) 19 AIR 1932 Nag 23 (25) : 27 Nag L R 327 : 137 Ind Cas 33, *Gulabgir* v. *Nathmal.*
('05) 28 Mad 544 (545, 546) : 15 Mad L Jour 384 (DB), *Muthar Sahib* v. *Kadir Sahib.*
† ('38) 25 AIR 1938 Mad 377 (379) : ILR (1938) Mad 568 : 174 Ind Cas 577 (FB), *Maruthamuthu Naicker* v. *Kadir Badsha.*
*('01) 24 Mad 654 (665) (DB), *Muhammad Khumarali* v. *Ranga Rao.*
('01) 24 Mad 657*n* (657*n*) (DB), *Ramchandra Rao* v. *Abeeb Rowthan.*
('06) 9 Oudh Cas 174 (177) (DB), *Jagannath* v. *Allahabad Bank.*
('19) 6 AIR 1919 Lah 85 (86) : 1919 Pun Re No. 29 : 51 Ind Cas 250 (DB), *Pannalal* v. *Hargopal.*

17a. ('34) 21 AIR 1934 Cal 549 (549, 550) : 61 Cal 425 : 150 Ind Cas 925, (DB), *Surath Chandra* v. *Kripanath.*

17b. † ('38) 25 AIR 1938 Mad 377 (379) : ILR (1938) Mad 568 : 174 Ind Cas 577 (FB), *Maruthamuthu Naicker* v. *Kadir Badsha.*
('34) 21 AIR 1934 Cal 549 (550) : 61 Cal 425 : 150 I. C. 925 (DB), *Surath Chandra* v. *Kripanath.*
[*See* ('35) 22 AIR 1935 Mad 240 (242, 243) : 156 Ind Cas 455, *Periakaruppan* v. *Motayya.* (Where the endorsement is in blank, it only operates to transfer the property in the instrument and not as an assignment of the debt. Approved in AIR 1938 Mad 377 : I L R (1938) Mad 568 (FB).)]

(E) Railway receipt

A railway receipt is not a negotiable instrument unless by special custom.[18]

5. "Any mercantile document of title to goods."—Compare S. 2, sub-s. (4) of the Sale of Goods Act, 1930. In order that a document may be a "mercantile document of title to goods" it must be a document—

(a) which is used in business as proof of the possession or control of the goods, or

(b) which authorises or purports to authorise the possessor of the document to transfer or receive the goods thereby represented.[1]

A railway receipt,[2] a bill of lading,[3] delivery order,[4] dock warrant and warehousekeeper's certificate, are all illustrations of mercantile documents of title to goods. But a document called a "mate's receipt" by a shipping company, containing stipulations as to freight, carriage and other conditions appropriate to a bill of lading, was held by their Lordships of the Privy Council not to amount to a document of title to goods.[5] A railway receipt which provides for delivery of goods only to the consignee or his endorsee as his agent is not an instrument of title within the meaning of this section.[5a]

A document of title to goods represents the goods to which it relates, and the law governing its transferability is the same as the law which governs the transferability of the goods themselves.[6] The contract indicated by a railway receipt can be

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18. ('23) 10 AIR 1923 Rang 1 (3, 4) : 11 Low Bur Rul 341 : 68 Ind Cas 694 (DB), *Firm Arunachalam* v. *Ko. Ro.* (Railway receipt not negotiable by the custom of the paddy trade in Rangoon.)

('48) 35 AIR 1948 Pat 36 (38), *G.-G.-in-Council* v. *Jaynarain.* [*See Also*] (Transfer of a railway receipt can be made by endorsement in blank coupled with delivery of document if the intention is to make an absolute delivery, carrying with it a right to the goods.)

Section 137—Note 5

1. ('49) 36 AIR 1949 Nag 186 (187) : ILR (1948) Nag 843, *Abdul Shakur* v. *Motiram.* (*Souda Chithi* in Berar held not document of title—Endorsement does not pass title in goods. AIR 1916 PC 7 : 40 Bom 630 : 43 Ind App 164 (PC) and AIR 1934 PC 246 : 58 Mad 181 : 61 Ind App 416 (PC) Applied.]

('14) 1 AIR 1914 Bom 290 (292, 293) : 38 Bom 255 : 21 Ind Cas 343 (DB), *S. Amarchand & Co.* v. *Ramdas V. Darbar.* (Affirmed in AIR 1916 P C 7 : 40 Bom 630 : 43 Ind App 164 (PC).)

2. ('48) 35 AIR 1948 Pat 36 (38), *G.-G.-in-Council* v. *Joynarain.*

*('16) 3 AIR 1916 PC 7 (8) : 40 Bom 630 : 43 Ind App 164 : 35 I. C. 954, *Ramdas Vithaldas Darbar* v. *Amarchand & Co.*

('33) 20 AIR 1933 Mad 207 (209) : 56 Mad 177 : 143 Ind Cas 641 (DB), *Mercantile Bank of India* v. *Official Assignee of Madras.*

('16) 3 AIR 1916 Mad 750 (751) : 38 Mad 664 : 30 Ind Cas 950 (DB), *Fakeerappa* v. *Thippanna.*

('34) 21 AIR 1934 PC 246 (248) : 61 Ind App 416 : 58 Mad 181 : 152 Ind Cas 730 (PC), *Official Assignee, Madras* v. *Mercantile Bank of India.* (AIR 1916 P C 7 : 40 Bom 630 : 43 Ind App 164 (PC) followed.)

('28) 15 AIR 1928 All 145 (146) : 50 All 227 : 108Ind 457 (DB), *Secretary of State* v. *Rishi Ram.* (Railway receipts should be endorsed.)

('23) 10 AIR 1923 Rang 1 (5, 6) : 68 Ind Cas 694 (DB), *S. R. M. S. Arunachalam Chetty* v. *Ko Po Yan.*

('14) 1 AIR 1914 Bom 178 (178) : 38 Bom 659 : 25 Ind Cas 380 (DB), *Dolatram Dwarkadas* v. *B. B. and C. I. Ry. Co.*

[*See* ('19) 6 AIR 1919 Mad 140 (145) : 41 Mad 871 : 49 Ind Cas 69 (DB), *M. & S. M. Ry. Co. Ltd.* v. *Haridoss Bonmali Dass.*]

[But see ('13) 7 Sind L R 163 (167) : 24 Ind Cas 798 (801), *Firm of Kalu Ram Shuduram* v. *Firm of Budhuram Parmanand.*]

3. (1869-70) 18 W R (Eng) 1041 (1043) : L R 4 H L 317 : 39 L J C P 187 : 22 L T 808, *Barber* v. *Meyerstein.*

[*See* ('19) 6 AIR 1919 Mad 140 (143) : 41 Mad 871 : 49 Ind Cas 69 (DB), *Madras and Southern Maratha Railway Co. Ltd.* v. *Haridas.*]

4. ('11) 38 Cal 127 (141) : 10 Ind Cas 859 (861) (DB), *Anglo Indian Jute Mills Co.* v. *Omademull.*

('84) 8 Bom 501 (509, 510) (DB), *Le Geyt* v. *Harvey.*

('18) 5 AIR 1918 Low Bur 122 (127) : 9 Low Bur Rul 143 : 40 Ind Cas 86 (DB), *Khoo Eo Khwet* v. *Nanigram Jagannath Firm.*

(1810) 11 R R 491 (495) : 12 East 614, *Whitehouse* v. *Frost.*

5. ('14) 41 Cal 670 (678) : 22 Ind Cas 311 (313) (PC), *Natcheappa Chetty* v. *Irrawaddy Flotilda Co. Ltd.*

5a. ('12) 16 Ind Cas 61 (65) (Bom), *The Bombay Steam Navigation Co. Ltd.* v. *Ramdas Vithaldas.*

transferred without a writing. Such a transfer is regulated by custom.[6aa] The transfer of a railway receipt does not effect a transfer of the *ownership* of goods unless the instrument is negotiable by the custom of the trade.[6a] It has been held in the undermentioned case[6bb] that a transfer of a railway receipt can be made by endorsement in blank coupled with delivery of the document to the transferee where the intention is to make an absolute delivery carrying with it a right to the goods.

A bill of lading transferred by endorsement and delivery transfers *ownership* of the goods; no other documents, though they may be mercantile documents of title to goods, can transfer by mere assignment and delivery the *ownership* of the goods though they may transfer the right to *receive* the goods.[6b].

See also the undermentioned cases.[7]

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6. ('18) 5 AIR 1918 Low Bur 122 (128) : 9 Low Bur Rul 143 : 40 Ind Cas 86 (DB), *Khoo Eo Khwet* v. *Nanigram Jagannath Firm.*

6a. ('48) 35 AIR 1948 Pat 36 (38), *C.-G.-in-Council* v. *Joynarain.*

6aa. ('23) 10 AIR 1923 Rang 1 (4) : 11 Low Bur Rul 341 : 68 Ind Cas 694 (DB), *Arunachalam* v.*Ko Po Yan.*

6b. ('48) 35 AIR 1948 Pat 36 (38), *C.-G.-in-Council* v. *Jaynarain.*

6bb. ('23) 10 AIR 1923 Rang 1 (4) : 11 Low Bur Rul 341 : 68 Ind 694 (DB), *Arunachalam* v. *Ko Po Yan.*

[*See also* ('16) 3 AIR 1916 P C 7 (9) : 40 Bom 630 (635) : 43 Ind App 164 : 35 Ind Cas 154 (PC), *Ramdas Vithaldas* v. *Amerchand Co.* (Bill of lading differs from other documents of title in that its assignment operates as a constructive delivery of the goods to which it refers.)]

7. ('84) 8 Bom 501 (508, 509) (DB), *Le Gyet* v. *Harvey.*
(1787-1794) 1 R R 425 (427) : 5 Term Rep 683 : 2 T R 63 : 4 Bro P C 57 : 6 East 20 : 6 T R 831 : 1 H Bl 357, *Lickbarrow* v. *Mason.*

THE SCHEDULE.

Year and chapter.	Subject.	Extent of repeal.
	(*a*) STATUTES.	
27 Hen. VIII, c. 10	Uses	The whole.
13 Eliz., c. 5	Fraudulent conveyances	The whole.
27 Eliz., c. 4	Fraudulent conveyances	The whole.
4 Wm. and Mary, c. 16	Clandestine mortgages	The whole.
	(*b*) ACTS OF THE GOVERNOR-GENERAL IN COUNCIL.	
IX of 1842	Lease and release	The whole.
XXXI of 1854	Modes of conveying land	Section 17.
XI of 1855	Mesne profits and improvements.	Section 1; in the title, the words "to mesne profits and," and in the preamble "to limit the liability for mesne profits and."
XXVII of 1866	Indian Trustee Act	Section 31.
IV of 1872	Punjab Laws Act	So far as it relates to Bengal Regulations 1 of 1798 and XVII of 1806.
XX of 1875	Central Provinces Laws Act.	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XVIII of 1876	Oudh Laws Act	So far as it relates to Bengal Regulation XVII of 1806.
I of 1877	Specific Relief Act	In sections 35 and 36, the words "in writing."
	(*c*) REGULATIONS.	
Bengal Regulation I of 1798.	Conditional sales	The whole Regulation.
Bengal Regulation XVII of 1806.	Redemption	The whole Regulation.
Bombay Regulation V of 1827.	Acknowledgment of debts; Interest; Mortgagees in possession.	Section 15.

APPENDICES.

APPENDIX I.

THE CODE OF CIVIL PROCEDURE, 1908.

ORDER XXXIV.

SUITS RELATING TO MORTGAGES OF IMMOVABLE PROPERTY.

Parties to suits for foreclosure, sale and redemption.

R. 1. [New: Act IV of 1882, S. 85.] Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

Explanation.—A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

[See Civil Procedure Code O. 1 Rr. 1, 3, 9, 10 and O.31 R. 1.]

Synopsis

1. Suits relating to mortgages.
2. Transfer of Property Act, Section 85.
3. Scope and object of the rule.
4. "Subject to the provisions of this Code."
5. "Persons having an interest either in the mortgage-security or in the right of redemption."
6. Parties to a suit for foreclosure, sale or redemption.
7. Trustees, executors or administrators.
8. Benamidar.
9. Sub-mortgagee.
10. Prior mortgagees—Explanation.
11. Mahomedan co-heirs.
12. Joint Hindu family.
13. Assignee of mortgage.
14. Receiver in insolvency.
15. Lessee.
16. Landlord.
17. Kanomdar.
18. Parties to appeal.
19. Effect of non-joinder.
20. A person cannot be both a plaintiff and a defendant.
21. Joinder of parties.
22. Revision.

Topic Indicator

Adverse claimants. See Note 5.
Contingent or reversionary interests. See Note 6.
Decree not affecting interests of persons not impleaded. See Note 19.
Interest under customary law. See Note 12.
Necessary or proper parties. See Note 21.
Notice now immaterial. See Note 2.
Puisne mortgagee's rights and duties. See Note 19.
Rival claimants of deceased mortgagee's estate. See Notes 5 and 6.
Suits confined to part of hypotheca. See Note 6.
Suit for contribution. See Note 6.

1. Suits relating to mortgages.—This Order is new. It incorporates, with certain alterations, Ss. 85 to 90, 92 to 94, 96, 97 and 99 of the Transfer of Property Act of 1882 which dealt with the procedure governing suits relating to mortgages. The chief objects with which this Order was enacted were—

(1) To set at rest the conflict of decisions under the Transfer of Property Act, 1882, as to whether an application for an order absolute after a preliminary decree for sale was an application in execution or was one in the 'suit' itself for a further decree. (It is now made clear that the application is for a further decree.)

(2) To put an end to the conflict of decisions as to the applicability of Art. 178 (now Art. 181) of the Limitation Act, to applications for

orders absolute, in mortgage suits.(1) (It is now established that Art. 181 applies to an application for a final decree.)

(3) Under the Transfer of Property Act there was no provision for the passing of a final decree where payment was made in accordance with the preliminary decree. This omission has been rectified in this Order.

In suits relating to mortgages, Courts should be guided by the provisions of O. 34 and not by the English practice.(2) The High Court on its original side is also governed by these provisions.(3)

This Order provides for the frame of the suit relating to mortgages, for the decrees, preliminary and final, to be passed in such suits and generally for the substantive rights of the mortgagees to be satisfied in respect of their debts out of their mortgage securities.(3a)

The provisions of this Order are not exhaustive and there is nothing to debar the parties to a mortgage from contracting themselves out of the provisions of this Order and to settle by compromise the form of decree to be passed in suits on mortgage.(3b)

This order applies not only to 'mortgages' of 'immovable property' but also to charges(4): see R. 15. The provisions of this Order have no application to suits under S. 12 of the Redemption of Mortgages Act (Punjab Act II of 1913)(5) or to compromise decrees.(6) As to the applicability of this Order to mortgages of chattels, see the undermentioned cases.(7)

2. Transfer of Property Act, Section 85.—This rule corresponds to S. 85 of the Transfer of Property Act; that section ran as follows :

"85. Subject to the provisions of the Code of Civil Procedure, S. 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage: Provided that the plaintiff has notice of such interest."

The following are material alterations—

(1) The words "all persons having an interest either in the mortgage security or in the right of redemption" have been substituted for the words "all persons having an interest in the property comprised in a mortgage."

(2) The words "provided that the plaintiff has notice of such interest" have been omitted.

(3) An Explanation has been added.

Order 34 Rule 1—Note 1

1 ('11) 38 Cal 913 (921): 11 Ind Cas 943 (945, 946) DB).

2 ('26) 13 AIR 1926 Oudh 113 (114).

3 ('10) 37 Cal 907 (910).

3(a) ('43) 30 AIR 1943 Mad 455 (457): 210 Ind Cas. 194 *Krishnaswami* v. *Chockalingam* [Order 34, Civil P.C., does not relate to execution of decrees.]

3(b) ('44) 31 AIR 1944 Oudh 111 (113): 217 Ind Cas 208 *Bansidhar* v. *Mt. Sitala.* [Separate decrees as preliminary and final may be dispensed with.]
('43) 30 AIR 1943 All 321 (326): ILR (1943) All 684: 210 Ind Cas 573 (DB). *Ghulam Amir* v. *Masuda Khatun.* [For example, they can agree that the decretal amount shall be payable by the judgment debtor by instalments extending over a much longer period than the period of 6 months laid down in O. 34, R. 2. It is also open to them to agree that the very first decree passed in the suit shall be an executable decree and thus do away with the necessity of the passing first, of a preliminary decree and then, of a final decree as provided in O. 34, of the Code.]

4 ('05) 1 Nag L R 117 (120).

5 ('33) 20 AIR 1933 Lah 179 (181): 14 Lah 218.

6 ('35) 22 AIR 1935 Pat 385 (395): 14 Pat 488 (DB). (See O. 34 R. 4, N. 15 and O. 34 R. 5, N. 5.)

7 NOTE.—It will be noticed that the Order is entitled "Suits relating to mortgages of Immovable Property."
('33) 20 AIR 1933 Bom 51 (54, 55): 57 Bom 346 DB). (Order 34 Rule 14 applies only to mortgage of immovable property and not to mortgage of movable property.)
('32) 19 AIR 1932 Cal 524 (533): 59 Cal 667 (DB).
(Rules of O. 34 are based on well settled rules of equity which in absence of any statutory provisions to the contrary, should be applied in suits on mortgages of movable property as well—Rules of O. 34 as regards costs apply to such suits also.)

The omission of the proviso to S. 85 in the present rule shows that a person may be a necessary party to a mortgage suit though the plaintiff may not be 'aware' of that person's interest in the mortgaged property.(1) Cases under S. 85 of the Transfer of Property Act bearing on the question of notice are only of academic interest now.(2)

The other effects of the changes introduced by the rule have been discussed in their proper places in the commentary on this rule.

3. Scope and object of the rule.—The object of the present rule as to joinder of parties in mortgage suits is to avoid multiplicity of suits.(1) The rule applies only to suits relating to mortgages (i.e., suits for sale, foreclosure or redemption) and to suits to enforce 'charges' but not to suits for 'ejectment'. (2) The rule does not 'prohibit' the joining of any party but merely lays down that all persons interested in the mortgage security or in the right of redemption should be made parties. (3) It is not necessary that all the persons having an interest in the mortgage security should be arrayed on the same side.(4) As to the applicability of the rule to proceedings under the United Provinces Encumbered Estates Act, see the undermentioned cases.(5)

4. "Subject to the provisions of this Code."—This expression has been substituted for the words "subject to the provisions of the Code of Civil Procedure, S. 437" (now O. 31 R. 1) which occurred in the Transfer of Property Act, S. 85. Hence the present rule is subject not only to O. 31 R. 1 but also to other provisions of the Code, as, for instance, O. 1 R. 9(1) or O. 23 R. 3 (1a) or O. 30 (Suits by or against firms).(2)

O 34 R 1 Note 2

1 ('42) 29 AIR 1942 Oudh 197 (198): 17 Luck 482.
('11) 33 All 71 (78): 7 Ind Cas 902 (904) (DB).
2 ('08) 12 Cal W N 911 (913) (DB).
('07) 6 Cal L Jour 719 (722) (DB).
('06) 3 Cal L Jour 12 (13, 14) (DB).
('09) 5 Nag L R 117 (119, 120): 3 Ind Cas 570 (571).
('15) 2 AIR 1915 Cal 729 (730) (DB).
('15) 2 AIR 1915 Cal 432 (433) (DB).
('14) 1 AIR 1914 P C 136 (137): 36 All 383: 41 Ind App 216 (PC).
('99) 21 All 195*n* (196*n*) (DB).
('99) 21 All 193 194) (DB).
('99) 1899 All W N 34 (34) (DB).

Note 3

1 ('43) 30 AIR 1943 Oudh 218 (223, 224): 19 Luck 183 (DB).
('91) 13 All 432 (459) (FB).
('97) 19 All 379 (381) FB).
('01) 28 Cal 517 (530) (SB).
('11) 11 Ind Cas 826 (826) (DB) (All).
(19) 6 AIR 1919 Bom 135 (135): 43 Bom 575 (DB).
†('27) 14 AIR 1927 P. C. 32 (36): 51 Ind App 68: 50 Mad 180 (PC).
†('24) 11 AIR 1924 All 107 (108).
('37) 24 AIR 1937 Mad 136 (139).
2 ('09) 1 Ind Cas 560 (560) (DB) (Mad).
3 ('20) 7 AIR 1920 Nag 247 (248).
4 ('36) 23 AIR 1936 Pat 439 (441).
[See ('36) 23 AIR 1936 Pat 306 (307) (DB). (Rent made charge on property—Rent payable to lessors half to one party and half to another—Suit by one party joining other party as defendant—Decree for charge on whole property can be given.)]
5.* ('40) 27 AIR 1940 Oudh 435 (436): 16 Luck 110 (DB). (Doubtful of O. 34 R 1 applies to such proceedings—But where a mortgage is subject-matter of such proceedings, all persons interested in the mortgage may be made parties.)
('40) 27 AIR 1940 Oudh 437 (438): 16 Luck 168, (Civil Procedure Code applies to such proceedings in so far as it is not inconsistent with the provisions of the Act—Reversioner not a necessary party to mortgage suit.)

Note 4

1 ('48) 35 AIR 1948 Nag 56 (59): ILR (1947) Nag 412 (DB). *Madhaorao* v. *Eknathrao.* (An appeal filed against a preliminary decree for foreclosure by one of several mortgagore does not fail for non-joinder of the other mortgagors, as it is possible to work out the right of the appellant in the appeal even though the other mortgagors are not parties to it.)
('43) 30 AIR 1943 Oudh 218 (223): 19 Luck 183 (DB).
†('42) 29 AIR 1942 Pat 213 (226):20 Pat 904 (DB).
('40) 27 AIR 1940 Oudh 235 (236): 15 Luck 399. (Non-compliance with O. 34, R. 1 is not fatal to suit to enforce mortgage.)
('24) 11 AIR 1924 All 107 (108).
('36) 23 AIR 1936 All 512 (514).
('35) 22 AIR 1935 Rang 139 (141).
('33) 20 AIR 1933 Cal 325 (328): 60 Cal 87 (DB).
[*See also* ('32) 19 AIR 1932 Cal 34 (35, 36.] See also Note 19.
Ia ('49) 36 AIR 1949 Sind 9 (10) (DB). *Pessumal Virumal* v. *Sobhrajmal Ruchandmal.*
2. ('11) 12 Ind Cas 629 (630) (DB) (All).
('36) 23 AIR 1936 All 512 (514).

5. **" Persons having an interest either in the mortgage security or in the right of redemption."**—Under S. 85 of the Transfer of Property Act the plaintiff in a suit relating to a mortgage was bound to implead all persons having an interest in the " property comprised in a mortgage." This gave rise to a conflict of decisions. According to one view the words " property comprised in a mortgage " referred to the 'interest,' as distinguished from the 'physical property,' which the mortgagor was competent to transfer by way of mortgage at the date of the transaction.(1) In other words, according to this view, the plaintiff was not bound to implead any person who had no interest either in the 'mortgage security' or in the 'right of redemption.' The High Court of Allahabad,(2) on the other hand, held that the word "property" meant the 'physical property' mortgaged and that it was therefore necessary to implead all persons claiming interest in the property though they had no interest in the mortgage security or in the right of redemption. The present rule has adopted the former view and the Allahabad view is now no longer law.

All the High Courts were, however, agreed, even in cases coming under S. 85 of the Transfer of Property Act, that a person claiming adversely to the mortgagor and the mortgagee, i.e., a person claiming a 'paramount' title was not a necessary or a proper party to a suit relating to a mortgage.(3) The same principle has been held to apply under the present rule also.(4) Thus, a person impleaded as the legal representative of a deceased mortgagor cannot have a paramount title to the property, which he sets up adversely to the mortgagor.

Note 5

1. ('06) 33 Cal 425 (432) (DB).
2 ('91) 13 All 432 (461, 462) (FB).
3 ('06) 33 Cal 425 (440) (DB)
('08) 30 All 240 (242).
('09) 31 All 11 (12, 13) (DB).
('08) 12 Cal W N 94 (95, 96) (DB).
4 ('48) 35 AIR 1948 Nag 369 (371): ILR (1948) Nag 584 (DB). *Nimba Ganba* v. *Narayan Pikaji.*
('42) 29 AIR 1942 Pat 226 (229, 230): 20 Pat 841 (DB).
('41) 28 AIR 1941 Nag 133 (133).
('40) 72 Cal L Jour 493 (498) (DB).
('39) 26 AIR 1939 Cal 692 (693): ILR (1939) 2 Cal 551 (DB).
('27) 14 AIR 1927 Sind 265 (266, 267).
† ('35) 22 AIR 1935 All 205 (206) (DB).
('33) 15 Nag L Jour 173 (175, 176).
('30) 17 AIR 1930 Oudh 97 (99): 5 Luck 658 (DB).
('14) 1 AIR 1914 Oudh 184 (185). (Stranger claiming paramount title should not be joined in a mortgage suit.)
('27) 14 AIR 1927 Oudh 607 (608) (DB). (Do.)
('02) 5 Oudh Cas 94 (95).
('24) 11 AIR 1924 Rang 240 (240): 2 Rang 106.
†('28) 15 AIR 1928 Mad 764 (766, 767) (DB).
('27) 14 AIR 1927 Mad 945 (946) (DB).
('21) 8 AIR 1921 Mad 701 (704) (SB). (Investigation of mortgagor's title to land is not necessary.)
†('29) 16 AIR 1929 Cal 672 (673, 675) (DB).
('26) 13 AIR 1926 Cal 1192 (1192, 1193) (DB).
('25) 12 AIR 1925 Cal 973 (976, 979) (DB).
('32) 19 AIR 1932 Cal 512 (513): 59 Cal 548.
†('20) 7 AIR 1920 Pat 630 (631) (DB).
('20) 7 AIR 1920 Bom 96 (97).
('20) 7 AIR 1920 Cal 287 (287) (DB).
('18) 5 AIR 1918 Pat 240 (248) (DB).
('11) 11 Ind Cas 201 (202) (Cal).
('26) 13 AIR 1926 Nag 67 (68). (DB). (Mortgage suit—Person entitled to redeem but setting up paramount title in himself cannot be added as a party under O. I R. 10).
('32) 33 Pun L R 240 (241) (DB).
('36) 23 AIR 1936 Rang 198 (200) (DB).
('36) 23 AIR 1936 Mad 338 (340). Ordinarily claims of persons who set up adverse title to mortgagor and mortgagee should not be investigated—But this is not a rule of jurisdiction and the Court may in certain cases go into question of paramount title.)
('39) 26 AIR 1939 Rang 185 (186). (Father depositing conveyance in favour of sons to secure loan —Sons are not necessary or proper parties to suit against father.)
('37) 24 AIR 1937 Rang 351 (353) (DB).
[*See also* ('40) 27 AIR 1940 Sind 103 (104): ILR (1940) Kar 302, (Defendant impleaded as a person interested in equity of redemption is not bound to raise paramount title which he claims independently of mortgagor. See also A. I. R. Commentaries on the Civil Procedure Code Section 11, Note 40.)]

[See however ('16) 3 AIR 1916 Oudh 25 (27): 19 Oudh Cas 58: 36 Ind Cas 64 (65). (Mortgage suit against father, manager of Hindu joint family —Sons impleaded—Sons can contest that the mortgage does not bind the family estate.)]

determined in the suit.(5) A person who, in a redemption suit, claims the right of redemption in opposition to the plaintiff cannot be said to be claiming a title paramount to that of the mortgagor and the 'mortgagee' and may be a proper party to the suit.(6) The High Court of Madras(7) seems to draw a distinction between a suit for 'redemption' and a suit for the 'enforcement' of a mortgage and is inclined to hold that persons claiming the property adversely to the mortgagor and mortgagee can be joined as parties to a suit for redemption. But the judgments in these cases do not show why the general rule as to the exclusion of questions relating to paramount or adverse title from mortgage suits should not apply to suits for redemption. On the other hand, it has been held by the Patna High Court(8) that even in suits for 'redemption,' persons asserting a paramount title to the mortgaged property should not be joined as parties. Where a person asserting a paramount title to the property has been erroneously made a party to a suit relating to a mortgage, he should be discharged from the suit.(9) But an objection on the ground of the joinder of such a person is not one affecting jurisdiction but is only an 'irregularity' in the matter of the joinder of parties and can be cured under S. 99 of the Civil Procedure Code.(10) Where, therefore, a party allows the suit to go on and the Court adjudicates on his claim to paramount title, he will be bound by the decision and cannot subsequently contend that the question was not within the purview of the suit.(11) Moreover, the rule as to the exclusion of the person claiming paramount title is not an inflexible one and, in proper cases, persons asserting a paramount title to the property can be conveniently made parties to a mortgage suit and their claims

5 ('26) 13 AIR 1926 Rang 208 (209, 210) : 4 Rang 214 (DB).
('30) 17 AIR 1930 Lah 1068 (1069).
('21) 8 AIR 1921 Cal 343 (343) (DB).
('27) 14 AIR 1927 Sind 265 (266, 267).
('26) 13 AIR 1926 Mad 744 (746) (DB).
†('18) 5 AIR 1918 All 81 (84) : 40 All 584 (DB).
('18) 5 AIR 1918 Cal 557 (578) (DB).
('16) 3 AIR 1916 P C 18 (19) : 43 Ind App 187 : 38 All 488 (PC).
('14) 1 AIR 1914 All 265 (267).
('09) 31 All 11 (13) (DB).
†('31) 18 AIR 1931 Pat 64 (68) : 10 Pat 234 (DB).
('06) 29 Mad 217 (224) (DB).
[*See also* ('18) 5 AIR 1918 Cal 933 (937) : 44 Cal 425 (DB).
('32) 19 AIR 1932 Cal 12 (13) : 58 Cal 12 (22) (DB).]
[But see ('10) 7 Ind Cas 921 (922) (DB) (Cal.)]

6 ('10) 8 Ind Cas 225 (226) (DB) (Lah).
('68) 3 Agra 144 (144) (DB).
[*See also* ('24) 11 AIR 1924 Pat 234 (234) :2 Pat 805 (DB).]

7 ('18) 5 AIR 1918 Mad 705 (705) (DB).
[*See also* ('10) 8 Ind Cas 885 (886) (Mad).]

8 ('27) 14 AIR 1927 Pat 45 (45) (DB).

9 ('45) 32 AIR 1945 Nag 53 (55, 56) : ILR (1944) Nag 577 (DB)
(Person asserting title from person other than mortgagor and denying title of mortgagor—This amounts to assertion of paramount title.)
('42) 29 AIR 1942 Nag 33 (33) : ILR (1942) Nag 309 (DB).
('41) 28 AIR 1941 Nag 133 (134).
('40) 72 Cal L Jour 493 (498) (DB).
†('24) 11 AIR 1924 Oudh 19 (22,23) (DB).
('26) 13 AIR 1926 Cal 1192 (1192, 1193) (DB).
('37) 24 AIR 1937 Rang 351 (353) (DB).
('36) 23 AIR 1936 Rang 198 (200) (DB).
('35) 18 Nag L Jour 291 (293) (DB).
('38) 25 AIR 1938 Mad 293 (294) (DB).
('36) 23 AIR 1936 Mad 338 (340).
[*See* ('14) 1 AIR 1914 Cal 143 (145) : 41 Cal 69 : 19 Ind Cas 636 (638) (DB).]

10. ('28) 15 AIR 1928 Nag 306 (307).
('25) 12 AIR 1925 Cal 973 (976, 978) (DB).
† ('18) 5 AIR 1918 Mad 705 (705) (DB).

11 ('42) 29 AIR 1942 Pat 226 (229) : 20 Pat 841 (DB).
('41) 28 AIR 1941 Pat 243 (244). (Suit for sale—Plaintiff seeking to displace prior title claimed by defendant—Defendant taking up the challenge but failing to establish his priority—Question cannot be reagitated in execution.)
('24) 11 AIR 1924 Oudh 19 (23) (DB).
('34) 21 AIR 1934 Oudh 50 (54) : 9 Luck 291 (DB).
('21) 8 AIR 1921 Nag 67 (68) : 17 Nag L. R. 176.
('29) 16 AIR 1929 Pat 678 (679) : 9 Pat 539 (DB).
('24) 11 AIR 1924 Mad 193 (196) (DB).
('18) 5 AIR 1918 Cal 933 (937) : 44 Cal 425 (DB).
('16) 3 AIR 1916 Cal 173 (173) (DB).
* ('07) 5 Cal L Jour 95 (104) (DB).
[*See also* ('26) 13 AIR 1926 Cal 1192 (1192, 1193) (DB). (Plaintiff impleading person claiming paramount title—He cannot subsequently claim at late stage that such person should be discharged.)
('36) 23 AIR 1936 Mad 338 (340). (Question of paramount title adjudicated by trial Court—Appellate Court should not reverse decision on that ground.)]

can be adjudicated upon in such suit.(12) Thus, where the person claiming paramount or adverse title is in 'possession' of the mortgaged property and is likely to resist the claim of the plaintiff if the latter succeeds in the suit, it may be convenient to join him as a party so as to avoid a multiplicity of suits.(13) Similarly, where it is alleged that the person claiming paramount title is only a 'benamidar' for the mortgagor, he can be joined as a party to the suit and the question can be decided therein.(14) So also in the case of mortgage of joint family property by the manager of a joint Hindu family, the other members of the family, who are joined as defendants to a suit on the mortgage, can question the validity of the mortgage.(15)

Where a person is dismissed from a suit on a mortgage on the ground of his claiming a paramount title to the property, he cannot subsequently sue for redemption.(16) The decree passed in the suit from which he has been discharged does not bind him and cannot be executed against him by his ejectment.(16a)

The question whether a person other than one claiming a paramount title, may be made a party to a suit relating to a mortgage and whether the questions raised by him can be gone into in such suit will depend upon the applicability of the provisions of Orders 1 and 2 of the Civil Procedure Code thereto. As has been seen in Note 30 on O. 1 R. 10 of the A.I.R. Commentaries on the Code of Civil Procedure, 4th (1944) Edn., questions raised purely as between the plaintiffs or between the defendants 'inter se' and in which the opposite side is not concerned, are not "questions involved in the suit" and need not be gone into in the suit. Thus, in a suit on a mortgage in favour of a deceased person a person claiming the estate of the deceased mortgagee in opposition to the plaintiff is not a necessary party to the suit.(17) Similarly, where the plaintiff mortgagee

12 ('41) 28 AIR 1941 Nag 133 (134). (For instance, when all parties desire this to be done or when the person claiming a paramount title also pleads to the mortgage and claims a right to contest the mortgage on the ground that he is also interested in some way in the equity of redemption.)
('18) 5 AIR 1918 Pat 356 (363) (DB).
('35) 22 AIR 1935 Nag 68 (68).
('14) 1 AIR 1914 Mad 332 (333).
('11) 11 Ind Cas 826 (826) (DB) (Cal).
('17) 4 AIR 1917 Oudh 159 (159). (Suit on mortgage—Persons alleging that they are owners of property and executants of the subsequent mortgage, the mortgagee of which was impleaded by the plaintiff, are proper parties.)
† ('31) 18 AIR 1931 Nag 20 (23): 26 Nag L R 359.
('04) 8 Cal W N 365 (368) (DB).
('10) 7 Ind Cas 921 (921) (DB) (Cal). (Defendant mortgagor's legal representative can set up his own title to the property.)
† ('36) 23 AIR 1936 Mad 338 (340).
('37) 24 AIR 1937 Nag 376 (377): ILR (1937) Nag 498.
('37) 24 AIR 1937 All 251 (254) (DB). (Mortgagee can implead as defendant person who as prior transferee claims paramount title to mortgaged property.)

13 ('42) 29 AIR 1942 Nag 60 (61): I L R (1942) Nag 701. (In a suit on mortgage, a lambardar who had subsequently obtained a decree for arrears of land revenue against the property mortgaged and in execution of which he had purchased the field himself and obtained possession can be joined as a party and questions of priority in respect of land revenue and redemption of charge by mortgagee on payment could be decided in the mortgage suit.)
('24) 11 AIR 1924 Pat 613 (615): 3 Pat 244 (DB).
('35) 22 AIR 1935 Nag 68 (68).
('37) 24 AIR 1937 Nag 376 (377): ILR (1937) Nag 498.
[*See also* ('10) 8 Ind Cas 885 (886) (Mad).]

14 ('28) 15 AIR 1928 Mad 2 (4, 5).
('25) 12 AIR 1925 Cal 973 (976) (DB).

15 ('16) 3 AIR 1916 Oudh 25 (26).
†('28) 15 AIR 1928 Mad 764 (769) (DB).
('28) 15 AIR 1928 Mad 199 (200).
[*See also* ('21) 8 AIR 1921 P C 118 (119): 47 Ind App 265 (PC). (Mortgage by Hindu widow—Suit on mortgage—Reversioner joined as party—Reversioner can question binding nature of mortgage against him.)
('30) 17 AIR 1930 Nag 89 (90). (Suit on mortgage—Subsequent mortgagee joined—He can dispute the binding nature of the mortgage against him on the ground that it was not made with his consent which was requisite under the law, he being malguzar of the land.)]

16 ('86) 12 Cal 414 (421, 422): 12 Ind App. 171 (PC).
('16) 3 AIR 1916 Nag 120 (121): 13 Nag L R 69.

16a ('44) 31 AIR 1944 P C 46 (49): 71 Ind App 65: ILR (1944) Nag 597: ILR (1944) Kar (PC) 185: 214 Ind Cas 150 (PC): *Manakchand* v. *Manoharlal.*

17 ('28) 15 AIR 1928 Mad 978 (979).

dies and some of his legal representatives are brought on the record, a person who claims also to be another legal representative cannot be added as party on that ground only and allowed to raise questions purely between himself and the rival claimants 'inter se'.(18) It has also been held similarly that a question of the relative liability of each of several co-mortgagors cannot be gone into in a mortgage suit.(19)

6. Parties to a suit for foreclosure, sale or redemption.—As has been seen in Note 5, all persons having an interest in the mortgage security or in the right of redemption should be made parties to any suit relating to the mortgage. The interest should be one 'subsisting' at the time of the suit.(1) Thus the owner of a 'contingent' interest like that of a Hindu reversioner is not a necessary party to the suit.(2) Similarly, a transferee pending a suit on the mortgage is not a necessary party to the suit.(3)

The following persons are necessary parties as being interested in the mortgage security:

(1) The heirs and assignees of the mortgagee's interest.

(2) Co-mortgagees.(4)

The following persons are necessary parties as being interested in the equity of redemption:

(1) All persons mentioned in S. 91 of the Transfer of Property Act.(5)

18 ('27) 14 AIR 1927 Mad 1071 (1072).
[*See also* ('33) 20 AIR 1933 Cal 325 (328): 60 Cal 87 (DB).]

19 ('27) 14 AIR 1927 Pat 117 (120) (DB).
[*See also* ('23) 10 AIR 1923 Pat 199 (201) (DB). (Suit by mortgagee against mortgagor and subsequent mortgagee—Question of contribution between subsequent mortgagees is a question foreign to the suit.)
('31) 18 AIR 1931 Nag 161 (165): 27 Nag L R 312 (DB). (Subsequent purchaser impleaded—Disclaimer by him of any interest—He should be discharged immediately without raising issue between defendants *inter se*.)]

Note 6

1 ('88) 13 Bom 51 (53, 54) (DB).
('92) 16 Bom 599 (602) (DB). (Cessation of interest due to partition.)
('15) 2 AIR 1915 Mad 1203 (1203) (DB). Auction-sale of mortgagor's rights—Purchaser joined as party and effectively representing the mortgagor in the suit—Mortgagor not necessary party unless he can show that he has been prejudiced.)
('31) 1931 N 161 (165): 27 NLR 312 (DB). (Subsequent purchaser disclaiming all interest—To be discharged at once.)
[*See also* ('43) 30 AIR 1943 Oudh 164 (167): 18 Luck 601 (DB). (Prior mortgage declared not genuine in prior suit—Prior mortgagee is not a necessary party in suit on subsequent mortgage.)
('71) 8 Bom H C R O C 1 (19) (DB). (Deceased mortgagor having completely transferred to another the mortgaged property—His legal representatives are not necessary parties.)]

2 ('40) 27 AIR 1940 Oudh 437 (438): 16 Luck 168. (AIR 1919 Lah 40: 1919 Pun Re No. 125 relied on.)
('08) 30 All 497 (498) (DB).

3 ('27) 14 AIR 1927 Nag 299 (299). (Lessee of mortgagor.)
('99) 21 All 149 (151) (DB).
† ('89) 1889 All W N 91 (92) (DB).
('26) 95 Ind Cas 213 (214) (Oudh).
('21) 8 AIR 1921 Cal 801 (803) (DB). (Prior mortgagee is in no way bound or affected by the subsequent encumbrance created *pendente lite*.)

4 ('48) 35 AIR 1948 Bom 211 (219): ILR (1948) Bom 158 (FB): *Adiveppa* v. *Rachappa*.
('19) 6 AIR 1919 P C 24 (26): 46 Ind App 272: 47 Cal 175 (PC).
('41) 28 AIR 1941 Mad 710 (711). (Persons entitled to share in mortgage security.)
† ('33) 20 AIR 1933 Cal 621 (622): 60 Cal 777 (DB). (All mortgagees or heirs of mortgagees must be parties to suit—Necessary party joined after limitation—Whole suit fails.)
('02) 24 All 226 (228) (DB).
('87) 9 All 68 (73) (FB). (Sole mortgagee dying—Several heirs left—All must be joined.)
('13) 20 Ind Cas 329 (330) (DB) (Cal).
('14) 1 AIR 1914 Cal 788 (789) (DB).
('14) 1 AIR 1914 All 225 (225) (DB).
† ('16) 3 AIR 1916 Pat 411 (414) (DB). (Suit by one co-heir of a mortgagee—All other co-heirs should be joined as parties.)
('26) 13 AIR 1926 Cal 416 (417) (DB). (Heirs of co-mortgagee are necessary parties to the suit.)
('27) 14 AIR 1927 Mad 773 (775). (*Koot chit* deed executed by stake-holder of chit fund transactions—Whether all the subscribers to the fund were necessary parties to the suit—*Quœre*.)
[*See also* ('32) 19 AIR 1932 Cal 34 (35, 36). (Some heirs of mortgagee suing—Others consenting—Decree for former correct.)]

5 ('23) 10 AIR 1923 Nag 311 (313).
('12) 17 Ind Cas 432 (432) (DB) (Cal).
†('20) 7 AIR 1920 Nag 247 (248).

Thus, the mortgagor,(6) all co-mortgagors,(7) purchasers of the equity of redemption,(8) surety for the payment of mortgage debt,(8a) subsequent mortgagees,(9) and other persons interested in the equity of redemption(10) and in the proper taking of accounts,(11) are all necessary parties.

(2) There was a conflict of decisions as to whether under the law as it stood proir to the amendment of the Transfer of Property Act by Act XX of 1929, an attaching creditor (who was one of the persons mentioned in S. 91 of that Act before the amendment) was a necessary party to a mortgage suit.(12) The amended S. 91 does not mention an attaching creditor as one of the persons entitled

(26) 13 AIR 1926 All 46 (47): 48 All 171 (DB).

('01) 23 All 467 (469) (DB).

6 ('92) 15 Mad 54 (56) (DB).
('98) 23 Bom 287 (291) (DB).
('31) 18 AIR 1931 Oudh 410 (410, 411) (DB).

7 ('87) 11 Bom 425 (428) (DB).
('92-96) 2 Upp Bur Rul 586.
('74) 21 Suth W R 428 (428, 429) (DB).
('85) 7 All 376 (378) (DB).
('95) 3 Low Bur Rul 15 (17).
('85) 9 Bom 128 (131) (DB).
† ('86) 10 Bom 648 (655, 656) (DB).
('03) 26 Mad 461 (462) (DB).
('13) 18 Ind Cas 181 (182) (Low Bur).
† ('26) 13 AIR 1926 All 46 (47): 48 All 171 (DB).
('29) 16 AIR 1929 All 814 (814) (DB).

8 ('46) 33 AIR 1946 Pat 225 (227): 222 Ind Cas 439 (DB). *Ramcharitar Sao* v. *Bowan Prasad*. (Purchaser of a portion of the mortgaged property who has agreed to discharge the mortgage out of the sale consideration left with him is a necessary party to a suit for redemption by his vendor.)
('71) 16 Suth W R 98 (99) (DB).
(1864) 2 Bom H C R O C 194 (197).
('69) 11 Suth W R (Original Jurisdiction) 21 (23, 24).
('76) 25 Suth W R 60 (61) (DB).
('74) 6 N W P H C R 323 (324) (DB).
('92) 16 Bom 486 (491) (DB). (Auction-purchaser in execution of money decree.)
('97) 19 All 541 (542) (FB).
('71) 14 Moo Ind App 144 (149) (PC).
('20) 7 AIR 1920 Nag 247 (248). Transferee of mortgaged property in breach of covenant against alienation is a necessary party.)
('30) 17 AIR 1930 Mad 1017 (1020) (DB). (Purchaser from Government of mortgaged property attached under Cr.P.C., S. 88, is entitled to be made party to mortgage suit and has the right to redeem.)
('37) 24 AIR 1937 Pat 642 (642, 643). (Before sale under S. 88 of Cr.P.C. accused mortgaging property—Government can only sell equity of redemption and cannot acquire higher rights than mortgagor—To suit on mortgage, only necessary party is auction-purchaser and not Government.)
[*See also* ('36) 23 AIR 1936 Mad 814 (816): 59 Mad 1042 (DB). (In suit on mortgage, owner of equity of redemption need not always fill the role of defendant. It is enough if all the interests in the property are represented in the suit. Suit by purchaser of mortgaged property to enforce mortgage which he has paid off is competent.)]

8a ('48) 35 AIR 1948 Nag 123 (125): ILR (1947) Nag 643: *Sulchankhan* v. *Lalkhan*.. (No conditional decree for the balance can be passed against the surety. The reason is that the liability of the surety would arise only if the mortgaged property was found insufficient to repay the debt. Such a claim for relief against the surety would be premature.)

9 ('41) 28 AIR 1941 P C 90 (90, 91): ILR (1941) Kar P C 127: 61 Ind App 136: I L R (1942) Mad 82 (PC). (Suit to enforce an equitable mortgage which was subsequently found invalid—Money decree only passed—*Held*, subsequent mortgagee though ordinarily proper party was not a necessary party in this suit.)
('08) 1908 Pun Re No. 64, page 309 (311).
('16) 3 AIR 1916 Lah 219 (219): 1916 Pun Re No. 86 (DB).
('92) 15 Mad 487 (489) (DB).
('94) 21 Cal 116 (120) (DB).
('86) 10 Bom 88 (91) (DB).
('84) 8 Bom 168 (173) (DB).
[*But see* ('43) 30 AIR 1943 Oudh 164 (168): 18 Luck 601 (DB). (*Obiter*—Puisne mortgagee not necessary but only proper party.)]

10 ('27) 14 AIR 1927 Bom 474 (477): 51 Bom 771 (DB). (Heirs of intestate Parsi who intermeddle with his estate are his legal representatives and proper parties to suit on mortgage executed by the deceased Parsi.)
('92) 15 Mad 487 (489) (DB).
('26) 13 AIR 1926 Nag 496 (497): 23 Nag L R 128. (Person interested—The test is whether the party will be prejudiced by foreclosure or sale.)
('38) 25 AIR 1938 Oudh 10 (11): 13 Luck 625 (DB).

11 ('74) 6 N W P H C R 208 (210) (DB).
('88) 15 Cal 35 (38, 39).

12 ('33) 20 AIR 1933 Nag 333 (334). (He is a necessary party.)
('23) 10 AIR 1923 Nag 311 (313). (Do.)
('28) 15 AIR 1928 Nag 97 (98): 23 Nag L. R. 164. (Do.)

to redeem a mortgage and it is therefore now clear that he is not a necessary party to a mortgage suit.(13)

(3) In a suit to enforce a mortgage executed with the sanction of the Court by a Receiver appointed under O. 40 R. 1, Civil Procedure Code, the Receiver may be a proper party but the owners of the property who have interest in the right of redemption are necessary parties especially when they allege fraud and collusion between the mortgagee and the Receiver.(14)

The following persons are not necessary parties to a suit relating to a mortgage :

(a) A prior mortgagee. See the Explanation.
(b) A person merely in possession of the mortgaged property.(15)
(c) A person whose name is merely entered in the village papers as having some title to the plots in question, but who is in no way connected with the mortgage.(16)
(d) A person who has a right to be maintained out of the income of the mortgaged property when such right is not made a 'charge' on the property.(17)
(e) A person having merely an inchoate title to the property.(18)
(ee) A person acquiring right of redemption by transfer or adverse possession during pendency of suit.(18a)
(f) A Receiver appointed in a partition suit previous to the mortgage suit.(19)

('14) 1 AIR 1914 Mad 439 (439) : 37 Mad 418: 15 Ind Cas 334 (335) (DB). (Do.)
('01) 23 All 467 (471) (DB). (Do.)
('45) 32 AIR 1945 Oudh 87 (88, 89) : 20 Luck 53 (DB). (Neither the attaching creditor in execution of simple money decree nor the purchaser who had purchased property in execution of such decree is necessary party.)
('30) 17 AIR 1930 Mad 801 (807) : 53 Mad 881 (FB). (He is not a necessary party.)
('25) 12 AIR 1925 Mad 266 (269, 270). (Do.)
('31) 18 AIR 1931 Rang 108 (109) (DB). (Do.)
('20) 7 AIR 1920 Mad 126 (128) : 43 Mad 696 (DB). (Do.)
('29) 16 AIR 1929 All 861 (861) (DB). (Do.)
('21) 8 AIR 1921 Mad 30 (34) : 44 Mad 232 (DB). (Do.)
('12) 17 Ind Cas 432 (433) (DB). (Cal). (The attaching creditor is not a necessary party in a suit upon the mortgage brought before the C. P. Code, 1908.)
('31) 18 AIR 1931 Cal 763 (766, 770) : 58 Cal 598 (DB). (Creditor having attached before judgment—No interest—Not necessary party—After execution petition and application for rateable distribution, he gets right to redeem and is a necessary party—But after purchase in court-sale himself ceases to be a necessary party.)
[*See also* ('32) 19 AIR 1932 Cal 661 (663) : 59 Cal 827 (DB). (Attachment raised on security being furnished—Attaching decree-holder ceases to be a necessary party.)
('39) 26 AIR 1939 Pat 7 (11, 12) : 18 Pat 155 (DB). (Attaching decree-holder is not a necessary party.)
('38) 25 AIR 1938 All 651 (652). (Do.)
('36) 23 AIR 1936 Nag 209 (213) : ILR (1936) Nag 127 (DB). (He is not necessary party to suit on mortgage.)
('38) 25 AIR 1938 Mad 293 (294) (DB). (Decision as to case prior to amendment—Attaching creditor may be a proper party so long as the attachment subsides.)]

13 ('48) ILR (1948) Nag 133 (141) (DB). *Hafizbi* v. *Bhabutmal.*
†('36) 23 AIR 1936 All 512 (513).
('39) 26 AIR 1939 Lah 146 (147). (The fact that he purchases the property subsequently pending the suit does not alter situation.)
* ('36) 23 AIR 1936 Nag 209 (213, 214) : ILR (1936) Nag 127 (DB).
[*See however* ('38) 25 AIR 1938 Cal 471 (474) (DB). (Charge on decree—Person attaching decree is virtually assignee of decree under O. 21 R. 53, and is a necessary party to suit to enforce charge.)]

14 ('42) 29 AIR 1942 Cal 394 (401) (DB).

15 † ('24) 11 AIR 1924 Nag 191 (193, 194).
('21) 8 AIR 1921 Nag 67 (68) : 17 Nag L R 176. (Trespasser is not a necessary party.)
[*See also* ('32) 19 AIR 1932 Nag 144 (147, 148) : 28 Nag L R 69. (Redemption—Trespassers in possession—Decree against—Not binding on real heirs of deceased mortgagor.)]

16 ('25) 12 AIR 1925 All 593 (593).

17 (1900) 22 All 191 (199) : 27 Ind App 51 (PC). (*Obiter.*)

18 ('85) 9 Bom 10 (14, 15) (DB).

18a ('48) 35 AIR 1948 Nag 97 (99) : ILR (1947) Nag 719: *Sakhubai* v. *Eknath.*

19 ('28) 15 AIR 1928 Pat 304 (315) : 7 Pat 520 (DB).

(g) Where one of two co-owners of a property mortgages his undivided share and a suit is brought in relation to such mortgage, the other co-owner is not a necessary party thereto.(20)

(h) Where a number of persons own the equity of redemption in distinct shares and the mortgagee in his suit on the mortgage exempts one or more of such shares, and claims only a decree for a proportionate part of the mortgage debt, the owners of the exempted shares are not necessary parties.(21) The same rule applies where the mortgagee has released from the mortgage any portions of the property.(22)

(i) Where a mortgagee has, through negligence, allowed strangers to trespass upon and acquire parts of the mortgaged property, such persons are not necessary parties to a suit for redemption.(23) The general rule is that a mortgage is indivisible and hence suits cannot be brought for the redemption or enforcement of a mortgage part by part.(24)

(j) A judgment-creditor who has obtained an order for the appointment of a Receiver in execution proceedings for holding the property of the judgment-debtor (mortgagor) has no interest or charge in the property and is not a necessary party to a suit by the mortgagee. (25)

[*See also* ('25) 12 AIR 1925 Sind 167 (169): 19 Sind L R 268 (DB). (Mortgagee's property under management of manager under the Sind Encumbered Estates Act—Suit for redemption—Manager not a necessary party because the claim for redemption is not a claim for any "debt" against the mortgagee.)]

20 ('05) 32 Cal 746 (748) (DB).

21 ('05) 2 Cal L Jour 202 (216) (DB).
('08) 31 Mad 333 (336) (DB).
('03) 30 Cal 755 (757) (DB).
('06) 28 All 174 (177, 180) (FB).
('05) 1905 All W N 156 (156) (DB). (Portions already redeemed by paying proportionate amount—Owners of such portions are not necessary parties.)
('09) 1 Ind Cas 80 (81) (DB) (Mad).
[*See* ('31) 18 AIR 1931 Nag 44 (45): 27 Nag L R 4. (If mortgagee claims the whole debt from the rest, the exempted sharer in the equity of redemption would be a necessary party.)]
[*See also* ('13) 35 All 247 (248): 19 Ind Cas 614 (614) (DB).]

22 ('03) 30 Cal 755 (757) (DB).
('05) 1905 All W N 156 (156) (DB). (Where one item has been already redeemed, its owner is not necessary party to suit as to other items.)
See also the following cases holding that where a mortgagee has lost his rights against the owner of a portion of the property or has released such portion from mortgage, he cannot throw the whole burden on the rest of the property:
('06) 33 Cal 613 (621) (DB).
('05) 2 Cal L Jour 202 (216) (DB).
('12) 34 All 606 (612): 16 Ind Cas 401 (404) (DB).
('10) 6 Ind Cas 842 (846, 847) (DB) (Cal).
('80) 2 All 906 (907, 908) (DB).
('21) 8 AIR 1921 Cal 554 (555) (DB).
('20) 7 AIR 1920 Bom 306 (307): 44 Bom 223 (DB).
[Compare ('09) 1 Ind Cas 264 (277) (DB) (Cal).]
[But see ('13) 35 All 441 (444): 20 Ind Cas 41 (42, 43) (DB).
('98) 1898 All W N 120 (120).
('13) 19 Ind Cas 423 (423) (DB) (Cal). (Released part being property which mortgagor was not entitled to mortgage—Mortgagee can claim the whole debt from the rest of the property.)
('91) 18 Cal 320 (321) (DB). (Where whole property is included, mortgagee is not bound to apportion mortgage debt.)
('03) 25 All 79 (82) (DB). (Mortgagee's right to personal decree against mortgagor for balance not affected.)]

23 ('22) 9 AIR 1922 Bom 156 (157): 46 Bom 218 (DB).

24 ('75) 1 All 297 (300) (DB).
('02) 25 Mad 108 (113) (DB).
('27) 14 AIR 1927 Bom 513 (513) (DB).
†('68) 10 Suth W R 476 (476) (DB).
('22) 9 AIR 1922 Pat 70 (73): 6 Pat L Jour 465 (DB). (Exact interest of each of the mortgagors need not be considered.)
[But see ('70) 13 Moo Ind App 404 (408) (P C). (Purchaser of portion of equity of redemption in a portion of mortgaged premises entitled to redeem that portion on payment of proportionate amount.)
('66) 1 Agra 36 (38) (DB).
†('18) 5 AIR 1918 Mad 1142 (1144, 1145) (DB). (Suit by one co-owner for redemption of whole mortgage—Court can in suitable case pass decree for both reliefs viz., for partition and redemption of plaintiff's share.)]

25 ('37) I L R (1937) 1 Cal 65 (70): 164 Ind Cas 1009 (1010).

As to the parties to suits, other than suits for redemption, foreclosure or sale, by or against mortgagors or mortgagees, see the undermentioned cases.(26)

7. Trustees, executors or administrators.—The rule is made "subject to the other provisions of the Code." This would include O. 31 R. 1, Civil Procedure Code, under which a trustee, executor or administrator in whom the property is vested can effectively represent the persons beneficially interested. The latter need not therefore be joined as parties to a suit relating to the mortgage.(1) But the Court has a discretion to join the beneficiaries in a proper case,(2) as for example when, in the case of an executor, the estate has been fully administered,(3) or in the case of a trustee or an executor, his interest is adverse to that of the beneficiaries.(4) In the case of joint trustees, however, all of them should be impleaded in any suit relating to the mortgage.(5)

8. Benamidar.—It is now well settled that a benamidar can sue or be sued in his own name and that this rule applies to mortgage suits also.(1) The real owner is not a necessary party to such a suit. The contrary view, held in

26 ('70) 2 N W P H C R 72 (73) (DB). (Suit for possession by mortgagee against third party who denies mortgagee's title—Mortgagor is a necessary party.)
('68) 5 Bom H C R O C 76 (81, 82) (DB). (Suit by puisne mortgagee against first mortgagee who has been paid the amount due to him to recover the mortgaged premises—Mortgagor is a necessary party.)
('74) 22 Suth W R 532 (533) (DB). (Suit by mortgagee for possession—Subsequent mortgagees and purchasers who opposed him in obtaining possession are proper parties.)
('76) 25 Suth W R 39 (40) (DB). (Mortgagee's suit for khas possession of undefined area of the mortgaged land—Co-mortgagees are necessary parties.)
('12) 36 Bom 624 (627) : 17 Ind Cas 87 (88) (DB). (Suit by puisne mortgagee to establish his mortgage and to set aside the order passed against him in claim proceedings in suit brought by prior mortgagee—Mortgagor is necessary party to puisne mortgagee's suit.)
('88) 15 Cal 35 (38). (Suit to determine the rights of the puisne and prior mortgagees *inter se*—Mortgagor is necessary party.)
('01) 5 Cal W N 423 (425) (DB). (Mortgagee purchasing a portion of the property in execution of his mortgage decree—Suit by him for contribution against purchasers of other portions of the mortgaged property—Mortgagor is not necessary party.)
('31) 18 AIR 1931 P C 229 (231) (PC). (Suit for accounts by some mortgagors against assignee decree-holder purchaser—Other co-mortgagors previously held entitled jointly to account, not impleaded—Suit bad for non-joinder.)
('36) 40 Cal W N 428 (430) (DB). (Receiver appointed by Court mortgaging certain property—Property sold in execution of mortgage decree—Suit by owner for declaration that the sale is not binding—Receiver must be impleaded.)
('37) 24 AIR 1937 All 646 (647) : ILR (1937) All 723 (DB). (Suit by one co-mortgagee for possession on basis of usufructuary mortgage—Other co-mortgagee is a necessary party.)

Note 7

1 ('02) 6 Cal W N 488 (489) (DB). (Foreclosure decree against executor binds beneficiaries though not parties to the suit.)
('31) 18 AIR 1931 Bom 533 (537) (DB).
2 ('84) 10 Cal 713 (718) (DB). (Executor finding it difficult to sue debtor—Legatee may sue.)
('27) 14 AIR 1927 Bom 49 (50) : 51 Bom 16 (DB).
3 (1866) 3 Eq 368 (374).
4 ('89) 13 Mad 197 (206, 207) (DB).
5 ('12) 13 Ind Cas 234 (234) (DB) (Mad).
('39) 26 AIR 1939 Oudh 161 (171) : 14 Luck 548 (DB). (Mortgagor creating trust for paying debts including that on mortgages—Trustees subsequently discharged, debtor having taken possession of properties—Debtor declared insolvent—Suit by mortgagee on mortgages against debtor, his son and receiver—Equity of redemption held not represented in mortgage suit as trustees were not joined.)
[Contra ('08) 34 Mad 406 (414) (DB).
('03) 26 Mad 649 (653) (FB).]

Note 8

1 *('96) 18 All 69 (74) (DB).
('33) 20 AIR 1933 Mad 635 (636) (DB). (A transferee from the heirs of a benamidar mortgagor can maintain a suit for redemption.)
†('99) 21 All 380 (382, 384) (DB).
('06) 28 All 44 (46).
('98) 22 Bom 672 (678, 679) (DB).
('97) 24 Cal 644 (645) (DB).
('92) 15 Mad 267 (268) (DB). (Presumption is that benamidar instituted suit with the authority of real owner and latter is bound by result of such suit.)
('05) 28 Mad 205 (207) (DB).
†('14) 1 AIR 1914 Cal 323 (324) (DB).
('72) 17 Suth W R 192 (193) (DB).
†(1900) 13 C P L R 33 (37).
*(18) 5 AIR 1918 P C 140 (143): 46 Cal

the undermentioned cases,(2) is not good law. There is, however, no impropriety in adding the real owner as a party in proper cases.(3)

9. Sub-mortgagee.—Where a mortgagee creates a mortgage of his rights in favour of another, he is said to create a sub-mortgage. The sub-mortgagee is entitled to bring to sale the 'interest' of the sub-mortgagor in the mortgage,(1) and the original mortgagor is not a necessary party to such a suit.(2) Where the mortgagor is also made a party to the suit, the sub-mortgagee may sue for sale or foreclosure of the 'mortgaged property itself' in cases and in the circumstances which would have entitled the sub-mortgagor on the date of the sub-mortgage to claim that relief, for the purpose of working out his rights against the sub-mortgagor.(3) The mortgagor is not a necessary party to a suit for redemption by the sub-mortgagor against his sub-mortgagee,(4) though there is no impropriety in making him a party thereto.(5) In a suit for redemption by the mortgagor against his mortgagee, the sub-mortgagee, as being interested in the mortgage security is a necessary party.(6) But where the mortgagor, not having notice of the sub-mortgage, fails to implead him in such suit and pays off the mortgage amount to the mortgagee, the sub-mortgagee cannot, after that redemption, bring the right mortgaged to him to sale.(7) The reason is that he has only a terminable interest in the mortgage right of his sub-mortgagor and when that right has been legally terminated, his security so far is gone.

566 : 46 Ind App 1 (PC).
('24) 11 AIR 1924 Pat 458 (459) : 3 Pat 81 (DB).
('97) 24 Cal 34 (36) (DB).
('98) 22 Bom 820 (823) (DB).
('25) 12 AIR 1925 Cal 973 (978, 979) (DB).
('08) 30 All 30 (32) (DB).
('10) 7 Ind Cas 166 (170) (DB) (Cal).
2 ('89) 16 Cal 364 (366) (DB).
('98) 25 Cal 98 (99) (DB).
('03) 30 Cal 265 (272) (DB).
('07) 30 Mad 245 (246) (DB).
3 ('29) 16 AIR 1929 Mad 268 (269, 270) (DB).

Note 9

1 ('43) 30 AIR 1943 Mad 498 (499): ILR (1944) Mad 104: 213 Ind Cas 270 (DB). *Vengannan Chettiar & Sons* v. *Ramaswamy.*
('07) 29 All 385 (406) (FB).
('11) 9 Ind Cas 765 (765) (DB) (Bom).
(21) 8 AIR 1921 Lah 253 (254) (DB).
('04) 26 All 611 (613, 617) (DB).
('09) 2 Ind Cas 645 (646) (DB) (Cal).
('97) 20 Mad 35 (38, 39) (DB).
†(1900) 1900 Pun Re No. 31, page 102 (111) (FB).

The following cases of the Allahabad High Court which held that he could get only a money decree against the sub-mortgagor are no longer good law:
('96) 18 All 113 (114) (DB).
('01) 1901 All W N 153 (154).
('03) 25 All 46 (47) (DB).
('05) 27 All 364 (370) (DB).
('05) 27 All 511 (512).
2 ('09) 4 Ind Cas 433 (434) (DB) (Cal).
('10) 5 Ind Cas 654 (655) (DB) (Cal). (It is however open to him to implead original mortgagor.)
('11) 9 Ind Cas 765 (765) (DB) (Bom).
('21) 8 AIR 1921 Lah 253 (254) (DB).
3 ('43) 30 AIR 1943 Mad 498 (499): ILR (1944) Mad 104: 213 Ind Cas 270 (DB). *Vengannan Chettiar & Sons* v. *Ramaswami.*
('40) 27 AIR 1940 Pesh 25 (26), (Sub-mortgagee can sue for sale of the mortgaged property if the mortgagor has not paid the amount to the mortgagee.)
('08) 5 All L Jour 402 (403).
('09) 2 Ind Cas 645 (646) (DB) (Cal).
('97) 20 Mad 35 (38, 39) (DB).
('04) 26 All 611 (617) (DB).
('13) 18 Ind Cas 389 (390, 391) (Oudh).
('05) 27 All 472 (477, 478) (DB), (Sub-mortgagee can redeem under the Transfer of Property Act, S. 91, prior mortgage.)
[*See also* (1900) 1900 Pun Re No. 31, page 102 (111) (FB), (Sub-mortgagee is entitled to retain possession until amount due to him is paid off.)]
[*But see* ('37) 24 AIR 1937 Rang 56 (60) (DB), (Property of original mortgagor cannot be sold by the sub-mortgagee in a suit against the sub-mortgagor and the original mortgagor—English law does not apply.)]
4 ('22) 9 AIR 1922 Bom 424 (426) (DB).
5 ('22) 9 AIR 1922 Bom 424 (426) (DB).
6 ('32) 19 AIR 1932 Mad 115 (116): 55 Mad 320 (DB).
('06) 28 All 638 (640) (DB).
('91) 15 Bom 692 (693, 694) (DB), (Form of decree given.)
('22) 9 AIR 1922 Bom 350 (351): 46 Bom 993 (DB).
('27) 14 AIR 1927 Mad 703 (704).
[*See* (10) 37 Cal 239 (250): 37 Ind App 19: 5 Ind Cas 151 (152, 153) (PC). (Sub-mortgagee by deposit of title deeds not impleaded—Not bound by decree or sale.)]
7 ('40) 27 AIR 1940 Pesh 25 (26).
('32) 19 AIR 1932 Mad 115 (117): 55 Mad 320 (DB).
('21) 8 AIR 1921 Mad 374 (376) (DB).

10. Prior mortgagees—Explanation.—Under section 85 of the Transfer of Property Act it was held in some cases that a prior mortgagee was a necessary party to a suit to enforce or redeem a puisne mortgage.(1) These cases have been superseded by the explanation to the present rule under which a prior mortgagee or his transferee is not a necessary party to a suit relating to a puisne mortgage.(2) But there is no prohibition against joining a prior mortgagee in such a suit,(3) and the equities of a particular case may even demand that he should be so made a party.(4)

Where a decree for sale is passed on foot of a puisne mortgage, without making the prior mortgagee a party to the suit, the rights of the prior mortgagee are in no way affected and the sale under the decree can only be subject to the prior mortgage.(5) Even if the prior mortgagee is made a party to the puisne mortgagee's suit he is not bound to assert his prior right, if 'no relief' is claimed against him and 'the priority of his right is not in any way impugned,' and the decree in the suit cannot affect his rights.(6) But where he is impleaded and his prior right impugned or sought to be postponed in any way, he is bound to assert his right under the prior mortgage. Otherwise, his right will be barred by constructive 'res judicata.(7) (See also under sub-heading "suits by puisne mortgagee against the mortgagor and the prior mortgagee" in Note 40 on S. 11

Note 10

1 ('04) 14 Mad L Jour 467 (468) (DB).
('97) 19 All 543 (545) (DB).
('95) 22 Cal 33 (39) (DB).
('06) 30 Bom 156 (162) (DB).
('98) 22 Bom 701 (707).
('98) 20 All 110 (114, 115) (FB).
('91) 13 All 432 (465) (FB).
(1900) 22 All 212 (214) (DB).
('91) 13 All 581 (585) (DB). (Property cannot be sold subject to a prior mortgage.)
('90) 12 All 548 (549) (DB). (Suit ignoring prior mortgage is brought on false allegation and should be dismissed.)
('99) 21 All 272 (273) (DB). (Failure to acknowledge prior lien of a defendant not fatal to suit.)
('01) 1901 All W N 68 (69). (Suit by subsequent mortgagee for sale—Prior mortgage ignored—Offer to redeem if prior mortgage found valid—Suit maintainable. [Compare ('95) 17 All 48 (50, 51) (DB).]
[*See however* ('07) 29 All 205 (206) (DB). (Sale subject to prior charge for maintenance allowed.)]

2 ('48) 35 AIR 1948 Pat 111 (111): *Sarat Chandra* v. *Chintamani*.
('26) 13 AIR 1926 Nag 135 (136).
†('16) 3 AIR 1916 Pat 113 (114): 2 Pat L Jour 118 (DB).
('12) 13 Ind Cas 182 (182) (DB) (Mad).
('09) 36 Cal 193 (210) (DB).
('20) 7 AIR 1920 Pat 630 (631) (DB).
('98) 1 Oudh Cas 105 (111, 112).
('09) 1 Ind Cas 139 (139) (DB) (Cal).
('97) 1 Cal W N 453 (455).
('14) 1 AIR 1914 Bom 268 (269): 38 Bom 24: 21 Ind Cas 39 (41) (DB). (Non-joinder of prior mortgagee in suit by puisne mortgagee does not affect latter's right to redeem prior mortgage.)
[*See however* ('38) 25 AIR 1938 Oudh 10 (11): 13 Luck 625 (DB). (In this case the prior mortgagee brought a suit against the mortgagor and the puisne mortgagee—The suit was decreed against the mortgagor but dismissed against the puisne mortgagee—It was held that on account of this decree the prior mortgagee lost his priority over the puisne mortgagee but that he was entitled to redeem the puisne mortgage and that he was therefore a necessary party to the suit to enforce the puisne mortgage.)]

3 ('29) 16 AIR 1929 Nag 135 (136): 25 Nag L R 171.
('97) 1 Cal W N 453 (455).
[*See also* ('36) 23 AIR 1936 Rang 340 (341).]

4 ('20) 7 AIR 1920 Mad 650 (651) (DB).

5 ('12) 16 Ind Cas 779 (779) (DB) (Mad).
('30) 17 AIR 1930 All 113 (114): 52 All 426 (DB).
('95) 22 Cal 33 (46).
('29) 16 AIR 1929 All 126 (127).
Also see O. 34 R. 12, Note 2.

6 ('24) 11 AIR 1924 Nag 191 (193).
('30) 17 AIR 1930 All 113 (113): 52 All 426 (DB).
†('31) 18 AIR 1931 All 76 (79, 80) (DB).
('26) 13 AIR 1926 All 449 (449): 48 All 554 (DB).
*('20) 7 AIR 1920 P C 81 (83): 47 Cal 662: 47 Ind App 11 (PC).
('15) 2 AIR 1915 Cal 373 (374) (DB).
('12) 13 Ind Cas 182 (182) (DB) (Mad).
†('20) 7 AIR 1920 Pat 630 (631) (DB).
('31) 18 AIR 1931 Pat 33 (38): 9 Pat 816 (DB).
('05) 1 Cal L Jour 337 (350) (DB).
('37) 24 AIR 1937 Cal 446 (449) (DB).

7 ('23) 10 AIR 1923 Pat 290 (291): 2 Pat 435 (DB).
('04) 31 Cal 428 (431, 432) (DB).
†('31) 18 AIR 1931 Pat 33 (38): 9 Pat 816 (DB).
('05) 1 Cal L Jour 337 (350) (DB).
('02) 24 All 429 (436): 29 Ind App 118 (PC).
†('12) 39 Cal 527 (557, 558): 39 Ind App 68: 14 Ind Cas 496 (502) (PC).

of the A. I. R. Commentaries on the Code of Civil Procedure, 4th (1944) (Edn.) When a prior mortgagee who has also purchased the equity of redemption and is in possession of the mortgaged property is made a defendant to a suit upon the puisne mortgage, the decree may direct the puisne mortgagee to redeem the prior mortgage before bringing the property to sale.(8)

A holds a first and a third mortgage on a property. B, the holder of the second, i.e., the intermediate mortgage, impleads A as a defendant to his suit on the ground that he is a 'third' mortgagee. A is not bound to set up his prior mortgage inasmuch as the prior mortgage is not impugned.(9) But he is not precluded from setting up the prior mortgage and if he so sets it up it should be adjudicated upon by the Court.(10) Where A's claim to the priority rests not on a prior mortgage in his favour but on the fact of his being 'subrogated' to the rights of a prior mortgagee by payment, he must assert the right to such priority on pain of being precluded by 'res judicata' from putting it forward in a subsequent suit.(11) The reason is that in such a case he fills only 'one role," viz., that of puisne mortgagee and must put forward all the defences open to him. Where, however, the puisne mortgagee 'admits' in the plaint the right of A to priority, it is not necessary that A should appear in Court and set up his rights under the prior mortgage.(12) As to whether a person holding two mortgages on the same property can sue on the later mortgage subject to his rights under the earlier mortgage, see Notes on section 67A of the Transfer of Property Act.

11. Mahomedan co-heirs.—Where a Muhammadan mortgagor or mortgagee dies leaving a number of heirs, the ordinary rule is that all the heirs should be made parties to a suit relating to the mortgage.(1) But it has been held that a failure to implead some of the heirs of a mortgagor is no ground for dismissing the entire suit and that the suit may be decreed so far as the shares of the heirs actually joined are concerned.(2)

Supposing that some of the heirs of a deceased Muhammadan mortgagor have not been joined as defendants to a suit to enforce the mortgage, will the

8 †('12) 34 All 323 (328): 14 I.C. 674 (677) (DB).
('08) 31 Mad 425 (428) (DB).
('23) 10 AIR 1923 All 423 (423).
[*See* ('33) 20 AIR 1933 Mad 595 (596). (Prior mortgagee impleading second mortgagee and obtaining decree—Property purchased by private sale and satisfaction of decree entered—Subsequent suit by second mortgagee impleading prior mortgagee—Decree directing sale of property subject to his lien—Property purchased in execution—Second mortgagee purchaser is entitled to possessionn.)]
[*But see* ('29) 16 AIR 1923 All 296 (298) (DB). (Subsequent mortgagee paying prior mortgagee—Suit by intermediate mortgagee—Subsequent mortgagee cannot insist on prior mortgage being paid—Property can be sold subject to prior mortgage.)]

9 ('26) 13 AIR 1926 All 449 (449): 48 All 554 (DB).
('09) 9 Cal L Jour 78 (81) (DB).
†('36) 23 AIR 1936 All 578 (583): 58 All 1056 (FB).
('15) 2 AIR 1915 Cal 373 (374) (DB).
[*But see* ('04) 8 Cal W N 385 (389, 390) (DB). (Puisne mortgagee being a necessary party must, when impleaded, set up his prior as well as subsequent mortgages.)]

10 ('11) 9 Ind Cas 643 (643) (DB) (Mad).
[*See also* ('36) 23 AIR 1936 Rang 340 (341) (Prior mortgagee joined as party in suit on subsequent mortgage—Mortgagee not objecting to issues as to genuineness or otherwise of his mortgage but offering evidence in support of his title—Court has jurisdiction to decide the matters raised in the suit.)]

11 ('16) 3 AIR 1916 Cal 808 (808) (DB).
†('12) 39 Cal 527 (545): 39 Ind App 68: 14 Ind Cas 496 (504) (PC).
('09) 3 Ind Cas 686 (688) (DB) (Cal).
('31) 18 AIR 1931 Pat 33 (38): 9 Pat 816 (DB).
[*But compare* ('27) 14 AIR 1927 Nag 38 (39). (Decision by Court on question of subrogation is unnecessary.)]

12 ('36) 23 AIR 1936 All 578 (583): 58 All 1056 (FB).

Note 11

1 ('87) 11 Bom 425 (428) (DB).
('70) 14 Suth W R 216 (216) (DB).
[*See also* ('32) 19 AIR 1932 Cal 34 (35.)]

2 ('15) 2 AIR 1915 Bom 272 (272): 39 Bom 729 (DB).
†('19) 6 AIR 1919 Bom 135 (136): 43 Bom 575 (581) (DB).
[*See also* ('95) 19 Bom 273 (275) (DB).]

decree passed in the suit be binding on all the heirs? This question arose in 'Khiarajmal' v. Daim.(3) In that case, one Nabibaksh was impleaded as a defendant to a suit by the mortgagee. Nabibaksh died pending the suit, leaving two widows, one minor son and one minor daughter as his heirs. The widows and the son alone were brought on the record as his legal representatives. It was held by the Privy Council that Nabibaksh's estate was fully represented in the suit, notwithstanding the omission to bring on record his minor daughter. But with reference to the estate of another person, Naurez by name, the Privy Council held in the same case, that the impleadment of only one of his heirs was not sufficient to make the estate of Naurez represented in a suit to enforce payment of a debt due by Naurez. The question arose in the following circumstances. Naurez died before the suit was instituted, leaving a widow and four children including a son, Amirbaksh, a minor. Only Amirbaksh by his guardian, his uncle, Alahnawaz, was joined as a defendant to the suit. In holding that the estate of Naurez was not represented for the purpose of the suit, their Lordships observed as follows:

> " Amirbaksh was, of course, one of the heirs of Naurez, but in no other sense his legal representative. It is not pretended that Alahnawaz was in any legal sense or in fact his guardian, or was even appointed his guardian 'ad litem'.....The Indian Courts have properly exercised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family, and in refusing to disturb judicial sales on the mere ground that some members of the family, who were minors, were not made parties to the proceedings, if it appears that there was a debt justly due from the deceased, and no prejudice is shown to the absent minors. But these are usually cases where the person named as defendant is 'de facto' manager of a Hindu family property, or has the assets out of which the decree is to be satisfied under his control."

It would appear from the decision taken as a whole and in the light of the remarks quoted above (see the last clause in the passage quoted) that in their Lordships' view, even in the case of Mahomedan co-heirs (to whom considerations applicable to Hindu joint families may not apply) if one of the co-heirs is in possession of the property of the deceased liable to be proceeded against, a decree passed against him alone would bind the entire estate. The undermentioned decisions(4) fall within this principle. The decisions cited below(5) in which it was held that although the heir who was sued was in possession of the property proceeded against, the other heirs would not be bound by the decree against him, do not appear to lay down good law in view of the Privy Council decision. Similarly, decisions holding in unqualified terms that a decree passed in a suit impleading as a defendant only one of the heirs of the deceased would

3 ('05) 32 Cal 296 (313, 314): 32 Ind App 23 (PC).
[*See also* ('25) 12 AIR 1925 All 479 (480): 47 All 466 (DB).]

4 ('40) 27 AIR 1940 Oudh 230 (231): 15 Luck 463 (DB). (In spite of the omission to implead the heir of the deceased in the mortgage suit the estate was sufficiently represented.)
('15) 2 AIR 1915 Bom 272 (272): 39 Bom 729 (DB).
('94) 21 Cal 311 (318) (DB).
('82) 8 Cal 370 (374).
†('96) 20 Bom 338 (345) (DB).
('75) 1 All 57 (59) (FB). (Heir not impleaded being in possession—He is not bound by decree against another heir.)

5 ('23) 10 AIR 1923 Bom 411 (412): 47 Bom 712 (DB).
('35) 22 AIR 1935 Lah 203 (205).
('19) 6 AIR 1919 Bom 135 (136): 43 Bom 575 (DB).
('79) 4 Cal 142 (156) (FB).
('01) 23 All 263 (265) (DB).
('85) 7 All 716 (719) (DB).
('85) 7 All 822 (826) (FB).
('19) 6 AIR 1919 Bom 61 (63): 43 Bom 412 (426) (DB).
('76) 2 Cal 395 (398) (DB).
('82) 11 Cal L. Rep (268) (272) (DB).
[*See also* ('36) 23 AIR 1936 All 94 (97): 58 All 594. (In this case it is held broadly that the heir who is not impleaded will not be bound by the decree—The question as to who was in possession of the mortgaged property is not adverted to.)
('87) 14 Cal 464 (483) (DB).]

bind the whole estate(6) also do not appear to lay down correct law. In the undermentioned decisions(7) it was held that the heir who had not been impleaded was not bound by the decree passed against one of the heirs alone; but it is not clear whether the heir who was sued was in possession of the assets of the deceased.

12. Joint Hindu family.—There is a conflict of decisions as to whether, in a suit by or against the manager of a joint Hindu family to enforce or redeem a mortgage, the other members of the family are necessary parties in the sense that their interests will not be bound if they are not individually joined as parties. On the one hand, it has been held by the High Courts of Madras(1) and Patna(2) and in several cases of the other High Courts(3) that in such a case the manager effectively 'represents' the other members of the family and that the latter cannot impugn the proceedings as not binding on them merely on the ground of their not having been individually made parties to the suit. But in many other decisions,(4) it has been held that the other coparceners are necessary parties to the suit and that their interests cannot in any way be affected by the result of the suit. In this connection, the undermentioned decisions of

6 *See* ('88) 12 Bom 101 (103) (DB).
7 ('23) 10 AIR 1923 Bom 411 (411): 47 Bom 712 (DB).
('70) 14 Suth W R 448 (449) (DB).

Note 12

1 ('85) 8 Mad 388 (393) (DB).
('98) 21 Mad 222 (225) (DB).
('99) 22 Mad 207 (208) (DB). (Following 21 Mad 222.)
†('12) 35 Mad 685 (688, 691): 10 Ind Cas 874 (878, 879) (DB).
('30) 17 AIR 1930 Mad 69 (71) (DB).
('20) 7 AIR 1920 Mad 814 (814) (DB). (Father manager not precluded from suing in his own name merely because he purports to execute the document also as guardian of his minor sons.)
2 ('17) 4 AIR 1917 Pat 104 (106) (DB).
('32) 19 AIR 1932 PAT (80) (85): 10 Pat 670 (DB).
†('17) 4 AIR 1917 Pat 352 (353) (DB).
('26) 13 AIR 1926 Pat 207 (208): 4 Pat 723 (DB).
('23) 10 AIR 1923 Pat 290 (292): 2 Pat 435 (DB).
†('21) 8 AIR 1921 Pat 377 (378): 6 Pat L Jour 640 (DB).
('22) 9 AIR 1922 Pat 252 (253): 6 Pat L Jour 650 (DB).
('20) 7 AIR 1920 Pat 251 (252) (DB).
('17) 4 AIR 1917 Pat 375 (377): 2 Pat L Jour 306 (DB).
('17) 4 AIR 1917 Pat 674 (674).
†('36) 23 AIR 1936 Pat 3 (4, 5) (DB). (One of the legal representatives of Hindu mortgagee being minor—Minor forming joint family with major brothers —Major brothers made parties—Minor is properly represented.)
3 ('48) 35 AIR 1948 Nag 324 (326): ILR (1948) Nag 393 (DB). *Trimbak Raoji* v. *Lonkaran*. (Suit for foreclosure against manager—Minor member not made party Manager can represent him—Decree is binding on him unless prejudice is shown)
†('44) 31 AIR 1944 Bom 35 (36) (DB). (But other members of the family can stop the sale in the manner provided by R. 5.)
†('27) 14 AIR 1927 Oudh 27 (29, 30): 2 Luck 288 (DB).
('10) 34 Bom 354 (358) (DB).
(1900) 27 Cal 724 (743) (DB). (Per Ghose, J.)
('12) 14 Ind Cas 333 (335) (DB) (Cal).
*('12) 34 All 549 (554, 555, 558): 15 Ind Cas 126 (129) (FB).
('12) 34 All 572 (575): 15 Ind Cas 138 (139) (FB).
('12) 15 Ind Cas 876 (877) (DB) (All).
†('13) 9 Nag LRI (7, 8): 18 Ind Cas 848 (852).
('13) 21 Ind Cas 192 (193) (DB) (All).
('15) 2 AIR 1915 Cal 432 (433) (DB).
('15) 2 AIR 1915 All 318 (319).
('24) 11 AIR 1924 Oudh 17 (19) (DB).
('98) 1 Oudh Cas 53 (58, 62) (DB).
('24) 11 AIR 1924 All 738 (739) (DB).
('24) 11 AIR 1924 All 908 (908): 46 All 709 (DB).
†('29) 16 AIR 1929 Bom 213 (214): 53 Bom 444.
('10) 7 Ind Cas 902 (904, 905) (DB) (All).
('17) 4 AIR 1917 Nag 105 (106).
('19) 50 Ind Cas 243 (247) (A G G C I).
*('36) 23 AIR 1936 Sind 87 (89, 90): 30 Sind L R 42 (DB).
4 ('10) 8 Ind Cas 633 (634) (Bom).
('14) 1 AIR 1914 All 125 (126) (DB).
('14) 1 AIR 1914 Cal 455 (456): 41 Cal 727 (DB).
('12) 40 Cal 342 (350): 17 Ind Cas 577 (580) (DB).
('12) 14 Ind Cas 35 (37) (DB) (All).
('01) 28 Cal 517 (531) (SB).
(1900) 27 Cal 742 (756) (DB). (Per Herington, J.)
('06) 30 Bom 477 (486).
('08) 30 All 256 (257) (DB).
('07) 29 All 311 (315, 317) (DB).
('98) 24 All 211 (213) (DB).
('95) 17 All 537 (568) (FB).
('93) 15 All 75 (83) (FB).

the Privy Council should be referred to.(5) In 'Kishan Prasad' v. 'Har Narain(6), it was held that the manager of a joint Hindu family business effectively represents the family in all litigation by or against the family in connection with the joint family business. In 'Sheo Shankar' v. 'Jaddo Kunwar',(7) the Privy Council observed as follows :

> "There seems to be no doubt upon the Indian decisions from which their Lordships see no reason to dissent) that there are occasions, including foreclosure actions when the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound."

In 'Ganpat Lal' v. 'Bindbasini Prashad,'(8) a minor coparcener sued for a declaration that his right to redeem a mortgage was unaffected by a sale under a decree passed against the manager without impleading him (the minor) as a party. Their Lordships rejected that claim holding that, after the purchase under his decree, the mortgagee was in the position of a purchaser and that unless the sale and the decree were attacked in a properly constituted suit, his possession could not be disturbed. In 'Lingan Gowda' v. 'Basan Gowda,'(9) the Privy Council held that S. 11, Explanation VI of the Civil Procedure Code was applicable to a joint Hindu family. In view of the foregoing decisions of the Privy Council, the Madras and Patna view must be accepted as correct. See also Note 61 on S. 11 of the A.I.R. Commentaries on the Code of Civil Procedure, 4th (1944) Edn. Even granting that the son is a necessary party to a suit against the father, where he is impleaded as a legal representative of his father, he cannot object to the decree in the executing Court, on the ground of the plaintiff's failure to implead him.(10) Nor does the plaintiff mortgagee lose his right to sue the son separately by his failure to join him in the suit against the father.(11)

On the question whether in a suit by or against the manager of a joint Hindu family the manager should be 'expressly' and 'specifically' stated as suing or as being sued in his representative capacity as manager, there is a conflict of decisions, some cases holding that such express mention is not necessary,(12) and others holding that it is.(13) The better view, it is submitted, is that the question whether a manager sues or is sued in a representative character, is a question of fact in each case and his specific description as manager is not essential.

Although it may not be legally necessary to implead the other coparceners in a suit by or against a manager, yet, they would be 'proper' parties to such a suit.(14) Further, the right of the other coparceners to object, not on the ground

5 ('11) 33 All 272 (278) : 38 Ind App 45 : 9 Ind Cas 739 (741) (PC).
('14) 1 AIR 1914 P C 136 (137) : 36 All 383 : 41 Ind App 216 (PC).
('20) 7 AIR 1920 P C 1 (2, 3) : 47 Cal 924 : 47 Ind App 91 (PC).
('27) 14 AIR 1927 P C 56 (56, 57) : 51 Bom 450 : 54 Ind App 122 (PC).

6 ‡('11) 33 All 272 (278) : 38 Ind App 45 : 9 Ind Cas 739 (741) (PC).

7 ‡('14) 1 AIR 1914 P C 136 (137) : 36 All 383 : 41 Ind App 216 (PC).

8 ('20) 7 AIR 1920 P C 1 (2, 3) : 47 Cal 924 : 47 Ind App 91 (PC).

9 ('27) 14 AIR 1927 P C 56 (56, 57) : 51 Bom 450 : 54 Ind App 122 (PC).

10 ('99) 21 All 356 (367, 358) (DB).

11 ('99) 21 All 301 (307) (DB).

12 ('48) 35 AIR 1948 Nag 324 (327) : ILR (1948) Nag 393 (DB). .*Trimbak Raoji* v. *Lonkaram.*
AIR 1927 P. C. 56: 51 Bom 450: 54 Ind App 122 (PC) and AIR 1935 Nag 14: 31 Nag LR 352 Rel on).
('30) 17 AIR 1930 Pat 293 (297) (DB).
('23) 10 AIR 1923 All 284 (284) (DB).
('12) 34 All 549 (571) : 15 Ind Cas 126 (129) (FB).
('21) 8 AIR 1921 Pat 377 (378) : 6 Pat L Jour 640 (DB).
('36) 23 AIR 1936 Sind 87 (89, 90) : 30 Sind LR 42 (DB).

13 ('16) 3 AIR 1916 Bom 278 (279) : 40 Bom 248 (DB).
('16) 3 AIR 1916 Pat 310 (311) : 1 Pat L Jour 468 (DB).

14 ('03) 25 All 162 (164) (DB).
('02) 24 All 459 (460) (DB).
†('39) 26 AIR 1939 All 6 (7).
('37) 24 AIR 1937 Nag 121 (122) : ILR (1937) Nag 366. (Suit on mortgage executed by father of joint family property-- Son contending that mortgage is executed without any legal necessity should be joined as proper party.)

of their non-joinder, but on the ground of the debt being not binding on them, or as being tainted with illegality or immorality, is not affected by proceedings to which they have not been parties.(15) But in a suit on a mortgage of joint family property where the 'manager' is not made a party, 'all' the other members are necessary parties.(16) Similarly, where the father is impleaded but he does not, or cannot, act in a representative character, the other members should be joined if their interests are sought to be affected.(17)

To a suit against the members of a Mitakshara joint family for the enforcement of a mortgage, the mother is not a necessary party.(18) To a suit to enforce the mortgage of the share of one coparcener alone, the other coparceners are not necessary parties.(19) Similarly, where the mortgage is not a 'joint family transaction' but one entered into by a member of the family in his 'individual' capacity, the other members are not necessary parties.(20)

Where the parties are not governed by Hindu law, and the son, under the customary law, is entitled only to a reversionary interest for the protection of which he has the right to interfere to prevent unnecessary alienations of the property, the son's interest is not suffiicent to entitle him to be made a party to a suit on the mortgage.(21)

13. Assignee of mortgage.—In a suit for redemption of a mortgage against the assignee thereof, the original mortgagee is not a necessary party.(1) But in a suit to enforce the mortgage brought by the assignee of the mortgage, the original mortgagee is a necessary party where the mortgagor denies receipt of consideration.(2)

14. Receiver in insolvency.—Where the mortgagor becomes insolvent after the date of the mortgage, the mortgagee bringing a suit on his mortgage is bound to implead the Official Receiver or Official Assignee as a party there- to (1) The undermentioned cases (2) to the contrary are no longer good law in view of the decision of the Privy Council in **Kala Chand v. Jagannath. (3)** See also O.22 R. 10, Note 10 of the A.I.R. commentaries on the Code of Civil procedure, 4th (1944) Edition.

15. Lessee.—A lessee who has been inducted on the land by the mortgagor or by the mortgagee and whose interest will be affected by the result of

15 †('03) 25 All 214 (223) (DB).
('10) 34 Bom 354 (357) (DB).
('98) 21 Mad 222 (225) (DB).
('39) 26 AIR 1939 All 6 (7).

16 ('42) 29 AIR 1942 Oudh 197 (198) : 17 Luck 482.
('13) 21 Ind Cas 712 (713) (DB) (All).

17 ('20) 7 AIR 1920 Oudh 84 (86).
('14) 1 AIR 1914 Nag 31 (31) : 10 Nag L R 72.
('12) 17 Ind Cas 734 (735) (All). (Father in jail—Minor son not represented—Son not bound.)
('17) 4 AIR 1917 Mad 761 (763, 765) (DB). (Once the parties have become divided in interest the father cannot sue on behalf of his son.)
[*See also* ('33) 20 AIR 1933 Nag 44 (46) : 29 Nag L R 77.]

18 ('36) 23 AIR 1936 P C 20 (24) : 63 Ind App 33 : 63 Cal 691 (PC).

19 ('13) 21 Ind Cas 689 (690) (Bom).

20 ('02) 1902 Pun Re No. 15, p. 53 (56) (DB).
('04) 1 All L Jour 367 (368). (Mortgage of property which is not ancestral.)
('15) 2 AIR 1915 Mad 387 (390) (DB) (Mortgage in favour of coparcener who does not disclose that he is lending joint family funds—He is entitled to sue without joining other coparceners.)
[*See also* ('89) 13 Bom 51 (53) (DB).]

21 ('19) 6 AIR 1919 Lah 40 (40) : 1919 Pun Re No. 125.

O. 34 R. 1 N. 13

1 ('26) 13 AIR 1926 Sind 145 (147) : 20 Sind L R 277.

2 ('10) 7 Ind Cas 69 (69) (DB) (All).

O. 34 R. 1 N. 14

1 †('27) 14 AIR 1927 P C 108 (109) : 54 Ind App 190 : 54 Cal 595 (P C). (Reversing A I R 1925 Cal 785).
†('35) 22 AIR 1935 Lah 316 (318).
('02) 25 Mad 406 (423) (DB).
('35) 22 AIR 1935 Cal 460 (462) : 62 Cal 483 (DB).

2 ('27) 14 AIR 1927 Mad 609 (610). (Decided before the decision in AIR 1927 P C 108 : 54 Ind App 190 : 54 Cal 595 (PC).)
('30) 17 AIR 1930 Lah 791 (792) (DB). (Which simply follows AIR 1925 Cal 785 which was reversed by the Privy Council.)

3 ('27) 14 AIR 1927 P C 108 (109) : 54 Ind App 190 : 54 Cal 595 (PC).

the suit is a necessary party to a suit relating to the mortgage. (1) But a person having merely a 'raiyati' interest in the land is not entitled to redeem a mortgage or to be joined as a party to a suit on the mortgage. (2)

16. Landlord.—Although the general rule is that a person claiming a paramount title is not a necessary party to a suit on the mortgage, yet in some cases, it may be convenient to join the landlord of the mortgagor as a party thereto. (1) (See Note 5.) Where the landlord is in possession of the mortgaged property not by virtue of a supreme title but by virtue of a title improperly and collusively obtained from the tenant under a decree for ejectment, he is a necessary party to the suit on the mortgage. (2)

17. Kanomdar.—In an appeal by sub-tenants against a decree for redemption of a 'kanom' obtained by a 'jenmi', the 'kanomdar' is a necessary party. (1) Where a 'melcharathdar' along with the 'jenmi' obtains a decree for the redemption of a 'kanom, and the 'kanomdar appeals against the decree, claiming compensation for improvements, the 'jenmi' is a necessary party to the appeal.(2)

18. Parties to Appeal.—The provisions of this rule apply also to appeals. (1)

19. Effect of non-joinder.—Under section 85 of the Transfer of Property Act, 1882, it was held that the word "must" in that section was imperative in character, and that, consequently the failure to join a person interested in the mortgaged property as a party to the suit was a defect fatal to the suit. (1) But

O. 34 R. 1 N. 15

1 ('45) 32 AIR 1945 Pat 106 (107): 23 Pat 648 (DB): *Kamakshya Narain* v. *Ramzan Ali*.. A lessee from the mortgagor whether his lease is binding on the mortgagee or not, is a necessary party to the mortgage suit.
('26) 13 AIR 1926 Bom 522 (523) (DB). (Lessees under mortgagee.)
('19) 6 AIR 1919 Pat 325 (327). (Lease granted by mortgagee.)
('07) 29 All 679 (682). (Lessee under perpetual lease.)
('82) 8 Cal 79 (87) (DB). (Patnidar.)
('81) 6 Cal 317 (319) (DB). (Zarpesgidar).
('94) 21 Cal 116 (120) (DB). (Patnidar).
('26) 13 AIR 1926 Nag 495 (496). (Lessee for a term of years.)
('80) 5 Cal L Rep 243 (250) (DB). (Mokararidar.)
('28) 15 AIR 1928 Mad 1270 (1270) (DB).
('23) 10 AIR 1923 Nag 273 (273): 19 Nag L R 18. (Permanent lessee.)
('27) 14 AIR 1927 Pat 411 (411, 412) (DB). (Mokararidar.)
[*But see* ('41) 28 AIR 1941 Nag 72 (76): ILR (1942) Nag 145 (DB). (Though lessee, or trespasser, (or even transferee) may be proper party, if his interest accrues subsequent to the mortgage he is not necessary party to a suit on mortgage.)
('83) 9 Cal 643 (644) DB). (Holder of mourasi mokurari patta granted by mortgagor not entitled to redeem and is not necessary party.)]
2 ('01) 5 Cal W N 83 (85) (DB).

O. 34 R. 1 N. 16

1 ('29) 16 AIR 1929 Pat 222 (227): 8 Pat 439 (DB). (Suit by mortgagee of non-transferable holding—Landlord purchaser in rent decree made defendant—Right must be decided in the very suit.)
('18) 5 AIR 1918 Cal 95 (96) (DB). (To a suit to enforce a mortgage of non-transferable occupancy holding the landlord is a proper but not a necessary party.)
('30) 17 AIR 1930 Nag 89 (90). (Suit on prior mortgage—Puisne mortgagee joined as defendant—Puisne mortgagee (malguzar) can contend that mortgagor could not validly mortgage without his consent.)
2 ('12) 16 Ind Cas 703 (705) (DB) (Cal).

O. 34 R. 1 N. 17

1 †('02) 25 Mad 568 (571) (DB).
2 ('11) 9 Ind Cas 940 (940) (DB) (Mad).

O. 34 R. 1 N. 18

1 ('48) 35 AIR 1943 Nag 56 (59): ILR (1947) Nag 412 (DB). *Madhaorao* v. *Eknathrao*.
(Appeal filed by one of mortgagors against preliminary decree—Non-joinder of other mortgagors—Appeal does not fail as it is possible to work out the right of the appellant in the absence of other mortgagors.)
('97) 7 Mad L Jour 266 (267) (DB).
('99) 9 Mad L Jour 49 (50) (DB).
('05) 2 Cal L Jour 202 (216).
('16) 3 AIR 1916 Mad 828 (829) (DB).
[But see ('27) 14 AIR 1927 Cal 479 (480). (Redemption suit dismissed—One only of mortgagors appealing—Others are not necessary parties.)]

O. 34 R. 1 N. 19

1 ('02) 26 Bom 433 (436) (DB).
('05) 27 All 517 (525) (DB).
('96) 18 All 109 (112) (DB).
('91) 13 All 432 (465, 466) (FB).
('06) 29 Mad 84 (86) (DB). (Point was doubted in this case.)
[*See also* ('01) 1901 All W R 22 (22) (DB). (Decree-holder cannot bring pro-

the Court was, however, held to have power under S. 32 of the old Code (now O. I R. 10) to add the necessary parties.(2) As has been seen in Note 4, O. 34 R. 1 now makes it clear that its provisions are "subject to the other provisions of the Code" including O. 1 R. 9, of the Civil Procedure Code, and hence the non-joinder of any person as a party to the suit is not a fatal defect; a decree can be passed so far as regards the parties 'actually' on the record are concerned, (3) unless the person omitted is a necessary party in the sense that, in his absence, no relief could be given at all even as regards the parties actually

perty to sale subject to puisne mortgagee's right of redemption.)
('94) 16 All 478 (483) (FB).]

2 ('92) 19 Cal 401 (411) (DB).
('85) 11 Cal 45 (51) (DB).
('98) 22 Bom 701 (707).
('86) 8 Bom 323 (336).
('03) 27 Bom 157 (161) (DB).
('04) 27 All 75 (78) (DB).
('01) 5 Cal W N 83 (85) (DB). (Review granted for the purpose of joining omitted persons.)
('71) 8 Bom H C R O C 96 (101). (Court may add a necessary party even after a preliminary decree.)
('95) 18 Mad 33 (38) (DB). (Do.)
('93) 16 Mad 319 (320) (DB). (Do).
('05) 1 Nag L R 117 (121). (Do.)
('05) 1905 All W N 35 (36) (DB). (Prayer for amendment not to be refused even though a previous opportunity had been given and the case was nearing conclusion.)
(1900) 1900 All W N 20 (21) (DB).
('98) 20 All 188 (189) (DB).

3 ('48) 35 AIR 1948 Nag 56 (59): ILR (1947) Nag 412 (DB). *Madhaorao* v. *Eknathrao.*
(*Appeal by one mortgagor against decree for foreclosure—All mortgagors not impleaded as parties*—Appeal not fail for non joinder—act that in the absence of the other mortgagors it may not be permissible for appellant to ask for change of decree from one for foreclosure to one for sale has northing to do with competency of the appeal.)
('43) 30 AIR 1943 Oudh 218 (223): 19 Luck 183 (DB).
('42) 29 AIR 1942 Cal 226 (227) (DB).
('41) 28 AIR 1941 Nag 72 (75): I L R (1942) Nag 145 (DB). (Mortgagee can sue on his mortgage without joining purchaser of mortgagor's right or trespasser whose title had not yet ripened.)
('40) 27 AIR 1940 Oudh 235 (236): 15 Luck 399.
†('31) 18 AIR 1931 Pat 164 (167): 10 Pat 341.
('34) 21 AIR 1934 Oudh 220 (221): 10 Luck 70 (DB). (Suit for redemption by one heir of mortgagor—Non-joinder of other heirs is not fatal.)
('35) 22 AIR 1935 Rang 139 (141).
('25) 12 AIR 1925 Pat 59 (61): 3 Pat 829 (DB).
†('22) 9 AIR 1922 Pat 651 (652): 2 Pat 175 (DB).
('22) 9 AIR 1922 Pat 450 (473): 1 Pat 509 (DB).
('25) 12 AIR 1925 Cal 152 (156) (DB).
('21) 8 AIR 1921 Cal 554 (555) (DB).
†('29) 16 AIR 1929 All 941 (942): 52 All 134 (DB).
('27) 14 AIR 1927 All 290 (290).
('27) 14 AIR 1927 All 488 (488) (DB).
('24) 11 AIR 1924 All 928 (928).
('24) 11 AIR 1924 All 107 (108).
('19) 6 AIR 1919 Bom 135 (136): 43 Bom 575 (DB).
('13) 35 All 484 (486): 21 Ind Cas 271 (272) (DB).
('13) 35 All 247 (248): 19 Ind Cas 614 (614) (DB).
('31) 18 AIR 1931 All 235 (236) (DB). (One of joint mortgagors daying pending suit—No legal representative impleaded—Abatement—Decree passed for sale of property of other mortgagors for proportinate amount.)
('12) 16 Ind Cas 674. (674) (DB) (All).
('12) 13 Ind Cas 38 (39) (DB) (All).
('04) 28 Bom 11 (17) (DB).
('23) 10 AIR 1923 Nag 234 (235).
('08) 35 Cal 519 (523) (FB). (When in course of mortgage suit purchaser of portion of mortgaged property is made a party defendant after prescribed period of limitation, suit as against him is barred by limitation.)
('09) 3 Ind Cas 291 (293) (DB) (Cal). (Decree is binding on parties thereto.)
†('32) 19 AIR 1932 Cal 34 (35, 36). (Some heirs of deceased mortgagee suing—Others consenting—Decree for former is correct.)
('33) 20 AIR 1933 Cal 325 (328): 60 Cal 87: 36 Cal W N 1138 (1142, 1143) (DB). (One of the purchasers of the equity of redemption impleaded dying pending suit —All legal representatives except one substituted after notice and without objection—Non-joinder of one is not fatal or material.)
('33) 20 AIR 1933 Lah 179 (182): 14 Lah 218. (Suit by mortgagees to set aside order of Collector for redemption under S. 12 of the Punjab Redemption of Mortgages Act, II of 1913—Death of one and failure to implead his legal representatives—Each plaintiff has a well-defined and separate share—Suit does not abate in entirety—O. 34 R.1 is inapplicable.)

on the record. (4) If the party on the record effectually represents others not joined, the decree will bind the interests of the latter also. (5) The Court has also ample powers under O. 1 R. 10, Civil Procedure Code, to add, in proper cases, any parties it considers necessary for the disposal of the suit. (6) In this con-

†('37) 24 AIR 1937 Pat 414 (416). (Suit for redemption—Non-joinder of some of the persons interested in equity of redemption is not necessarily fatal to suit.)
('39) 26 AIR 1939 Pat 49 (51) : 18 Pat 141 (DB). (Mortgage suit—Failure to substitute legal representatives of deceased defendant—Decree can be passed as against others.)
('39) 26 AIR 1939 Cal 403 (407) : ILR (1939) 1 Cal 493 (DB). (One co-mortgagor dying before final decree—No legal representative brought on record—Decree is valid and can be enforced with respect to shares of the mortgagors on record.)
('37) 24 AIR 1937 Mad 136 (139). (Suit for redemption—Non-joinder of a person interested in the equity of redemption.)
('35) 22 AIR 1935 Rang 315 (315) (DB).
†('36) 23 AIR 1936 All 512 (514).
[*See* ('37) 24 AIR 1937 All 646 (647) : ILR (1937) All 723 (DB). (Suit for possession against mortgagor on basis of usufructuary mortgage, by one co-mortgagee alone—Non-joinder of other co-mortgagee is not fatal defect—Decree for possession of his share can be passed.)]
[*See also* ('08) 12 Cal W N 911 (913, 914) (DB).]
[But see ('16) 3 AIR 1916 Pat 310 (311) : 1 Pat L Jour 468 (DB). (Order 1 R. 9 is subject to O. 34 Rule 1.)]

4 ('48) 35 AIR 1948 Bom 211 (216, 219) : ILR (1948) Bom 158 (FB). *Adiveppa* v. *Rachappa.*
(Simple mortgage in favour of joint mortgagees—Subsequent partition among mortgagees—Suit by one of them for recovery of mortgage debt without joining his co mortgagees as parties—Co-mortgagees added as defendants after expiry of limitation—Whole suit fails—AIR 1932 Cal 34 and AIR 1929 All 941: 52 All 134 dissented from.)
('48) 52 Cal W N 530 (531) (DB). (Decca) *Ranjit Kumar* v. *Kalamjan Bibi*
(Foreclosure suit—One of mortgagors dying pending even after objection was taken—Defect held fatal.) (Dacca).
('46) AIR 1946 Pat 225 (228): 222 Ind Cas 439 (DB). *Ramcharitar Sao* v. *Bawan Prasad.*
(Suit for redemption by mortgagor—Purchaser of part of mortgagor property not inpleaded—Suit cannot proceed.)
('43) 30 AIR 1943 Oudh 164 (168) : 18 Luck 601 (DB). (But a mortgage suit is not liable to be dismissed if a puisne mortgagee is not impleaded as a party as he is not a necessary party.)
('42) 29 AIR 1942 Oudh 197 (198) : 17 Luck 482. (Suit to enforce mortgage of joint family property against one of the heirs of mortgagor, such heir not being the manager—Other heirs impleaded after period of limitation—The whole suit must be dismissed.)
('41) 28 AIR 1941 Nag 5 (8) : ILR (1941) Nag 615 (DB). (Suit for mortgage money—Non-joinder of all co-mortgagees—Suit must be dismissed in its entirety.)
('27) 14 AIR 1927 All 290 (290).
('33) 20 AIR 1933 Cal 621 (622) : 60 Cal 777 (DB).
('18) 5 AIR 1918 Pat 154 (154, 155). (Withdrawal of suit against a necessary party—Suit should be dismissed.)
('16) 3 AIR 1916 Mad 828 (829) (DB).
('14) 1 AIR 1914 All 109 (111). (In redemption suit all the mortgagees or their representatives are necessary parties.)
†('37) 24 AIR 1937 Rang 220 (223, 224) : 1937 Rang L R 13 (DB).
('35) 22 AIR 1935 Sind 131 (133) (DB). (Property sold in execution of decree and decree-holder paid amount—Suit by another person claiming relief on his alleged equitable mortgage—Auction-purchaser not impleaded—Suit is not maintainable.)
('39) 26 AIR 1939 All 688 (689) (DB). (Mortgage by a member of joint Hindu family—Suit against his widow without impleading other sole surviving member is not maintainable.)
('34) 21 AIR 1934 Pesh 38 (40) (DB). (Suit for sale on mortgage—Alienee of whole interest of mortgagor in property made party after the period of limitation—Suit must wholly fail.)
[*See* ('06) 30 Bom 156 (161) (DB). (Necessary parties defendants are those without whom no decree at all can be rendered.)]

5 ('43) 30 AIR 1943 Oudh 218 (222) 19 Luck 183 (DB). (Estate properly represented—Suit directed against estate —No personal relief sought—Suit can be decreed against estate though some heirs are not joined.)
('25) 12 AIR 1925 Cal 94 (95) (DB).
('27) 14 AIR 1927 Mad 1071 (1072).

6 ('29) 16 AIR 1929 All 941 (942) : 52 All 134 (DB).
('21) 8 AIR 1921 Bom 152 (154) : 45 Bom 1009 (DB).
('11) 10 Ind Cas 776 (778) (DB) (Low Bur). (Defect may be remedied even in appeal.)
('36) 40 Cal W N 1173 (1174). (Court can add a necessary party even after final decree in mortgage suit—See however A. I.R. Civil Procedure Code Note 32 on O. 1 R. 10 in this connexion.)
('36) 23 AIR 1936 Pat 153 (154) (DB).
[*See* ('41) 28 AIR 1941 Nag 5 (8) : ILR (1941) Nag 615 (DB). (Mortgagee ra[illegible]sing to implead co-mortgagees as pa[illegible]s even

nexion reference may also be made to S. 99 of the Civil Procedure Code which lays down that a misjoinder (which includes non-joinder) is not, in itself, a ground for reversing or varying a decree.(7)

Where in a mortgage suit, some of the persons interested in the equity of redemption have not been impleaded, under the principles discussed above, the entire suit need not be dismissed but may be decreed so far as the shares of the persons actually on the record are concerned. But is the mortgagee entitled to a decree for the entire mortgage amount or only to an amount which is proportionate to the shares of the parties actually on the record? On this question, there is a conflict of decisions. The Patna High Court (8) and the Calcutta High Court in the undermentioned decision (9) have held that the mortgagee is entitled to a decree for the entire mortgage amount though the Calcutta High Court held a contrary view in other decisions. (10) It is submitted that the former view is correct in principle as the mortgagee is entitled to realize his dues from any portion of the mortgaged property.

But, although, the non-joinder of persons who ought to have been joined as parties under this rule is not fatal to the suit, the result of this cannot 'in any way affect' the rights and liabilities of such persons. (11) Simple as this proposition is, its application to the complicated facts arising in mortgage suits has been the subject of a great diversity of judicial opinions. In order to appreciate the various views properly, it is necessary to remember the following important principles:

(1) Where an owner C mortgages his property to A by way of a 'simple' mortgage, the mortgagee gets nothing more than a right to obtain

after objection by other side—Court cannot join them as parties—In appeal mortgagee offering to join—*Held*, offer came too late.)]

7 ('26) 13 AIR 1926 Cal 416 (417) (DB). (When the merits of the case have been affected by the non-joinder, S.99 cannot be invoked to cure the defect.)

8 ('39) 26 AIR 1939 Pat 49 (51) : 18 Pat 141 (DB).

9 ('39) 26 AIR 1939 Cal 403 (407) : I L R (1939) 1 Cal 493 (DB).

10 ('42) 29 AIR 1942 Cal 226 (227).
('35) 22 AIR 1935 Cal 666 (670) (DB). (Mortgagee having notice of sale of portion of equity of redemption but not impleading purchaser in suit on mortgage —There should be proportionate abatment of mortgage money.)

11 ('48) 35 AIR 1948 Mad 105 (110, 111) (DB). *Sooryanarayanrao* v. *Sarup Chand Rajaji*. (The necessary corollary and consequence of this principle is that if the rights of parties who were not impleaded remain unimpaired, the rights of the person who failed to implead them should remain unimpaired too. First suit on prior mortgage without impleading puisne mortgagee withdrawn under (P C O 23 R 1—Second suit on prior mortgage impleading puisne mortgagee not barred.)
('45) 32 AIR 1945 Pat 106 (108) : 23 Pat 648 (DB). *Kamakshya Narain* v. *Ramzan Ali*
(Lessee from mortgagor though necessary party nor impleaded in suit on mortgage—Lessee's right to redeem is not affected by leave passed in much suit or sale in execution thereof.).
('42) 29 AIR 1942 Cal 394 (401) (DB). (Mortgage executed by receiver—Suit on —Owner of property not impleaded in suit is not bound by decree in suit.)
('41) 28 AIR 1941 Nag 72 (75) : ILR (1942) Nag 145 (DB).
('40) 27 AIR 1940 Mad 646 (647).
('40) 27 AIR 1940 Sind 195 (197).
('18) 5 AIR 1918 P C 34 (35) : 40 All 407 : 45 Ind App 130 (PC).
('34) 21 AIR 1934 Pat 648 (650) : 13 Pat 364 (DB). (Subsequent mortgagee not impleaded—His right to redeem is not lost.)
('70) 14 Moo Ind App 144 (149) (PC). (Mortgagor's assignee not bound by decree to which he was not party.)
('87) 9 AII 125 (128, 129) (DB).
†('88) 10 All 520 (523) (DB). (Following 9 All 125.)
('97) 19 All 379 (381) (FB).
('01) 23 All 25 (31) (DB).
†('03) 25 All 446 (453) (DB).
('06) 28 All 279 (280) (DB).
('06) 1906 All W N 285*n* (286*n*.)
('04) 1 All L Jour 207 (208) (DB).
*('91) 18 Cal 164 (179) : 17 Ind App 201 (PC).
('94) 21 Cal 70 (79) : 20 Ind App 165 (PC).
†('10) 37 Cal 239 (250) : 37 Ind App 19 (PC). (Right to question priority, etc., not affected.)
(1900) 4 Cal W N 507 (508) (DB).
('84) 1884 All W N 136 (136) (DB).
('97) 20 Mad 82 (83) (DB).
('02) 25 Mad 406 (422) (DB).
('03) 26 Mad 332 (333) (DB). (Puisne mortgagee not impleaded in suit on prior mortgage cannot apply to set aside execution sale under O. 21 R. 89 because his rights are not affected by sale.)

from the Court an order that the property be sold for the recovery of the debt. The morgagor, retains in himself:

(a) a right to redeem the mortgage, and

(b) a right to the physical possession and enjoyment of the mortgaged property. (12)

(2) Where the mortgage is a usufructuary one, A will get a right to be in possession of the property until his debt is discharged, and C will retain only the right to redeem.

(3) Where C, the mortgagor, sells his interest in the property to D, then, if the mortgage is a simple one, D gets C's rights, Viz., the right to redeem and right to possession of the mortgaged property; if the mortgage is a usufructuary one, he will get only the right to redeem the mortgage.(13)

(4) Where C, after creating a mortgage in favour of A, creates a further mortgage in favour of B, then,

(1) if the mortgage is a simple one,

(i) B will get—

(a) a right to redeem the prior mortgage, and

(b) a right to obtain from the Court an order that the property be sold subject to the prior mortgage, for the recovery of his debt.

(ii) C will retain the right to redeem both the mortgages 'plus' the right to possession (2) if the mortgage is a usufructuary one, B will be entitled to a right to redeem the prior mortgage and a right to the possession of the property; and C will be entitled only to a right to redeem both the mortgages.

(5) Where C makes several mortgages successively in favour of different persons, the later mortgagee is entitled to redeem the earlier one, but the earlier ones cannot redeem the later ones, according to the maxim "redeem up and foreclose down."(14)

('03) 26 Mad 484 (485) (DB).

('08) 31 Mad 258 (260).

('31) 18 AIR 1931 Oudh 358 (362) : 6 Luck 715 (DB). (Foreclosure decree against life-estate-holder — Remainderman not impleaded—Decree does not bind him.)

('26) 13 AIR 1926 Pat 337 (338) : 5 Pat 513 (DB).

('29) 16 AIR 1929 Pat 94 (95) (DB).

('28) 15 AIR 1928 Rang 127 (127) : 6 Rnag 122.

('09) 2 Ind Cas 662 (667) (DB) (Cal).

*('11) 9 Ind Cas 513 (515, 517) (DB) (Mad.)

('11) 10 Ind Cas 422 (423) (DB) (All).

('11) 12 Ind Cas 155 (157, 158) (DB) (Cal).

('12) 1 Upp Bur Rul 92 : 13 Ind Cas 874 (875, 876). (Unimpleaded person is entitled to declaration that his rights are not affected by decree.)

('12) 39 Cal 527 (539) : 39 Ind App 68 : 14 Ind Cas 496 (504) (PC).

('12) 39 Cal 925 (930) : 14 Ind Cas 299 (300) (DB).

('14) 1 AIR 1914 Bom 268 (269) : 38 Bum 24 : 21 Ind Cas 39 (41).

('14) 7 Low Bur Rul 135 (137) : 25 Ind Cas 931 (932).

('16) 3 AIR 1916 Oudh 151 (152).

†('18) 5 AIR 1918 Mad 103 (105) : 41 Mad 513 (DB). (Puisne mortgagee is entitled to account of the profits of the property.)

('18) 5 AIR 1918 Cal 80 (82) (DB).

('36) 23 AIR 1936 All 512 (514).

†('36) 23 AIR 1936 Mad 70 (74) : 59 Mad 312 (DB).

('39) 26 AIR 1939 Pesh 34 (37) (DB).

('36) 23 AIR 1936 Nag 128 (129) : ILR (1936) Nag 9.

('36) 23 AIR 1936 Sind 87 (89) : 30 Sind L R 42 (DB). (Failure to join every person interested in equity of redemption does not discharge them of their liability to pay the mortgage debt.)

[*See* ('35) 22 AIR 1935 Cal 131 (134) : 61 Cal 1056 (DB). (Mortgage by father and son—In partition suit mother allotted a share—Suit by mortgagee without impleading her—Her right of redemption is not lost.)]

[*See also* ('38) 25 AIR 1938 Cal 471 (474) (DB). (Charge on decree—Attachment of such decree—attaching decree-holder is proper party to suit to enforce charge on decree—Failure to implead him—Decree in suit cannot affect his rights.)]

[But see ('86) 8 All 324 (329) (DB). (Obsolete law.)]

12 ('18) 5 AIR 1918 Sind 26 (27) : 12 Sind L R 1 (DB).

('38) 25 AIR 1938 Cal 524 (525) (DB).

13 ('18) 5 AIR 1918 Sind 26 (27) : 12 Sind L R 1 (DB).

14 See Section 94 of the Amended Transfer of Property Act.

The various classes of cases illustrating the application of the above principles can now be considered—

(i) C executes a simple mortgage in favour of A and then sells his interests in the mortgaged property to D. A files a suit on his mortgage against C without impleading D, and, in execution of the decree obtained therein, purchases the property himself. Being obstructed by D in the possession proceedings A sues D for possession. Is the suit maintainable? No. (15) The reason is that D, not having been made a party in A's suit on the mortgage, is not affected in any way by the decree and execution proceedings in such suit, and his right to possession cannot be disturbed. On the same principle, if D is dispossessed by A in execution, he can, in a suit by him against A, recover back possession unconditionally.(16) There is no difference in principle, in this respect, even if D is a purchaser of C's interest in execution of a money decree against him, instead of under a private transfer. (17) The remedy of A in such cases would be to file a fresh suit on his mortgage against D. (18) He cannot, however,

15 ('48) 83 Cal L Jour 200 (202) *Mir Mahomed Hossain* v. *Meerza Mahomed.* [Mortgage suit Purchaser of equity of redemption not impleaded as such but impleaded as proform dependant owning a portion of mortgagee's interest—Mortgage decree passed—Suit for possession by mortgage against purchaser of equity of redemption is not maintainable—He can however be allowed to convert it into a suit on mortgage provided it is still within limitation.]
('44) 31 AIR 1944 Nag 57 (59) : I L R (1943) Nag 796.
('41) 28 AIR 1941 Cal 613 (618) : I L R (1941) 2 Cal 209 (DB).
('97) 19 All 541 (542) (FB).
('23) 10 AIR 1923 Cal 274 (277) : 49 Cal 1048 (DB).
†('29) 16 AIR 1929 Cal 233 (236). (Suit was also barred by limitation in this case.)
*('31) 18 AIR 1931 Mad 542 (547) (DB.)
('27) 14 AIR 1927 Pat 411 (411, 412) (DB).
('16) 3 AIR 1916 Low Bur 99 (99).
('21) 8 AIR 1921 Low Bur 61 (63) : 11 Low Bur Rul 119 (DB).
('26) 13 AIR 1926 Rang 183 (184) : 4 Rang 96 (DB).
('26) 13 AIR 1926 Nag 495 (495). (Lessee not made party.)
('29) 16 AIR 1929 Nag 246 (250) : 25 Nag L R 19.
('23) 10 AIR 1923 Nag 273 (274) : 19 Nag L R 18. (Transfer by way of lease.)
('25) 12 AIR 1925 Sind 193 (195) : 17 Sind L R 281 (DB). (Vendee of equity of redemption not bound by mortgage decree to which he was not party.)
('38) 25 AIR 1938 Cal 524 (525) (DB). (Permanent lessee not made a party cannot be evicted auction-purchaser under prior mortgagee's decree.)

16 ('44) 31 AIR 1944 Nag 57 (59) : I L R (1943) Nag 796. (Mortgagee cannot insist that purchaser's decree should be conditional on his being paid off.)
*('44) 31 AIR 1944 Pat 119 (128) : 22 Pat 761 (DB). (A executing a mortgage in favour of *B* in respect of certain property —Title of *C* declared by Court in respect of portion of property mortgaged by *A*—*B* suing on mortgage without impleading *C* and obtaining decree—Property purchased by *B* himself and *C* dispossessed—Suit for possession by *C*—*Held* suit was maintainable.)
(16) 3 AIR 1916 Pat 401 (402, 403).
('18) 5 AIR 1918 Oudh 184 (185) : 21 Oudh Cas 70. [*See also* ('82) 4 Mad 213 (216) (DB). (Puisne mortgagee in possession—Prior mortgagee who had obtained money decree, purchasing the property in execution, depriving puisne mortgagee of his possession—Latter can sue prior mortgagee for possession.)]

17 ('44) 31 AIR 1944 Nag 57 (59) : I L R (1943) Nag 796. (Mortgagee foreclosing behind back of execution purchaser.)
('27) 14 AIR 1927 All 611 (612) : 49 All 923 (DB).
('22) 9 AIR 1922 Bom 334 (335) (DB).
†('14) 1 AIR 1914 All 116 (116).
('23) 10 AIR 1923 Cal 274 (275) : 49 Cal 1048 (DB).
†('32) 19 AIR 1932 Cal 561 (562) (DB).

18 ('49) 36 AIR 1949 Ajmer 52 (53, 54) : 1949 A. M. L. J. 23 *Kishan Lal* v. *Gauri Shankar.*
*('44) 31 AIR 1944 Pat 119 (128) : 22 Pat 761 (DB). (The remedy of auction-purchaser, be he mortgagee decree-holder himself or a third person, is no more than to bring a suit for sale because the rights as mortgagee only are affected and such rights will remain in him if he is mortgagee auction-purchaser and if a third person, he be considered as assignee of mortgagee.)
('41) 28 AIR 1941 Cal 613 (618) : I L R (1941) 2 Cal 209 (DB).
*('31) 18 AIR 1931 Mad 542 (549) (DB).
('30) 17 AIR 1930 Rang 175 (176).
('07) 30 Mad 500 (502) (DB).
('27) 14 AIR 1927 Pat 411 (411, 412) (DB).
('23) 10 AIR 1923 Nag 273 (274) : 19 Nag L R 18. (Transferee a lessee.)
('26) 13 AIR 1926 Rang 183 (184) : 4 Rang 96 (DB).
('29) 16 AIR 1929 Nag 246 (250) : 25 Nag L R 19.
('44) 31 AIR 1944 Nag 57 (59) : ILR (1943) Nag 796. (AIR 1929 Nag 246 : 25 Nag L R 19, Rel. on.)

bring a fresh suit where his claim on the original mortgage is barred by limitation. (19)

It was, however, held in the undermentioned cases (20) that the result of not impleading D or other person entitled to be in possession would be to make the decree so obtained ineffectual only against the right of 'redemption' vested in such persons, so that A would be entitled to possession against them subject to their right of redemption. It is submitted that this view is not correct. D has got not only a right of redemption but a 'right to the possession' of the property as well. A decree to which he was not a party cannot effect him even in respect of the latter right. But this principle will not apply in the case of an English mortgage as under such a mortgage the 'mortgagee' is entitled to possession and this right will pass to the purchaser under the mortgage decree and prevail over the right of a person who has acquired an interest in the mortgaged property 'after' the creation of the mortgage and thus has obtained no right to possession in virtue of such interest. (21)

(ii) The principles stated in class (i) will equally apply to cases where D, instead of being a purchaser of C's interest, is a usufructuary mortgagee in possession. (22)

(iia) The above principles will apply also where D is a person who becomes entitled to the equity of redemption by adverse possession (22a).

(iib) But where the acquisition of title by D whether by transfer or by adverse possession takes place pending a suit on the mortgage in A's favour the doctrine of 'lis pendens' will apply and D will be bound by the decree in the suit although he is not joined as a party to it (22 b)

('11) 10 Ind Cas 137 (138) (Cal).
('11) 11 Ind Cas 74 (75) (DB) (Cal).
('24) 11 AIR 1924 Mad 650 (655) : 47 Mad 551 (DB).
('23) 10 AIR 1923 All 232 (232) (DB).
(01) 5 Cal W N 423 (425 426) (DB).
('31) 18 AIR 1931 Lah 438 (438) (DB).
[*See also* ('35) 22 AIR 1935 Rang 139 (141). (Puisne mortgagee not joined in suit on prior mortgage—Fresh suit against puisne mortgagee is not barred.)]

19 ('42) 29 Air 1942 Bom 146 (146, 148) (DB).
('22) 9 AIR 1922 Bom 334 (335) (DB).
†('85) 12 Cal 614 (620) (DB).
('31) 18 AIR 1931 Mad 542 (549).
('28) 15 AIR 1928 Rang 189 (190) : 6 Rang 297 (DB).
('38) 25 AIR 1938 Cal 524 (525).

20 ('41) 28 AIR 1941 Nag 72 (75) : I L R (1942) Nag 145 (DB).
('04) 26 All 464 (467) (DB).
('32) 19 AIR 1932 All 356 (358) (DB).
('91) 16 Bom 486 (491) (DB).
('13) 18 Ind Cas 457 (459) (DB) (Cal).
('27) 14 AIR 1927 Cal 259 (260) (DB). (Where it was held that dispossessed purchaser can only redeem and cannot sue for possession.)
('16) 3 AIR 1916 Cal 771 (771) (DB). (Do.)
('21) 8 AIR 1921 Cal 157 (158) (DB). (Do.)
('24) 11 AIR 1924 Pat 452 (453) : 3 Pat 114 (DB).
('98) 6 Cal L Jour 612 (616) (DB).
('92) 17 Mad 17 (20) (DB). (Puisne mortgagee in possession.)
('91) 13 All 315 (319) (DB). (Subsequent usufructuary mortgagee in possession.)
('86) 10 Bom 224 (226) (DB) (Do.)
('02) 7 Cal W N 11 (19, 20) (DB). (Case of puisne mortgagee who had purchased in execution of his decree.)
('01) 23 All 1 (3) (DB).
('36) 23 AIR 1936 Mad 70 (77) : 59 Mad 312 (DB).
[*See* ('98) 21 Mad 64 (66) (DB). (Where defendant was willing to redeem.)]

21 ('40) 27 AIR 1940 Sind 195 (197, 198).

22 ('30) 17 AIR 1930 All 355 (357) : 52 All 471 (DB). (Prior and subsequent mortgagees—Suit on prior mortgage without impleading subsequent usufructuary mortgagee—Property purchased by prior mortgagee in execution of his decree—Subsequent mortgagee held entitled to possession on payment of prior mortgage decree.)
('11) 9 Ind Cas 513 (515) (SB) (Mad). (Overruling 26 Mad 537.)
('87) 1887 All W N 125 (125). (*A* cannot sue to recover possession from puisne usufructuary mortgagee.)
('94) 21 Cal 116 (120) (DB).
†('16) 3 AIR 1916 Oudh 74 (76) : 18 Oudh Cas 347 (DB).
('15) 2 AIR 1915 Low Bur 49 (50, 51) : 8 Low Bur Rul 266. (Puisne mortgagee entitled to sue for confirmation of possession.)

22 (a) ('48) 35 AIR. 1948 Nag 97 (99): ILR (1947) Nag 719 *Sakhubai* v. *Eknath.*

22 (b) ('48) 35 AIR 1948 Nag 97 (99): ILR (1947) Nag 719 *Sakhubai* v. *Eknath.*
It is submitted that S. 52 does not apply to transfers by operation of law—See S. 52 N 30]

(iii) C executes simple mortgages first in favout of A and then in favour of B. B sues on his mortgage without impleading A and, in execution of the decree obtained therein, purchases the property in court-auction and enters into possession. 'Thereafter' A sues on his mortgage without impleading B and purchases the same property in execution of his decree. It will be seen that, at the time of the suit by A the right to redeem and the right to possession of the property, being already vested in B, cannot be affected by A's suit to which he was not a party. It follows that A cannot maintain a suit for 'possession' against B (23) or a suit for 'possession subject to redemption' by B. (24) He can, however, bring a fresh suit for sale on his mortgage against B, provided of course, that on the date of such suit, the claim on the morthgage is not barred by limitation. (25)

(iv) C executes simple mortgages first in favour of A and then in favour of B. A obtains a decree upon his mortgage without impleading B and in execution thereof purchases the property himself and obtains possession. B 'thereafter' files a suit on his mortgage, purchases the same property in execution of his decree and then sues A for 'possession'. Does the suit lie? No. (26) The reason is that at the time of B's suit on the mortgage the right to redeem and the right to possession having both already vested in A, the latter cannot be affected by anything done in B's suit. B has, however, two remedies open to

23 ('95) 18 Mad 500 (502) (DB). (The puisne mortgagee can obtain declaration of his right to possession and injunction restraining the prior mortgagee from interfering with such possession.)
†('99) 21 All 235 (237, 238) (FB).
†('18) 5 AIR 1918 Sind 26 (28): 12 Sind L R 1 (DB).
('03) 26 Mad 484 (485) (DB). (Not entitled to possession without paying off subsequent mortgagee.)
('16) 3 AIR 1916 Nag 120 (121) : 13 Nag L R 69.
('35) 22 AIR 1935 Cal 139 (141) : 62 Cal 75 (DB). (In this case the same principle was applied to a suit by the prior mortgagee against a stranger purchaser in execution of the decree on the puisne mortgage.)
('38) 25 AIR 1938 Cal 634 (636) (DB). (Though the puisne mortgagee's suit in this case was instituted after the suit by the prior mortgagee, a decree was obtained in the puisne mortgagee's suit and possession obtained by the puisne mortgagee before the decree in the prior mortgagee's suit.)

24 ('99) 21 All 235 (237, 238) (FB).
('23) 10 A 1923 A 449 (449): 45 A 189 (DB).
('35) 22 AIR 1935 Cal 139 (141) : 62 Cal 75 (DB).
('38) 25 AIR 1938 Cal 634 (636) (DB). (In this case, the prior mortgagee sued first and the puisne mortgagee sued afterwards but the decree in the latter suit and the execution proceedings therein were before the decree in the suit of the prior mortgagee.)
[*See also* ('32) 19 AIR 1932 Cal 561 (562) (DB).]
[But see ('13) 20 Ind Cas 184 (185) (DB) (All). (Decree must be for possession, subject to redemption by *B*—Submitted wrong on principle.)]

25 ('95) 18 Mad 500 (502) (DB).
('10) 32 All 119 (124): 5 Ind Cas 451 (452) (DB).
('12) 39 Cal 527 (558) : 39 Ind App 68 : 14 Ind Cas 496 (504) (PC).
*('26) 13 AIR 1926 All 480 (483, 489) (DB). (Remedy on original mortgage barred—Therefore not entitled to any remedy.)
('35) 22 AIR 1935 Rang 139 (141).
('35) 22 AIR 1935 Cal 139 (141) : 62 Cal 75 (DB).
[*See also* ('12) 16 Ind Cas 779 (779) (DB) (Mad). (Sale under puisne mortgage—Then private purchase by prior mortgagee in satisfaction of his mortgage—His purchase not entitled to priority—He can, however, sue for sale on his prior mortgage.)]
[But see ('20) 7 AIR 1920 Mad 1026 (1029) (DB). (Subsequent mortgagee not impleaded—Fresh suit on mortgage against him not maintainable, security having merged in decree—*Obiter*.)]

26 ('23) 10 AIR 1923 Nag 225 (226).
('37) 24 AIR 1937 Oudh 478 (480) (DB). (Prior mortgagee foreclosing his mortgage without impleading subsequent mortgagee — Subsequent mortgagee obtaining decree for sale impleading prior mortgagee as party and purchasing it himself—Subsequent mortgagee cannot get possession.)
[*See* ('34) 21 AIR 1934 All 73 (75) (DB). (But if *A* is impleaded in *B's* suit, *A's* remedy is to avail of Rules 12 and 13 of this Order or to redeem *B*. If not the only other remedy of *A* is to sue again on his mortgage if within time.)]
[*See also* ('37) 24 AIR 1937 Oudh 33 (34) : 12 Luck 690 (DB). (The prior mortgagee suing for possession on dispossession by puisne mortgagee in execution of his dscree—Prior mortgagee can recover possession subject to redemption by puisne mortgagee.)]

him, viz., (a) to redeem A (27) and (b) to sue A for sale on the subsequent mortgage subject to the prior mortgage. (28) If B adopts the former remedy and redeems A, the latter, in his turn, as owner of the equity of redemption, can redeem B. (29) Both these rights can, however, be adjusted on equitable grounds in the same suit. (30) If B adopts the latter remedy, A can, in equity, claim that B should redeem the prior mortgage rights vested in him before disturbing his possession. (31) In other words, A can set up his prior mortgage as a 'shield' against the claim of B. (32) This right of A is a weapon of 'defence' and not of attack (33) and can be set up notwithstanding the fact that the claim on the mortgage itself is barred by limitation. (34)

27 ('40) 27 AIR 1940 Sind 251 (254) : ILR (1940) Kar 447 (DB), (His right is not lost if he had filed unsuccessful application under O. 21 R. 89 to set aside the sale held in execution of prior mortgagee's decree to which he was not a party.)
('23) 10 AIR 1923 Nag 225 (226).
('24) 11 AIR 1924 Nag 198 (199). (*B* has the first right to redeem and not *A* to redeem him.)
('21) 8 AIR 1921 All 339 (341) : 43 All 204 (FB).
('03) 13 Mad L Jour 72 (74).
[*See also* ('33) 20 AIR 1933 Bom 25 (26) (DB). (Perior simple mortgagee in possession under sale in enforcement of his mortgage — Subsequent mortgagee not made party—Latter can redeem and obtain transfer of security but cannot get possession—His remedy is to sue for sale if not barred.)]
[But see ('21) 8 AIR 1921 Mad 648 (649) (DB).
('04) 28 Bom 153 (162) (DB). (*A* was held entitled to redeem *B* first.)]

28 ('40) 27 AIR 1940 Mad 646 (647). (Failure to join second mortgagee in suit on prior mortgage does not give second mortgagee any further rights which he did not possess so as to entitle him to ignore existence of prior mortgage.)
('03) 30 Cal 599 (604, 605) (FB).
('17) 4 AIR 1917 Pat 214 (217) (DB). (But purchaser cannot dispossess *A* without redeeming him.)
('20) 7 AIR 1920 Mad 650 (651) (DB).
('24) 11 AIR 1924 Pat 484 (486) : 3 Pat 435 (DB).
('20) 7 AIR 1920 Nag 251 (253) : 16 Nag L R 215.
('12) 39 Cal 527 (558) : 39 Ind App 68 : 14 Ind Cas 496 (504) (PC).

29 ('22) 9 AIR 1922 All 135 (137) : 44 All 462 (DB). (Prior mortgagee who has foreclosed his mortgage without impleading puisne mortgagee can deposit under the Transfer of Property Act, S. 83 and sue for redemption.)
[See however ('32) 19 AIR 1932 Pat 270 (272) : 11 Pat 415 (DB).]

30 ('41) 28 AIR 1941 Cal 484 (488) : ILR (1941) 1 Cal 514 (DB) (Puisne mortgagee left out of prior mortgagee's suit suing to enforce his mortgage—Decree for sale conditional on redeeming prior mortgage granted.)
('22) 9 AIR 1922 All 135 (137) : 44 All 462 (DB). (Prior mortgagee was allowed to redeem having regard to equities.)
('22) 9 AIR 1922 Nag 89 (91, 92) (FB). (*A* was given a decree for possession subject to *B's* right of redemption.)
[*See also* ('31) 18 AIR 1931 Pat 434 (435, 436). Prior mortgagee suing without impleading subsequent mortgagee of portion and becoming purchaser in Court auction—Second suit against subsequent mortgagee for possession—Second mortgagee allowed to redeem that portion alone.)]

31 ('42) 29 AIR 1942 Cal 138 (140, 141) (DB).
('41) 28 AIR 1941 Cal 484 (488, 489) : ILR (1941) 1 Cal 514 (DB). (Decree in puisne mortgagee's suit may be made conditional on his redeeming prior mortgage.)
('31) 18 AIR 1931 All 466 (481) : 53 All 1023 (FB).
('22) 9 AIR 1922 All 104 (105) : 44 All 418 (DB).

32 ('41) 28 AIR 1941 Cal 484 (486, 489) : ILR (1941) 1 Cal 514 (DB).
('40) 27 AIR 1940 Mad 646 (649).
('22) 9 AIR 1922 PC 11 (13) : 48 Ind App 495 : 43 All 469 (PC).
('33) 20 AIR 1933 All 412 (413) (DB).
('83) 1883 All W N 193 (193) (DB).
('04) 31 Cal 737 (743) (DB).
('12) 14 Ind Cas 537 (539) (DB) (Lah).
('22) 9 AIR 1922 Mad 249 (259) (DB).
('31) 18 AIR 1931 Rang 105 (106, 107) : 9 Rang 1 (DB).
('23) 10 AIR 1923 Rang 107 (108) (DB).
('32) 19 AIR 1932 Pat 270 (271) : 11 Pat 415 (DB).
('39) 26 AIR 1939 Pesh 34 (37) (DB). (Auction-purchaser under prior mortgage decree can use prior mortgage as shield.)
('37) 24 AIR 1937 Oudh 478 (480) (DB).
[But see ('17) 4 AIR 1917 Mad 751 (753) : 40 Mad 77 (DB). (Dissented from in AIR 1932 Mad 566 : 56 Mad 115 and also contrary to AIR 1922 PC 11 : 48 Ind App 465 : 43 All 469 (PC).)]

33 ('31) 18 AIR 1931 All 466 (481) : 53 All 1023 (FB).

34 ('40) 27 AIR 1940 Mad 646 (649).
('22) 9 AIR 1922 PC 11 (13) : 48 Ind App 465 : 43 All 469 (PC). (The limitation period had run out in this case—See the discussion of this decision in AIR 1931 All 466 : 53 All 1023 (FB).)

(v) J mortgages with possession certain property to G but the latter allows him to remain in possession under a rent deed executed by him. Then J purports to mortgage the same property to S with possession. Thereafter G obtains a decree for sale on foot of his mortgage and purchases the property himself in execution of the decree. To the suit in which this decree is obtained, S is not made a party. When G attempts to obtain possession, he is resisted by S who is in possession. Thereupon G brings a suit against S for possession. G is entitled to succeed in the suit as the mortgage conferred on him the right to possession and therefore S could not get any right to possession from J the mortgagor under 'his' mortgage. (35) As seen already, an 'English' mortgagee is similarly entitled to possession and this right is not affected merely because a subsequent transferee of the mortgaged property is not impleaded as a party to the suit on the mortgage.

(vi) C makes a mortgage in favour of A. Thereafter, in execution of a money decree against C, the mortgaged property is attached and sold and is purchased by D. Pending the attachment, A purchases by private sale the property from C in satisfaction of the mortgage and enters into possession. In a suit by D against A for recovery of possession, can A set up his mortgage as a "shield" as a defence to the suit? No. (36) The reason is that the private purchase of A pending attachment is void against all claims of D arising under the attachment and does not convey the equity of redemption to A. The prior mortgage can be used as a shield only for the purpose of protecting a possession 'to which the person setting it up has become lawfully entitled', and since in the case above referred to, A had no valid title to such possession as against D, he cannot use his prior mortgage as a shield in D's suit to recover possession. But the prior mortgagee can sue the auction-purchaser on the mortgage. (37)

(vii) C executes simple mortgages first in favour of A and then in favour of B. A sues C on his mortgage without impleading B. B also institutes a parallel suit on his own mortgage without impleading A. A purchases, 'pending' B's suit, the mortgaged property in execution of his decree, and thereafter B purchases the same property in execution of his decree. If the doctrine of 'lis pendens applies to the case, then A's purchase cannot take effect as against B's and therefore B will be entitled to possession as against A; A's remedy will then be to file a fresh suit for sale against B.(38) Further, on the analogy of the principle stated in class (vi) above, A not being 'entitled' to possession cannot hold up his prior mortgage as a shield against B's suit for possession. The undermentioned cases, (39) however, while holding that the doctrine of 'lis pendens applies to such cases, have nevertheless come to the conclusion that A can get a decree for possession 'subject to redemption by' B. The High Court

35 ('36) 23 AIR 1936 Lah 153 (155, 156) (DB).

36 ('29) 16 AIR 1929 PC 288 (289) (PC). (Not a usufructuary mortgage.)
[But see ('26) 13 AIR 1926 Nag 21 (23, 24) :23 Nag LR 86. (Transferee *pendente lite* held entitled to set up prior mortgage as shield.)]

37 *See* ('37) 24 AIR 1937 Rang 359 (360).

38 ('07) 31 Bom 112 (118) (DB). (In this case the decision turned on the peculair facts disclosed.)
('30) 17 AIR 1930 Mad 570 (571 572).
[*See also* ('48) 35 AIR 1948 Pat 111 (112) *Sarat Chandra* v. *Chintamani*.]
[See also sale under decree on prior mortgage pending foreclosure suit on puisne mortgage, (the prior and puisne mortgagees not being made parties to each other's suits)—Foreclosure decree in puisne mortgagee's suit binds the auction purchaser under decree on prior mortgage, as sale in his favour is affected by lis pendens]
('12) 16 Ind Cas 779 (779) (DB) (Mad). (Puisne mortgagee obtaining decree on his mortgage without impleading prior mortgagee and purchasing property in execution—Prior mortgagee purchasing mortgaged property privately during pendency of the suit—*Held*, prior mortgagee was entitled to fall back on his mortgage and suit for sale on his mortgage was maintainable.)]

39 ('21) 8 AIR 1921 Pat 150 (151, 152) (DB).
('22) 9 AIR 1922 Nag 89 (91, 92) (FB).
('14) 1 A 1914 S 131 (132): 8 S L R 264 (DB).
[But see ('26) 13 AIR 1926 All 480 (486) (DB). (*Lis pendens* does not apply—Prior mortgagee cannot compel unimpleaded puisne mortgagee to redeem him.)]

of Allahabad has, in the undermentioned Full Bench case, (40) held that the doctrine of 'lis pendens' applies to such cases but has in a somewhat contrary manner come to conclusions which can only follow on the basis that the doctrine does 'not' apply. Thus, it has formulated the following conclusions:

If a sues B as plaintiff for possession, then,

(1) If he was the earlier purchaser, (i. e., purchaser pending B's suit) in point of time, he can redeem B and recover possession even though his (A's) mortgage is barred by time;

(2) If he is the later purchaser (i. e., if B's purchase is pending A's suit) then his suit even for redemption cannot be decreed.

If B sues A as plaintiff for possession, then,

(1) If B is the earlier purchaser in point of time, he must redeem A and A cannot compel B to submit to redemption by him;

(2) If B is the later purchaser in point of time he must first redeem A but A will have the right to redeem B next and retain possession. (40 a)

The High Courts of Madras (41) and Calcutta (42) have held that the doctrine of 'lis pendens' does not apply to legal proceedings to enforce mortgages and that therefore a sale in pursuance of a mortgage decree, the mortgage having been executed before the institution of the suit, is not affected by the doctrine of 'lis pendens'. According to this view the 'first' purchaser will be entitled to possession as against the later purchaser, a result, which is practically the same as that of the Full Bench case of the Allahabad High Court referred to above. (See also A. I. R. commentaries on the Civil procedure Code, S.65, Note 14 and the Transfer of Property Act, section 52.)

In the principles discussed in the several classes of cases considered above, there is no distinction between the case of a mortgagee purchaser and a stranger purchaser, as can be seen from an examination of the case above referred to.

When the puisne mortgagee, who has not been impleaded in a suit on the prior mortgage, seeks to redeem a prior mortgage, it was held before the Transfer of Property Act was passed that he should pay the amount due under the prior 'mortgage' without any reference to the 'decree' that was passed in the suit on the prior mortgage. (43) But S. 89 of the said Act provided that when

40 *('31) 18 AIR 1931 All 466 (481, 482, 486) : 53 All 1023 (FB).

40 (a) ('48) 35 AIR 1948 Pat 111 (112) *Sarat Chandra* v. *Chintamani.*

[Suits by perior and puisne mortgagees without impleading each other—Decree and sale under prior mortgage followed by foreclosure decree on puisne mortgage—Puisne mortgagee can redeem the auction purchaser but latter will afterwards be entitled to redeem the puisne mortgagee by paying the amounts of both the mortgages. A. I.R. 1931 All 466 : 53 All 1023 (F. B.) Rel. on.]

41 ('45) 32 AIR 1945 Mad 91 (92, 93): ILR (1945) Mad 578 (DB) *Natesh Chettair* v. *Subbunarayana.*

[Refusal by puisne mortgagee to implead the prior mortgagee purchaser in the execution proceedings in spite of the puisne mortgagee knowing of such purchase will disentitle him to equitable relief] ('34) 21 AIR 1934 Mad 585 (586, 587). (Priority of date of purchase gives priority of title to possession—Fact that particular mortgage was earlier in date or particular suit was filed earlier is immaterial.)
('33) 20 AIR 1933 Mad 583 (584, 590, 594): 56 Mad 846 (FB). (Priority of date of purchase gives priority of title to possession.)
('80) 2 Mad 108 (112) (DB).
('03) 26 Mad 484 (485) (DB).
('09) 32 Mad 485 (489) : 4 Ind Cas 1077 (1079) (DB).

42 ('42) 29 AIR 1942 Cal 394 (401) (DB).
†('05) 32 Cal 891 (905) (DB). (Per Mitra, J.)
('33) 20 AIR 1933 Cal 181 (182).
('80) 5 Cal 265 (268) (DB).
See however ('43) 30 AIR 1943 Cal 577 (585, 586) : 210 Ind Cas 67 *Md. Juman Mia* v. *Akali Mudiani.*
[Where the prior mortgagee is impleaded as a party to the suit on the puisne mortgage and pending such suit, the prior mortgagee sues on his mortgage obtains a decree and purchases the property in execution of such decree, the sale in his favour will be affected by the doctrine of lis pendens]

43 ('91) 18 Cal 164 (180) : 17 Ind App 201 (PC).

once a final decree was passed on a mortgage the mortgage security and the right to redeem were both 'extinguished' with the result, that thereafter the rights of the parties fell to be determined on the basis of the decree. (44) Even subsequent to the Transfer of Property Act the earlier view is adopted in many cases. (45) In O. 34 R.5 which has taken the place of S.89 of that Act the words as to the mortgage security being extinguished have been omitted. The result now is the same as was held by the decisions prior to the Transfer of Property Act, namely, that the puisne mortgagee seeking to redeem the prior mortgagee should pay the amount due under the prior 'mortgage' and not merely the amount due under the 'decree' thereon.(46) (See also O. 34 R. 5, Note 13.) He is not, however, bound to pay for any 'improvements' made by the purchaser. (47) Where a puisne mortgagee is 'impleaded in a suit to enforce a prior mortgage, and a decree for sale or foreclosure is passed on the mortgage the effect is to extinguish his security if he does not exercise his right of redemption or his security is not expressly saved. (48) It was held in the undermentioned case (49) that the puisne mortgagee is not entitled, in such a case, to insist that the mortgagor should redeem 'his mortgage' also, his cause of action being altogether different from that of the prior mortgagee. Similarly, it was held that if the puisne mortgagee pays off the prior mortgage, he cannot apply for an order absolute for the amounts of 'both' the mortgages. (50) But the said cases are of doubtful authority now, since express provision is made in

44 ('20) 7 AIR 1920 P C 79 (80) : 42 All 364 : 47 Ind App 71 (PC).
(1900) 22 All 394 (397, 398))DB).
[*See also* ('18) 5 AIR 1918 PC 34 (35) : 40 All 407 : 45 Ind App 130 (PC).]

45 ('97) 19 All 527 (534) (DB).
('03) 25 All 388 (394, 395) (FB).
('01) 24 All 185 (187) (DB).
('91) 16 Bom 486 (491) (DB).
('06) 33 Cal 590 (595) (DB).
('97) 21 Mad 64 (67, 68) (DB).
('03) 26 Mad 484 (485) (DB).
('08) 31 Mad 425 (428) (DB).
('08) 31 Mad 258 (259, 260) (DB).
('07) 5 Cal L Jour 315 (320) (DB).
('04) 1 All L Jour 207 (208, 209) (DB).
('14) 1 AIR 1914 Bom 268 (269) : 38 Bom 24 (DB).
('11) 33 All 370 (373) : 9 Ind Cas 670 (671) (DB). (Not entitled to redeem by simply paying the price for which the property was sold—Must pay the full amount due on the prior mortgage.)

46 ('30) 17 AIR 1930 All 355 (356) : 52 All 471 (DB).
('41) 28 AIR 1941 Cal 484 (486) : I L R (1941) 1 Cal 514 (DB).
('41) 28 AIR 1941 Lah 96 (96).
('40) 27 AIR 1940 Cal 150 (153) (DB).
('39) 26 AIR 1939 Cal 15 (18) : I L R (1938) 2 Cal 643.
('22) 9 AIR 1922 Cal 23 (25, 27) : 49 Cal 626 (DB).
('26) 13 AIR 1926 Nag 214 (214, 215) : 21 Nag L R 165.
('33) 20 AIR 1933 Lah 75 (76). (But credit should be given for profits recovered by prior mortgagee.)
('33) 20 AIR 1933 All 412 (414) (DB).
('30) 17 AIR 1930 All 485 (486, 487) : 52 All 331 (DB).
('22) 9 AIR 1922 PC 11 (13) : 48 Ind App 465 : 43 All 469 (PC).
('12) 17 Ind Cas 291 (292) (DB) (Mad).
('16) 3 AIR 1916 Lah 219 (220) : 1916 Pun Re No. 86 (DB).
('16) 3 AIR 1916 All 273 (275).
('14) 1 AIR 1914 All 42 (42) : 36 All 123.
('32) 19 AIR 1932 Pat 270 (272) : 11 Pat 415 (DB). (Not entitled to redeem by simply paying the price for which the property was sold—Must pay the full amount due on the prior mortgage.)
('36) 23 AIR 1936 Nag 128 (129) : ILR (1936) Nag 9. (Costs in prior mortgagee's suit should not be included in the price of redemption.)
[*See* ('42) 29 AIR 1942 Cal 138 (141) (DB). (Sale in execution of prior mortgagee's decree to which puisne mortgagee was not a party—Suit by puisne mortgagee to enforce his mortgage making purchaser a party—Purchaser can claim not the purchase-money paid by him at auction sale but only the amount due on the prior mortgage.)]

47 ('22) 9 AIR 1922 All 104 (105) : 44 All 418 (DB).
('08) 31 Mad 425 (430) (DB).
('96) 20 Mad 120 (123) (DB).

48 ('04) 7 Oudh Cas 243 (247) (DB).
('06) 1906 All W N 112 (113).
('16) 3 AIR 1916 Pat 64 (65) : 1 Pat L Jour 261.
†('32) 19 AIR 1932 Cal 126 (131) : 59 Cal 117 (DB). (Rights of puisne mortgagee discussed.)
[See however ('15) 2 AIR 1915 All 297 (298). (Puisne mortgagee's rights are not affected when only a money decree is obtained on the prior mortgage.)]

49 ('05) 1 Cal L Jour 31 (36) (DB).
50 ('04) 36 All 504 (506) (DB).

Rr. 2 and 4 for the adjudication of the rights of subsequent mortgagees who are joined as parties to a suit on the prior mortgage. See also Form Nos. 9, 10 and 11 of Appendix D. These legislative changes only give effect to an old practice as can be seen from the case noted below. (51) Where a prior mortgagee sues on his mortgage without impleading the puisne mortgagee and purchases the property in execution of the decree in such suit and enfers into possession he is liable to account for the rents and profits of the property and in a suit by the puisne mortgagee on the puisne mortgage, such rents and profits must be credited in reduction of the amount payable to the prior mortgagee. (51 a) See also the undermentioned cases. (52)

20. A person cannot be both a plaintiff and a defendant.—Suppose, A and B are first mortgagees and A and C are the puisne mortgagees of a property. In a suit by A and B for foreclosure of their mortgage, C alone can be joined as defendant as a puisne mortgagee, because A cannot be both plaintiff and defendant in the same suit. (1) The same person cannot be both plaintiff and defendant in a suit even in 'different capacities.' (2)

21. Joinder of parties.—A misjoinder of plaintiff in a mortgage suit, some of whom are not entitled to any relief, is a mere defect of form and is not fatal to the suit. (1) This rule does not 'prohibit' the joinder of any person (2) whom it is proper to add under the provisions of O.1 Rr. 1 and 3, Civil Procedure Code. Where, after the commencement of the trial of the suit, an application is made to the Court for adding persons alleged to be interested in the subject-matter of the suit, the matter is in the discretion of the Court; it may, in a proper case, decline under O. 1 R. 10, Civil Procedure Code, to add the parties sought to be impleaded. (3) As to the effect of joining new parties after the period of limitation, see the A. I. R. Commentaries on the Limitation Act, 2nd (1942) Edition, S.22.

22. Revision.—It has been held by the High Court of Patna (1) that S.115 does not apply to the case of a mere refusal to add a person as a plaintiff in a

51 ('97) 24 Cal 190 (192).
('48) 35 AIR 1948 Mad 132 (132, 133) *Arunachalam* v. *Jagannatha.*

51 (a) ('45) 32 AIR 1945 Mad 91 (92, 93): ILR (1945) Mad 578 (DB). *Natesa Chettiar* v. *Subbunarayana.*

52 ('20) 7 AIR 1920 Nag 176 (176) : 16 Nag LR 180. (Lessee not joined in suit on mortgage—Mortgagor foreclosed—Lessee redeeming mortgage—Mortgagor's rights not revived and he cannot redeem lessee.)
('22) 9 AIR 1922 Mad 307 (309, 310) (DB). (Legal representative of deceased party not brought on record—Proceedings do not bind him.)
('10) 5 Ind Cas 339 (340) (DB) (Mad). (Legal representatives of deceased defendant not brought on record of application for sale—Sale set aside.)
('25) 12 AIR 1925 Pat 57 (58) : 3 Pat 818 (DB). (Defendant opposing the impleadment of any person is estopped from objecting to the proceedings on the ground of failure to make him a party.)
('30) 17 AIR 1930 Mad 538 (539) : 53 Mad 581 (DB). (Charge decree—Non-party cannot intervene in the execution of the decree and resist execution—His remedy is by separate suit.)
('17) 4 AIR 1917 All 359 (361, 362) (DB). (Suit by prior and puisne mortgagee without impleading others—Subsequent suit to establish priority—Court should decide according to equity having regard to the real position of the parties.)
('02) 30 Cal 142 (151, 152) (DB). (Party to suit omitted in execution proceedings—Sale is not nullity but may be set aside by appropriate proceedings.)
('32) 19 AIR 1932 Cal 126 (129) : 59 Cal 117 (DB). (Rights of puisne mortgagee discussed.)

O. 34 R. 1 N. 20

1 ('01) 24 All 179 (183, 184) (DB).
2 ('01) 25 Bom 606 (612) (DB).

O. 34 R. 1 N. 21

1 ('25) 12 AIR 1925 Nag 366 (368).
2 ('20) 7 AIR 1920 Nag 247 (248).
3 ('24) 11 AIR 1924 Oudh 33 (33, 34) : 26 Oudh Cas 317. (Party sought to be impleaded after preliminary decree—Application for joinder refused.)
('05) 1905 All W N 35 (36). (In this case it was held that the Court ought to have granted the application for the addition of parties.)

O. 34 R. 1 N. 22

1 ('26) 13 AIR 1926 Pat 207 (208) : 4 Pat 723 (DB).

mortgage suit but that, if the result amounts to a denial of a fair trial, the High Court could interfere under S. 107 of the Government of India Act of 1915. An order discharging necessary parties from the suit is open to revision. (2) See also the undermentioned case. (3)

(a)**R. 2.** [New: Act IV of 1882, S. 86.] (1) In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a preliminary decree—

Preliminary decree in foreclosure suit.

(a) ordering that an account be taken of what was due to the plaintiff at the date of such decree for—
  (i) principal and interest on the mortgage,
  (ii) the costs of suit, if any, awarded to him, and
  (iii) other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage-security, together with interest thereon; or
(b) declaring the amount so due at that date; and
(c) directing—
  (i) that, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant at his cost free from the mortgage and from all nicumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property; and
  (ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) Where, in a suit for foreclosure, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree shall provide for the

2 ('31) 18 AIR 1931 Oudh 410 (410, 411) (DB).

3 ('41) 28 AIR 1941 Nag 133 (134). (The decision as to when a person who claims a paramount title is a necessary party to the mortgage suit is similarly open to revision.)

adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 or Form No. 10, as the case may be, of Appendix D with such variations as the circumstances of the case may require.

[See Rules 3, 10 and 11]

(a) Rules 2 to 8 were substituted by the Transfer of Property (Amendment) Supplementary Act XXI of 1929, Section 4, for the original rules.

Provincial Amendment

PATNA

In sub-rule (2) *insert* the words "of its own motion or" after the words "the Court may." [7-1-1936]

Synopsis

1. Legislative changes.
2. Analogous law—Transfer of Property Act, Section 86.
3. Scope and object of the rule.
4. Persons entitled to the right of foreclosure.
5. Form of preliminary decree.
6. "Ordering that an account be taken."
7. Principal.
8. Interest.
9. Interest subsequent to the date fixed for payment.
10. Rule of damdupat. See Note 16 on Section 34 of the A.I.R. Commentaries on the Code of Civil Procedure, 4th (1944) Edn.
11. Costs of the suit.
12. Other costs, charges and expenses.
13. Account against mortgagee in possession.
14. Accounts in suits by or against sub-mortgagee.
15. Subsequent mortgagees.
16. "Pays into Court."
17. "On or before such date as the Court may fix within six months."
18. Extension of time.
19. Plaintiff to apply for final decree.
20. Mortgage of chattel and intangible property.
21. Res judicata.
22. Equitable mortgage of personal property. See Note 4.
23. Appeal.

Topic Indicator

Instalment decrees in mortgage suits. See Note 5.

Irregular decrees. See Note 5.

Right of redemption. See Notes 3 and 18.

Rights of mortgagee after preliminary decree. See Note 4.

Subsequent mortgagee's subrogation and effect. See Note 15.

Validity of part of mortgage. See Note 7.

1. Legislative Changes.— The rule has been extensively amended by the Transfer of Property (Amendment) Supplementary Act (XXI of 1929). The old rule ran as follows:

"2. In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a decree—

(a) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for the costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

(b) declaring the amount so due at the date of such decree, and directing—

(c) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all encumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property, but

(d) that if such payment is not made on or before the day to be fixed by the Court, the defendant shall be debarred from all right to redeem the property."

The following important changes may be noted :

(1) The present rule makes it clear that the decree under it is a 'preliminary' decree.(1).

(2) Under the old rule it was not clear, when accounts were directed to be taken whether they were to be taken up to the date of declaring in Court the amount due, or up to the date fixed for payment. It is now provided that the accounts are to be taken up to the date of the preliminary decree.

(3) The provision as to other costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage security, is new.

(4) The new rule makes it clear as to when the period fixed for payment commences to run.

(5) The provision in sub-rule (1) (c) (i) relating to subsequent costs and subsequent interest is new.

(6) The same sub-rule makes it clear that the re-transfer is to be at the mortgagor's cost.

(7) Under the same sub-rule the mortgagee has to apply for a final decree on default by the mortgagor.

(8) The provision as to the Court's power to extend time which was contained in the proviso to sub-rule (2) in the old Rule 3 has been enacted as sub-rule (2) of this rule.

(9) Sub-rule (3) makes express provision for the form of decree in cases where subsequent mortgagees are made parties.

2. Analogous law—Transfer of Property Act, Section 86.—This rule corresponds to S. 86 of the Transfer of Property Act; that section was as follows:

"86. In a suit for foreclosure, if the plaintiff succeeds, the Court shall make a decree, ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree,

and ordering that, upon the defendant paying to the plaintiff or into Court the amount so due, on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all encumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims; and shall, if necessary, put the defendant into possession of the property; but

that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property."

The following differences may be noted—

(1) Under R. 2 payment has to be made in all cases **into the Court** while under S. 86 payment could be made to the **plaintiff** or into the Court.

(2) The words "if so required" have been added to sub-rule (1) (c) (i) as it was found that in the mofussil Courts it was not the practice for the mortgagee to execute a re-conveyance of the property to the mortgagor.

Order 34 Rule 2—Note 1

1 ('23) 10 AIR 1923 Bom 420 (421) (DB). (Where the opinion was expressed under the old rule that the point should be made clear by amendment.)

3. Scope and object of the rule.—The scheme and object of this rule is "that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day and that after the expiration of that day, if the property be not redeemed, the matter shall pass from the domain of contract to that of judgment and the rights of the mortgagee should thenceforth depend not on the contents of the bond but on the directions in the decree."(1)

The object of this rule is to prevent mortgagees from realizing their securities otherwise than in the mode prescribed by the rule.(2)

As to the applicability of the rule to cases under the Bengal Land Redemption and Foreclosure Regulation, XVII of 1806, see the case noted below.(3) See also the undermentioned case.(4)

4. Persons entitled to the right of foreclosure.—Under S. 67 of the Transfer of Property Act, as it existed before it was amended by Act XX of 1929, the remedy by way of foreclosure was available only in the case of—

(1) a mortgage by conditional sale,

(2) an English mortgage, and

(3) an equitable mortgage by deposit of title deeds in Bombay.(1)

The newly amended S. 67 now provides that no mortgagee "other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose," can institute a suit for foreclosure.(2) It follows that neither a mortgagee under an English mortgage, nor an equitable mortgagee by deposit of title deeds in Bombay, can sue for foreclosure. Their remedy is only to sue for sale. By S. 15 of the amending Act XXI of 1929, however, the remedy of the equitable mortgagee in Bombay to proceed by way of foreclosure was kept open till 1st April 1932.

The characteristic of a foreclosure decree is that it completely extinguishes the mortgagor's right to redeem and thereafter makes the mortgagee owner of the property. A mortgagee who has obtained a preliminary decree for foreclosure is entitled to apply for setting aside an execution sale under O. 21 R. 90, Civil Procedure Code, on the ground of material irregularity.(3)

5. Form of preliminary decree.—In a preliminary decree for foreclosure, the Court cannot, except with the consent of parties, direct payment of the mort-

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Order 34 Rule 2 Note 3

1 *('07) 34 Cal 150 (161) : 34 Ind App 9 (PC). (Observations were with reference to the Sections of the old Transfer of Property Act; but they apply equally to the present rule.)

('19) 1919 P 420 (422) : 4 P L 306 (DB).

('21) 1921 U B 5 (7) : 4 U B R 1.

('17) 1917 A 17 (20) : 39 A 506 (DB).

[*See also* ('42) 29 AIR 1942 Cal 367 (368) : ILR (1942) 1 Cal 395. (Contract remains effective until expiry of period of grace —Only after that date it passes into domain of judgment—Amendment of the rule in 1929 has made no change in this respect. Interest payable after preliminary decree up to date fixed for payment is sum payable in respect of loan and therefore interest within the meaning of S. 2 (8) of Bengal Money-lenders Act of 1940.)

('39) 26 AIR 1939 All 52 (54). (Preliminary decree for foreclosure passed in suit on mortgage—Relations between parties are governed subsequently by terms of decree and not by terms of mortgage deed.)]

2 ('95) 22 Cal 813 (816) (DB).

3 ('36) 23 AIR 1936 Lah 982 (983) (DB).

4 ('42) 29 AIR 1942 Cal 128 (129) : ILR (1942) 1 Cal 414 (DB). (If, after the preliminary decree has been passed, the judgment-debtor applies under S. 36 (6) of the Bengal Money-lenders Act (X of 1940) and the suit is one to which that Act applies, the Court has to pass a fresh preliminary decree after re-opening the previous one.)

Order 34 Rule 2 Note 4

1 ('89) 14 Bom 269 (273) (DB).

2 ('96) 19 M 249 (252, 253) : 23 I A 32 (PC). (Simple mortgagee not entitled to foreclosure.)

('35) 22 AIR 1935 All 778 (781) (DB).

('20) 1920 Oudh 204 (206) (DB). (Foreclosure decree can only be passed in the case of a mortgage by conditional sale.)

3 ('86) 13 Cal 346 (348) (DB).

gage-money by instalments.(1) But, where a preliminary decree allowing payment by instalments is passed by 'consent' of parties, it does not necessarily fall outside the scope of R. 2; the provisions of Rr. 2 and 3 may still apply to such a decree.(2) A preliminary decree for foreclosure which does not conform to the form prescribed by this rule is irregular, but after it is made absolute, the defendant cannot object to delivery of possession under the decree to the decree-holder.(3)

The parties to a mortgage can contract themselves out of the provisions of Rr. 2 and 3 and agree to have a decree passed in such terms as to make it operate as a final decree automatically or that in default of payment by a stipulated date the decree shall operate as a final decree for foreclosure.(4) (See also O. 34 R. 4, Note 15. and O. 34 R 5, Note 5.)

See also Appendix D, Form Nos. 3, 3A, 9 and 10.

6. "Ordering that an account be taken."—The amount (whether accounts are directed to be taken or not) is to be calculated 'up to the date of the preliminary decree'. The object of the rule is that a general account should be taken of 'all' the amounts due between the parties once for all and that the aggregate amount should be declared as due to the plaintiff on payment of which the property is to be redeemed.(1) The accounts have to be taken 'before' the final decree; they cannot be directed to be taken 'in execution' of the final decree.(2) In the taking of such accounts, not only sums due by the mortgagor but also those due by the mortgagee should be taken into consideration.(3) If the decree is silent as to the person selected to take the accounts, the parties may themselves select a person to do so and his award will be binding on them.(4) The accounting is, however, to be restricted to the 'mortgage transaction' in question in the suit and should not be extended to other transactions between the parties.(5) For other cases on this topic, see the undermentioned decisions.(6)

7. Principal.—The onus of proving the amount due to him is initially on the mortgagee. Hence, if the mortgage deed is not properly stamped and the mortgagee refuses to pay the stamp duty and penalty with the result that the mortgage deed is inadmissible in evidence, the mortgagee cannot recover anything beyond what the mortgagor 'admits' to be due.(1)

The statement in the mortgage deed is 'prima facie' proof of the amount due.(2) But the mortgagor can plead a total or partial discharge of the debt or that the recital as to consideration in the bond is wholly or partially untrue.(3) But in such a case the burden will be upon him to substantiate his allegations.

Order 34 Rule 2 Note 5

1 †('79) 2 All 320 (321, 322) (DB).
('83) 7 Bom 332 (335) (DB).
('81) 5 Bom 604 (607) (DB).
2 ('28) 15 AIR 1928 Nag 333 (335) : 25 Nag LR 175.
3 ('06) 4 Cal L Jour 533 (535) (DB).
4 ('43) 30 AIR 1943 All 321 (326): ILR (1943) All 684: 210 Ind Cas 573 (DB). *Ghulam Amir* v. *Masuda Khatun.*
('44) 31 AIR 1944 Oudh 111 (113).
('44) 31 AIR 1944 Oudh 106 (109) (DB).

Order 34 Rule 2 Note 6

1 ('26) 13 AIR 1926 All 119 (120).
[*See* ('32) 19 AIR 1932 Pat 332 (334) (DB). (The rule contemplates declaration, (a) at time of judgment, or (b) after taking account of amount due on date of decree.)]
2 ('12) 15 Ind Cas 362 (363) (DB) (Mad). Also see O. 34 R. 4, Note 5.
3 ('17) 4 AIR 1917 Cal 853 (854) (DB).
('80) 6 Cal 377 (378, 379) (DB). (Mortgagee not entitled to withdraw from the taking of accounts when they appeared to be going against him.)
('89) 16 Cal (682) (691): 16 Ind App 107 (PC). (If the mortgagor fails to set up any equity in his favour he cannot subsequently sue on it.)
4 ('09) 33 Bom 216 (218, 219) (DB).
5 ('27) 14 AIR 1927 Oudh 170 (173) (DB).
('25) 12 AIR 1925 Pat 59 (63) : 3 Pat 829 (DB).
6 ('27) 14 AIR 1927 P C 17 (17) (PC). (Failure to direct accounts to be taken not serious error when the result of taking accounts would be to give the same sum as that for which decree was passed.)
('14) 1 AIR 1914 Lah 64 (65) (DB). (Mortgagee under-stating his real claim—Further deductions not to be allowed.)

Order 34 Rule 2 Note 7

1 ('82) 6 Bom 669 (670) (DB).
2 ('14) 1 AIR 1914 All 319 (319) : 36 All 478 (DB).
3 ('20) 7 AIR 1920 Cal 888 (888) (DB). (Plea of partial adjustment.)

It is not for the mortgagee to prove that the consideration stated in the bond was actually paid by him.(4) But recitals in deeds are not evidence against 'third parties'.(5)

Where only part of the alleged consideration is proved to have been paid, the mortgage is valid to the extent of the part so paid.(6) Similarly, in the case of a mortgage of property belonging to a Hindu joint family, where it is proved that only a part of the consideration was supported by legal necessity, the mortgage is valid and binding to that extent.(7)

8. Interest.—By Act XXI of 1929, a new rule (R. 11) has been enacted which deals specially with the power of the Court to order payment of interest in mortgage suits. See the Notes on that rule for full information on the subject. According to S. 58 (a) of the Transfer of Property Act, "Mortgage-money" includes interest on the principal secured by the mortgage. This principal is recognized by the present rule which 'inter alia' makes the payment of the interest, provided in the mortgage deed, a condition of redemption. In the absence of anything to the contrary in the mortgage deed,(1) interest as well as the principal constitutes a charge on the property.(2)

9. Interest subsequent to the date fixed for payment.—Before the amendment of the rule by Act XXI of 1929 there was no provision either in R. 2 or R. 3 for the payment of interest subsequent to the date fixed for payment. Hence, there was a lack of uniformity in the decisions on the question.(1) Express provision has now been made for the inclusion, in the preliminary decree for foreclosure, of a direction for the payment of "subsequent interest" up to the date of actual payment. For fuller information on the subject, see Note 2 on Rule 11.

10. Rule of damdupat.—See Note 16 on Section 34 of the A.I.R. Commentaries on the Code of Civil Procedure, 4th (1944) Edition.

11. Costs of the suit.—The general rule in all suits relating to mortgages is that the mortgagee is entitled to his costs. But it is within the power of the Court, in view of the mortgagee's conduct and the peculiar circumstances of any case, to refuse to award him any costs.(1) Ordinarily costs awarded against a

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4 ('15) 2 AIR 1915 Lah 221 (222) (DB).
('96) 23 Cal 950 (955) : 23 Ind App 92 (PC).
†('04) 27 All 71 (72, 73) (DB).
('01) 15 C P L R 24 (25). (Onus of promisor ' not shifted by promisee's admission that actual consideration was different from that stated in bond.)
('02) 26 Bom 363 (371) (DB).
[*See* ('80) 6 Cal 268 (277, 278). (Transaction not honest and *bona fide*—The recital as to payment of consideration entitled to little weight—Onus of proving *bona fides* of transaction is on plaintiff.)]

5 ('95) 17 All 428 (430) (DB).
('07) 5 Cal L Jour 653 (658) (DB).

6 ('06) 10 Cal W N 932 (933) (DB).

7 *See* ('29) 16 AIR 1929 All 15 (15, 16) (DB).

Order 34 Rule 2 Note 8

1 ('25) 12 AIR 1925 Lah 182 (182) (DB). (Mortgage deed providing for redemption on payment of principal sum only, interest stipulated is not a charge.)
('21) 8 AIR 1921 Bom 28 (29) : 45 Bom 523 (DB). (Mortgage not for interest, but mortgagee to take possession of property—Mortgagee making no attempt to obtain possession cannot claim interest.)

2 †('24) 11 AIR 1924 PC 183 (183, 184) : 5 Lah 425 : 51 Ind App 377 (PC).

Order 34 Rule 2 Note 9

1 ('16) 3 AIR 1916 Mad 1202 (1202) (DB).
('17) 4 AIR 1917 Pat 582 (583, 584) (DB). (Provision for payment of interest may be made at the time of enlarging the period fixed for payment.)
('94) 16 All 269 (270). (Future interest not charge on property.)
[*See also* ('21) 8 AIR 1921 Upp Bur 5 (7) :4 Upp Bur Rul 1. (Appellate Court confirming lower Court's decree—No provision made for subsequent interest therein nor in the final decree—Review or appeal is the only remedy—Allowing subsequent interest on aggregate amount by way of amendment to meet ends of justice is invalid.)]

Order 34 Rule 2 Note 11

1 ('39) 26 AIR 1939 Bom 322 (333) (DB). (Plaintiff suing for Rs. 2, 00, 000 when he knew he could not recover more than Rs. 700—Costs of the suit not allowed.)
('78) 3 Bom 202 (203) (DB). (Costs refused on ground of usurious nature of transaction.)
('83) 8 Bom 190 (193) (DB). (Defendant in redemption suit is ordinarily entitled to costs unless he has refused a tender of the amount due to him or has so misconducted himself in the course of the suit as to induce the Court to subject him to a penalty.)

mortgagor are part of the mortgage-money, and are recoverable from out of the mortgaged property.(2) But the Court can, in the exercise of its discretion under S. 35, Civil Procedure Code, make such costs recoverable from the mortgagor 'personally'.(3) Where a defendant in a mortgage suit claiming title paramount to that of the mortgagor is struck off from the array of parties and is awarded costs, the mortgagor who is in no way responsible for it or the mortgaged property should not be made liable for such costs.(4)

A puisne mortgagee who is made a party to a suit on the mortgage is also entitled to his costs against the mortgagor.(5) Similarly, a co-mortgagee is also entitled to his costs even though he refused to join the plaintiff in a suit on a mortgage and was therefore joined as a defendant in the suit.(6) It has been held that costs are to be awarded to the mortgagee on the scale of costs as between attorney and client.(7) The mortgagee is also entitled to his costs incurred subsequent to the preliminary decree up to the date of payment. (See also Rule 10.)

12. Other costs, charges and expenses.—The rule as amended by Act XXI of 1929 makes express provision for payment to the mortgagee of all expenses properly incurred by him in respect of the mortgage security, together with interest thereon.(1) Even prior to the Act XXI of 1929 the mortgagee was entitled in a suit on the mortgage, to claim as part of the mortgage-money, expenses properly incurred by him for the preservation of the mortgaged property, the protection of his title to the property, etc.(2) (See the Transfer of Property Act, sections 72 and 63A.) Rule 10 also provides for the payment of such expenses incurred subsequent to the preliminary decree up to the date of payment.

13. Account against mortgagee in possession.—Under S. 77 of the Transfer of Property Act a mortgagee in possession of the mortgaged properly is not liable to account for the rents and profits of the property where, under the terms of the mortgage, the mortgagee is to take rents and profits in lieu of interest or

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('87) 14 Cal 99 (108) : 13 Ind App 116 (PC). (Both parties maintaining pleas far in excess of their legal rights—Ordered to bear their own costs.)
Also see O. 34 R. 10, Note 3.

2 ('48) 1948 Pat 127 (128) : 26 P 422 (DB).
†('25) 1925 Cal 1135 (1135,, 1136) (DB).
('25) 12 AIR 1925 Oudh 351 (351) : 29 Oudh Cas 34.
('30) 17 AIR 1930 Oudh 167 (168) : 5 Luck 595 (DB).
('28) 15 AIR 1928 Bom 123 (129, 130) : 52 Bom 459 (DB).
('18) 5 AIR 1918 Oudh 445 (445, 446) (DB).
('18) 5 AIR 1918 All 366 (366) : 40 All 109 (DB).
('89) 2 C P L R 94 (97, 98).
('39) 26 AIR 1939 Cal 166 (168) (DB).
Also see O. 34 R. 4, Note 12; R. 5, Note 26; R. 6, Note 11 and R. 10, Note 8.
[But see ('09) 4 Ind Cas 545 (545) (DB) Cal.
('88) 10 All 179 (181). (Foreclosure decree containing distinct and separate order for costs—Costs could not be considered part of the morgage-money—Mortgagee allowed to execute order for costs separately.)]

3 ('87) 14 Cal 185 (187) (DB).
('07) 3 Nag LR 97 (100).
('19) 6 AIR 1919 All 297 (298, 299) : 41 All 473 (DB).
('18) 5 AIR 1918 Nag 185 (185).
('39) 26 AIR 1939 Cal 166 (168) (DB).
[*See* ('88) 10 All 179 (181).
('98) 20 All 523 (527) (FB). (Mere separate order of costs under the rules of the Code is not necessarily an order for realization of the costs personally from the mortgagor. 1898 All W N 33 overruled.)]
Also see O. 34 R. 10, Note 8.

4 ('34) 21 AIR 1934 Nag 264 (268) : 30 Nag LR 331 (DB).

5 ('10) 37 Cal 907 (913).

6 ('29) 16 AIR 1929 Cal 544 (544) (DB).

7 ('77) 1 Ind Jur (NS) 22.
('81) 8 L Rep 437 (438).

Order 34 Rule 2 Note 12

1 †('41) 1941 Oudh 498 (501) : 16 L 812 (DB).
('33) 20 AIR 1933 Rang 112 (112). (Mortgagee paying Government revenue to save land may add it to the mortgage-money.)

2 ('85) 9 Bom 435 (437) (SB).
('98) 21 Mad 32 (34) (DB).
('98) 22 Bom 440 (446) (DB).
('91) 15 Bom 625 (639) (DB).
('80) 4 Bom 584 (589) (DB). (Mortgagee in possession entitled to reasonable costs of repairs if he renders an account of rents and profits.)
('98) 20 All 401 (408) (DB). (Mortgagee in possession paying Government revenue payable by mortgagor—He has a right to tack on amount so paid to his mortgage debt.)
(1864) 2 Bom H C R 214 (218, 219). (Cost of improvements.)

in lieu of interest and defined portions of the principal. In other cases a mortgagee in possession is liable to account for the rents and profits of the property. Under S. 76 (g) of the Transfer of Property Act he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee,(1) and is bound to deduct the rents and profits realized by him from the amount claimed by him against the mortgagor.(2) Further, he is liable to pay a reasonable occupation rent if he is personally in possession of the land.(3) He must also, in the absence of a contract to the contrary, pay the Government revenue and all charges of a public nature and all rents accruing due in respect of the property, and if owing to his default, the mortgagor has to pay any of these items of expenditure, he is entitled to a set-off in respect thereof.(4) See the Transfer of Property Act, section 76 (c).

14. Accounts in suits by or against sub-mortgagee.—A sub-mortgagee is entitled to sue for sale or foreclosure to the same extent as the original mortgagee himself.(1) Where a sub-mortgagee is a party to a suit on the mortgage, the proper course is to direct accounts to be taken, both of the amounts due to the original mortgagee and of the amounts due to the sub-mortgagee and to order that, out of the sum due to the original mortgagee, the sub-mortgagee should be paid the amount due to him on his mortgage, that the balance should be paid to the original mortgagee and that, thereafter, both the mortgagees should re-convey to the mortgagor the mortgaged property.(2) See also Appendix D, Form No. 11 and Notes on Rule 1.

15. Subsequent mortgagees.—The form of the preliminary decree given in the present rule should be adapted to the circumstances of each case. Where puisne mortgagees are impleaded as parties in a suit on a prior mortgage, a form similar to the one in use in the Chancery Division in the High Court in England may be found useful.(1) (See also Appendix D, Form Nos. 9 to 11.) The chief point to be noted in such cases is to give effect to the principle "redeem up, and foreclose down." The first right of redemption belongs to the next puisne mortgagee. If he makes default, he is foreclosed and the right to redeem devolves on the next puisne mortgagee and in the event of his default, the right belongs to the next mortgagee and the process goes on until the mortgagor is reached. If the mortgagor also fails to redeem he will be foreclosed.(2)

A subsequent mortgagee who has been added as a party to a suit for foreclosure by a prior mortgagee and who pays off the decree amount can, on his being transposed as plaintiff, apply for a final decree.(3)

16. "Pays into Court."—Under S. 86 of the Transfer of Property Act the defendant could pay the mortgage-money under the preliminary decree to the 'mortgagee' plaintiff direct or into the 'Court.'(1) But the present rule requires

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('03) 28 Bom 181 (188) (DB). (Mortgagee in possession can add sums spent for making good his title against mortgagor.)

Order 34 Rule 2 Note 13

1 ('66) 5 Suth W R 271 (276) (DB).
('66) 6 Suth W R 84 (85) (DB).
('02) 26 Bom 363 (371) (DB).
2 ('73) 14 Moo Ind App 443 (451) (PC).
('03) 25 All 287 (295) : 30 Ind App 66 : 7 Cal W N 514 (517) (PC).
('05) 27 All 351 (355) (FB).
[*See also* ('72) 6 Moo Ind App 393 (422) (PC).]
Also see O. 34 R. 7, Note 4.
3 ('90) 14 Bom 113 (115) (DB).
†('05) 1 Cal L Jour 531 (537) (DB).
4 ('84) 6 All 303 (312) : 1884 All W N 92 (95) (DB).

Order 34 Rule 2 Note 14

1 ('97) 20 Mad 35 (40) (DB).
2 ('91) 15 Bom 692 (693, 694) (DB).
Also see O. 34 R. 7, Note 4.

Order 34 Rule 2 Note 15

1 ('05) 27 All 325 (330) : 32 Ind App 123 (PC).
2 †('83) 7 Bom 526 (529) (DB).
('11) 10 Ind Cas 174 (175) (Oudh).
('05) 27 All 325 (331, 332, 333) : 32 Ind App 123 (PC).
3 ('28) 15 AIR 1928 Nag 145 (146) : 24 Nag L R 119.
[But see ('05) 27 All 325 (332) : 32 Ind App 123 : 9 Cal W N 577 (583) (PC). (Case under the Transfer of Property Act.)]

Order 34 Rule 2 Note 16

1 ('03) 8 Cal W N 102 (104) (DB).
[*See also* ('03) 16 C P L R 111 (112).]

the payment to be made only 'into the Court' in all cases.(2) As to when and how far a payment made 'out of Court' can be recognized by the Court dealing with an application to pass a final decree, see Note 14 on Rule 5.

17. "On or before such date as the court may fix within six months." —The rule only fixes the outer limit for the period to be fixed for the payment of the mortgage-money under the preliminary decree. The Court has a discretion to fix any shorter period it thinks fit.(1) Where accounts are directed to be taken, the period of six months should be calculated not from the date of the preliminary decree, but from the date on which the Court confirms and countersigns the accounts taken under its decree.(2) (See sub-r. (1) cl. (c) sub-cl. (i).) As to the question whether, when the preliminary decree is appealed against, the period fixed for payment runs from the date of the first Court's decree or from the date of the appellate decree, see Note 5 on R. 3.

It is open to the parties to agree that the decretal amount shall be payable by the judgment-debtor by instalments extending over a much longer period than the period of six months laid down in this rule.(2a).

See also the undermentioned case(3) under the Co-operative Societies Act of 1912.

18. Extension of time.—Sub-rule (2) of this rule which corresponds to the proviso to the old sub-r. (2) of R. 3 empowers the Court, on good cause being shown, to extend the time fixed for payment of the mortgage-money under the preliminary decree(1). But the mortgagor is not entitled to an extension of time 'as of right'.(2) The rule provides that extension of time may be granted "on good cause shown." The Court has no power to grant an extension of time where no good cause has been shown for such extension.(3) As to what constitutes "good cause," see the undermentioned cases.(4) Time may be extended

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2 ('39) 26 AIR 1939 Lah 79 (81) : ILR (1939) Lah 313.
('18) 5 AIR 1918 Cal 472 (473) (DB).
('19) 6 AIR 1919 Mad 792 (792) : 42 Mad 61: 48 Ind Cas 196 (197) (DB).
('13) 1913 Pun Re No. 12: 16 I.C. 987 (987) (DB).
†('30) 17 AIR 1930 Mad 105 (107, 108) (DB).

Order 34 Rule 2 Note 17

1 ('27) 14 AIR 1927 P C 17 (17) (PC).
2 ('15) 2 AIR 1915 Cal 502 (503) (DB).
2a ('43) 30 AIR 1943 All 321 (326): ILR (1943) All 684: 210 Ind Cas 573 (DB). *Ghulam Amir v. Mt Masuda Khatun.*
3 ('33) 20 AIR 1933 Nag 211 (213) (DB). (Rules under S. 43 depriving right of six months under O. 34 R. 2 are not *ultra vires.*)

Order 34 Rule 2 Note 18

1 ('90) 5 C P L R 54 (55).
('91) 5 C P L R 104 (104).
('18) 5 AIR 1918 All 98 (99) : 40 All 579 (DB).
('21) 8 AIR 1921 Oudh 138 (138).
[*See also* (33') 20 AIR 1933 Nag 164 (166) :29 Nag LR 227 (DB). (Preliminary decree — Compromise — Undertaking by mortgagor not to oppose application for final decree—Statutory right to ask for extension is not taken away.)]
2 ('19) 6 AIR 1919 Pat 497 (500) : 4 Pat L Jour 347 (DB).
('16) 3 AIR 1916 Mad 882 (882) : 39 Mad 882.
3 ('48) 35 AIR 1948 Nag 56: ILR (1947) Nag 412 (DB). *Madhaorao v. Eknathrao.* (AIR 1928 P.C. 137: 55 Ind App 207: 55 Cal 821 (PC) (Foll.)
('28) 15 AIR 1928 PC 137 (139) : 55 Ind App 207 : 55 Cal 821 (PC).
4 ('97) 19 All 180 (185) (DB).
('06) 2 Nag LR 137 (143).
('07) 3 Nag L R 55 (66). (Onus of proving "good cause" is on judgement-debtor.)
('07) 3 Nag L R 146 (156).
('87) 2 C P L R 29 (30).
('22) 9 AIR 1922 Nag 175 (177, 178).
('28) 15 AIR 1928 Nag 301 (302, 303). (Failure of crop and inability to raise necessary money in time afford good cause for extension of time.)
('30) 17 AIR 1930 Nag 12 (13). (Good cause must be alleged and judicially proved—No evidence of *bona fide* efforts to secure loan—Good cause entitling applicant to extension held not shown.)
('30) 17 AIR 1930 Nag 55 (55).
('30) 17 AIR 1930 Nag 178 (179) (DB). (No sufficient cause for extension of time shown—Final decree must be passed.)
('10) 8 Ind Cas 592 (593) (Low Bur). (Question of good cause to be decided in view of all the circumstances of the case.)
('13) 35 All 116 (119) : 18 Ind Cas 14 (16) (DB). (Deficiency in deposit within the time fixed due to miscalculation—*Held*, good cause for extension of time.)
('14) 1 AIR 1914 Nag 8 (10) : 10 Nag L R

even after the expiry of the period originally fixed(5) provided a 'final decree' has not been passed.(6) As the right to redeem continues until the final decree is actually passed, the mortgagor may pay in the money at any time before the final decree is passed though there may not be an 'express' order extending the period.(7) This is made clear now by the substitution of the words "before a final decree has been passed" at the beginning of R. 3 in place of the words "on or before the day fixed" which occurred in the old rule. Even where a preliminary decree is passed by consent of parties, the Court can exercise its power of extending the period fixed for payment.(8) See also the undermentioned decisions.(9)

An express application for extention of time is not necessary.(10) Nor need the application where one is made, be in 'writing.'(11) But the Court cannot postpone the passing of a final decree, on the application of a 'third party.'(12)

19. Plaintiff to apply for final decree.—The rule [sub-rule (1) (c) sub-cl (ii)] makes it clear that the 'plaintiff' has to apply for a final decree for foreclosure if the defendant fails to pay mortgage-money within the time fixed by the Court. In one case it was contended that a final decree passed on the application of the 'transferee' from the mortgagee was not binding on the mortgagor.

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150. (The words "good cause" should be liberally construed in favour of defendant for first extension—For subsequent extensions a stronger case must be made out.)
('20) 7 AIR 1920 Nag 24 (25). (Sufficiency of cause is a question of fact and a matter of judicial discretion in each case.)
('26) 13 AIR 1926 Oudh 180 (180, 181). (Discretion to be exercised liberally—Time to be extended to enable money being raised.)
('29) 16 AIR 1929 Nag 263 (264). (*Sembles*: Difficulty in raising money can be treated as good cause. The facts that the decretal amount is large and payment is made within a few months from the time fixed do not by themselves constitute good cause.)
('25) 12 AIR 1925 Nag 258 (258) (DB). (*Bona fide* attempt to raise money—Time may be extended provided mortgagee is not caused undue loss.)
('32) 19 AIR 1932 Nag 177 (179) : 28 Nag L R 221. (Time extended—One-third amount deposited—Time again asked for, refused and final decree passed in ignorance of deposit—On review time extended—*Held*, justified as balance also was deposited in the meantime.)

5 ('20) 7 AIR 1920 Nag 24 (25).
('02) 25 Mad 244 (289) (FB).
('99) 22 Mad 133 (136) (DB).
[*See also* ('01) 26 Bom 121 (126) (DB).
('97) 22 Bom 771 (773) (DB).]
[See however ('91) 13 All 400 (403).]

6 ('18) 5 AIR 1918 Cal 424 (424) (DB). (Court cannot accept payment after final decree has been passed.)

7 ('23) 70 Ind Cas 152 (152, 153) (DB) (Cal).
('89) 16 Cal 246 (249) (DB).
('02) 25 Mad 300 (307) (FB).
('31) 18 AIR 1931 All 223 (223) (DB).
('31) 18 A 1931 O 121 (122) : 6 L 610 (DB).
('03) 25 All 231 (233).
('98) 1 Oudh Cas 91 (92, 93).
('10) 7 Ind Cas 50 (50) (DB) (All).
('14) 1 AIR 1914 Oudh 209 (211) : 17 Oudh Cas 347 (DB).
†('09) 36 Cal 122 (129) : 1 Ind Cas 780 (782) (DB).
[*See also* ('14) 1 AIR 1914 Bom 200 (201) : 39 Bom 41 (DB).]
Also see O. 34 R. 3, Note 3 and R. 8, Note 7.
[But see ('84) 1884 All W N 178 (178) (DB). (Ruling superseded by amendments introduced by Act XXI of 1929.)
('92) 14 All 529 (530, 531) (DB). (Observations as to right of redemption not being available after expiry of time fixed.)
('05) 8 Oudh Cas 33 (35) (DB). (Mortgagee obtaining possession of the mortgaged property before the expiry of the period fixed in preliminary decree for payment of mortgage-money — Mortgagee's possession is as absolute owner and mortgagor's suit after 12 years is barred.)]

8 ('22) 9 AIR 1922 Nag 182 (184).
('19) 6 AIR 1919 Cal 68 (69) (DB).
[But see ('26) 13 AIR 1926 Nag 280 (281).]

9 ('34) 21 AIR 1934 Oudh 44 (45) : 9 Luck 387 (DB). (It was held that the decree in this case was not a preliminary decree at all and that time could not be extended.)
('21) 8 AIR 1921 Lah 9 (10) : 2 Lah 53 (FB). (Parties compromising—Mortgagee given possession—One year allowed for redemption—After one year mortgagee automatically becomes full owner.)

10 ('03) 28 Bom 102 (105) (DB).

11 ('01) 26 Bom 121 (126) (DB).

12 ('12) 6 Cal W N 654 (655) (DB).

It was held that as the decree was passed in the presence of the mortgagor he could not subsequently object to it.(1)

20. Mortgage of chattel and intangible property.—It has been held by the High Court of Calcutta that a mortgagee of chattel is entitled to sue for foreclosure.(1) The High Court of Bombay,(2) and the Judicial Commissioner's Courts of Nagpur(3) and Oudh,(4) on the other hand, have held that he is not so entitled. A mortgagee of a turn of worship is entitled, according to the Calcutta High Court, to sue for foreclosure of that right,(5) the turn of worship being regarded as intangible property.

21. Res Judicata.—See Section 11, Note 40 of the A.I.R. Commentaries on the Code of Civil Procedure 4th (1944) Edn. See also Notes on Rules 7 and 9.

22. Equitable mortgage of personal property.—See Note 4.

23. Appeal.—An appeal lies from a preliminary decree.(1) Under O. 43 R. 1 (o), Civil Procedure Code, an appeal lies from an order 'refusing' to extend time under this rule but not from an order 'granting' an extension of time.(2) An application for revision may, however, lie from such an order.(3) No appeal lies against an order refusing to extend time, 'after a final decree has been passed'.(4) See also section 97.

(a)**R. 3.** [New: Act IV of 1882, S. 87] (1) Where, before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 2, the Court shall, on application made by the defendant in this behalf, pass a final decree—

Final decree in foreclosure suit.

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,

and if necessary,—

(b) ordering him to re-transfer at the cost of the defendant the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(2) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged

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Order 34 Rule 2 Note 19

1 ('19) 6 AIR 1919 Pat 497 (500) : 4 Pat L Jour 347 (DB).

Order 34 Rule 2 Note 20

1 ('15) 2 AIR 1915 Cal 161 (168) : 42 Cal 455 : 27 Ind Cas 400 (406) (DB). (Following the decesions of the house of Lords in (1726) 1 Comb 393, Harrison v. Hart; 2 Fonblanque on Equity, 5th Edn., 261n. Tancred v. Polts and (1749) 1 Ves Sen 278 (279), Kemp v. Westbrook.)

2 ('16) 3 AIR 1916 Bom 77 (80).

3 ('11) 7 Nag L R 72 (78) : 10 Ind Cas 869 (873).

4 ('01) 4 Oudh Cas 301 (302). (It was held that the provisions of Ss. 86 to 89 of the Transfer of Property Act corresponding to O. 34 Rr. 2 to 5 did not apply to the mortgage of moveable property.)

5 ('15) 2 AIR 1915 Cal 161 (168) : 42 Cal 455 (DB).

Order 34 Rule 2 Note 23

1 ('18) 5 AIR 1918 Nag 185 (185).

2 ('31) 18 AIR 1931 Nag 1 (3) (FB).
('87) 9 All 500 (502) (DB).
('16) 3 AIR 1916 Mad 694 (695) : 39 Mad 876 (DB).
('14) 1 AIR 1914 Nag 8 (9) : 10 Nag L R 150.
[*See* ('01) 26 Bom 121 (125) (DB). (Under the Transfer of Property Act, an order refusing extension of time was held to come within S. 244 of the Code (now S. 47) and hence appealable.)]
[But see ('92) 14 All 520 (521) (DB). (Order granting an extension of time—*Held* that revision did not lie as such order was appealable—NOTE.—This is not good law under the present Code. See observations in 35 All 582 at P. 586.)]

3 ('31) 18 AIR 1931 Nag 1 (3) (FB).

4 ('30) 17 AIR 1930 Nag 240 (240).

property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property.

(3) On the passing of a final decree under sub-rule (2), all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged.

(a) See the foot-note to the text of Rule 2 of this Order.

Synopsis

1. Transfer of Property Act, Section 87.
2. Transfer of Property (Amendment) Supplementary Act, XXI of 1929.
3. "Where, before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed."
4. Power to enlarge time.
5. Effect of appeal on time fixed for payment.
6. Where payment in accordance with sub-rule (1) has not been made.
7. Final decree for foreclosure.
8. Partial foreclosure.
9. Discharge of debt, etc., on foreclosure.
10. Delivery of title-deeds.
11. Limitation for application for final decree. See the A.I.R. Commentaries on the Limitation Act, 2nd (1942) Edn., Art. 181, Note 4.
12. Application for execution of final decree.
13. Appeal.
14. Court-fee. See the A.I.R. Commentaries on the Court-Fees Act, 1st (1944) Edn., S. 7(i), Note 20.

Topic Indicator

Application by plaintiff. See Note 7.
Court to which application is to be made. See Note 7.
Nature of proceeding, suit and not execution. See Note 7.
Notice. See Note 7.
Payment after date fixed but before final decree. See Note 3.
Right to interest. See Note 6.

1. Transfer of Property Act, Section 87.—This rule corresponds to S. 87 of the Transfer of Property Act which ran as follows:

"87. If payment is made of such amount and of such subsequent costs as are mentioned in S. 94, the defendant shall (if necessary) be put into possession of the mortgaged property.

If such payment is not so made, the plaintiff may apply to the Court for an order that the defendant and all persons claiming through or under him be debarred absolutely of all right to redeem the mortgaged property, and the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff:

Provided that the Court may, upon good cause shown, and upon such terms, if any, as it thinks fit, from time to time postpone the day appointed for such payment.

On the passing of an order under the second paragraph of this section the debt secured by the mortgage shall be deemed to be discharged.

In the Code of Civil Procedure, Sch. IV, No. 129, for the words "Final decree," the words "Decree absolute" shall be substituted."

The following differences may be noted—

(1) The present rule provides for the 'passing of a decree' when the defendant pays up the mortgage-money within the time allowed. But S. 87 merely provided that, in such a case, the defendant should, if necessary, be put in possession of the mortgaged property.

(2) Under the present rule, if the defendant does not pay the mortgage-money within the time allowed, a 'final decree' is passed. But under section 87 the procedure was to pass an 'order' absolute for foreclosure.

2. Transfer of Property (Amendment) Supplementary Act XXI of 1929.—The present rule has been amended by Act XXI of 1929. The chief points of distinction between the old rule and the new rule are—

(1) The words "before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed" have been substituted for the words "on or before the day fixed."

(2) Under the amended rule, the defendant mortgagor has to 'apply' to the Court for a decree in his favour if he pays the mortgage-money within the time allowed. The old rule did not require this.

(3) The new rule makes it clear that the decree to be passed under it is a 'final' decree.

(4) The proviso to sub-rule (2) of the old rule regarding to the Court's power to extend the time fixed for payment of the mortgage-money has been transferred to Rule 2.

(5) Sub-rule (3) makes it clear that the passing of a final decree for foreclosure discharges not only the mortgage debt but all liability of the defendants in respect of the mortgage or on account of the suit thereon.

3. "Where, before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed."—The substitution of the words "before a final decree....has been passed" for the words "on or before the day fixed" now makes it clear that though a mortgagor has not paid the mortgage-money under the preliminary decree for foreclosure within the time allowed by the Court, he does not lose his right to redeem but can exercise the right till a final decree for foreclosure is actually passed.(1) In view of this the undermentioned decisions(2) prior to the Transfer of Property (Amendment) Supplementary Act XXI of 1929, which disclose a conflict of judicial opinions, are only of academic interest now. Where after a preliminary decree for foreclosure has been passed, the mortgagee enters into possession before the day appointed for payment has arrived and remains in possession and the mortgagor keeps quiet for a long time, the mortgagor will be held to have acquiesced in the mortgagee holding the property as his own and may thus be deprived of his right on the ground of estoppel.(3)

4. Power to enlarge time.—See Note 18 on Rule 2. Also see Note 9 on Section 148 of the A.I.R. Commentaries on the Code of Civil Procedure, 4th (1944) Edition.

Order 34 Rule 3 Note 3

1 ('31) 18 AIR 1931 Oudh 121 (122) : 6 Luck 610 (DB). Also see O. 34 R. 2, Note 18 and R. 8, Note 7.

2 *In the following cases the mortgagor was held entitled to redeem till order absolute or final decree for foreclosure was actually passed:*
('99) 22 Mad 133 (136) (DB).
('89) 16 Cal 246 (249) (DB).
(1900) 27 Cal 705 (708) (DB).
('02) 25 Mad 244 (289, 290) (FB).
('02) 25 Mad 300 (306, 307) (FB).
('09) 36 Cal 122 (127) : 1 Ind Cas 780 (782) (DB).
('04) 1 All L Jour 300 (301, 302).
('10) 7 Ind Cas 50 (50) (DB) (All).
('98) 20 All 446 (447) (DB).
('98) 20 All 375 (377) (DB).
('02) 24 All 479 (480) (DB).
('03) 25 All 231 (233).
('05) 27 All 501 (504, 505) (FB).
('13) 18 Ind Cas 357 (358) (DB) (Cal).
('14) 1 AIR 1914 Oudh 209 (210, 211) : 17 Oudh Cas 347 (DB).
('13) 18 Ind Cas 326 (326) (DB) (All).
('23) 70 I C 152 (152, 153) (DB) (Cal).
('06) 3 Cal L Jour 533 (536) (DB).
('10) 5 Low Bur Rul 219 (220) : 8 I C 961 (962).
('07) 3 Nag L R 146 (155). (Extension of time is an equitable relief within the reasonable discreation of the Court.)
In the following cases it was held that if the mortgagor did not pay within the time originally fixed or subsequently extended by the Court, he could not redeem the property afterwards:
('30) 17 AIR 1930 Nag 55 (55). (Good cause not proved—Extension of time refused.)
('30) 17 AIR 1930 Nag 178 (179) (DB). (Sufficient cause for non-payment not made out—Further extension disallowed.)
[*See also* ('97) 22 Bom 771 (773) (DB). (Decree for redemption—application to extend time for redemption fixed by the original decree may be made at any time before the decree absolute is made.)
('95) 22 Cal 931 (934). (Decree on a simple mortgage directing sale of mortgaged property—Until order absolute for sale of mortgaged property is made the mortgagor has a right to redeem.)
('93) 16 Mad 214 (219) (DB). (Decree for redemption—Usufructuary mortgage—Mortgagor entitled to redeem until order absolute for sale is made.)
('94) 9 C P L R 75 (77). (The Court has a discretion to extend time.)]

3 ('26) 13 AIR 1926 Bom 273 (277) (DB).

5. Effect of appeal on time fixed for payment.—Order 41 R. 5 expressly provides that an appeal shall not operate as a stay of proceedings under a decree or order appealed from, except so far as the Appellate Court may order to that effect. Hence the mere 'pendency' of an appeal from the preliminary decree does not extend the time fixed, and is no bar to the passing of a final decree(1) unless the Appellate Court expressly or by necessary implication extends the period for payment.(2) Nor is it a ground for enlarging the time fixed by the preliminary decree for payment.(3)

As to the effect of a 'decree' passed in, or 'dismissal' of, the appeal on the time fixed by the preliminary decree, see Note 9 on S. 148 of the A.I.R. Commentaries on the Code of Civil Procedure, 4th (1944) Edition.

6. Where payment in accordance with sub-rule (1) has not been made.—A mortgagee is not bound to accept a smaller sum than that due as part satisfaction of his decree but is entitled to insist on a final decree for foreclosure being passed in his favour where the 'whole' of the amount found due to him is not paid into the Court.(1) But this principle only applies where there is no dispute as to the sum due.(2) Thus, where the mortgagor deposits in Court the sum found due by the lower Court, but the sum is increased by the Appellate Court, the payment by the mortgagor reduces the debt 'pro tanto' and interest is payable afterwards only on the balance.(3) The mortgagee is not bound to accept payment after the passing of the final decree for foreclosure.(4)

7. Final decree for foreclosure.—The rule makes it clear that the decree to be passed under this rule is a final 'decree'. The procedure under the Transfer of Property Act was to obtain an 'order' absolute for foreclosure or sale.(1)

An application for a final decree for foreclosure should be made by the 'plaintiff,'(2) and he should make it to the Court of 'first instance' even though the preliminary decree was modified in appeal.(3) But a defendant who is present and allows a final decree to be passed on the application of a 'transferee' from the plaintiff will be estopped from questioning the validity of the decree afterwards.(4)

Order 34 Rule 3 Note 5

1 ('48) 35 AIR 1948 Nag 56 (60): ILR (1947) Nag 412 (DB) *Madhavrao* v. *Eknathrao*.
('30) 17 AIR 1930 Pat 227 (229) (DB).
('96) 1 Cal W N 197 (197) (DB).

2 ('48) 35 AIR 1948 Nag 56 (60): ILR (1947) Nag 412: (DB).

[*Appeal against preliminary decree—During its pendency final decree passed—Appeal dismissed—decree.* It is not necessary that a fresh preliminary decree, should invariably be drawn up, fixing a fresh date for payment after making a calculation of the amount payable under the decree.]
('96) 18 All 455 (457, 458).
('18) 5 AIR 1918 Cal 424 (424) (DB).
('06) 1906 All W N 203 (203).

3 ('06) 10 Cal W N 910 (912) (DB).
('89) 13 Bom 106 (109) (DB).
('93) 17 Bom 547 (553, 554) (DB).
('13) 18 Ind Cas 747 (749) (DB) (Cal).

Order 34 Rule 3 Note 6

1 †('10) 5 Ind Cas 165 (169) (DB) (Cal).
('07) 10 Oudh Cas 354 (356) (DB).
(Mortgagor not entitled to a refund of sums paid by him under a foreclosure decree when the decree is made absolute.)
('39) 26 AIR 1939 All 52 (55). (Preliminary decree for foreclosure passed—Subsequent payment of principal by mortgagor does not affect plaintiff's right to have decree made final in lieu of balance due.)
2 ('10) 5 Ind Cas 165 (169) (DB) (Cal).
3 ('10) 5 Ind Cas 165 (169) (DB) (Cal).
†('12) 16 Ind Cas 374 (375) (DB) (Cal).
4 ('18) 5 AIR 1918 Cal 424 (424) (DB).

Order 34 Rule 3 Note 7

1 ('20) 7 AIR 1920 Mad 286 (287) (DB).
(Right to order absolute already accrued at the time of coming into force of Code of 1908 not affected by the Code.)
[*See* ('14) 1 AIR 1941 P C 66 (67): 36 All 350 (PC). (Execution of order absolute barred before Code of 1908—Not revived by passing of new Code.)]
2 ('19) 6 AIR 1919 Pat 497 (500): 4 Pat L Jour 347 (DB).
3 ('01) 23 All 88 (89) (DB).
(1900) 23 Mad 521 (523) (DB).
('10) 6 Ind Cas 323 (325) (DB) (Cal).
[*See* ('81) 6 Cal 513 (515) (DB). (Court passing preliminary decree—Jurisdiction transferred to another Court—Application for final decree may be made to either Court.)]
4 ('19) 6 AIR 1919 Pat 497 (500): 4 Pat L Jour 347 (DB).

Prior to the amendment of rules 2 and 3 in 1929 it was held that notice to defendant was not necessary before a final decree was passed,(5) though in practice it was generally given on grounds of justice and equity.(6) Notice was, however, held necessary where the defendant happened to be a minor.(7) But the failure to give notice was held to be a mere irregularity which did not invalidate the proceedings unless the merits of the case were affected.(8)

Under the present rules as amended notice of an application for final decree for foreclosure must be given to the defendant before a final decree can be passed.(8a)

An 'ex parte' final decree can be set aside under O. 9, R. 13, Civil Procedure Code, if "sufficient cause" within the meaning of that rule is established.(9) The dismissal for default of an application for a final decree does not preclude a fresh application for the same purpose.(10)

The procedure for obtaining a final decree applies to a preliminary decree passed on compromise between the parties(11) unless the decree, by its terms,

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5 ('02) 25 Mad 506 (507) (DB).
('01) 29 Cal 644 (646) (DB).
('23) 10 AIR 1923 Nag 13 (15) (DB).
('06) 4 Cal L Jour 317 (318) (DB).
†('96) 9 C P L R 5 (8).
[*See also* ('03) 27 Mad 40 (42) (DB). (Under the Transfer of Property Act, notice was held to be necessary if the application for order absolute was made more than one year after the decree, the view being that such an application was an application for execution.)]
[But see ('44) 31 AIR 1944 Nag 181 (182): ILR (1944) Nag 425. (A final decree cannot be passed behind the defendant's back—It is necessary to hear him as shown by the form of final decree given in Appendix D—Notice to the defendant is therefore clearly necessary.)
('93) 6 C P L R 1 (3). (Application for order absolute against legal representatives of deceased mortgagor—Notice is necessary.)]

6 ('23) 10 AIR 1923 Nag 320 (320) : 19 Nag L R 124.
†('35) 22 AIR 1935 Mad 716 (717) (DB).
('30) 17 AIR 1930 Mad 105 (107, 108) (DB).
('17) 4 AIR 1917 Oudh 320 (321) : 20 Oudh Cas 268.
('30) 17 AIR 1930 Nag 136 (136).
('29) 16 AIR 1929 Mad 393 (394) (DB).
('10) 6 Ind Cas 306 (307) (DB) (Cal). (Notice necessary before application for final decree for sale can be converted into application for final decree for foreclosure.)
('09) 1 Ind Cas 677 (681, 682) (DB) (Cal).
('99) 22 Mad 133 (136) (DB).
('07) 3 Nag L R 55 (63).

7 ('24) 11 AIR 1924 All 573 (573) (DB).
('26) 13 AIR 1926 All 757 (758, 759) : 48 All 828 (DB).

8 ('26) 13 AIR 1926 All 757 (758, 759) : 48 All 828 (DB).
('35) 22 AIR 1935 Mad 716 (717) (DB).
('06) 28 All 193 (195) (DB).
('01) 25 Bom 337 (347, 348) : 27 Ind App 216 (P C).
[*See also* ('32 19 AIR 1932 All 698 (699), (700) (DB).]

8a ('49) 53 Cal W N 326 (329) (DB). *Mahadeo* v. *Joy Narayan.*
[The putting up of a notice upon the board of the Court that a decree will be drawn up on a certain day as required by R. 185 of the Civil Rules and Circular Orders of the Calcutta High Court, does not amount to giving notice to the mortgagor that an application for a final decree has been made.]

('44) 31 AIR 1944 Nag 181 (182) : ILR (1944) Nag 425: 218 Ind Cas 200 *Raghubir Prasad* v. *Pyarelal.*
(A final leave for foreclosure cannot be passed behind the dependants back—It is necessary to hear him as shown by the form of final decree given in Appendix D—Notice therefore is necessary.)

9 ('44) 31 AIR 1944 Nag 181 (182): ILR (1944) Nag 425.
†('29) 16 AIR 1929 All 279 (280) : 51 All 634.
('05) 32 Cal 253 (256) (FB).
('07) 3 Nag L R 55 (56).
('03) 16 C P L R 92 (94). (*Ex parte* order absolute in foreclosure suit—Order can be set aside under S. 108 (O. 9 R. 13) of old Code.)
[*See* ('01) 4 Oudh Cas 238 (240). (Want of notice is no ground for setting aside a final decree under O. 9 R. 13.)]
[*See also* ('99) 12 C P L R 82 (83). (Suit lies to set aside order absolute on ground of fraud.)]
[But see] ('49) 36 AIR 1949 Pat 68 (68) *Surendra Kumar v. Mukundlal Sahu.*

10 ('27) 14 AIR 1927 Oudh 49 (50) (DB).

11 ('22) 9 AIR 1922 Nag 182 (184).
[See also ('37) 24 AIR 1937 All 108 (112) (DB). (Preliminary foreclosure decree passed on compromise — Final decree in accordance with preliminary decree—Final decree is valid under O. 34 R. 3.)]

provides for execution on default without any fresh decree being passed.(12) (See also O. 34 R. 4, Note 15.). A 'conditional' decree for foreclosure is not contemplated by the rule.(13)

Where a party is entitled to Pre-emption on foreclosure, the right arises, not on the expiry of the period fixed for payment, but on the passing of the final decree for foreclosure,(14) as until then the ownership of the mortgaged property vests in the mortgagor.(15)

An omission to draw up a final decree is only an irregularity and hence where a Court erroneously passed an order absolute instead of a final decree, it was held that the order could be enforced by execution.(16) See also the undermentioned cases.(17)

8. Partial foreclosure.—The nature of the proceedings for foreclosure is such that a mortgage must be foreclosed as a whole or not at all. Thus, where a suit for foreclosure is decreed only with respect to some of the properties but dismissed with regard to others and an appeal is filed from that portion of the decree which dismisses the suit, the mortgagee cannot first obtain a final decree in respect of the portion of the decree favourable to him and then, on succeeding in the appeal as to the rest, another final decree in respect thereof.(1)

9. Discharge of debt, etc., on foreclosure.—The present rule makes it clear that on the passing of a final decree for foreclosure, not only the mortgage 'debt' but all the defendant's liabilities in respect of the mortgage as well as for the costs of the suit become discharged.(1) The mortgagor's right to redeem revives if, notwithstanding the foreclosure, the mortgagee pursues his personal remedy against the mortgagor.(2) Where a person holding several mortgages on the

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12 ('44) 31 AIR 1944 Oudh 111 (113). (Compromise decree providing that on default of two consecutive instalments the decree-holder would be entitled to get possession of mortgaged property—On default of two consecutive instalments decree becomes final and application for final decree is not necessary.)
('44) 31 AIR 1944 Oudh 106 (109) (DB). (No difference in principle between decree for foreclosure and decree for sale—Claim for Rs. 39,000—Compromise for Rs. 20, 300 payable by two instalments —On non-payment by fixed date, decree to be deemed final for full claim—Decree held not merely preliminary—Final decree for foreclosure in terms of R. 3 held not necessary.)
('11) 10 Ind Cas 536 (538) (DB) (Cal).
('31) 18 AIR 1931 Cal 546 (548) (DB).
('25) 12 AIR 1925 Bom 509 (509, 510) (DB).

13 ('21) 8 AIR 1921 Oudh 138 (139).
[But see ('99) 12 C P L R 103 (105, 106). (Possession obtained under conditional decree for foreclosure cannot be disputed on ground of final decree not having been passed.)]

14 ('98) 20 All 315 (319) (FB).
†('98) 20 All 358 (361).
('98) 20 All 375 (377) (DB).
('37) 24 AIR 1937 All 108 (112) (DB).
See also S. 4, clause (2), S. 6 and S. 16, Agra Preemption Act, XI of 1922.

15 ('96) 9 C P L R 130 (131).
[See ('39) 26 AIR 1939 All 52 (54). (Possession of mortgagee after final decree is that of full owner.)]

16 ('27) 14 AIR 1927 Bom 131 (133) : 51 Bom 125 (DB).
Also see O. 34 R. 5, Note 4.

17 ('23) 10 AIR 1923 Nag 130 (132). (Interpretation of final decree for foreclosure.)
('14) 1 AIR 1914 All 177 (178) : 36 All 376 (DB). (Foreclosure — Preliminary decree —Plea of agricultural tribe—Finding negativing plea, by Collector—Case referred to Civil Court—Decree absolute for foreclosure must inevitably be passed.)
('81) 7 Cal 394 (400) (DB). (Suit in nature of foreclosure suit—Defendant not to be ordered to pay deficiency in principal, interest, etc., which the moneys to arise from the sale may be sufficient to meet.)

Order 34 Rule 3 Note 8

1 †('05) 27 All 501 (504) (DB).

Order 34 Rule 3 Note 9

1 *See* ('09) 4 Ind Cas 545 (545) (DB) (Cal). (Case under the Transfer of Property Act—On order absolute for foreclosure, mortgage debt is discharged but liability for costs of suit continues.)
[*See also* ('42) 29 AIR 1942 Cal 224 (225) (DB) (Liabilities of mortgagor may have been at an end as soon as decree becomes final, but decree itself is not satisfied unless execution proceedings are taken and mortgagee decree-holder gets possession of mortgaged property—Therefore the Court had jurisdiction to grant relief under S. 36, of Bengal Money-lenders Act.)
(10') 6 Nag L R 27 (29) : 5 Ind Cas 705 (706).]

2 ('11) 10 Ind Cas 748 (751) (Bom).

same property forecloses under the first mortgage, it will be inequitable to allow him to sue the mortgagor personally for the debt secured by the second mortgage.(3)

See also the undermentioned case.(4)

10. Delivery of title-deeds.—A mortgagor can institute a separate suit to recover compensation for loss of title-deeds; the Court may also grant, in the mortgage decree itself, an alternative relief for damages for such loss. But if no such alternative relief for damages is provided for in the preliminary and final decrees, the Court cannot grant it in execution.(1)

11. Limitation for application for final decree.—See the A.I.R. Commentaries on the Limitation Act, 2nd (1942) Edition, Article 181, Note 4.

12. Application for execution of final decree.—An application for the execution of a final decree is governed by Art. 182 of the Limitation Act.(1)

A final decree in a mortgage suit may be adjusted out of Court like any other decree and Civil Procedure Code, O. 21 R. 2 applies thereto.(2) Where a mortgage decree is time-barred, it cannot be enforced, the mortgage itself having merged in the decree.(3) Section 48, Civil Procedure Code, applies to a final decree under O. 34, though the preliminary decree, on which it was based, had been passed under the Transfer of Property Act.(4) Where in a foreclosure decree against the defendants, costs are awarded to the defendants, O. 21, R. 19, Civil Procedure Code, is no bar to their executing the decree for costs.(5) Where a foreclosure decree contains no direction for delivery of possession, the mortgagee cannot obtain possession by 'applying in execution'. The proper course is to apply for an order for 'possession'.(6)

13. Appeal.—It is clear under O. 34 that a final 'decree' is a decree and appealable as such. Even under the Transfer of Property Act, an order absolute was held to be appealable as a decree.(1)

An order dismissing an application for passing a final decree for foreclosure on ground that it is premature is an interlocutory order and not a decree and therefore is not appealable.(2)

14. Court-fee.—See the A.I.R. Commentaries on the Court-fees Act, 1st (1944) Edn., S. 7(i), Note 20.

Preliminary decree in suit for sale.

(a)R. 4. [New: Act IV of 1882, S. 88.] (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in clauses (a), (b) (i) of subrule (1) of rule 2, and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preli-

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3 ('87) 11 Bom 112 (113, 114) (DB).
('79) 4 Cal 475 (481) (DB).
4 ('11) 10 Ind Cas 174 (176) (Oudh). (Subsequent mortgagee made party to decree under Rule 2 but not made party to decree under R. 3, redeeming prior mortgagee—Mortgagee ceases to have any interest in the property and cannot redeem the subsequent mortgage.)

Order 34 Rule 3 Note 10

1 ('22) 9 AIR 1922 Mad 299 (300) (DB).
Also see O. 34 R. 5, Note 15.

Order 34 Rule 3 Note 12

1 ('27) 14 AIR 1927 Pat 215 (217) : 6 Pat 780 (DB).
[*See also* ('14) 1 AIR 1914 P C 66 (67) : 36 All 350 (P C).]
2 ('23) 10 AIR 1923 Nag 20 (21) (DB).
3 ('13) 35 All 250 (253) : 18 I. C. 923 (925) (DB).
4 ('24) 11 AIR 1924 All 696 (696) (DB).
5 ('03) 16 C P L R 73 (75, 76).
6 ('04) 17 C P L R 62 (64).

Order 34 Rule 3 Note 13

1 ('07) 3 Nag L R 146 (152, 153).
('90) 12 All 61 (62) (FB).
[*See also* ('32) 19 AIR 1932 Lah 214 (215) (DB). (Order dismissing application for final decree amounting to dismissal of suit—Appealable as decree.)]
('45) 32 AIR 1945 Nag 277 (279) : ILR (1945) Nag 885: 222 Ind Cas 350 *Govindrao* v. *Narayan.*
2 Order is however revisable.

minary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree for sale is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

Power to decree sale in foreclosure suit.

(3) In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the Court may, at the instance of any party to the suit or of any other person interested in the mortgage-security or the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms.

(4) Where, in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9, Form No. 10 or Form No. 11, as the case may be, of Appendix D with such variations as the circumstances of the case may require.

a. See the foot-note to the text of Rule 2 of this Order.

Provincial Amendments

ALLAHABAD

In sub-rule (2) after the words "The Court may" *insert* the words "of its own motion, or."

CALCUTTA

Re-number sub-rules (3) and (4) as sub-rules (4) and (5) respectively and *insert* the following as sub-rule (3):

"(3) The Court may in its discretion direct in the decree for sale that if the proceeds of the sale are not sufficient to pay the mortgage-debt, the mortgagor shall pay the banlance personally."

[3-2-1933.]

Note.—See the undermentioned case.(1)

OUDH

Same as that of Allahabad.

Synopsis

1. Transfer of Property Act, Section 88.
2. Amendments subsequent to 1908.
3. Who may obtain a decree for sale.
4. Decree for money in suit for sale.
5. Form of decree.
6. Contents of decree in suit for sale by first mortgagee.
7. Court's power to adjust equities.
8. Power to extend time in suit for sale—Sub-rule (2).
9. Decree for sale in a foreclosure suit—Sub-rule (3).
10. Order in which properties should be sold.
11. Interest. See Note 2 on Order 34 Rule 11.
12. Costs.
13. Succession certificate.
14. Award.
15. Consent decree.
16. Appeal.

Topic Indicator

Anomalous mortgagees. See Notes 3 and 9.
Charges. See Note 4.
Construction of mortgage decrees. See Note 5.
English mortgagee. See Note 3.
Equitable mortgagee or mortgagee by deposit of title deeds. See Note 3.
Final decree—Direction to take accounts in execution—Against law. See Note 5.
Personal decree not to be included. See Note 5.
Rights of subsequent mortgagees. See Notes 6 and 8.

Order 34 Rule 4 (Calcutta)

1 ('43) 30 AIR 1943 Cal 372 (376) : ILR (1943) 2 Cal 417 (DB). (Bengal Money-Lenders Act—Preliminary decree incorporating personal decree is not satisfied until personal liability is also satisfied—Personal liability can be scaled down if the personal decree is made after 1st January 1939.)

1. Transfer of Property Act, Section 88.—This rule corresponds to S. 88 of the Transfer of Property Act which was as follows:

"88. In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of S. 86, and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same.

In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff, or of any person interested either in the mortgage-money or in the right of redemption, if it thinks fit, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms."

The provision as to the payment of subsequent costs and interest to the mortgagee out of the sale proceeds of the mortgaged property is new. The present rule is not retrospective in effect so as to affect decrees already passed under the Transfer of Property Act at the time of coming into force of the new Code.(1)

2. Amendments subsequent to 1908.—The present rule has been amended extensively by the Transfer of Property (Amendment) Supplementary Act, XXI of 1929. The material changes introduced by the amendment are as follows:

(1) The new rule makes it clear that the decree under it is a 'preliminary' decree.
(2) If the mortgagor makes default in payment, the mortgagee has to 'apply' for a final decree for sale.
(3) The rule makes it clear that the mortgagees should be paid out of the sale proceeds not only subsequent costs and interest but also 'subsequent charges and expenses properly incurred' in respect of the mortgage security.
(4) Sub-rule (2) enables the Court to 'extend the time' fixed for payment. There was no such provision in the old rule.
(5) Sub-rule (3) corresponding to sub-rule (2) of the old rule is now expressly limited to anomalous mortgages, while sub-rule (2) of the old rule applied to 'all' mortgages other than mortgages by conditional sale.
(6) Sub-rule (4) makes express provision for the adjudication of the rights of 'subsequent mortgagees' who are joined as parties to a suit by a prior mortgagee.

3. Who may obtain a decree for sale.—The right to sue for sale or foreclosure is conferred by S. 67 of the Transfer of Property Act. A decree for sale cannot be obtained by a usufructuary mortgagee as such or a mortgagee by conditional sale as such. Such a decree can be obtained only by a 'simple' mortgagee, an 'English' mortgagee, an 'equitable' mortgagee and an 'anomalous' mortgagee. See Note 4 on rule 2 and the undermentioned cases.(1) As to the rights of sub-mortgagees, see Note 9 on Rule 1.

Order 34 Rule 4 Note 1

1 ('21) 8 AIR 1921 Mad 126 (128) (DB).

Order 34 Rule 4 Note 3

1 ('40) 27 AIR 1940 Lah 197 (197). (Punjab Land Alienation Act, S. 16—No decree for sale can be passed against a statutory agriculturist as under S. 16 of the above Act his land cannot be sold—Decree creating a charge on the property can be passed.)
('89) 11 All 367 (370, 373) (DB). (Usufructuary mortgagee not entitled to sue for sale.)
('35) 22 AIR 1935 All 778 (781) (DB). (In the case of an anomalous mortgage Court has discretion to pass a decree for sale in lieu of a decree for foreclosure.)
('93) 17 Bom 425 (428) (DB). (Case of anomalous mortgage—Sale allowed.)
('89) 12 Mad 109 (111) (DB). (Case of

The High Court of Madras(2) has held that a mortgagee of chattel is entitled to obtain a decree for sale in enforcement of his mortgage quite as much as a mortgagee of immovable property. See also Note 1 on Rule 1 and Note 20 on Rule 2.

4. Decree for money in suit for sale.—In a suit on a mortgage, it is open to a mortgagee to relinquish his security and to content himself with a simple money decree.(1) A mere decree for money which creates a charge on immovable property for the decretal amount(2) or which authorises the decree-holder to enforce the decree by selling certain property(3) is not a "preliminary decree" on a mortgage under this rule. But a preliminary mortgage decree passed under this rule is not a decree for money and the decree-holder cannot execute it by attachment and sale of the mortgaged property. His sole remedy is to apply for final decree (4)

5. Form of decree.—The forms in Appendix D for decrees in suits relating to mortgages have been greatly changed by the Transfer of Property (Amendment) Supplementary Act, XXI of 1929. For the form of preliminary decrees in suits for sale, see Appendix D, Form Nos. 5 and 5A.

In framing decrees in mortgage suits the provisions contained in Order 34 should not be overlooked.(1) A preliminary decree in a mortgage suit must fix a period within which the mortgagor should pay the mortgage-money and the decree should direct a sale of the property 'only' if the mortgagor fails to pay the money within the period fixed.(2)

It will be noted that the form of a preliminary decree for sale under this rule does not contain any provision regarding the mortgagor's personal liability. Any decree which contains such a provision is in contravention of the rules which contemplate the determination of the question only when the sale proceeds of the mortgaged property are 'not sufficient' to pay off the mortgage debt.(3) Accounts between the mortgagor and the mortgagee should be taken

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usufructuary mortgage—In this case Muttusami Ayyar, J., held that 11 Mad 88 was incorrectly decided.)
('97) 24 Cal 677 (680) (DB). (Case of usufructuary mortgage—Sale not allowed.)
('96) 20 Bom 296 (298) (DB). (Do.)
('94) 17 Mad 131 (133) (FB). (Personal covenant in usufructuary mortgage—Mortgagee entitled to sue for sale.)
('04) 27 Mad 526 (528) (FB). (Combination of a simple and usufructuary mortgage—Mortgagee has a right to decree for mortgage-money and for sale.)
('88) 1888 All W N 171 (172) (DB). (Do).
('86) 1886 All W N 212 (213) (DB). (Do).
('97) 24 Cal 348 (350), (Equitable mortgage—Appropriate remedy is a decree for sale.)
('80) 2 All 527 (532) (DB). (Simple mortgagee can sue for sale.)
('04) 1 All L Jour 20 (26) (DB). (Prior usufructuary mortgage but possession not given—Subsequent simple mortgage—Suit based on both mortgages—Mortagee entitled to a simple money decree for the amount due on the first mortgage and a decree for sale upon the second mortgage.)
('36) 23 AIR 1936 Pesh 43 (45) (DB). (Anomalous mortgage.)

2 ('33) 20 AIR 1933 Mad 241 (241, 242) : 56 Mad 560.

Order 34 Rule 4 Note 4

1 ('39) 26 AIR 1939 Pesh 34 (35).
('02) 24 All 456 (457) (DB).
2 ('25) 12 AIR 1925 Mad 1101 (1103).
3 ('25) 12 AIR 1925 Mad 1083 (1084).
4 ('46) 50 Cal W N 486 (488,489) (DB) *Jivandas Khimji v. Dindayal Shah.*

Order 34 Rule 4 Note 5

1 ('14) 1 AIR 1914 Lah 524 (528) : 1915 Pun Re No. 29 : 27 Ind Cas 489 (492) (DB).
('11) 5 Sind L R 71 (76, 77) : 11 Ind Cas 192 (195) (DB).
2 ('15) 2 AIR 1915 Lah 221 (223) (DB). [*See* ('37) 24 AIR 1937 Pesh 31 (32) (DB). (Decree for payment by annual instalments and for possession on default was held erroneous.)]
3 ('40) 27 AIR 1940 Bom 276 (277) : ILR (1940) Bom 640. (Preliminary decree in suit to enforce charge.)
('19) 6 AIR 1919 Pat 365 (366) (DB). (Decree providing that if sale proceeds of mortgaged property fall short of mortgage debt there should be a personal decree against mortgagor—*Held* that it was not a preliminary decree on a mortgage in the strict sense of the term.)
('14) 1 AIR 1914 Cal 214 (215) : 23 Ind Cas 389 (390). (Preliminary decree should not direct that no application against properties other than the mortgaged property shall be entertained—Question should be left for determination under Rule 6.)

before passing the final decree. A direction in the decree for taking accounts in 'execution' is against law.(4) A decree directing sale of the mortgaged property in default of the mortgage-money being paid within a fixed time(5) or a decree for the debt which provides that the mortgaged property shall be liable for the debt (6) is in substantial compliance with the present rule. Where a decree purporting to be a decree on a mortgage is ambiguous, it should be construed so as to accord with the law.(7) As regards the construction of mortgage decrees, see Order 34 Rule 5, Note 23 and the undermentioned case (8)

6. Contents of decree in suit for sale by first mortgagee.—For the form of a preliminary decree in a suit for sale impleading the mortgagor and a 'puisne mortgagee', see Appendix D, Form No. 9. For the form of a decree in a suit by a puisne mortgagee for redemption of a prior mortgage and for foreclosure or sale on the puisne mortgage, see Form No. 10 in Appendix D (1). The direction contained in sub-rule (4) is mandatory and makes it the duty of Court to adjudicate on the rights of the puisne mortgagee impleaded in a prior mortgagee's suit (1a). It is not necessary for the puisne mortgagee to file a substantive suit or counter-claim to get his rights ascertained (1b). In a suit on a prior mortgage in which puisne mortgagees are also impleaded as parties, each of them is entitled to an order that an account be taken of the amount due to him and to a declaration of his right to participate in the surplus sale proceeds remaining after paying off the prior mortgagee in the order of his priority.(2) But the pusine mortgagee's right is dependent on a 'sale being held under the prior mortgage'.

('25) 12 AIR 1925 Lah 640 (641) (DB). (A combined decree under Rr. 4 and 6 is an contravention of the rules.)

('04) 31 Cal 792 (795) (DB). (Combined decree under Ss. 88 and 90 of the Transfer of Property Act contravenes provisions of the Act.)

NOTE.—Under sub-rule (3) of the rule as amended by the Calcutta High Court the Court may, in its discretion, direct in the decree for sale that if the proceeds of sale are not sufficient to pay the mortgage debt, the mortgagor shall pay the balance personally.

Also see Order 34 Rule 6, Note 3.

4 ('12) 15 Ind Cas 362 (363) (DB) (Mad). Also see O. 34 R. 2, Note 6.

5 ('95) 22 Cal 931 (934) (DB).
('33) 20 AIR 1933 Cal 316 (318) (DB). (Court holding mortgage lien proportionately to property in possession of mortgagee discharged—Decree directing account of what would be due to plaintiff and in default of payment sufficient property to be sold—Decree held to be one under O. 34 R. 4.)

6 † ('97) 24 Cal 473 (488, 489) (SB).
('98) 25 Cal 580 (583) (DB).
†('99) 26 Cal 166 (171) (DB).
('06) 20 Mad 78 (79) (DB).

7 ('98) 20 All 397 (399) (DB).

8 ('45) 32 AIR 1945 Cal 6 (14): ILR (1943) 2 Cal 485 *Gour Chand v. Pradyumna Kumar.*
[Preliminary decree—Provision in, for redemption of part of mortgaged properties on payment of half of mortgage money—Decree is still preliminary decree under O. 34 R. 4—Quality and nature of decree is to be determined from actual proceedings of decree and not from the heading given to it]

Order 34 Rule 4 Note 6

1 *See* ('37) 24 AIR 1937 Cal 446 (449) (DB). (Suit by puisne mortgagee impleading as defendant prior mortgagee who is also a subsequent mortgagee — Plaintiff not offering to redeem prior mortgage—Decree in Form No. 9 would be proper.)
(1a) ('47) 51 Cal W N 798 (801) (DB) *Shiva Kumar* v. *Improvement of Calcutta.*
[Puisne mortgagee is not liable to pay any Court fee on his written statement, whether his claim is contested or uncontested. As the written statement of the puisne mortgagee is not a written statement containing a plea of set-off or a counter-claim, no court-fee is payable on it.]
('45) 32 AIR 1945 Bom 169 (170, 171) (DB). *Amratlal v. Mulji.*
(1b) ('45) 32 1945 Bom 169 (170, 171) (DB).
[See also] ('47) 51 Cal W N 798 (802) (DB). *Shiv Kumar* v. *Improvement of calcutta.*
[See also written statement of puisne mortgagee is not a counter claim—No court fee is payable].

2 ('06) 33 Cal 92 (110, 111) (SB).
[*See* ('40) 27 AIR 1940 P C 134 (136) : I L R (1940) 2 Cal 436 : I L R (1940) Kar ILR (1940) 2 Cal 436: ILR (1940) Kar PC 271: 67 Ind App 309 (PC). (Under O. 34 R.4 (4), C.P. code, subsequent mortgagee who is impleaded as a party to a suit on a prior mortgage is entitled at least to redeem the plaintiff or to receive his own mortgage money out of the surplus sale proceeds remaining after satisfaction of the plaintiff's mortgage—If they pay

Hence, where the prior mortgage is paid off before the sale under it is held, the puisne mortgagee cannot ask for a sale of the property.(3) Where the puisne mortgage includes some properties in addition to those mortgaged to the prior mortgagee, the puisne mortgagee cannot ask that, if the sale proceeds of the properties subject to the prior mortgage are not sufficient to pay off both the prior and the puisne mortgages, the additional properties subject to the puisne mortgage should also be sold. His right is only to have his mortgage debt satisfied out of the sale proceeds of the properties subject to the prior mortgage.(4) In a suit by a prior mortgagee impleading both the mortgagor and the puisne mortgagee, the mortgagor cannot be called upon to pay off both the mortgages on pain of his property being sold.(5) The puisne mortgagee's right to have his mortgage debt satisfied out of the surplus sale proceeds is not affected by such sale proceeds being withdrawn from the Court by a person having notice of the puisne mortgagee's title.(6)

7. Court's power to adjust equities.—Where a sale of the mortgaged properties is impossible, as where the mortgaged properties have been sold for arrears of revenue or rent, the decree must be suitably modified. The Court has inherent power, in such cases, to give appropriate directions for the disposal of the fund which represents the property.(1) See also Note 19 on Rule 1. Where part of the mortgaged property has been acquired by the Government under the Land Acquisition Act, the proper decree to pass will be a decree for sale of the available mortgaged property with a direction that in case the entire mortgaged debt is not realized by the sale of such property, the mortgagee shall be entitled to a simple money decree against the mortgagor for a sum not in excess of the amount withdrawn by the mortgagor as compensation money in the land acquisition proceedings.(2)

8. Power to extend time in suit for sale—Sub-rule (2).—See also Note 18 on Rule 2.

The provision in sub-r. (2) enabling the Court to extend the time fixed for payment of the mortgage-money under the preliminary decree is new. The provision is intended for the benefit of the mortgagor (1a). There was no such provision before the amendment of the present rule by Act XXI of 1929. Hence, it was held that the Court had no power to extend the period fixed for payment of the mortgage-money under a preliminary decree for sale.(1) It was, however, open to the mortgagor to prevent a sale at any time before it was actually

off the plaintiff he becomes entitled to apply for a final decree for sale in the plaintiff's stead.)]
('48) 35 AIR 1948 Mad 336 (337) (DB). *Jagannadharao* v. *K. V. Sastry.*
[See also Suit by prior mortgagee—Puisne mortgagee impleaded—Determination of amount due to puisne mortgagee is necessary in order to give relief to plaintiff—case under S. 11 [Civil P.C.]

3 ('10) 37 Cal 907 (910, 911).
†('19) 6 AIR 1919 Mad 100 (102) : 42 Mad 90 : 49 Ind Cas 36 (38) (DB).
[*See* ('32) 19 AIR 1932 Cal 126 (129) : 59 Cal 117 (DB). (He must file a separate suit).]
[But see ('36) 23 AIR 1936 Oudh 183 (185) : 12 Luck 72 (DB). (Suit on mortgage by prior mortgagee—Subsequent mortgagees cannot be deprived of right to sell property in all circumstances—Decree in Form No. 9 of Appendix D—Court can pass orders to safeguard rights of subsequent mortgagees to obtain final decree or to sell property.)]

4 ('10) 37 Cal 907 (910, 911).
('04) 26 All 504 (506) (DB).
†('37) 24 AIR 1937 Cal 717 (718) (DB).
[*See* ('32) 19 AIR 1932 Cal 126 (129) : 59 Cal 117 (DB). (But he must bring a suit of his own.)]
[*See also* ('37) 24 AIR 1937 Cal 446 (450) (DB).]

5 ('05) 1 Cal L Jour 31 (35) (DB). (Prior to the Transfer of Property (Amendment) Act of 1929.)

6 ('21) 8 AIR 1921 All 312 (314) : 43 All 268 (DB).

Order 34 Rule 4 Note 7

1 ('42) 29 AIR 1942 Pat 185 (187).
('15) 2 AIR 1915 Cal 203 (207) (DB). (Mortgage security lost or converted—Court has inherent jurisdiction over conversion which represents property.)]

2 †('38) 25 AIR 1938 All 221 (227) : ILR (1938) All 513 (FB).

Order 34 Rule 4 Note 8

1a. ('46) 50 Cal W N 4 (5) *Jivandas Khimji v. Dindayal Shah.*

1 ('11) 9 Ind Cas 771 (772) (Low Bur).
(1900) 24 Bom 300 (302) (DB).
('97) 19 All 205 (207) (DB).
('11) 14 Oudh Cas 147 (152) : 11 Ind Cas 528 (530) (DB).
Also see O. 34 R. 5, Note 18.

held, by payment under the Civil Procedure Code, O. 21, R. 69.(2) Even after the sale it was open to him to have the sale set aside at any time before it was confirmed by applying under O. 21 R. 89.(3) But O. 21 R. 83 expressly provides that R. 83 does not apply to decrees on mortgages.(4)

In a suit for sale by a puisne mortgagee he was given a decree conditional on his redeeming a prior mortgage within two months from the decree. He failed to redeem the prior mortgage within the period fixed but did so about four months after the decree. It was held that as the defendant had not taken any steps to redeem, the plaintiff was entitled to the benefit of the payment though made after the prescribed time and to a decree absolute for sale.(5) As to the extension of time for payment of instalments under an instalment decree passed under the Bengal Money-Lenders Act of 1940, see the under-mentioned case.(6)

9. Decree for sale in a foreclosure suit—Sub-rule (3).—Sub-rule (3) has been taken from S. 25 of the English Conveyancing and Law of Property Act, 1881.(1) The provision occurred even in S. 88 of the Transfer of Property Act and was repeated in O. 34, R. 4, sub-r. (2) [now sub-r. (3).]

The Transfer of Property (Amendment) Supplementary Act, XXI of 1929, has made a slight change in the language of the sub-rule, and it is this: The old rule applied to mortgages other than 'mortgages by conditional sale.' The new rule applies only to 'anomalous' mortgages.(2) The doubt that was felt under the old sub-rule as regards its applicability to anomalous mortgages(3) can thus no longer exist. In such cases, the Court in order to protect the interest of all parties concerned can, in the exercise of its discretion under this sub-rule, pass a decree for sale instead of one for foreclosure, although the suit may be for foreclosure.(4) But the Court will not pass a decree for sale instead of one for foreclosure under this sub-rule where it does not appear that the property was 'undervalued'.(5)

Where a plaintiff mortgagee sues for foreclosure on the allegation that the mortgage is one by conditional sale, and it is found that the mortgage is not one by conditional sale, the proper course is not to dismiss the suit but to grant relief under sub-rule(3).(6)

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2 See the A. I. R. Commentaries on the Code of Civil Procedure, 4th (1944) Edn., O. 21 R. 69, Note 10.

3 See O. 34 R. 5, Note 13.

4 ('02) 29 Cal 651 (653) (DB).
('21) 8 AIR 1921 Lah 384 (385).
See also Note 20 on R. 5 of O. 34.

5 ('02) 24 All 479 (481) (DB).

6 †('43) 30 AIR 1943 Cal 214 (216) (DB). (New preliminary mortgage decree under S. 34, Bengal Money-Lenders Act, payable by instalments—Default in payment of any single instalment—Court can extend time for payment of whole amount and not of particular instalment.)

Order 34 Rule 4 Note 9

1 ('88) 11 Mad 88 (90) (DB). (44 & 45 Vict.,c 41, Section 25.)

2 ('35) 22 AIR 1935 All 778 (781) (DB).

3 ('13) 18 Ind Cas 24 (25) (DB) (Oudh). (Provision does not apply to anomalous mortgage.)
[*See* ('29) 16 AIR 1929 Oudh 282 (282) (DB). (Rule 4, sub-r. (3) applies to anomalous mortgages.)]

4 ('41) 28 AIR 1941 All 169 (171, 172) : I L R (1941) All 240. (Discretion must be exercised judicially and not arbitrarily. The consideration that it is open to a mortgagee, where a sale is ordered, to bid for it and purchase it himself is a consideration which a good deal enlarges the scope of a Judge's discretion in India.)
('40) 27 AIR 1940 Nag 156 (156, 157) :ILR (1941) Nag 607 (DB). (Lahan gahan mortgage—Decree for sale or foreclosure may be passed—High rate of interest—Interest allowed to accumulate for number of years—*Held*, circumstances warranted exercise of discretion in ordering sale.)
('26) 13 AIR 1926 Oudh 487 (489) : 2 Luck 388 (DB).
†('38) 25 AIR 1938 Nag 112 (114) : I L R (1938) Nag 91 (DB).

5 ('21) 8 AIR 1921 Oudh 176 (182) (DB).
('13) 18 Ind Cas 24 (27) (DB) (Oudh). (Discretion will be exercised only on clear evidence of some distinct advantage to accrue thereby to the party in whose favour the discretion is asked to be exercised without injury to the reasonable and equitable claims of the opposite side.)
[*See also* ('41) 28 AIR 1941 All 169 (172): I L R (1941) All 240. (Where the security is deficient, or where it is a matter of speculation whether it is sufficient or deficient, a mortgagee will not be deprived of his remedy by way of foreclosure, if he prefers it.)]

6 ('85) 1885 All W N 329 (329) (DB).

10. Order in which properties should be sold.—'Prima facie' the decree-holder is entitled to have the mortgaged properties sold in any order he likes.(1) There are, however, two important exceptions to this general rule, namely,—

(1) the doctrine of 'marshalling' securities as laid down in the Transfer of Property Act, and

(2) the Court's power under this rule to 'adjust the equities' between the parties.

'Doctrine of marshalling'—Section 56 of the Transfer of Property Act, as it stood before its amendment, applied only as between the 'seller' and his 'buyer'.(2) The section has now been recast by Act XX of 1929 and it is now provided that the buyer can claim the right of marshalling against not only the seller but also against the 'mortgagee,' but not so as to prejudice his rights. Similarly, the old S. 81 of the Transfer of Property Act provided for marshalling where there were two properties only. The scope of that section has now been widened by Act XX of 1929 by providing that the section should apply to cases where there are 'more than two' properties and to 'all' subsequent mortgages.

'Court's power to adjust equities'—Even if the doctrine of marshalling, above referred to, is not strictly applicable, the Court has, under this rule, the power to direct the order in which the various mortgaged properties should be sold, for the purpose of protecting the equities that may exist in favour of any of the parties.(3) Thus, where a son undertakes that where the sale of the father's share alone is insufficient to satisfy the mortgage, he will agree that his own share also may be sold, the Court may direct that the interest of the father alone may be sold first.(4)

A and B mortgage certain items of property to C. B then mortgages to D his own items of the mortgaged property. In a suit by C, D cannot claim that the items belonging to A alone should be sold first, the reason being that the mortgagor is not the same in both the mortgages.(5) If, however, the mortgagee has agreed that the properties should be sold in a particular order, the agreement should be given effect to. It has been held by the Madras High Court that S. 56

Order 34 Rule 4 Note 10

1 ('24) 11 AIR 1924 Mad 366 (367) : 47 Mad 688 (DB).
('09) 4 Ind Cas 398 (399) (DB) (Cal).
('67) 8 Suth W R 379 (382) (DB).
†('07) 34 Cal 13 (17) (DB).
('95) 17 All 434 (435) (DB).
('11) 12 Ind Cas 439 (439, 440) (DB) (Mad).
('24) 11 AIR 1924 Pat 700 (703) (DB).
('40) 27 AIR 1940 Cal 159 (160) : I L R (1939) 2 Cal 455 (457).

2 ('08) 31 Mad 419 (421, 423) (FB).
('95) 17 All 434 (435) (DB).
[*See* ('14) 1 AIR 1914 Cal 828 (829) : 41 Cal 418 (DB).]

3 ('24) 11 AIR 1924 Pat 459 (464) : 3 Pat 522 (DB).
('19) 6 AIR 1919 Pat 281 (282) : 4 Pat L Jour 207 (DB). (Descretion is not to be arbitrarily exercised.)
('31) 18 AIR 1931 Nag 91 (94) : 13 Nag L R 213. (Although in sub-r. (4) of R. 4 subsequent mortgagees or persons deriving title from them are mentioned, it was held that it must be taken to include subsequent purchasers also.)
('08) 31 Mad 419 (423, 424) (FB).
('06) 29 Mad 217 (223).
*('27) 14 AIR 1927 Cal 522 (526).
('24) 11 AIR 1924 Pat 802 (802) : 3 Pat 962 (DB).
('10) 7 Ind Cas 4 (5) (DB) (Cal).
('83) 9 Cal 409 (410) (DB).
('11) 36 Bom 68 (76) : 12 Ind Cas 949 (952) (DB).
('17) 4 AIR 1917 Mad 772 (773) (DB).
('03) 25 All 42 (45) (DB).
('24) 11 AIR 1924 Mad 509 (510) (DB). (Executing Court can also do so.)
†('32) 19 AIR 1932 All 85 (87, 88, 90) : 53 All 391 (DB).
('39) 26 AIR 1939 All 314 (316, 318) : I L R (1939) All 150 (DB). (Transferee of a portion of the mortgaged property paying part of the decretal amount and decree-holder agreeing that the portion transferred should not be proceeded against—Decree-holder is entitled to ask that such portion should not be sold first.)
[*See also* ('44) 31 AIR 1944 Nag 25 (27, 28) : I L R (1944) Nag 230 (DB). (Maintenance decree charging certain properties—One of them subsequently transferred to another for an old family debt—Transferee can ask that the decree-holder should proceed first against other properties.)]

4 ('11) 36 Bom 68 (76) : 12 Ind Cas 949 (952) (DB).

5 ('30) 17 AIR 1930 Mad 178 (180).

of the Transfer of Property Act as amended by Act XX of 1929 is exhaustive and the right of marshalling in law since 1929 is co-extensive with the right in equity and so, there is no justification to extend the legal right of marshalling by relying on the provisions of O. 34, Rr 4 and 5 in a way which cannot be justified by any well established principle.(6)

See Note 17 on Rule 5.

11. Interest.—See Note 2 on Order 34 Rule 11.

12. Costs.—Costs awarded to a mortgagee in a suit for sale on a mortgage are part of the mortgage-money(1) and are primarily recoverable from the mortgaged property and not from the mortgagor personally,(2) unless the decree makes the mortgagor personally liable for the costs.(3) This will apply even to a decree passed in appeal. Though the words used in the appellate decree may lend themselves to the construction that the judgment debtor was personally liable, the appellate decree is to be interpreted in accordance with the rules of O. 34 and the party which contends that a departure from the general rule was intended must establish his contention from the words used in the judgment and the decree (3a)

Ordinarily, in a mortgage suit, a puisne mortgagee is not personally made liable for the costs.(4) But if he makes himself responsible for any unnecessary contest in the suit, he may be made personally liable for the costs.(5) The ut-

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6 ('40) 27 AIR 1940 Mad 776 (776) (DB).

Order 34 Rule 4 Note 12

1 ('14) 1 AIR 1914 All 444 (445).
('32) 19 AIR 1932 Cal 524 (533, 534) : 59 Cal 667 (DB). (A case of mortgage of moveables.)
('16) 3 AIR 1916 Pat 1 (1) : 2 Pat L Jour 51 (DB).
†('37) 24 AIR 1937 Rang 71 (72) : 14 Rang 538.
('35) 22 AIR 1935 Rang 514 (517) (DB).
('35) 22 AIR 1935 Oudh 452 (453).
('35) 22 AIR 1935 Mad 101 (105) : 58 Mad 418 (DB).
[*See also* ('33) 20 AIR 1933 Rang 81 (83). (Plaintiff was held to be entitled to add his costs to the mortgage-money.)]

2 ('48) 35 AIR 1948 Pat 127 (128) : 26 Pat 422 (DB). *Rama Rao v. Rajeswar Rao.*
†('98) 20 All 523 (526, 527, 528) (FB).
('18) 5 AIR 1918 All 366 (366) : 40 All 109 : 43 Ind Cas 557 (559, 560) (DB).
('16) 3 AIR 1916 Pat 1 (1) : 2 Pat L Jour 51 (DB).
('18) 5 AIR 1918 Oudh 445 (445) (DB).
('07) 30 Mad 464 (465, 466).
†('25) 12 AIR 1925 Cal 1135 (1135, 1136).
('26) 13 AIR 1926 Oudh 27 (28).
('35) 22 AIR 1935 Oudh 452 (453).
('35) 22 AIR 1935 Mad 101 (105) : 58 Mad 418 (DB). (But where right of mortgagee to maintain suit is disputed, this rule cannot be insisted on.)
('39) 26 AIR 1939 Cal 166 (168, 169) (DB).
[*See also* ('39) 26 AIR 1939 Lah 303 (304). (Holder of mortgage decree cannot claim rateable distribution even for costs, as they are primarily recoverable from the mortgaged property.)]
Also see O. 34 R. 2, N. 11; R. 5, N.. 26; R. 6, N. 11 and R. 10, Note 8.

3 ('48) 35 AIR 1948 Pat 127 (128) : 26 Pat 422 (DB). *Ram Rao* v. *Rajeswar Rao.*
('43) 30 AIR 1943 Nag 178 (783) : ILR (1943) Nag 422 (DB). (Personal decree for costs can be passed if defence or conduct of mortgagor demands it—Mortgagor setting up *bona fide* plea of limitation—This is not justification for personal decree for costs.)
('19) 6 AIR 1919 All 297 (298) : 41 All 473 (DB).
†('31) 18 AIR 1931 Rang 153 (159, 160) : 9 Rang 186 (DB). (Persons other than mortgagors such as prior mortgagees impleaded and unsuccessful—Ordered to pay costs personally.)
('33) 20 AIR 1933 Lah 329 (330) (DB). (Pre-emptor of mortgaged property raising false defence—Personal decree for costs passed against him.)
('88) 10 All 127 (129).
('39) 26 AIR 1939 Cal 166 (168, 169) (DB). (Court can in appropriate cases direct costs to be recovered personally from the mortgagor.)
[*See also* ('30) 17 AIR 1930 Bom 11 (15) (DB), (Official Receiver disputing validity of mortgage ordered to pay costs, the question of his right to reimbursement out of surplus being left for Insolvency Court to decide.)]

3a ('48) 35 AIR 1948 Pat 127 (128) : 26 Pat 422 (DB). *Ram Rao* v. *Rajeswar Rao.*

4 ('33) 20 AIR 1933 Rang 335 (336) (DB).
†('32) 19 AIR 1932 Rang 153 (153) : 10 Rang 308 (DB).

5 ('33) 20 AIR 1933 Rang 335 (336) (DB).
('32) 19 AIR 1932 Rang 153 (153) : 10 Rang 308 (DB).
('35) 22 AIR 1935 Mad 101 (105) : 58 Mad 418 (DB).
('36) 23 AIR 1936 Lah 607 (608) : 17 Lah 520 (DB).
[*See also* ('36) 23 AIR 1936 Nag 184 (184) : ILR (1937) Nag 32. (Appeal by subsequent mortgagees failing—Costs a

most that he can be made liable for is the 'extra' costs caused by his unnecessary contest.(6) The mere fact that a subsequent purchaser of the mortgaged property purchased it for a very small sum does not necessarily imply that he undertook to pay the mortgage debt and that if he failed to pay he was to be personally liable for the costs of the suit, and hence, is no justification for ordering costs to be recovered personally from him.(7)

13. Succession certificate.—It has been held by the High Courts of Bombay,(1) Calcutta(2) and Madras(3) that S. 4 of the Succession Certificate Act (now S. 214 of the Succession Act, 1925) does not apply to suits for sale on mortgages of immovable property, where no personal decree against the mortgagor is asked for. But a contary view is held by the Allahabad High Court.(4)

14. Award.—Rules 4 and 5 of Order 34 do not apply to a decree passed on the award of an arbitrator and hence a 'final decree' is not necessary in such a case before the decree can be executed. See O. 34 R. 5, Note 5.

15. Consent decree.—It is open to the parties to a mortgage suit to enter into a compromise and the Court can, in such a case, pass a decree in terms of the compromise. Such a decree need not conform to the provisions of O. 34.(1) For instance, instead of a lump sum being directed to be paid on a fixed day, a compromise decree may provide that the mortgage-money should be paid in certain instalments and that in default the mortgaged property should be brought to sale. In such a case, it is not necessary to have a final decree passed under R. 5 before bringing the property to sale.(2) For it is open to the mortgagor to waive the benefit of the provision which requires that a final decree should be

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awarded against such appellants—Costs can be realized personally against subsequent mortgagees.)]

6 ('33) 20 AIR 1933 Rang 335 (336) (DB).

7 ('43) 30 AIR 1943 Nag 178 (184) : ILR (1943) Nag 422 (DB).

Order 34 Rule 4 Note 13

1 ('04) 28 Bom 630 (633, 634, 635) (DB).

2 ('99) 26 Cal 839 (841, 842) (DB). Mortgage suit —In such a suit succession certificate is not necessary.)
('92) 19 Cal 336 (339) (DB). (Do.)
('95) 22 Cal 143 (149) (DB). (Do.)

3 ('06) 29 Mad 77 (78, 79) (DB). (In this case personal decree was prayed for and granted—*Held* that succession certificate was necessary.)

4 ('94) 16 All 259 (268) (FB). (Section 4 of Succession Certificate Act applies to suit for sale under S. 88, T. P. Act (now O. 34 R. 4).)

Order 34 Rule 4 Note 15

1 ('45) 32 AIR 1945 Nag 289 (291): ILR (1945,) Nag 643 (DB) *Ratanlal Harlalji v. Mt. Sagarbai.*
[Decree passed in terms of compromise and not in terms of R. 4—R. 5 has no application—Decree is executable.]
('43) 30 AIR 1943 All 321 (326) : ILR (1943) All 684 (DB).
†('20) 7 AIR 1920 Pat 731 (733) : 5 Pat L Jour 672 (DB). (Payments made out of Court can be recognized.)
('21) 8 AIR 1921 Pat 320 (320) (DB).
('26) 13 AIR 1926 Oudh 385 (386) : 29 Oudh Cas 26 (DB). (Order 34 refers to a case where a plaintiff succeeds, and not to a case where the matter is compromised.)
('27) 14 AIR 1927 Pat 271 (277) : 6 Pat 388 (DB).
†('23) 10 AIR 1923 Pat 375 (378) : 7 Pat 28 (DB).
('24) 11 AIR 1924 Mad 645 (646) (DB). (Decree passed in accordance with compromise is not a preliminary decree and is capable of execution.)
('21) 8 AIR 1921 Lah 384 (385). (Do).
('22) 9 AIR 1922 All 383 (384) : 44 All 668 (DB).
*('35) 22 AIR 1935 Pat 385 (395) : 14 Pat 488 (DB).
†('37) 24 AIR 1937 Lah 874 (875). (Final decree may be passed by consent of parties without preliminary decree.)

2 ('44) 31 AIR 1944 Oudh 111 (113). (Preliminary decree for foreclosure on compromise providing for payment by instalments.)
('44) 31 AIR 1944 Oudh 106 (109) (DB). (Do.)
('43) 30 AIR 1943 All 321 (326) : ILR (1943) All 684 (DB).
('43) 30 AIR 1943 Lah 189 (190, 191).
†('07) 34 Cal 886 (890) (DB).
('21) 8 AIR 1921 Lah 384 (385) : 55 Ind Cas 816 (816).
('34) 21 AIR 1934 Cal 735 (736) (DB).
('29) 16 AIR 1929 Lah 390 (391).
('09) 1 Ind Cas 677 (681) (DB) (Cal).
('29) 16 AIR 1929 Cal 11 (12, 14) (DB).
†('27) 14 AIR 1927 All 167 (168) : 49 All 297 (FB).
[*See also* ('23) 10 AIR 1923 Cal 626 (628 : 50 Cal 650 (DB). (Compromise decree fiixing two years for payment and for immediate sale on default—Decree-holder dying within two years—No final decree is necessary—Heirs of decree-holder need not be brought on record within three months.)]
Also see O. 34 R. 5, Note 5.

passed before the property can be sold and where by his agreement he has waived the benefit, a final decree which is intended only for his benefit is not necessary.(3) But the decree-holder is not 'precluded' from applying for a final decree in such a case.(4) So also where the parties have agreed that the decree should be drawn up under R. 4, a final decree under R. 5 is necessary.(5) Order 34 Rule 14 does not apply to a compromise decree.(6)

A compromise decree on a mortgage may fix a longer period than the six months allowed under the rule, for payment by the mortgagor.(7) Where a compromise mortgage decree authorises its enforcement against properties other than the mortgaged property, execution of the decree by the arrest of the mortgagor is permissible.(8)

See also Note 18 on Rule 2 and Note 5 on Rule 5.

16. Appeal.—Under the Civil Procedure Code, O. 43 R. 1 (o) an appeal lies from an order refusing to extend time for payment under this rule. But no such appeal lies after the 'final decree has been passed.'(1) In an appeal from a preliminary decree 'ad valorem' court-fee is payable on the amount 'found due' and not on the amount claimed by the plaintiff.(2) Under S. 97 of the Code, where a preliminary decree is not appealed from, it cannot be questioned in an appeal from the final decree.(3) Under the former Code it was held that an application for taking accounts on a mortgage, directed by a decree thereon, was one in execution and that an order on such application was appealable under S. 244 (now S. 47).(4) This view is not tenable under the present Code.

Final decree in suit for sale.

[a] R. 5. [New: Act IV of 1882, S. 89.] (1) Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3) of this rule, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 4, the Court shall, on application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(b) ordering him to transfer the mortgaged property as directed in the said decree,

and, also, if necessary,—

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3 †('11) 10 Ind Cas 536 (537, 538) (DB) (Cal).
('07) 34 Cal 886 (890) (DB).
('14) 1 AIR 1914 P C 150 (151, 152) : 42 Cal 776 : 42 Ind App 88 (PC).
('23) 10 AIR 1923 Cal 626 (628) : 50 Cal 650 (DB).
[*See* ('44) 31 AIR 1944 Oudh 106 (109) (DB). (Provisions of O. 34 Rr. 2 and 3 being for the benefit of the mortgagor can be waived by him.)]

4 ('31) 18 AIR 1931 All 340 (341) (DB).
[*See also* ('37) 24 AIR 1937 Oudh 453 (454). (Preliminary decree based on compromise—Final decree passed after notice to judgment-debtor—Judgment-debtor not putting in appearance cannot plead in execution that final decree was unnecessary and that limitation for execution began to run from the preliminary decree.)]

5 †('29) 16 AIR 1929 All 881 (883) (DB).
('31) 18 AIR 1931 All 340 (341) (DB).
[*See also* ('40) 27 AIR 1940 Oudh 90 (92) : 15 Luck 95 (DB). (Limitation for execution does not run from the, date of preliminary decree.)]

6 See O. 34 R. 14, Note 14.

7 ('43) 30 AIR 1943 All 321 (326) : I L R (1943) All 684 (DB).
('29) 16 AIR 1929 All 881 (883) (DB).

8 †('29) 16 AIR 1929 Lah 86 (87).
('32) 19 AIR 1932 All 439 (440) : 54 All 763 (DB). (Consent decree creating charge or mortgage silent as to mode of execution—Arrest or execution against other properties available in execution—But properties charged or mortgaged can be sold only by separate suit under R. 14.)
[*See also* ('32) 19 AIR 1932 Cal 775 (778, 780) : 59 Cal 1314 (DB).]

Order 34 Rule 4 Note 16

1 ('30) 17 AIR 1930 Nag 240 (240).
2 ('27) 14 AIR 1927 Sind 251 (252) : 23 Sind L R 277 (DB).
3 ('16) 3 AIR 1916 Bom 305 (307) : 40 Bom 321 (DB). (This was the law even under the old Code.)
4 ('03) 26 Mad 237 (238) (DB).

(c) ordering him to put the defendant in possession of the property.

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of rule 4.

[cf. C.P.C., O. 21 R. 89.]

a. See the foot-note to the text of Rule 2 of this Order.

Provincial Amendment

MADRAS

Substitute the following *for* sub-rule (3):

"Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf and after notice to all the parties, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of Rule 4". (1)

[R. O. C. No. 4955 of 1930.]

Synopsis

1. Transfer of Property Act, Section 89.
2. Amendments after 1908.
3. Scope of the rule.
4. Final decree, when can be passed.
5. Consent decrees and decrees on award.
6. Only one final decree to be passed.
7. Form of final decree for sale.
8. Court cannot go behind preliminary decree.
9. Court to which application for final decree is to be made.
10. Application for final decree, if and when necessary.
11. Notice to judgment-debtor, if necessary before passing final decree.
12. Limitation for application for final decree.
13. Mortgagor's rights before confirmation of sale.
14. Payment into Court.
14a. Payment or adjustment out of Court—see N. 14.
15. Return of documents relating to property.
16. Dismissal of mortgagee's application for final decree.
17. "Directing that the mortgaged property or a sufficient part thereof be sold.".
18. Power to enlarge time.
19. Effect of sale under mortgage decree.
20. Execution of final decree for sale.
21. Transfer of final decree.
22. Injunction restraining mortgagor from receiving income of mortgaged property.
23. Construction of mortgage decree.
24. Appeal.
25. Court-fee. See the A.I.R. Commentaries on the Court-fees Act, 2nd (1949) Edn., S. 7 (i) Notes 18 and 20 and Sch. I, Art. 1, Note 8.
26. Costs not recoverable from mortgagor personally.
27. Dekkhan Agriculturists' Relief Act.
28. Limitation for application for execution of final decree. See Notes on Articles 182 and 183 in the A. I. R. Commentaries on the Limitation Act, 2nd (1942) Edition.
29. Nature of proceedings for final decree.
30. Joint decree-holders.

Topic Indicator

Acquisition under the Land Acquisition Act —Effect—Final decree, if essential. See Note 17.

Decree directing payment by instalments—Not a decree under Rule 4. See Note 5.

Defective applications—Effect. See Notes 10 and 16.

Defective final decree—Effect. See Note 7.

Enlargement of mortgagor's interest. See Note 19.

Non-liability of non-parties to final decree. See Note 20.

"Order absolute," and final decree—Effect of —Difference. See Note 13.

Order in which properties are to be sold. See Note 17.

Partition subsequent to mortgage—Remedy mortgagee. See Note 17.

Preliminary decree not questionable in appeal from final decree. See Note 24.

Who may apply for final decree. See Notes 10 and 30.

Order 34 Rule 5 (Madras)

1 The substituted sub-rule (3) came into force on 20-8-1931, *see* ('35) 22 AIR 1935 Mad 716 (717) (DB).

1. Transfer of Property Act, Section 89.—This rule corresponds to S. 89 of the Transfer of Property Act; that section was as follows:

"89. If in any case under S. 88 the defendant pays to the plaintiff or into Court on the day fixed as aforesaid the amount due under the mortgage, the costs, if any, awarded to him and such subsequent costs as are mentioned in S. 94, the defendant shall (if necessary) be put in possession of the mortgaged property; but if such payment is not so made, the plaintiff or the defendent, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in S. 88: and thereupon the defendant's right to redeem and the security shall both be extinguished."

The chief points of distinction between the two provisions are the following:

(1) Under S. 89 an 'order absolute' for sale was passed while under the present rule a final 'decree' is passed.
(2) Under S. 89 payment of the mortgage-money could be made either to the 'plaintiff' or 'into the Court.' Under the present rule, payment has to be made only 'into the Court.'
(3) The words at the end of S. 89, "and thereupon the defendant's right to redeem and the security shall both be extinguished" have been omitted in the present rule.
(4) The provision for the passing of a 'decree' in case of payment by the mortgagor within the proper time is new.

2. Amendments after 1908.—The chief changes introduced in the rule by the amending Act, XXI or 1929, are as follows:

(1) The present rule makes it quite clear that the decree under it is a 'final decree.'
(2) Upon payment of the mortgage-money under the preliminary decree, the present rule requires the mortgagor to 'apply' for a 'final decree.'
(3) The provision in sub-rule (1) as to the defendant paying the mortgage-money at any time before the confirmation of the sale is new.
(4) Sub-rule (2) is new.

3. Scope of the rule.—The present rule applies only where a preliminary decree has been passed under rule 4.(1) A decree passed in a suit for maintenance, the amount of maintenance being a charge upon the property, is not a preliminary decree under R. 4 and R. 5 cannot be applied to such a decree (2) It has been held in the undermentioned case(3) that an agreement registered under S. 14 of the Madras Debt Conciliation Act, 1936 providing for the sale of the mortgaged property in default of payment within a certain time is to be regarded as a final decree in a mortgage suit and hence the provisions of R. 5 apply to it.

Order 34 Rule 5 Note 3

1 ('09) 1 Ind Cas 677 (680) (DB) (Cal). [See also] ('49) 36 AIR 1949 Mad 143 (144) *Venkata Chalapatti Rao v. Kanchayya.*
Exparte money decree—Judgment debtor giving immovable property as security as condition for setting aside exparte decree — Suit decreed — Decree-holder executing decree against property given as security—Property purchased by decree-holder himself — Judgment debtor applying under O. 34 R. 5, for setting aside sale after making necessary deposit —Procedure under O. 34 R. 5 held inapplicable there having no decree based on charge.]

('47) 34 AIR 1947 Mad 101 (102) : ILR (1947) Mad 377 (DB). *Sarraju v. Venkatraju.*
[Decree entitles decree-holder to proceed directly in execution, should the judgment-debtor fail to pay the amount due by him.]

('45) 32 AIR 1945 Mad 422 (423) : ILR (1946) Mad 265 (DB). *Nanjappa v. Sreeranga.*
[Mortgagor failing to pay within time fixed in agreement—Property sold in execution—Mortgagor can deposit amount in Court under R. 5, before confirmation of sale.]

4. Final decree, when can be passed.—Order 34 contemplates the passing of a preliminary decree and a final decree in all mortgage suits. The final decree for sale is passed when the payment directed by the preliminary decree has not been made within the proper time. A final decree under R. 5 is necessary only when the decree originally passed is a preliminary decree under R. 4. Hence, where only a money decree has been passed, a final decree under the rule is not necessary although the decree may authorize the decree-holder to realize the decree amount by sale of the judgment-debtor's property.(1) Similarly, where, at the time of the coming into force of the present Code of Civil Procedure, a decree had already been passed under the Transfer of Property Act, S. 88, it has been held that a final decree under the present rule is not necessary.(2) But where property is charged with the payment of the decretal amount it was held in the undermentioned case(3) that the proper mode of realizing the decree-amount was to obtain a decree absolute for sale and that it was not necessary to 'attach' the property.

Where the plaintiff under a preliminary decree in a mortgage suit is directed to pay off a prior mortgage before bringing the mortgaged property to sale, he is entitled to apply for a final decree for sale even though he has made the payment only 'after' the time fixed by the decree.(4)

Where the purchaser of a portion of the equity of redemption is made one of the defendants to a suit on a mortgage and, after the preliminary decree is passed, he obtains an assignment of the mortgagee's rights, he is entitled to apply for a final decree, although only for a 'proportionately reduced portion' of the mortgage amount.(5) Although a final decree is necessary to be passed before execution, yet a mortgagor who allows execution to take place, without raising any objection, will be estopped from contending that the want of a final decree is fatal to the proceedings.(6) Similarly, it was held under the Transfer of Property Act that no objection as to the want of a formal order absolute for sale could be raised where execution had once proceeded without objection.(7)

5. Consent decrees and decrees on award.—It has been seen in Note 4 that this rule applies only where a preliminary decree has been passed under Rule 4. A consent decree providing for payment by instalments is not a 'preliminary' decree under Rule 4 and hence, a final decree under the present rule is not necessary in such a case.(1) Similarly, a decree on an 'award' is not a preliminary

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Order 34 Rule 5 Note 4

1 ('25) 12 AIR 1925 Mad 1083 (1084).
2 ('24) 11 AIR 1924 Mad 603 (603) (DB).
('17) 4 AIR 1917 Mad 315 (315, 316) (DB).
†('18) 5 AIR 1918 Pat 41 (45) : 4 Pat L Jour 213 (DB).
('21) 8 AIR 1921 Mad 126 (130, 131) (DB).
3 ('27) 14 AIR 1927 Mad 190 (191, 192).
4 ('02) 24 All 479 (481) (DB).
[*See also* (1900) 1900 All W N 95 (95) (DB).]
5 ('27) 14 AIR 1927 Mad 560 (562).
6 ('42) 29 AIR 1942 Pat 343 (344). (Sale held after final decree but application for execution made before final decree—Sale only irregular and not void.)
†('18) 5 AIR 1918 Pat 41 (46) : 4 Pat L Jour 213 (DB).
('14) 1 AIR 1914 Mad 365 (365) : 23 Ind Cas 390 (391) (DB).
('27) 14 AIR 1927 Bom 131 (133) : 51 Bom 125 (DB).
7 ('99) 2 Oudh Cas 337 (339, 340).
('02) 25 Mad 537 (539) (DB).
('04) 31 Cal 370 (371, 372) (DB).
('01) 28 Cal 73 (77) (DB).
('91) 18 Cal 139 (142) (DB).
Also see O. 34 R. 3, Note 7.
[But see ('99) 9 Mad L Jour 349 (350) (DB).]

Order 34 Rule 5 Note 5

1 ('49) 36 AIR 1949 All 317 (318) (Luck. Bench) *Surajpal Sing* v. *Sarjoo Prasad.*
('45) 32 AIR 1945 Nag 289 (291 : ILR (1945) Nag 643 (DB). *Ratanlal Hartalji* v. *Mt. Sagarbai.*
[No application under R. 6 is necessary]
†('11) 10 Ind Cas 536 (537) (DB) (Cal).
('34) 21 AIR 1934 Cal 735 (736) (DB).
('27) 14 AIR 1927 Pat 271 (277) : 6 Pat 388 (DB).
('28) 15 AIR 1928 Mad 38 (39) (DB).
('23) 10 AIR 1923 Pat 375 (378) : 2 Pat 538 (DB).
('24) 11 AIR 1924 Mad 645 (646) (DB).
('21) 8 AIR 1921 Lah 384 (385).
†('29) 16 AIR 1929 Cal 11 (14) (DB).
('23) 10 AIR 1923 Cal 626 (628) : 50 Cal 650 (DB).
('29) 16 AIR 1929 Bom 227 (228).
*('27) 14 AIR 1927 All 167 (168) : 49 All 297 (FB).
('09) 1 Ind Cas 677 (680) (DB) (Cal).

decree under Rule 4 and no final decree is necessary to be passed.(2) But a decree-holder is not 'precluded' from applying for a final decree where a preliminary decree by consent has been passed.(3) It has been held that where the mortgagee enters into a compromise with one of the mortgagor—defendants and a consent decree is passed against such defendant, the mortgagee can still obtain a usual mortgage decree against the other defendants if there is nothing in the compromise preventing the mortgagee from proceeding with the suit against the other Co-mortgagors.(3a) See also Note 15 on Rule 4.

Where a mortgage itself is invalid, as being opposed to a certain statute, it cannot be validated by consent decree on the mortgage. The mortgagor can resist an application for final decree on the ground that the mortgage is not binding on him.(4)

6. Only one final decree to be passed.—This rule contemplates the passing of only 'one' final decree.(1) Where the the preliminary decree is appealed from, the final decree should be based on the appellate decree.(2) But this does not mean that a final decree cannot be passed pending an appeal from the preliminary decree and that a final decree so passed is invalid and inexecutable. (3)

("22) 9 AIR 1922 All 383 (384) : 44 All 668 (DB).
('31) 18 AIR 1931 Cal 546 (548) (DB). (Solenama expressly stating that no final decree is needed.)
[*See also* ('43) 30 AIR 1943 All 321 (326) : ILR (1943) All 684 (DB). (Order 34 is not exhaustive —Even in suit for sale parties by compromise can settle form of decree—They can do away with necessity of passing fresh preliminary and then final decree.)
('35) 22 AIR 1935 Pat 385 (395) : 14 Pat 488 (DB).]
Also see O. 34 R. 4, Note 15.

2 ('30) 17 AIR 1930 Lah 116 (117).
('27) 14 AIR 1927 Sind 103 (104) : 19 Sind LR 202 (DB).
†('24) 11 AIR 1924 Pat 263 (264) : 3 Pat 221.
('33) 20 AIR 1933 Lah 48 (50) : 14 Lah 243. (Order 34 not applicable to decree on an arbitration award.)

3 ('45) 32 AIR 1945 Nag 289 (291 : ILR (1945) Nag 643 (DB) *Ratanlal Harlalji* v. *Sagarbai*.
[It may be that a final decree may be necessary if the compromise decree itself provides for it. Unless it is so drawn up as to require a final decree, a compromise decree which differs in its terms from R. 2 or 4 of O. 34, C. P. Code, must be treated as an executable decree.]
('43) 30 AIR 1943 All 321 (326) : ILR (1943) All 684 (DB). (If the agreement between the parties is that on the happening of certain event the decree-holder shall have the right to apply for a final decree it will be necessary for the decree-holder to apply for a final decree—Art. 181, Limitation Act applies.)
†('31) 18 AIR 1931 All 340 (341) (DB).
('07) 34 Cal 886 (891) (DB).
('36) 23 AIR 1936 Oudh 173 (173) : 11 Luck 757 (DB). (Compromise decree described as preliminary decree for sale and providing for final decree in certain eventualities—Application for final decree is not barred.)

3a ('49) 36 AIR 1949 Sind 9 (10) (DB). *Pessumal Virumal* v. *Sobhrajmal Ruchandmal*
[The passing of compromise decree against one of the mortgagors does not mean that the co-mortgagor must be deemed to have been given up.]

4 ('19) 6 AIR 1919 Mad 429 (431) (DB).

Order 34 Rule 5 Note 6

1 ('17) 4 AIR 1917 All 163 (164) : 39 All 641 (SB).
('11) 9 Ind Cas 835 (836) (DB) All.)

2 ('43) 30 AIR 1943 Mad 449 (450) : ILR (1943) Mad 804 (DB). (The fact that pending appeal, a final decree is passed by the trial Court, would not make the appellate decree from the preliminary decree a final decree.)
('42) 29 AIR 1942 Pat 348 (348) (DB). (But final decree based on trial Court's decree is not nullity.)
* ('17) 4 AIR 1917 All 163 (164) : 39 All 641 (SB).
('34) 21 AIR 1934 All 89 (90, 91) (DB). (this principle will apply even if appeal is by some defendants only, provided the appeal is against the whole decree.)
('26) 13 AIR 1926 PC 93 (94) : 53 Ind App 167 : 6 Pat 24 (P C.)
('26) 13 AIR 1926 All 343 (343).
[*See also* ('34) 21 AIR 1934 Mad 65 (68). (Even when the appellate decree simply confirms the decree of the first Court.)
('33) 20 AIR 1933 Nag 236 (237) : 29 Nag LR 130. (Appeal against preliminary decree dismissed—Appellate Court should fix a date for payment.)]

3 ('47) 34 AIR 1947 Pat 225 (229) : 25 Pat 432 : 225 Ind Cas 256 (DB) *Sona Debi* v. *Bhola Prasad Sahi*.
*('31) 18 AIR 1931 All 386 (388) : 53 All 283 (FB). (AIR 1926 All 291 overruled.)
('29) 16 AIR 1929 All 287 (289) : 51 All 640 (DB).
('39) 26 AIR 1939 Cal 601 (604) : ILR (1939) 1 Cal 477 (DB). (Final decree passed pending appeal from preliminary decree is not destroyed if preliminary decree is affirmed on appeal.)
('06) 10 Cal W N 910 (912) (DB).

Where a final decree is passed and subsequently the preliminary decree is modified on appeal, the Court of first instance may either prepare a 'new' final decree or 'amend' the preliminary decree already passed.(4) It has been held that where after the death of original judgment debtor after the preliminary decree the decree-holder obtains a final decree against wrong persons as legal representatives of the deceased by mistake, he can apply for a fresh final decree as against the real legal representatives of the deceased.

Under S. 89 of the Transfer of Property Act, successive applications for an order absolute were maintainable, such applications being proceedings in 'execution'.(5)

7. Form of final decree for sale.—For the form a final decree for sale, see Appendix D, Form No. 6. Nothing in R. 4 or in this rule requires the 'specification' of the mortgaged property in the decree.(1) Where the mortgage-money is payable under the bond in a 'lump sum of the Court is not justified in allowing it to be paid in 'instalments'.(2)

Where a co-mortgagee was made a party-defendant to a suit for sale on the mortgage and the decree directed a payment to him of a part of the decretal amount, it was held that the form of the decree was correct.(3) See also the undermentioned cases.(4)

8. Court cannot go behind preliminary decree.—When preparing a final decree under this rule, the Court has no power to go behind the preliminary decree.(1) Similarly, the amount fixed in the preliminary decree cannot be altered except for some reason which may have arisen 'subsequent' to the preli-

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('128) 15 AIR 1928 Lah 904 (906) : 10 Lah 132 (DB).
('28) 108 Ind Cas 751 (752) (Lah).
†('37) 24 AIR 1937 Mad 421 (424). (Appeal from preliminary decree—Final decree passed during pendency of appeal—Preliminary decree confirmed in appeal—Final decree already passed is valid and executable—No application for making fresh final decree is necessary.)
†('34) 21 AIR 1934 Pat 225 (227) : 13 Pat 379 (DB).
('27) 14 AIR 1927 Pat 215 (218) : 6 Pat 780 (DB).
[*See also* ('32) 19 AIR 1932 All 238 (238) : 54 All 344 (DB). (Appeal from preliminary decree—Final decree not to be stayed but execution of final decree may be stayed under S. 151, C.P.C.)]

4 ('47) 34 1947 All 83 (84, 85) : ILR (1947) All 40 : 227 Ind Cas 57 (DB) *Ram Nath* v. *Deokinandan Krishna.*
[Original final decree cannot be executed until made *consistent* with preliminary decree of appellate court or fresh final decree prepared]
('46) 33 AIR 1946 Mad 383 (386) : ILR (1947) Mad 132 (DB) *Periakaruppan.* v. *Venugopal.*
[Modifications as may be necessary in the circumstances might be made in the execution petition filed after the appellate decree.]
('26) 13 AIR 1926 All 134 (135).
†('34) 21 AIR 1934 Mad 65 (68).
[But see ('33) 142 Ind Cas 80 (82) : 15 Nag L Jour 124 (127, 128) (DB). (Preliminary decree affirmed on appeal—Final decree passed—Amendment of preliminary decree not allowable.)]

5 ('03) 25 All 212 (213) (DB).
('03) 25 All 264 (265) (DB).

Order 34 Rule 5 Note 7

1 ('17) 4 1917 443 (444, 445) : 38 398 (DB).
2 ('30) 17 AIR 1930 Lah 132 (133).
3 ('30) 17 AIR 1930 All 634 (636) (DB).
4 ('03) 5 Bom L R 389 (392) (DB). (Absence of the word "absolute" after "order" in order under S. 89 was not fatal.)
('82) 8 Cal 357 (363, 364) (DB). (Apportionment of mortgage debt.)
('26) 13 AIR 1926 Lah 364 (364,365). (Final decree made by endorsement on preliminary decree itself—Absence of separate final decree is merely an irregularity.)
('35) 22 AIR 1935 Rang 514 (515) (DB). (Mortgage of different properties to mortgagee under separate mortgages—Mortgagee obtaining final decree in a suit on the different mortgages—Final decree should contain position of parties under each mortgage, and money due under each separately.)
('39) 26 AIR 1939 Pesh 34 (37) (DB). (Decree not in proper form—Decree-holder can realize his decree from the mortgaged property.)

Order 34 Rule 5 Note 8

1 ('29) 16 AIR 1929 All 252 (253) (DB).
('34) 21 AIR 1934 Oudh 45 (46) (DB). (But Court can interpret preliminary decree and also correct accidental mistakes.)
[*See also* ('31) 18 AIR 1931 All 657 (658, 659) (DB). (Order in which properties are to be sold put in issue and negatived Not in corperated in preliminary decree—Not to be introduced in the final decree.)
('32) 19 AIR 1932 Bom 136 (146) : 56 Bom 36 (DB). (Preliminary decree—Person not agriculturist—Plea of being agriculturist cannot be raised at the time of final decree.)]

2 ('47) 34 AIR 1947 Mad 52 (54) : ILR

minary decree.(2) A full Bench of the Allahabad High Court(3) has held that where after the passing of a preliminary decree the mortgagor (a Hindu) dies and his heirs are substituted as his legal representatives, their objection that the mortgage, being without legal necessity, is not binding on them cannot be raised in the proceedings for the preparation of the final decree. But the Madras High Court(4) has held that an objection that the property mortgaged is inalienable on grounds of public policy can be raised in the proceedings for a final decree. Where there is an obvious mistake in the preliminary decree the Court is not bound to repeat it in the final decree. Thus, where the mortgaged property has been sold for arrears of revenue free from the mortgage and is no longer liable to be sold under the mortgage decree but the preliminary decree provides for its sale, the mistake need not be repeated in the final decree and such decree must be against the surplus sale proceeds remaining after the payment of revenue.(5)

9. Court to which application for final decree is to be made.—Though the preliminary decree may be modified by the appellate Court, the application for final decree should be made only to the Court of 'first instance'.(1)

10. Application for final decree, if and when necessary.—The rule requires that the mortgagee must 'apply' for a final decree.(1) But it has been held that an application for sale of the mortgaged property may be treated as an application for a decree absolute.(2) An application for a final decree in a mortgage suit need not be in 'writing'.(3) Nor need the plaintiff in his application 'describe the properties' with respect to which he asks for a final decree for sale, and therefore, if any item is omitted in the application, it cannot be contended that the final decree should not be passed in respect thereof.(4) A benamidar transferee of a preliminary decree may apply for a final decree.(5) So also where a preliminary decree ascertains the amount due to a puisne mortgagee impleaded as a party in a suit on the prior mortgage he can apply for a final decree on default of payment by the mortgagor of the amount due to the prior mortgagee, even though the decree does not authorize him to do so (5a). A decree-holder who attaches in execution of his decree a preliminary mortgage decree obtained by his judgment-debtor cannot apply for a final decree under this rule.(6) A mortgagee who

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(1947) Mad 184 : 229 Ind Cas 239 (DB) *Krishna Rao v. Ganti Bairagi.*

[Failure on the part of mortgagee to claim or at the time of the passing of the final decree reduction of mortgage amount on account of loss of rent owing to mortgagee's failure to recover it from tenant disentitles him to claim it as set off in execution of mortgage decree.]

('27) 14 AIR 1927 All 589 (589) : 49 All 809 (DB).

[*See also* ('33) 20 AIR 1933 Rang 323 (325) (DB). (Mortgage decree with interest at contract rate till suit and at Court rate till realization—Judge on application by defendant allowing instalments and ordering that decree should cease to bear interest—Order is without jurisdiction.)

('09) 4 Ind Cas 546 (547) (DB) (Cal). (Provision for any further interest than that provided for in preliminary decree cannot be added.)]

3 ('40) 27 AIR 1940 All 99 (100) : ILR (1940) All 153 (FB).

4 ('37) 24 AIR 1937 Mad 918 (922). *Acharyapursha* service inam, mortgage of.

5 ('42) 29 AIR 1942 Pat 185 (187).

Order 34 Rule 5 Note 9

1 (1900) 23 Mad 521 (523) (DB).

†('10) 6 Ind Cas 323 (325) (DB) (Cal).

Order 34 Rule 5 Note 10

1 ('47) 34 AIR 1947 Sind 12 (15, 16) ILR (1946) Kar 110 : 228 Ind Cas 541 (DB), *Bhajanmal Topandas v. Tikamdas.*

('18) 5 AIR 1918 Bom 217 (219) : 42 Bom 309 (DB).

2 ('17) 4 AIR 1917 Mad 669 (669) (DB).

('09) 4 Ind Cas 42 (43) (DB) (Mad).

('09) 2 Ind Cas 433 (433) (DB) (Mad).

('25) 12 AIR 1925 Lah 640 (642) (DB).

(Where the objection to decree-holder's application for sale on the ground that there is no decree absolute under which properties could be sold is raised too late, objection will be disallowed.)

[Contra ('23) 10 AIR 1923 Sind 14 (15) : 17 Sind L R 255 (DB.)]

3 ('26) 13 AIR 1926 Nag 152 (153).

4 ('29) 16 AIR 1929 All 551 (551) (DB).

5 ('15) 2 AIR 1915 All 264 (265) : 37 All 414 (DB).

('45) 32 AIR 1945 Mad 463 (465) *Rajamayyer v. Venkatasubba Iyear.*

6 ('36) 23 AIR 1936 All 857 (858) : ILR (1937) All 82 (DB).

[But see ('44) 31 AIR 1944 Nag 298 (302) (DB).

ILR (1944) Nag 885 (DB). Attachment creates interest in favour of attaching creditor within the meaning of O. 22 R. 10 and he can apply under O. 34 R. 5 (3) read with S. 146 AIR 1936 All 857, AIR

fails to apply within limitation for a final decree for sale cannot being a suit on the basis of the preliminary decree (6a). See also the case noted below.(7)

11. Notice to judgment-debtor, if necessary before passing final decree.—As has been seen in Note 7 on R. 3 this rule also does not require any 'notice' to be issued to the judgment-debtor before the passing of a final decree though, as a matter of practice, such notice should generally be given, on the principle that a party should be heard before any order is passed against him.(1) Where a final decree has been passed 'ex parte' against a mortgagor to whom no notice has been given of the application for final decree, the Court has inherent jurisdiction to set aside the 'ex parte' decree in furtherance of justice and equity.(2)

See also Note 7 on Rule 3.

12. Limitation for application for final decree.—See the A. I. R. Commentaries on the Limitation Act, 2nd (1942) Edition, Art. 181 Note 4.

There is no Limitation for the mortgagor's application for deposit of the mortgage-money under the preliminary decree.(1)

13. Mortgagor's rights before confirmation of sale.—Even before the amendment of 1929, it was held that the right of a mortgagor to redeem under

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1937 All 652 : ILR (1937) All 823 and AIR 1937 Oudh 365 : 13 Luck 237 dissented from.)]

6a ('47) 34 AIR 1947 Sind 12 (15 to 18) : ILR (1946) Kar 110: 228 Ind Cas 541 (DB). *Bhajanmal Topandas* v. *Tikamdas.*
[A suit can no doubt be filed upon a debt created by a decree but as a debt implies a personal legal obligation to pay an ascertained sum of money, the relationship of a debtor and creditor is necessary to found an action upon a judgment which creates a debt. In the case of a preliminary mortgage decree for sale, no such personal obligation exists.]

7 ('43) 30 AIR 1943 All 321 (326) : ILR (1943) All 684 (DB). (Compromise in suit for dower stating the amount decreed and making it a charge on the defendant's property and also providing that a decree under O. 34 R. 4 should be passed in terms of the compromise—Suit decreed in terms of the compromise—But the blank spaces in the form of the decree for amount due and date within which it is to be paid not filled up—*Held*, in the circumstances of the case that the decree did not specify any amount as due, nor fix any period within which it was to be paid and consequently there was no default by the judgment-debtor so that the decree-holder did not have any occasion for applying for a final decree and so his failure to do so did not affect his rights under the decree owing to the efflux of any period of limitation.)

O 34 R 5—Note 11

1 ('22) 9 AIR 1922 Nag 175 (177).
('30) 17 AIR 1930 Mad 105 (107, 108) (DB). (Remedy of the aggrieved party is to come up under O. 9 R. 13.)
†('35) 22 AIR 1935 Mad 716 (717, 718) (DB). (Notice sent to some defendants only—Application can be dismissed only as against defendants to whom notice has not been sent.)
('06) 4 Cal L Jour 317 (318) (DB).
('01) 25 Mad 506 (507) (DB).
('95) 9 C P L R 5 (8).
('99) 22 Mad 133 (136) (DB).
('29) 16 AIR 1929 Mad 393 (394) (DB).
('37) 24 AIR 1937 Sind 273 (274, 278) : 31 Sind LR 180.

2 †('05) 32 Cal 253 (256) (FB).
('35) 22 AIR 1935 Mad 716 (717) (DB). (Application for final decree—Notice to all parties is not compulsory—But if any party is aggrieved by omission to issue notice, decree can be set aside. NOTE.—case decided on facts arising before substitution of sub-rule (3).)
('31) 18 AIR 1931 Cal 58 (59) (DB).
('30) 17 AIR 1930 Nag 136 (136). (Practice of issuing notice is firmly established in Central Provinces.)
('49) 36 AIR 1949 Pat 68 (68) *Surendra Kumar* v. *Mukund Lal Sahu.*. [*But see* Notice not necessary inherent power not to be exercised for setting aside *exparte* decree.]
[See however ('43) 30 AIR 1943 Pesh 31 (32). (Notice for passing final decree is not necessary —Judgment-debtor therefore cannot as of right claim setting aside *ex parte decree.*)
('23) 10 AIR 1923 Nag 320 (320) : 19 Nag L R 124. (Notice served—Defendant not appearing—Second notice not necessary —If one is ordered but not served, there is no ground for setting aside the *ex parte* decree.)]

O 34 R 5—Note 12

1 ('22) 9 AIR 1922 Oudh 33 (34).

O 34 R 5—Note 13

1 †('29) 16 AIR 1929 All 309 (311) : 51 All 606 (DB).
('22) 9 AIR 1922 Pat 92 (94) (DB).
('20) 7 AIR 1920 Oudh 204 (207) (DB).
('20) 7 AIR 1920 All 136 (136) : 42 All 517 (DB).
('16) 3 AIR 1916 Pat 64 (65) : I Pat L Jour 261.
('11) 9 Ind Cas 158 (159) (DB) (All).
('25) 12 AIR 1925 Mad 1191 (1192). (Final decree for sale not executed—Mortgagor can bring separate suit for redemption.)

a mortgage decree was not lost till the sale was actually held and confirmed.(1) Thus, it was held that the mortgagor could apply to stop a sale under the Civil Procedure Code, O. 21 R. 69,(2) or have the sale set aside under O. 21 R. 89.(3) The amendment of 1929 gives express legislative sanction to the said view, namely that the mortgagor's right to redeem continues till the 'confirmation of the sale'. (4) The right of redemption given by this rule is, however, different from the right given by S. 60 of the Transfer of Property Act. The right of redemption given by S. 60 of the Transfer of Property Act includes the right of total redemption given by the first paragraph as well as the right of partial redemption given by the last paragraph of that section and the right is the right to redeem by paying or rendering the 'mortgage money' or the 'mortgage debt'. The moment the final decree is passed this debt merges in the decretal debt. So after the final decree neither the right of total redemption nor the right of partial redemption given by S. 60 survives the final decree for sale. All that remains thereafter is the different right of total 'redemption' conferred by this rule.(4a)

In this connection it may be noted that, under S. 89 of the Transfer of Property Act, the defendant's right to redeem and the security became both 'extin-

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[*See* ('30) 17 AIR 1930 Pat 451 (452). (Mere obtaining of a mortgage decree does not extinguish a mortgage.)]
[But see ('33) 20 AIR 1933 Cal 39 (42, 43): 59 Cal 1464 (DB). (*Held* that prior to amendment of 1929, right of redemption was extinguished by the sale itself even before confirmation and also that Act XXIof 1929 is not retrospective.)]

2 See the A.I.R. Commentaries on the Code of Civil Procedure, 4th (1944) Edn., O. 21 R. 69, Note 10.

3 ('08) 31 Mad 354 (358) (DB).
(1900) 4 Cal W N 474 (479) (DB).
*('02) 25 Mad 244 (255 to 258) (FB).
('99) 22 Mad 286 (288) (DB).
†('01) 25 Bom 104 (106, 107) (DB).
[*See also* ('97) 24 Cal 682 (685) (DB). (Sale not set aside under O. 21 R. 89 or R. 90—Sale must be confirmed.)]
[But see ('98) 25 Cal 703 (709, 710) (FB). (Overruling 23 Cal 682.)]

4 ('45) 32 AIR 1945 Mad 422 (423): ILR (1946) Mad 265 (DB). *Nanjappa v. Sreeranga.*
[Proceedings before Debt Conciliation Board—Mortgage—Agreement for payment within specified time and for sale in default of payment Agreement to be treated as final decree under O. 34 R. 5—Sale—Deposit before confirmation of sale can be made].
('44) 31 AIR 1944 Bom 35 (35) (DB). (only defendant can avoid sale—Junior member of Hindu joint family represented by the manager in the suit is a 'defendant' within the meaning of sub-rule (1).)
('40) 27 AIR 1940 Bom 321 (328) : ILR (1940) Bom 605.
('34) 21 AIR 1934 Cal 822 (823). (Even though the confirmation is delayed by the act of the judgment-debtor himself.)
('33) 20 AIR 1933 Lah 361 (362).
('37) 24 AIR 1937 Mad 560 (561).
('37) 24 AIR 1937 Nag 196 (196) : I L R (1939) Nag 310.
†('36) 23 AIR 1936 Lah 562 (563, 564) (DB). (Sale taking place after 1st April 1930—Order 34 Rule 5 as amended coming into force on 1st April 1930—Amended law applies.)

4a. ('48) 35 AIR 1948 Pat 208 (212, 214: 26 Pat 97 (DB), *Sheo Narain* v. *Deolochan Kuer.*

5 *('18) 5 AIR 1918 P C 34 (35) : 40 All 407: 45 Ind App 130 (PC).
('20) 7 AIR 1920 Oudh 253 (254) : 23 Oudh Cas 334.
(1900) 23 Mad 637 (642).
('24) 11 AIR 1924 Oudh 85 (91) (DB).
('24) 11 AIR 1924 Cal 881 (888) (DB).
*('29) 16 AIR 1929 Cal 233 (236) (DB).
('20) 7 AIR 1920 P C 79 (80) : 42 All 364: 47 Ind App 71 (PC).
('14) 1 AIR 1914 Oudh 209 (211) : 17 Oudh Cas 347 (DB). (Foreclosure suit—Right of redemption subsists till order absolute is passed—No question of limitation.)
('13) 20 Ind Cas 59 (60) (DB) (All).
('21) 62 Ind Cas 833 (837) (DB) (Mad).
('36) 23 AIR 1936 Mad 752 (758) (DB). (Order absolute for sale extinguishes security in simple mortgage but continued possession of usufructuary mortgage can be in character of usufructuary mortgagee.)
[But see ('06) 29 Mad 37 (40) (DB).
('06) 28 All 778 (780) (DB). (Person advancing money to mortgagor for paying off mortgage after order absolute but before sale, is entitled to subrogation—Last clause in S. 89 only refers to matters connected with execution of mortgage decrees and does not affect principles of subrogation.)
('88) 15 Cal 546 (552) (DB).
('04) 9 Cal WN 171 (174). (Until sale is confirmed mortgage subsists.)]

guished' on the passing of the order absolute.(5) The words as to the extinguishment have been omitted in the present rule with the effect that a final decree does not now extinguish the mortgage security or the right to redeem.(6)

Where a period has been fixed for the payment of the mortgage-money under the preliminary decree, it is not open to the mortgagor to pay the money before the date fixed with costs and interest calculated 'up to the date of payment' only and avoid further liability for costs and interest.(7)

Under sub-rule (2), a mortgagor who applies under this rule to get a sale set aside by depositing in Court the mortgage-money must also deposit in Court for payment to the purchaser "a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser." The words "purchase-money paid into Court by the purchaser" mean money actually paid and not the entire purchase-money whether paid into Court or not. It follows, therefore, that under this provision a stranger purchaser can get five per cent. only on the amount he has actually paid into Court and not on the amount of the accepted final bid and that a decree-holder purchaser who sets off his decree against the price can get nothing on the amount set off.(8) See also the undermentioned cases.(9)

14. Payment into Court.—Unlike the provisions of S. 89 of the Transfer of Property Act under which the defendant had to pay the mortgage-money either to the 'plaintiff' or into the 'Court', this rule provides that it should be paid *into* 'the Court.'(1) But suppose the money is paid out of Court to the mortgagee. Then, if such payment is made 'after' the 'final decree' or after the order absolute

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6 ('43) ILR (1943) 1 Cal 324 (331).
('40) 27 AIR 1940 Bom 321 (328) : I L R (1940) Bom 605.
('39) 26 AIR 1939 Cal 15. (17) : I L R (1938) 2 Cal 643.
†('24) 11 AIR 1924 Mad 650 (653) : 47 Mad 551 (DB). (A second suit on a mortgage against a person not impleaded in the previous suit on the same mortgage is not barred.)
*('22) 9 AIR 1922 P C 11 (12, 13) : 48 Ind App 465: 43 All 469 (PC).
('18) 5 AIR 1918 Mad 103 (105, 106) : 41 Mad 113 (DB). (18 Cal 164 : 17 Ind App 201 (PC) relied on.)
('22) 9 AIR 1922 Cal 23 (27) : 49 Cal 626 (DB).
('28) 111 Ind Cas 738 (739) (All).
('22) 9 AIR 1922 Pat 181 (182, 183) : 1 Pat 332 (DB). (Person lending money for paying off the mortgage after final decree but before sale is entitled to subrogation.)
('37) 24 AIR 1937 Nag 196 (196, 197) : ILR (1939) Nag 310. (Person interested in mortgaged property paying decretal amount before sale is entitled to be subrogated to rights of mortgagee decree-holder.)
('36) 23 AIR 1936 Lah 153 (155) (DB).
[But see ('25) 12 AIR 1925 All 6 (8) (DB). ('26) 13 AIR 1926 Mad 816 (819) : 49 Mad 691 (DB). (Payment by the defendant after order absolute for sale is *qua* judgment-debtor and not as a mortgagor.)]

7 See O. 34 R. 11, Note 2, under sub-heading (c).

8 ('43) I L R (1943) 1 Cal 324 (336).

9 ('45) 32 AIR 1945 Cal 6 (13): ILR (1943) 2 Cal 485 *Gour Chand* v. *Pradyumna Kumar*.
[Application by mortgaged judgment-debtor under O. 21 R. 89—Applicant offering to pay 5 per cent of whole of purchase money and not of purchase money actually paid in court—Applicant specifically not asking for return of title deeds and reconveyance—Application may still be treated substantially as one under O. 34 R. 5.]
('42) 29 AIR 1942 Cal 44 (45). (Deposit by mortgagor after sale under mortgage decree—Deposit whether should include costs—Procedure indicated—Case relating to Registrar's sale on Original Side.)
('10) 8 Ind Cas 806 (806) (Cal). (Plaintiff dying after date or order for payment —His heirs substituted—Fresh order for payment into Court must be taken before sale takes place.)
('36) 23 AIR 1936 Lah 562 (564) (DB). (Auction-purchaser of the mortgaged Property in execution of the final decree is not a necessary party to a proceeding under sub-r. (1) by the mortgagor.)

O 34 R 5—Note 14

1 ('48) 35 AIR 1948 Mad 373 (377): ILR (1948) Mad 734 (DB), *Madhavan Nayanar* v. *Parameswara*.
[Language of rule is imperative and payment or adjustment out of court would not be compliance with Rule.]
('39) 26 AIR 1939 Lah 79 (81) : I L R (1939) Lah 313. (Terms as to payment in Court are imperative.)
[*See also* ('36) 23 AIR 1936 Oudh 152 (153) : 11 Luck 500 (DB). (Difference between payment 'in' Court in presence of Judge and payment 'into' Court is technical—Procedure is not defective if payment is made in former manner.)]
See Note 16 on Rule 2.

(under the Transfer of Property Act) is passed, O. 21 R. 2, Civil Procedure Code, will clearly apply and the payment can be certified to the executing Court; in the absence of such certification within the limitation period, the execution Court will not take cognizance of it.(2) Even if the payment is made after the 'preliminary' decree and before the 'order absolute' or the 'final decree' is passed, the Court 'executing the final decree' cannot, by virtue of the provisions of O. 21 R. 2, recognize such a payment unless certified.(3) It has been held in the undermentioned case (3a) that O. 21 R. 2 has no application after the sale of the mortgaged property but before its confirmation and it is not open to the mortgagor to pay 'out of court' the amount due to the decree-holder. If, however, the mortgagor adjusts the decree out of Court and pays the five per cent. to the auction purchaser which amount the latter retains with him, the auction purchaser is precluded from objecting to the setting aside of the sale. On the question whether the Court 'dealing with an application for a final decree' can recognize such a payment, it was held by the High Courts of Madras(4) and Lahore(5) and the Judicial Commissioner's Court of Peshawar,(6) that O. 34 R. 5 prescribes only one method of payment, namely 'into Court' and that a payment 'out' of Court cannot be recognized. On the other hand, it was held by the High Courts of Calcutta(7) and Rangoon(8) and by the Judicial Commissioner's Court of Nagpur, (9) that such a payment could be 'certified' to the Court (Though it is not the executing Court) under the provisions of O. 21 R. 2, that, therefore, a certified payment could be recognized, or a payment could be certified by the Court dealing with the application to pass a final decree, but that a payment, not so certified within the period of limitation prescribed therefor, could not be recognized. The High Courts of Allahabad(10) and Patna(11) and the Judicial

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2 ('10) 7 Ind Cas 625 (626) (DB) (Cal). (After order absolute.)
('10) 7 Ind Cas 258 (260) (DB) (Cal).
('07) 12 Cal W N 282 (283) (DB). (After order absolute.)

3 †('20) 7 AIR 1920 Mad 97 (99) (DB).
('27) 14 AIR 1927 All 710 (710) : 50 All 111 (DB).

3a ('48) 35 AIR 1948 Mad 373 (377): ILR (1948) Mad 734 (DB). *Madhavan Nayanar* v. *Parameswara.*
[AIR 1931 PC 33: 58 Ind App. 50: 27 Nag ILR 95 (PC) *Foll.*]

4 ('43) 30 AIR 1943 Mad 81 (82, 83).
('40) 27 AIR 1940 Mad 461 (462). (Preliminary mortgage-decree cannot be deemed to be satisfied by private purchase by mortgagee from mortgagor—Mortgagee is still entitled to apply for final decree.)
('26) 13 AIR 1926 Mad 1069 (1071).
('19) 6 AIR 1919 Mad 792 (792) : 42 Mad 61 (DB).
†('31) 18 AIR 1931 Mad 592 (594) : 54 Mad 708 (DB). (Decree in redemption suit. AIR 1925 Mad 80 held overruled by AIR 1930 Mad 105.)
See also (1945) 1945 A.M.L.J. 13 (15) *Prem Raj v. Chand Mal.*
[This case follows AIR 1943 Mad 81 in preference to AIR 1939 All 28 and holds that the court cannot take co-gnizance of a compromise entered into out of court after a preliminary decree and before a final decree—But this view must be taken as not good law in view of the P.C. decision referred to below in this Note.]
[See however ('32) 19 AIR 1932 Mad 115 (119): 55 Mad 320 (DB). (Where mortgagor and mortgagee settle out of Court and report to the Court, preliminary decree ceases to exist.)]

5 ('35) 22 AIR 1935 Lah 168 (169).
('13) 1913 Pun Re No. 12 : 16 I.C. 987 (987) (DB).
†('32) 19 AIR 1932 Lah 231 (232) (DB). (Payment out of Court—not recognizable under O. 21 R. 2 or Order 23 Rule 3.)
('39) 26 AIR 1939 Lah 79 (81) : ILR (1939) Lah 313.

6 ('38) 25 AIR 1938 Pesh 12 (13) (DB).
7 ('18) 5 AIR 1918 Cal 472 (473) (DB).
8 *See* ('28) 15 AIR 1928 Rang 194 (195) : 6 Rang 285 (DB).
9 ('25) 12 AIR 1925 Nag 49 (49) : 20 Nag LR 122.
('15) 2 AIR 1915 Nag 55 (56) : 11 Nag L R 16.

10 ('39) 26 AIR 1939 All 28 (29). (Application by judgement-debtor for recording part satisfaction at the time of preparing final decree falls under O. 23 R. 3 and not under O. 21 R. 2.)
('39) 26 AIR 1939 All 174 (175) (DB). (Adjustment after preliminary decree but before final decree cannot be recorded under O. 21 R. 2, but O. 23 R. 3 applies to such a case.)
[*See also* ('36) 23 AIR 1936 All 9 (10, 11): 58 All 565 (DB). (Where the parties agree to adjust the matter before passing of final decree, the adjustment can be recorded by the Court under Order 23 Rule 3.)]

11 ('17) 4 AIR 1917 Pat 577 (577): 2 Pat L Jour 533 (DB).
*('35) 22 AIR 1935 Pat 385 (390, 395): 14 Pat 488 (DB). (Distinguishing AIR 1920 Pat 731.)

12 ('17) 4 AIR 1917 Nag 79 (80).

Commissioner's Court of Nagpur(12) had held that such a payment could be recognized under O. 23 R. 3, Civil Procedure Code, as an adjustment of a 'pending' suit, though, in a later case,(13) the Nagpur Court had disagreed with this view on the ground that O. 23 R. 3 could not apply to a satisfaction of a decree 'already passed.' The High Court of Lahore had also held that O. 23 R. 3 is inapplicable to such a payment.(14) According to the Oudh Chief Court, a payment out of Court might be recognized by the Court dealing with an application for final decree if such payment was admitted by the decree-holder but not if it was denied by him, the Court in such a case not having the power to enquire into the disputed payment. (15) Their Lordships of the Judicial Committee have now set at rest this conflict, agreeing with the view of the High Courts of Allahabad and Patna and the Judicial Commissioner's Court of Nagpur. Their Lordships have held that as the mortgage suit continues until the final decree is passed O. 21 R. 2 has no application in such a case; that it is the duty of the judge to satisfy himself as to whether any adjustment has been arrived at between the parties and to pass a decree in accordance with the result of his enquiry.(15a) See also O. 23 R. 3, Note 4 in the A. I. R. commentaries on the Code of Civil Procedure, 4th (1944) Edn.

Even in cases arising under the Transfer of Property Act, there was a conflict of opinions, but of a somewhat different nature. It was held by the Allahabad High Court and the Judicial Commissioner's Court of Oudh, that a proceeding under S. 89 of that Act for obtaining an order absolute was a proceeding in execution, and therefore the Court dealing with an application for an order absolute, being an 'executing' Court, could not recognize a payment after the preliminary decree unless it had been certified within time.(16) The High Court of Calcutta,(17) on the other hand, held that a proceeding for an order absolute is not one in execution, and that the Court dealing with such application can recognize such payments, especially as S. 89 expressly provided that payment may be to the 'plaintiff' or into the Court.

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13 ('25) 12 AIR 1925 Nag 49 (49) : 20 Nag L R 122.

14 †('32) 19 AIR 1932 Lah 231 (232) (DB).
('35) 22 AIR 1935 Lah 168 (169).
('39) 26 AIR 1939 Lah 79 (81) : ILR (1939) Lah 313.

15 ('42) 29 AIR 1942 Oudh 358 (359, 360) : 18 Luck 71 (DB).
('27) 14 AIR 1927 Oudh 275 (276). (Suit for redemption—If payment is accepted in satisfaction of the decretal money, Court can give effect to such agreement under O. 23 R. 3; but if the money paid is appropriated by the mortgagee towards other debts, Court need not enquire if there was adjustment within Order 23 Rule 3.)
†('35) 22 AIR 1935 Oudh 313 (315) : 11 Luck 116 (DB). (If payment is admitted Court can record it under O. 23 R. 3. But if disputed, payment being contrary to the terms of the rules, Court is not bound to embark upon an enquiry.)
('36) 23 AIR 1936 Oudh 152 (153) : 11 Luck 500 (DB).

15a ('45) 32 AIR 1945 PC 152 (156) : 20 Luck 461 : 72 Ind App 277 : ILR (1945) Kar (PC) 321 (PC) *Madan Theatres* v. *Dinshan & co.*
[AIR 1942 Oudh 358 : 18 Luck 71, Reversed; AIR 1927 Oudh 275, AIR 1935 Oudh 313 : 11 Luck 116; AIR 1936 Oudh 152 : 11 Luck 500; AIR 1932 Lah 231; AIR 1935 Lah 168; AIR 1939 Lah 79 : ILR (1939) Lah 313 : and AIR 1919 Mad 792 : 42 Mad 61, Overruled.]

16 ('08) 30 All 248 (250) (DB).
('10) 13 Oudh Cas 137 (138, 139) : 6 Ind Cas 1000 (1001).
[*See* ('13) 35 All 178 (182, 183) : 18 Ind Cas 731 (732) (DB).]

17 ('02) 29 Cal 651 (653) (DB).
('10) 7 Ind Cas 258 (260) (DB) (Cal).
('03) 8 Cal W N 102 (104) (DB).

18 ('22) 9 AIR 1922 All 383 (384) : 44 All 668 (DB).
('20) 7 AIR 1920 Pat 731 (733) : 5 Pat L Jour 672 (DB).

19 ('10) 6 Ind Cas 323 (325) (DB) (Cal). (Mortgagee in possession as receiver must account for rents and profits before he can obtain order absolute for sale.)
('82) 8 Cal 528 (529) (DB). (Payment into Court within a certain time ordered —It is sufficient compliance if judgment-debtor brings the money into Court within

Where the decree is not one under Rule 4, as in the case of a compromise decree, Rule 5 does not apply and the Court can recognize payments made out of Court.(18) See also the undermentioned cases.(19)

14a. Payment or adjustment out of Court.—See N. 14.

15. Return of documents relating to property.—Where the preliminary decree does not provide for the payment of damages by the plaintiff to the defendant if the plaintiff fails to deliver all the documents relating to the mortgaged property as directed by the decree, the Court cannot grant such relief by way of execution. The mortgagor may sue separately for damages.(1)

16. Dismissal of Mortgagee's application for final decree.—Order 34 Rule 5 requires only that the plaintiff should 'apply' for a final decree. His 'subsequent absence' is not any ground for dismissing his application. If it is dismissed on this ground, the dismissal should be set aside and a final decree passed.(1) The Court can also entertain a fresh application for final decree in such a case.(2) An application for final decree cannot be dismissed for failure to give a 'list of properties' in respect of which the final decree was prayed for, or for a 'wrong calculation of interest'.(3)

17. "Directing that the mortgaged property or a sufficient part thereof be sold."—As to the Court's powers to direct the order in which the mortgaged properties are to be sold, see Note 10 on R. 4 and the undermentioned cases.(1) But the Court cannot overrule any specific provision in the 'mortgage deed itself' concerning the matter.(2)

Where the mortgaged property has been compulsorily acquired by the Government under the Land Acquisition Act, the rights of the mortgagee are transferred to the compensation money awarded under the Act.(3) Similarly, where the property has been sold for arrears of Government revenue the fianl decree should be directed against the surplus sale proceeds.(4)

So also, where a share in joint family property has been mortgaged, and subsequent thereto there is a 'bona fide' partition of family properties in which

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the time fixed and diligently takes the necessary steps for actual payment into the treasury.)

('98) 1898 All W N 105 (106). (Preliminary decree providing that plaintiff should redeem certain prior mortgages—Plaintiff paying the money into Court but subsequently withdrawing it—Payment is illusory.)

O 34 R 5—Note 15

1 ('22) 9 AIR 1922 Mad 299 (300) (DB).
Also see Order 34 Rule 3, Note 10.

O 34 R 5—Note 16

1 ('34) 21 AIR 1934 Oudh 209 (210) (DB). (If dismissed, refusal to restore, it, is failure to exercise jurisdiction vested by law.)

†('33) 20 AIR 1933 Oudh 229 (231) :8 Luck 496 (DB). (Such a dismissal amounts not only to- refusal to pass the final decree but to reversal of the preliminary decree.)

†('25) 12 AIR 1925 All 622 (623) : 47 All 546 (DB).

('27) 14 AIR 1927 All 439 (440) : 49 All 592 (DB).

[*See also* ('31) 18 AIR 1931 Mad 795 (796, 797). (Dismissal for not taking steps as ordered—Period of three months under O. 9 R. 5 not given—Dismissal is *ultra vires*.]

2 ('18) 5 AIR 1918 All 285 (286: 40 All 235) (DB).

[*See also* ('33) 20 AIR 1933 Oudh 229 (231) : 8 Luck 496 (DB). (Preliminary decree for sale passed—Application for final decree dismissed under O. 9 R. 3—Application after period of 2½ years under S. 151 to set aside dismissal entertained and final decree passed.)

('33) 20 AIR 1933 Mad 55 (56) : 56 Mad 310 (DB). (Dismissal for non-payment of batta—Fresh application allowed under O. 9 R. 4 and Section 141.)

('37) 24 AIR 1937 Sind 273 (278) : 31 Sind L R 180. (Application for final decree dismissed for non-payment of costs for issuing notice—Fresh application can be made under O. 9 R. 4 read with S. 141.)]

3 ('27) 14 AIR 1927 All 439 (441): 49 All 592 (DB).

O 34 R 5—Note 17

1 ('31) 18 AIR 1931 All 657 (658, 659) (DB). (Order in which properties are to be sold raised in issue—Issue negatived but finding to that effect not incorporated in preliminary decree—Finding is not to be incorporated in final decree.)

('33) 20 AIR 1933 Pat 161 (163) : 12 Pat 77 (DB). (Where Court passing mortgage decree definitely lays down order in which properties are to be sold, executing Court cannot ignore this order and change it.)

2 ('19) 6 AIR 1919 Pat 281 (283) : 4 Pat L Jour 207 (DB).

3 ('09) 1 Ind Cas 264 (278) (DB) (Cal).
('07) 6 Cal L Jour 745 (747, 748) (DB).

4 ('42) 29 AIR 1942 Pat 185 (187). (Property sold for arrears of revenue—If O. 34

the specific property mortgaged is allotted to another coparcener, the mortgagee can proceed only against the property allotted to his mortgagor.(5) Ordinarily, the mortgagee is entitled to bring to sale any portion of the mortgaged property if he is satisfied that the sale of such property will be sufficient for the purpose of enabling him to realise his dues.(6) In such a case, if the mortgagee fails to realise his full dues he can proceed against other item of the mortgaged property.(7) But a mortgagee cannot release from his claim any portion of the properties so as to prejudice the persons interested in the other portions.(8) As seen in N. 13 the final decree does not extinguish the mortgage security. It has therefore been held that under S. 70 of the Transfer of Property Act a mortgagee decree-holder is entitled to have his decree satisfied by sale of the accession made to the mortgaged property after the passing of the final decree.(8a)

Where the judgment-debtor contends that the decree refers to some other property than the one proceeded against by the judgment-creditor, it is for him to show which that property is .(9)

18. Power to enlarge time.—Rule 4 as amended by Act XXI of 1929 empowers the Court to enlarge the time fixed for payment of the mortgage-money under a preliminary decree.(1) This renders obsolete the cases(2) before Act XXI of 1929 which held that as there was no provision in R. 5 (as there was in R. 3 or R. 8) for enlargement of time, the Court had no power to enlarge the time fixed by a preliminary decree for payment.

There is a conflict of decisions as to where a preliminary decree is appealed from but the appellate decree merely confirms the lower Court's decree, whether the time fixed for payment by the lower Court's decree is or is not in any way extended. See Note 9 on S. 148 of the A. I. R. Commentaries on the Code of Civil Procedure, 4th (1944) Edn.

19. Effect of sale under mortgage decree.—The effect of a sale under an ordinary money decree is to vest in the purchaser the right, title and interest of

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R. 5, sub-rule (3) is not wide enough to cover such a case Court may act in exercise of its inherent powers under S. 151, C.P. Code.)

5 ('99) 26 Cal 434 (438) (DB).
('93) 20 Cal 533 (536) (DB).
('07) 6 Cal L Jour 46 (49) (DB). (The mortgagee is entitled to proceed against only the substituted security.)
('99) 23 Bom 385 (390) (DB).

6 ('40) 27 AIR 1940 Cal 159 (160) : ILR (1939) 2 Cal 455 (457).
('39) 26 AIR 1939 All 314 (314) : ILR (1939) All 150 (DB).

7 ('41) 28 AIR 1941 Cal 205 (207) : ILR (1942) 2 Cal 520. (If in execution proceedings against a portion of the mortgaged property only, the mortgagee fails to realise his full dues, there is no reason why he should not proceed against some other items of the mortgaged property: and it certainly cannot be said that by failure to proceed against the entire property he waives his right to do so in a subsequent execution case.)

8 ('06) 33 Cal 613 (622) (DB).

8a ('45) 32 AIR 1945 Bom 248 (250) : ILR (1945) Bom 294 : 221 Ind Cas 535 (DB) *Shripad Laxman* v. *Kashibai*

9 ('74) 22 Suth W R 330 (331) (DB).

O 34 R 5—Note 18

1 ('33) 20 AIR 1933 Rang 323 (325) (DB). (In granting time interests of mortgagee should also be considered—Mortgagee banker pressed by creditors — Time should not be extended merely to allow mortgagors to reap benefit of rise in price that may eventuate.)

2 ('11) 9 Ind Cas 771 (772) (Low Bur.)
('11) 14 Oudh Cas 147 (150, 151) : 11 Ind Cas 528 (529) (DB).
('97) 19 All 205 (207) (DB).
(1900) 24 Bom 300 (302) (DB).
('06) 10 Cal W N 910 (912) (DB).
Also see O. 34 R. 4, Note 8.

O 34 R 5—Note 19

1 ('45) 32 AIR 1945 Nag 289 (291): ILR (1945) Nag 643 (DB) *Ratanlal Harlalji* v. *Mt Sagarbai*.
('78) 2 Mad 108 (112) (DB).
('93) 16 Mad 121 (125, 126) (DB).
('96) 20 Bom 390 (393) (DB).
('22) 9 AIR 1922 All 495 (496) : 44 All 488 (DB).
('26) 13 AIR 1926 All 457 (459) (DB).
('29) 16 AIR 1929 Rang 183 (183).
†('32) 19 AIR 1932 Cal 126 (132, 133) : 59 Cal 117 (DB). (Purchase by puisne mortgagee in prior mortgagee's suit—Right of redemption of mortgagor is extinguished though puisne mortgagee gets subrogated to plaintiff's rights.)
('33) 20 AIR Cal 39 (42, 43): 59 Cal 1464 (DB).

the 'judgment-debtor.' But a sale under a mortgage decree passes the interest both of the mortgagor as well as of the mortgagee.(1) Where the mortgagee has waived his claim against a particular mortgagor, the sale does not operate on the rights of that mortgagor.(2)

Any enlargement which takes place in the interest of the mortgagor subsequent to the final decree enures for the benefit of the auction-purchaser.(3) On the other hand, he is liable to pay the Government revenue accruing due on the property after the purchase.(4)

A mortgagee decree-holder purchasing the mortgaged property in execution of his decree is not bound to give credit to the mortgagor for the market-value of the property but only for the actual price for which he purchased it.(5)

A mortgagee who himself purchases the mortgaged property in execution of his decree for sale becomes the owner of the property and cannot maintain, as against subsequent purchasers, the position that the mortgage still remained an encumbrance.(6)

See also the undermentioned cases.(7)

20. Execution of final decree for sale.—Proceedings for sale under a final decree or under an order absolute are proceedings in execution.(1) Consequently, the Court executing the final decree cannot go behind the decree, (2) though, by consent of parties, accounts not allowed by the decree can be taken in execution.(3) A mere 'preliminary decree' under R. 4 is incapable of execution; it is only the 'final' decree that can be executed.(4) But where, in a case under the Transfer of Property Act, a decree was executed without an order absolute

('36) 23 AIR 1936 Rang 127 (128). (Mortgagee auction-purchaser is in the same position as independant purchaser.)
[*See also* ('18) 5 AIR 1918 Pat 522 (523) (DB). (Mortgage decrees in favour of same mortgagee under successive mortgages—Purchase by him under prior mortgage decree — Subsequent encumbrance over the property sold is destroyed.)]
[See however ('31) 18 AIR 1931 All 466 (480) : 53 All 1023 (FB).]
[But see ('09) 12 Oudh Cas 45 (51) (DB). (Per Chamier, J. C.)]

2 ('11) 12 Ind Cas 199 (200) (Upp Bur).

3 †('91) 18 Cal 164 (176, 177) : 17 Ind App 201 (PC).
('12) 40 Cal 89 (102) : 39 Ind App 228 : 16 Ind Cas 210 (212) (PC).
('95) 18 Mad 492 (495) (DB). (The increased shares of the mortgagors held liable to be sold in execution of the decree.)

4 ('12) 40 Cal 89 (102, 103) : 39 Ind App 228: 16 Ind Cas 210 (212) (PC).

5 ('96) 18 All 31 (33).

6 ('26) 13 AIR 1926 Cal 165 (166, 167) (DB).

7 ('30) 17 AIR 1930 All 578 (579) (DB). (Final decree for sale containing no exemption of particular property sold—subsequent correction of decree does not affect validity of sale.)
('04) 27 All 62 (66) (FB). (Judgment-debtor standing by and allowing sale to take place is estopped from questioning validity of sale so as to prejudice the interest of the innocent purchaser.)

O 34 R 5—Note 20

1 (1900) 3 Oudh Cas 1 (7) (DB).

2 †('05) 28 All 193 (195) (DB).
('98) 1 Oudh Cas 49 (50).
('18) 5 AIR 1918 Cal 459 (460) (DB).
('30) 17 AIR 1930 All 520 (520) (DB). (Final decree passed by Court having jurisdiction cannot be contested by judgment-debtor who remains absent on notice being served.)
('01) 1901 All W N 23 (23) (DB). (Decree cannot be executed against person not named therein.)

('17) 4 AIR 1917 Pat 582 (583, 584) (DB). (Final decree providing for interest which was disallowed by the preliminary decree —Remedy of judgment-debtor is by appeal and not by objection in execution.)

('39) 26 AIR 1939 Pat 113 (114) (DB). (Terms of final decree varying from those of preliminary decree—Judgment-debtor not objecting to such final decree—Execution sale held and confirmed—Judgment-debtor cannot say that the final decree or sale is not binding on him.)
('37) 24 AIR 1937 Oudh 453 (454). (Judgment—debtor not objecting to preparation of final decree though served with notice. He cannot contend in execution that final decree was unnecessary.)

†('37) 24 AIR 1937 Lah 874 (875). (Passing of final decree by consent without preliminary decree—Decree not appealed against—Executing Court cannot question its validity.)

[*See also* ('37) 24 AIR 1937 Mad 918 (921). (Doctrine that executing Court cannot go behind decree is not applicable where objection is taken at the stage of passing of final decree in mortgage suit.)]

3 ('16) 3 AIR 1916 Mad 795 (798) (DB).

having been obtained, and the judgment-debtor did not raise any objection to such course at the proper time, it was held that he was estopped from raising the contention subsequently, that the decree was not executable.(5) A decree for sale providing in terms that the rights of prior mortgagees should not be prejudiced is not incapable of execution.(6)

No 'attachment' is necessary before sale under a mortgage decree(7) and consequently, O. 21 R. 58, Civil Procedure Code, does not apply to claims preferred against the execution of mortgage decrees.(8) Under S. 20 of the Oudh Laws Act (XVIII) of 1876) the restrictions imposed by S. 60 of the Code are applicable to mortgage decrees also.(9)

The transferee of the mortgagor's interests after the final decree is not a necessary party to the execution proceedings.(10)

A Court can sell under a mortgage decree only the property comprised in the mortgage,(11) and the mortgagee cannot in execution of his 'mortgage decree,' seek any remedy against the other properties of the mortgagor.(12)

Proceedings for execution of a final decree for sale can be stayed under order 41 Rule 6 of the Code.(13)

Order 21 Rule 83 of the Code does not, under the express terms thereof, apply to mortgage decrees.(14)

21. Transfer of final decree.—Prior to the addition of clause (e) to sub-s. (1) of S. 17 of the Registration Act, by Act XXI of 1929, a transfer of a final decree for sale was held not to require registration;(1) but now the law is otherwise.

22. Injunction restraining mortgagor from receiving income of mortgaged property.—After a final decree for sale has been passed in a mortgage suit, the Court has no power to grant an injunction restraining the mortgagor from receiving the income of the mortgaged property. It can only bring the property to sale.(1)

23. Construction of mortgage decree.—See the undermentioned cases.(1)

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4 ('47) 34 AIR 1947 All 83 (84): ILR (1947) All 40 : 227 Ind Cas 57 (DB). *Ram Nath* v. *Deokinandan Krishna*
('46) 50 Cal W N 48 (488) (DB) *Jivandas Khimji* v. *Dindayal Shah.*
('46) 50 Cal W N 4 (6) *Jivandas Khimji* v. *Dindayal Shah.*
('05) 8 Oudh Cas 75 (76).
('21) 8 AIR 1921 Pat 320 (320) (DB).
('99) 9 Mad L Jour 349 (350) (DB).

5 ('02) 5 Oudh Cas 251 254 (DB).
('90) 1890 All W N 223 (224).
[*See* (1900) 10 Mad L Jour 205 (206) (DB). (It was held that, as there was no allegation that the judgment-debtor had suffered any damage by reason of the sale without order absolute the sale could not be set aside.)]

6 ('16) 3 AIR 1916 All 323 (324) : 35 Ind Cas 152 (153) (DB).

7 †('80) 4 Bom 515 (520) (FB).
('03) 2 Low Bur Rul 138 (139).
('16) 3 AIR 1916 Mad 786 (788) (DB).
('39) 26 AIR 1939 Lah 473 (474) : ILR (1940) Lah 231.
[*See also* ('32) 19 AIR 1932 Mad 716 (718, 719). (Rent decree under Estates Land Act which gives first charge is not a mortgage decree; so a claim is sustainable.)]

8 See the A.I.R. Commentaries on the Code of Civil Procedure, 4th (1944) Edn., O.21 R. 58, Note 11.

9 (1900) 3 Oudh Cas 1 (7) (DB).

10 ('30) 17 AIR 1930 All 597 (599) (DB).
('21) 63 Ind Cas 144 (144) (DB) (All).

11 ('17) 4 AIR 1917 PC 197 (200) (PC).
(1900) 22 All 442 (444) (DB). (Even though mortgage decree erroneously includes non-hypothecated properties also.)
†('36) 23 AIR 1936 Rang 127 (129). (Property not included in mortgage decree fraudulently inserted in sale certificate—Purchaser gets property that was included in mortgage decree only.)

12 ('02) 5 Oudh Cas 108 (109) (DB).

13 ('29) 16 AIR 1929 Lah 552 (552).

14 See also Note 8 on R. 4 of O. 34.
[But see (1900) 3 Oudh Cas 42 (47) (DB). (Submitted not correct.)]

O 34 R 5—Note 21

1 ('25) 12 AIR 1925 Oudh 399 (399) : 28 Oudh Cas 382.

O 34 R 5—Note 22

1 ('15) 2 AIR 1915 All 277 (278) : 37 All 423 (DB).

O 34 R 5—Note 23

1 ('96) 19 Mad 249 (254): 23 Ind App 32 (PC).
('24) 11 AIR 1924 Mad 193 (196) (DB).
('20) 7 AIR 1920 Bom 56 (57) : 44 Bom 981 (DB). (Decree providing for sale on default of two instalments—Decree-holder

24. Appeal.—An appeal lies from a final decree for sale as from any other decree. Such decree is therefore not open to revision under the Civil Procedure Code, S. 115.(1) An order rejecting an application for a final decree amounts to a dismissal of the suit and, as such, is appealable as a decree.(2) But on order allowing an application under this rule is not appealable.(3) The reason is that the order stands in the place of the judgment and it is only the decree that is drawn up in pursuance thereof that is a appealable. A decision as to the order in which the mortgaged properties should be sold may amount to a decree if it affects the rights of co-defendants 'inter se.'(4) Where after a sale in execution of a mortgage decree, the mortgagor applies for an order under sub-r.(1) of this rule, the decision of the executing Court on such application is covered by S. 47, Civil Procedure Code, and is appealable.(5)

See also the A. I. R. Commentaries on the Code of Civil Procedure, 4th (1944) Edn., S. 97, Notes 1 and 5, on the question as to whether, when, and how far, a preliminary decree can be attacked in an appeal from a final decree.

25. Court-fee—See the A.I.R. Commentaries on the Court-fees Act, 2nd (1949) Edn., S. 7(i) Notes 18 and 20 and Sch. I, Art. 1, Note 8.

26. Costs not recoverable from mortgagor personally.—In the absence of anything to the contrary in the decree itself, the costs awarded against a mort-

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cannot sell property on default of one instalment.)

('81) 3 All 388 (390) (FB).
('81) 3 All 239 (243) (DB).
('81) 3 All 216 (219) (FB).
('79) 2 All 345 (349) (DB).
('79) 2 All 342 (344, 345) (DB).

(1900) 22 All 442 (444) (DB). (Mortgage decree as per plaint wrongly including non-hypothecated properties also—*held*, intention was only to pass decree against hypothecated properties specified in the plaint.)

('33) 20 AIR 1933 Oudh 1 (3) : 8 Luck 217 (FB). (Mortgaged property ordinarily means hypotheca—If any part is found invalid, it will be excluded from the decree.)

O 34 R 5—Note 24

1 ('20) 5 Pat L Jour 342 (343) (DB).
('02) 29 Cal 651 (653, 654) (DB).
('09) 1 Ind Cas 677 (678, 679) (DB) (Cal).
*('02) 25 Mad 244 (263) (FB).

2 †('19) 6 AIR 1919 Mad 709 (709, 710) : 42 Mad 52 (DB).
('21) 8 AIR 1921 Cal 551 (552) (DB).
('32) 19 AIR 1932 Lah 214 (215) (DB).
[*See* ('41) 28 AIR 1941 Mad 817 (819) : ILR (1942) Mad 60 (DB). (Refusal to pass final decree is appealable as a decree under S. 96 but it does not amount to dismissal of suit.)
('34) 21 AIR 1934 Pat 225 (226) : 13 Pat 379 (DB). (But where Court merely postpones passing of final decree on account of the pendency of an appeal against preliminary decree the order is not a decree—It is however revisable.)]

3 ('34) 21 AIR 1934 Mad 198 (198) : 57 Mad 437 (DB).
[See also ('42) 29 AIR 1942 Pat 340 (341) (DB). (Order directing that accounts be taken and final decree made out—No appeal lies—Party should await completion of final decree.)]

4 ('29) 16 AIR 1929 Mad 506 (508) (DB).
('32) 19 AIR 1932 All 85 (89) : 53 All 391 (DB).

5 ('36) 23 AIR 1936 Lah 562 (564) (DB).

O 34 R 5—Note 26

1 ('48) 35 AIR 1948 Pat 127 (128): (26 Pat 422) (DB). *Ram Rao* v. *Rajeswar Rao* [O.41 R.35 to be read subject to O. 34—words in appellate decree lending themselves to construction that judgment-debtor was personally liable—Real meaning to be ascertained from judgment and decree as interpreted in accordence with rules of O. 34—Party confinding that departure from general rule was intended must establish contention from words used in judgment and decree.]
('24) 11 AIR 1924 All 104 (104, 105) : 45 All 630 (DB).
stion is one of construction of mortgage
('28) 15 AIR 1928 Mad 604 (606). (Quedecree in each case.)

('26) 13 AIR 1926 All 424 (425) : 48 All 425 (DB). (Where the terms of the decree are ambiguous, it ought not to be construed in such a manner as to enable the mortgagee to realize his costs personally from the mortgagor.)
('16) 3 AIR 1916 Pat 1 (1) : 2 Pat L Jour 51 (DB).
('18) 5 AIR 1918 All 366 (367) : 40 All 109 (DB).

*('98) 20 All 523 (526) (FB). (Overruling 1898 All W N 33.)

gagor in a mortgage suit form part of the mortgage-money and cannot be recovered 'personally' from the mortgagor.(1)

But see the undermentioned cases.(2)

27. Dekkhan Agriculturists' Relief Act.—A decree for sale upon a mortgage under S. 15 (b) of the Dekkhan Agriculturists' Relief Act is not a 'decree nisi' and no final decree is necessary before it can be enforced.(1) But the award of a conciliator under S. 44 of the Act was held to be not exempt from the requirements of section 89 of the Transfer of Property Act.(2) (Now see the Bombay Agricultural Debtors' Relief Act, XXVIII of 1939.)

28. Limitation for application for execution of final decree.—See Notes on Articles 182 and 183 in the A.I.R. Commentaries on the Limitation Act, 2nd (1942) Edition.

29. Nature of proceedings for final decree.—There was a conflict of decisions before the coming into force of the present Code of Civil Procedure, as to

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('08) 35 Cal 431 (433) (DB). (Only in the event of the mortgaged property being found insufficient, properties other than those mortgaged can be proceeded against.)

†('07) 30 Mad 464 (465) (DB). (Do).
('31) 18 AIR 1931 All 124 (125). (Decree for costs cannot be executed separately as personal one.)

('37) 24 AIR 1937 Rang 71 (72) : 14 Rang 538,)

Also see O. 34 R. 2, Note 11; R. 4 Note 12; R. 7 Note 6 and R. 10 Note 10.

2 ('26) 13 AIR 1926 All 68 (69). (Costs subsequent to final decree need not be added to mortgage money.)

('33) 20 AIR 1933 Lah 329 (330) (DB). (Non-mortgagor defendant raising false pleas made personally liable for costs.)

('32) 19 AIR Rang 153 (153) : 10 Rang 308 (DB). (Unless the decree directs specifically, a puisne mortgagee defendant is not personally liable for costs of the suit.)

('19) 6 AIR 1919 All 297 (298, 299) : 41 All 473 (DB). (Unsuccessful mortgagor appellant held liable personally.)

('31) 18 AIR 1931 Mad 272 (272) (DB). (Purchaser of equity of redemption—Frivolous defence in the mortgage suit—Court can make him personally liable for costs of mortgagee.)

(39) 26 AIR 1939 Cal 166 (168, 169) (DB). (Appeal from preliminary decree impleading some defendants against whom suit was dismissed—Decree for costs against these defendants only—Mortgagee can recover costs personally against them.)

O 34 R 5—Note 27

1 ('43) 30 AIR 1943 Bom 24 (26) (DB).
('16) 3 AIR 1916 Bom 99 (99) : 40 Bom 492 (DB).
('24) 11 AIR 1924 Bom 169 (170) : 48 Bom 172 (DB).

2 ('99) 23 Bom 644 (650) (DB).

O 34 R 5—Note 29

1 ('94) 16 All 270 (273).
('05) 27 All 625 (627) (DB).
('16) 3 AIR 1916 Mad 937 (937) (DB).
[*See* ('97) 19 All 520 (521) (DB).
('02) 24 All 542 (544) (DB). (Decree in suit for foreclosure.)]

2 ('09) 33 Bom 273 (277).
('05) 6 Bom L R 1043 (1049).
('98) 25 Cal 133 (135) (DB). (Any question arising out of the order absolute for sale is not a question relating to the execution of the decree.)
('94) 21 Cal 818 (823) (DB).
See also the following cases in which it was held that till order absolute for sale, there was no executable decree:
('90) 12 All 539 (541) (DB).
('95) 22 Cal 931 (934) (DB).
('09) 33 Bom 273 (277) : 2 Ind Cas 296 (296). (*Obiter.*)
('05) 8 Oudh Cas 75 (76).

3 ('46) 50 Cal W N 486 (488) (DB) *Jivandas Khimji* v. *Dindayal* Shah.
†('26) 13 AIR 1926 Mad 415 (416) (DB).
('17) 4 AIR 1917 Mad 844 (845) (DB).

whether proceedings for order absolute under S. 89 of the Transfer of Property Act were proceedings in execution of the decree under S. 88 or proceedings in the suit itself, some cases taking the former view(1) and others taking the latter view.(2) This conflict is now settled under the new Code which makes it clear that a decree under R. 4 is incapable of execution(3) and that the proceedings under R. 5 are proceedings in the suit itself for a supplemental decree and not proceedings in execution.(4) Hence, the provisions of the Civil Procedure Code, O. 22, apply to proceedings for final decree.(5) Similarly, the doctrine of 'lis pendens' applies to such proceedings.(6) The Madras High Court has held in the undermentioned case(7) that a mortgage suit must be considered to be pending till a final decree under sub-r. (1) or sub-r. (3) of this rule is passed and that the mere dismissal of an application for a final decree though it may amount to a decree and be appealable under S. 96, Civil Procedure Code, is not equivalent to a dismissal of the 'suit'. As to whether parties can be added after a preliminary decree has been passed and before a final decree is passed, see Note 32 on Order 1 Rule 10 of the A. I. R. Commentaries on the Code of Civil Procedure, 4th (1944) Edn.

30. Joint decree-holders.—One of several joint decree-holders cannot certify satisfaction of the decree beyond his own interest in the decree so as to bind the other decree-holders.(1)

Under the Transfer of Property Act, where a joint decree under S. 88 of the Act was passed in favour of several persons, some of them could apply for an order absolute in favour of all.(2)

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4 ('47) 34 AIR 1947 All 83 (84) : ILR (1947) All 40 : 227 Ind Cas 57 (DB). *Ram Nath* v. *Deokinandan Krishna.*

('45) 32 AIR 1945 P.C. 152 (156) : 20 Luck 461 : 72 Ind App 277 : ILR (1945) Kar (PC) 321 (PC) *Madan Theatres* v. *Dinshaw & Co.*

[Mortgage suit continues until final decree is passed]

('21) 8 AIR 1921 Cal 551 (552) (DB).
('33) 20 AIR 1933 Cal 798 (799) (DB).
* ('35) 22 AIR 1935 Pat 385 (389, 390, 394) : 14 Pat 488 (DB).

('16) 3 AIR 1916 Mad 523 (523, 524) : 39 Mad 488 (DB).

('27) 14 AIR 1927 Pat 105 (107) (DB). (Proceedings in a mortgage suit are deemed to be pending within the meaning of S. 3 of the Chota Nagpur Encumbered Estates Act after preliminary decree has been passed and before application for a final decree has been made.)

('25) 12 AIR 1925 Nag 15 (16).

('24) 11 AIR 1924 Mad 786 (786) (DB). (NOTE.—Overruled in AIR 1928 Mad 914: 51 Mad 701 (FB) on another point.)

('29) 16 AIR 1929 Mad 197 (197) (DB). (Preliminary decree does not end the mortgage suit.)

('26) 13 AIR 1926 Sind 20 (21). (Application for joinder of legal representatives after preliminary decree and before final decree is not one in execution proceeding.)

*('31) 18 AIR 1931 All 386 (387, 388) : 53 All 283 (FB).

('37) 24 AIR 1937 Mad 918 (921).

5 ('19) 6 AIR 1919 Pat 430 (433) : 4 Pat L Jour 240 (FB).

('17) 4 AIR 1917 All 429 (429) : 39 All 551 (DB).

6 ('15) 2 AIR 1915 All 27 (28) (DB).

('09) 3 Ind Cas 791 (792) (DB) (Cal).

(Doctrine of *lis pendens* applies to an *ex parte* decree in a mortgage suit—*Obiter.*)

[*See* ('15) 2 AIR 1915 Nag 28 (28) : 12 Nag L R 50. (Suit for foreclosure.)]

7 ('41) 28 AIR 1941 Mad 817 (819) : ILR (1942) Mad 60. (Mortgage suit—Application for final decree—Dismissal of application, decree having been satisfied under S. 19, Madras Act IV of 1938—This does not terminate the suit and decree-holder may still apply for final decree for balance due.)

O 34 R 5—Note 30

1 ('94) 26 All 318 (320) (DB).
[*See also* ('09) 32 All 164 (166) (DB).]

2 ('11) 34 All 72 (77) : 11 Ind Cas 700 (701) (DB).

[a]R. 6. [New: Act IV of 1882, S. 90.] Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the plaintiff, the Court, on application by him may, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance.

Recovery of balance due on mortgage in suit for sale.

a. See the foot-note to the text of Rule 2 of this Order.

Synopsis

1. Transfer of Property Act, Section 90.
2. Amendments after 1908.
3. Personal decree for balance against mortgagor.
4. Personal liability of purchaser from mortgagor.
5. Personal liability is a question of construction of the instrument.
6. Personal decree against person not the mortgagor.
7. Personal decree against the heirs of the mortgagor.
8. Personal remedy under compromise decrees.
8a. Personal remedy under decree on award.
9. Right of mortgagee to attach other properties of mortgagor before date fixed for payment of mortgage-money.
10. Where net proceeds of any such sale are found insufficient.
11. "Amount due."
12. "Legally recoverable."
13. "Legally recoverable from the defendant otherwise than out of the property sold."
14. Prior and puisne mortgagees.
15. Costs against puisne mortgagee.
16. Insolvency of mortgagor.
17. Limitation.
18. Succession certificate.
19. Notice.
20. Execution of personal decree.
21. Appeal.
22. Nature of proceedings under Rule 6.
23. Miscellaneous.

TOPIC INDICATOR

Application—Necessity and form of. See Note 3.

Costs. See Note 11.

Court to which it is to be made. See Note 23.

Form of decree. See Note 3.

Personal covenant in the mortgage—Express or implied. See Notes 3, 5 and 12.

Scope and object of the rule. See Note 3.

Separate decree for personal remedy, if necessary. See Notes 3 and 8.

Hindu Law—Junior members' liability under this rule. See Notes 6 and 7.

Mortgaged properties not saleable—Effect as regards personal decree. See Note 10.

Separate suit for personal remedy barred. See Note 3.

Two mortgage decrees in favour of same person—Personal decree, how far available. See Note 3.

1. Transfer of Property Act, Section 90.— This rule corresponds to S. 90 of the Transfer of Property Act; that section ran as follows:

"90. When the nett proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum."

The word "found" between the words "are" and "insufficient" is new.

As to the law before the amendment of the Transfer of Property Act, see the undermentioned cases.[1]

2. Amendments after 1908.— The rule was amended by the Transfer of Property (Amendment) Supplementary Act, XXI of 1929, as follows:

(1) The words "any sale held under the last preceding rule" have been substituted for the words "any such sale."

Order 34 Rule 6—Note 1.

1. ('17) 4 AIR 1917 All 149 (150) (DB). (Mortgagee could proceed against either the hypothecated property or any other property of the mortgagor.)
('26) 13 AIR 1926 Nag 168 (169).

(2) The words "an application by him" (plaintiff) are new.

3. Personal decree for balance against mortgagor.— This rule provides that the mortgagee may, *by way of application*, obtain a personal decree against the mortgagor, for the balance still remaining due to him after the mortgaged property is sold.[1] The object of the rule is to enable such a decree to be passed in the mortgage *suit* itself and to avoid multiplicity of proceedings.[2] In fact a separate suit for enforcing the personal liability would be barred under the provisions of the Civil Procedure Code, Order 2 Rule 2.[3]

A personal decree under this rule will, however, be granted only after the mortgagee has exhausted his remedies against the security; in other words, it will be granted only after the sale has been carried out and the *deficiency ascertained;* it is a relief which will not be granted to the mortgagee until that stage is reached.[4] The mere fact, therefore, that the *plaint* does not contain a prayer for such relief[5] or that the original decree does not reserve a liberty to the plaintiff to apply for a personal decree[6] will not preclude the mortgagee from applying under this

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O 34 Rule 6—Note 3.

1. ('26) 13 AIR 1926 All 343 (344).
('27) 14 AIR 1927 Lah 445 (447): 8 Lah 721 (DB.)
('11) 35 Bom 452 (461): 11 Ind Cas 987 (989) (DB.)

2. ('06) 28 All 365 (371, 372) (DB).
('92) 14 All 513 (516) (DB).
('89) 11 All 486 (488) (DB).
('20) 7 AIR 1920 Bom 95 (95) (DB).
†('02) 25 Mad 244 (286) (FB).

3. ('20) 7 AIR 1920 Oudh 251 (252): 23 Oudh Cas 145 (DB).
('02) 25 Mad 244 (287) (FB).
('22) 9 AIR 1922 Pat 450 (458): 1 Pat 506 (DB).
[*See* ('11) 10 Ind Cas 336 (337) (DB) (All).]

4. ('44) 31 AIR 1944 Mad 65 (67): I L R (1944) Mad 572 (DB).
('43) 30 AIR 1943 Cal 372 (376): I L R (1943) 2 Cal 417.
('42) 29 AIR 1942 Pesh 85 (86).
* ('32) 137 Ind Cas 672 (672): 62 Mad L Jour 170 (173, 174) (PC).
('34) 21 AIR 1934 Cal 426 (427) (DB). (Before order is passed under O. 34 R. 6 property ordered to be sold must be sold first and balance legally recoverable must be left unpaid.)
('16) 3 AIR 1916 Pat 350 (352): 35 Ind Cas 43 (44).
('26) 13 AIR 1926 Mad 415 (415, 416) (DB).
† ('30) 17 AIR 1930 Oudh 377 (378): 6 Luck 202 (FB).
('20) 7 AIR 1920 All 155 (156): 42 All 519 (DB).
('08) 35 Cal 431 (433) (DB).
('18) 5 AIR 1918 Mad 530 (530) (DB).
('05) 1 Nag L R 39 (43).
('06) 33 Cal 890 (891, 892).
('37) 24 AIR 1937 Oudh 252 (253): 13 Luck 129 (DB).
†('38) 25 AIR 1938 All 98 (99, 100): I L R (1938) All 148: 1937 All L Jour 1181 (1183) (DB). (Court cannot pass a personal decree on equitable grounds when a mortgage decree becomes useless.)
('30) 17 AIR 1930 All 69 (71): 52 All 363 (FB.)
†('36) 23 AIR 1936 Mad 34 (37): 59 Mad 188 (FB).
('36) 23 AIR 1936 Nag 34 (37): 31 Nag L R Sup 124 (DB). (The original decree may reserve the right to apply for a personal decree.)
[*See also* ('43) 30 AIR 1943 Cal 455 (457, 458): ILR (1943) 1 Cal 59 (DB). (Suit by one co-mortgagee for his share of the mortgage debt—Sale proceeds of mortgaged property not sufficient to pay off whole mortgage-money—Plaintiff can get paid *pro rata* from sale proceeds and apply for personal decree for balance of his dues.)
('35) 22 AIR 1935 Oudh 260 (262) (DB).
('34) 21 AIR 1934 Pesh 84 (85) (DB).]

5. ('44) 31 AIR 1944 Mad 65 (66): I L R (1944) Mad 572 (DB).
†('99) 1899 All W N 72 (72) (DB).
('09) 4 Ind Cas 256 (257) (DB) (Bom.)
('33) 20 AIR 1933 Oudh 520 (521): 9 Luck 211 (DB).
[*But* see ('24) 11 AIR 1924 Lah 132 (135, 136) (DB).]

6. ('44) 31 AIR 1944 Mad 65 (66): I L R (1944) Mad 572 (DB).
* ('32) 137 Ind Cas 672 (672): 62 Mad L Jour 170 (174) (PC). (Confirming AIR 1929 Cal 387.)
†('35) 22 AIR 1935 All 411 (413, 414): 57 All 797 (DB), (Plaintiff claiming personal decree in plaint—Defendant not denying it nor Court mentioning anything about it in decree—Subsequent application under O. 34 R. 6 is not barred by *res judicata.*)
('33) 20 AIR 1933 Oudh 520 (521): 9 Luck 211 (DB).
('09) 4 Ind Cas 256 (257) (DB) (Bom).
('89) 16 Cal 423 (425) (DB).
('92) 14 All 513 (517) (DB).
('27) 14 AIR 1927 Mad 779 (780) (DB).
('39) 26 AIR 1939 Mad 162 (162): I L R (1939) Mad 223 (DB). (Omission to provide for personal liability in preliminary decree does not operate as *res judicata* while claiming relief for personal liability under O. 34 R. 6.)

rule when the deficiency is ascertained. Where a compromise in a mortgage suit provided for payment of the mortgage money in certain instalments, and on default, for execution by sale of the mortgaged properties "in the usual way," but did not reserve any right to the plaintiff to apply for a personal judgment, it was held by their Lordships of the Privy Council that there was nothing to suggest that the plaintiff agreed to forgo the benefit of the personal covenant, and that the powers of the Court to give that relief do not depend on O. 34 R. 6 of the Code nor are they derived from the clause in the decree reserving leave to the plaintiff to apply for a personal judgment.[7] The usual liberty clause in a preliminary decree involves no adjudication as to the right to a personal decree for the balance. It is intended to make it clear that no inference should be drawn from the omission to deal with it in the preliminary decree.[8]

It follows from what has been said above that the rule contemplates a *separate* decree being passed for the balance; a Court will be acting irregularly, therefore, in providing in the decree for sale itself that the mortgagee may proceed personally against the mortgagor for the balance.[9] On the other hand, the preliminary decree should not direct that properties not mortgaged should not be proceeded against; the question must be left for decision at the proper time.[10] But where, at the time of the original decree, a *decision* has been given as to the *personal liability* to the defendant, the question cannot be raised again on general principles of *resjudicata*.[11] But where, there has been no decision on the point, the mere fact

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7. ('32) 137 Ind Cas 672 (672): 62 Mad L Jour 170 (173, 174) (PC), (Confirming AIR 1929 Cal 387.)

8. ('42) 1942 Nag L Jour 144 (145) (DB). (Preliminary decree in suit on mortgage against mortgagor and transferee of the equity—Liberty to apply for personal decree clause—Transferee of equity can plead that he is not a person from whom the balance is recoverable.')
('36) 23 AIR 1936 Mad 34 (39): 59 Mad 188 (FB).

9. ('04) 31 Cal 792 (796) (DB).
('89) 1889 All W N 149 (150) (DB).
('07) 30 Mad 464 (465) (DB).
('07) 31 Bom 244 (248) (DB).
('23) 10 AIR 1923 Bom 32 (32) (DB).
('12) 15 Ind Cas 911 (913) (DB) (Cal).
†('18) 5 AIR 1918 Mad 1187 (1190): 40 Mad 989 (FB).
[*See* ('36) 23 AIR 1936 Pesh 71 (72). (Decree for sale under O. 34 R. 5—No presumption that decree for balance under R. 6 is passed at the same time.)]
Also see O. 34 R. 4, Note 5.
[See however ('11) 5 Sind L R 71 (77): 11 Ind Cas 192 (195). (But this did not apply to Sind where the Transfer of Property Act was not in force.)
('33) 20 AIR 1933 Oudh 352 (354, 355): 9 Luck 51 (FB). (Suit on mortgage executed by guardian—Relief of personal decree prayed for among other reliefs—Guardian allowing decree to be passed without contest—Preliminary decree containing decree over is proper.)]
[But see ('20) 7 AIR 1920 Mad 479 (480): 43 Mad 421 (DB).]
NOTE (1).—Under S. 90, T. P. Act, which did not contain the word "found" between "are" and "insufficient," it was held that a separate decree was not necessary but provision could be made in the mortgage decree itself for proceeding against the mortgagor personally. See the following cases:
('18) 5 AIR 1918 P C 159 (160) (PC).
('90) 1890 All W N 142 (143) (DB).
('93) 15 All 334 (335).
('91) 13 All 360 (361) (DB).
('91) 13 All 356 (358) (DB).
('06) 28 All 295 (297) (DB). (Pre T. P. Act case.)

NOTE (2).—Under R. 4 as amended by the Calcutta High Court "the Court may in its discretion direct in the decree for sale that if the proceeds of the sale are not sufficient to pay the mortgage debt, the mortgagor shall pay the balance personally."

10. ('14) 1 AIR 1914 Cal 214 (215).

11. ('16) 3 AIR 1916 Nag 1 (2): 13 Nag LR 76 (DB).
('33) 20 AIR 1933 Lah 329 (330) (DB).
('35) 22 AIR 1935 Oudh 11 (12): 10 Luck 233 (DB). (Preliminary decree containing provision that if sale proceeds are insufficient plaintiff would be at liberty to apply for personal decree—Decree for sale—Sale proceeds insufficient to pay decretal amount—Application under O. 34 R. 6 for personal decree cannot be barred by limitation.)
('33) 20 AIR 1933 Oudh 466 (468): 9 Luck 90 (DB). (Composite decree combining decree for sale and personal decree operates at future dates when mortgage debts are not satisfied by sale.)
†('33) 20 AIR 1933 Oudh 529 (531): 9 Luck 162 (DB), (Do.)
('09) 32 Mad 534 (535, 536) (DB).
('06) 28 All 365 (369, 370) (DB).
†('30) 17 AIR 1930 Oudh 378 (381): 6 Luck 132 (FB). (Srivastava, J., dissenting.)
('30) 124 Ind Cas 669 (670) (DB) (Oudh).
('30) 17 AIR 1930 Oudh 10 (12) (DB).
('37) 24 AIR 1937 All 54 (55) (DB). (Claim

that the plaint claimed the relief of a personal decree and the preliminary decree did not provide for such decree does not preclude the plaintiff from applying for such decree under this rule. The reason is that Explanation V to S. 11, Civil Procedure Code, will not apply to such a case.[12] (See Notes 123 and 125 on Section 11 of the A. I. R. Commentaries on the Code of Civil Procedure, 4th (1944) Edition.) A decree for sale providing for execution thereof personally against the mortgagor in case of deficiency though contrary to the provisions of Rule 6, is not void on that ground.[13] No fresh supplementary decree under Rule 6 can be passed[14] or is necessary in such a case[15] before enforcing the personal liability, though execution cannot be issued until the mortgaged property has been sold and the proceeds found insufficient to satisfy the mortgage.[16]

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for personal decree rejected on merits in original suit—Subsequent application for personal decree is barred.)

[*See also* ('18) 5 AIR 1918 Pat 315 (316) (DB). (Where the original decree does not reserve such liberty the defendant is not stopped from disputing his liability.)

('33) 20 AIR 1933 Oudh 352 (354): 9 Luck 51 (FB). (Section 97 of the Code precludes the agitation of such a question.)

('36) 23 AIR 1936 Oudh 61 (64) (DB). (Mortgage decree on award—Award not providing for personal decree—Preliminary decree providing for personal decree—Judgment-debtor taking no steps challenging preliminary decree—Decree held became final and judgment-debtor could not prevent decree-holder's application for personal decree.)

('37) 24 AIR 1937 Lah 6 (7) (DB). (Judgment-debtor's personal liability to pay in case sale proceeds be insufficient incorporated in preliminary decree—Sale proceeds insufficient— Decc-holder obtaining order under O. 34 R. 6—Preliminary decree set aside on appeal—Order passed on application under O. 34 R. 6 falls to ground and cannot operate as *res judicata*.)

('37) 24 AIR 1937 Rang 494 (496) (DB). (Preliminary decree containing statement that mortgagor is personally liable for balance due—No appeal against such decree and final decree passed—Mortgagor appealing against final decree—Neither preliminary decree nor such statement therein can be questioned in such appeal in view of S. 97 of the Code.)

('36) 23 AIR 1936 Oudh 81 (82, 83) (DB). (Preliminary decree allowed to become final —Decree-holder applying for personal decree under O. 34 R. 6—Judgment-debtors cannot ask Court to amend preliminary decree by deleting clause granting personal decree.)]

[See however ('25) AIR 1925 Oudh 462 (464) (DB).]

12. †('35) 22 AIR 1935 All 411 (413, 414): 57 All 797 (DB).

[*See also* ('37) 24 AIR 1937 Lah 204 (206) (DB). (Preliminary decree for sale giving plaintinff liberty to apply for personal decree if sale proceeds found insufficient—Application under O. 34 R. 6—Objection by judgment-debtor repelled but Court omitting to pass personal decree—Fresh application is not barred by Explanation V to S. 11. Reversing AIR 1936 Lah 388 on Letters Patent appeal.)]

13. ('42) 29 AIR 1942 Pesh 85 (86) (DB).
('15) 2 AIR 1915 Mad 449 (451) (DB).
†('18) 5 AIR 1918 P C 159 (160): 47 Cal 370 (PC).
('28) 15 AIR 1928 Lah 653 (654) (DB).
('11) 12 Ind Cas 689 (690) (DB) (Mad).
('34) 21 AIR 1934 Cal 764 (765) (DB).

14. ('12) 17 Ind Cas 263 (265) ((DB) (Cal). (A personal decree cannot be passed under R. 6 where the mortgage decree itself has granted personal remedy.)

[*See also* ('32) 19 AIR 1932 Cal 775 (778): 59 Cal 1314 (DB). (Solenamah—Composite decree thereon incorporating personal decree on deficiency—Not invalid.)]

[See however ('21) 8 AIR 1921 Pat 49 (51): 6 Pat L Jour 106 (DB). (Application for personal decree under R. 6 need not be dismissed.)]

15. ('94) 21 Cal 26 (28) (DB).
('03) 7 Cal W N 744 (745, 746) (DB).
('93) 15 All 334 (325, 336).
('91) 13 All 360 (361) (DB).
('91) 13 All 356 (358) (DB).
('07) 29 All 12 (13) (DB).
('18) 5 AIR 1918 Mad 607 (608) (DB).
('19) 6 AIR 1919 Cal 432 (433) (DB), (*Held*, on construction of decree, that it was not a composite decree granting personal relief as well as relief against mortgaged property.)
('12) 15 Ind Cas 23 (24) (DB) (Cal), (Personal decree for costs.)
†('15) 2 AIR 1915 Mad 452 (453): 38 Mad 677 (DB).
('15) 2 AIR 1915 Mad 414 (414) (DB).
('14) 1 AIR 1914 Oudh 245 (245): 17 Oudh Cas 153 (DB).
('14) 1 AIR 1914 Oudh 333 (334): 18 Oudh Cas 55 (DB).
('24) 11 AIR 1924 Pat 262 (263): 2 Pat 796 (DB).
('36) 23 AIR 1936 Pat 568 (569): 15 Pat 345 (DB).

[*See* ('32) 19 AIR 1932 Cal 775 (778): 59 Cal 1314 (DB). (The necessity of separate decree under this rule in such cases depends on the terms of decree already passed.)]

16. ('97) 20 Mad 107 (112) (DB).
('07) 31 Bom 244 (249) (DB).
('05) 27 All 619 (620, 621) (DB).
('18) 5 AIR 1918 P C 159 (160) : 47 Cal 370 (PC).

Similarly, the mortgagee is not entitled to proceed against the non-hypothecated properties under the original decree for sale without a personal decree under this rule.[17] But where execution is allowed against the non-mortgaged properties of the mortgagor, without such a personal decree having been obtained, and the mortgagor *fails to object* to such procedure, he will be estopped subsequently from objecting to the execution on the ground of the want of a personal decree.[18]

A personal decree under R. 6 can only be passed in respect of the mortgage to which the decree for sale under which the mortgaged property has been sold relates. Thus, where a person holds two mortgages over the same property and obtains two decrees upon them but sells the mortgaged property under *one* of them, he cannot apply for a decree under R. 6 if the balance of the sale proceeds, after satisfying the decree under which the sale is held, is not sufficient to satisfy the *other* mortgage.[19] Similarly, where a puisne mortgagee who has obtained a decree on his mortgage is joined as a party to a suit on a prior mortgage and the property is sold in execution of the decree on the *prior* mortgage but the balance of sale proceeds after satisfying the prior mortgage is not sufficient to satisfy the *puisne* mortgage, the puisne mortgagee cannot obtain a decree under R. 6 for his amount.[20] See also Note 10.

The present rule makes it clear that the plaintiff must *apply* for a decree under this rule and that the Court cannot pass the decree *suo motu*. The law was the same even before the amendment of the rule in this respect by Act XXI of 1929.[21] But the application need not be in *writing* nor need it be signed.[22]

A decree under R. 6 can be made only against the defendants in the original suit.[23]

A personal decree under this rule can be executed either against the person

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('14) 1 AIR 1914 Mad 663 (664): 21 Ind Cas 782 (782) (DB).
('29) 16 AIR 1929 Mad 881 (884): 53 Mad 119 (DB). (Mortgage decree making certain defendants personally liable for costs, on default of payment of mortgage-money—Personal decree for costs should be executed only after sale proceeds are found insufficient.)
[But see ('87) 9 All 484 (485) (DB).
('76) 2 Cal 213 (221) (DB).
('11) 4 Sind L R 244 (247, 248): 10 Ind Cas 975 (976) (DB).
('14) 1 AIR 1914 Mad 170 (170) (DB).]

17. ('41) 28 AIR 1941 Lah 171 (173). (Mortgagee's application for attachment and sale of other properties cannot be considered as one under Order 34 Rule 6.)

†('87) 11 Bom 537 (539) (DB).
('03) 6 Oudh Cas 59 (60).
('20) 7 AIR 1920 Bom 95 (96) (DB).
('83) 10 All 632 (633).
('26) 13 AIR 1926 Mad 415 (416) (DB).
('30) 17 AIR 1930 Lah 103 (104).
('13) 20 Ind Cas 829 (830) (Cal).
('13) 16 Oudh Cas 238 (244, 245): 21 Ind Cas 283 (284) (DB).
('88) 10 All 127 (128, 129).
†('99) 26 Cal 166 (171) (DB).
('36) 23 AIR 1936 Pesh 71 (72). (Decree for sale under R. 5—There is no presumption that decree for balance under R. 6 is passed at same time.)

18. ('41) 28 AIR 1941 Lah 171 (173).
('04) 14 Mad L Jour 103 (104) (DB).
('97) 2 Cal W N 254 (256) (DB).
('36) 23 AIR 1936 Pat 568 (570): 15 Pat 345 (DB).

19.†('09) 31 All 373 (376) (DB).
('90) 12 All 537 (538) (DB).
[*See* ('36) 23 AIR 1936 Oudh 50 (51): 11 Luck 519 (DB). (Two mortgage decrees on same property against same judgment-debtor—Separate applications for execution—Executions proceeding simultaneously—Sale is in execution of both decrees—Sale proceeds if not sufficient to satisfy second mortgage a personal decree can be passed for the balance.)
('36) 23 AIR 1936 Oudh 143 (145): 11 Luck 481 (DB). (Two decrees against the same defendant—Sale in execution of one—Prayer for rateable distribution in respect of the other decree—Latter decree satisfied in part out of sale proceeds—Application for personal decree for balance is maintainable as the sale must be deemed to be in execution of both the decrees.)]
[But see ('93) 15 All 331 (332).]

20*('1900) 22 All 404 (404, 405) (DB). (The puisne mortgagee, in such a case, ought to redeem the prior mortgage.)
('99) 1899 All W N 208 (209) (DB).
†('20) 7 AIR 1920 All 155 (156): 42 All 519 (DB).
[*See also* ('18) 5 AIR 1918 Mad 669 (669) (DB).]
[But see ('16) 3 AIR 1916 Oudh 79 (80, 81): 34 Ind Cas 48 (50) (DB).]

21. ('16) 3 AIR 1916 Nag 1 (3): 13 Nag LR 76: 39 Ind Cas 854 (856, 857) (DB).

22. ('24) 11 AIR 1924 All 804 (805) (DB).

23. ('27) 14 AIR 1927 All 691 (692).

of the mortgagor or by attachment and sale of his other properties.[24] A decree under this rule should not, therefore, direct the realization of the amount from any *specific property*.[25]

Although a mortgage is invalid, a personal decree may be passed in the same suit against the mortgagor on the basis of the *personal covenant* in the mortgage deed.[26] A personal decree obtained without informing the Court of a previous refusal by it to grant such a decree, cannot be set aside as fraudulent.[27] In the undermentioned case[28] it was held that so long as the preliminary and final decrees in a mortgage suit were not set aside by appropriate proceedings, an application for a personal decree under this rule could be made irrespective of the question of the validity of the preliminary and final decrees. But when the decree for sale obtained by the mortgagee is declared null and void at the instance of a party claiming paramount title to the property the mortgagee has no right to apply under this rule but he can get a personal decree under S. 68 of the Transfer of Property Act.[29]

4. Personal liability of purchaser from mortgagor.—The word "defendant" in R. 6 means the *defendant mortgagor* and a personal decree cannot be passed under the rule against a purchaser of the equity of redemption.[1] This is so even if the purchaser has contracted with the mortgagor to pay off the mortgage and has retained with himself a portion of the consideration for that purpose. The reason is, that there is no *privity of contract* between himself and the mortgagee.[2] A personal decree for costs cannot be passed against an auction-purchaser who has purchased the property subject to a mortgage unless his conduct in the suit has been such as to make him liable for the costs.[3]

5. Personal liability is a question of construction of the instrument.— A personal liability to pay the mortgage amount is, in each case, a question of the construction of the mortgage deed.[1] But every simple mortgage[2] and

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24. ('89) 16 Cal 423 (425) (DB).
('25) 12 AIR 1925 All 352 (352). (Decree against Hindu widow—Other properties can be attached.)
[*See* ('01) 28 Cal 12 (16, 17) (DB). (Suit on mortgage is brought not only upon the lien but also upon the personal covenant.)]
25. ('99) 1899 All W N 125 (126) (DB).
26. ('31) 18 AIR 1931 Mad 124 (128) (DB).
† ('19) 6 AIR 1919 Pat 365 (366) (DB). (Unless there is an express stipulation in the bond that the mortgage-debt is to be realized from the mortgaged properties alone.)
†('15) 2 AIR 1915 Bom 102 (105): 39 Bom 358 (DB).
27. ('15) 2 AIR 1915 All 397 (400): 38 All 7 (DB).
28. ('37) 24 AIR 1937 Rang 12 (14) (DB). (Preliminary and final decrees passed by High Court on original side—Decrees attached on ground of want of territorial jurisdiction.)
29. ('48) 35 AIR 1948 Mad 33 (35, 36): I L R (1947) Mad 731 (DB), *Kamakshi Ammal* v. *Ananthanarayana*.

O 34 Rule 6—Note 4.

1. ('45) 32 AIR 1945 Oudh 65 (67) : 20 Luck 179, *Kali* v. *Ram Autar*.
('42) 1942 Nag L Jour 144 (145) (DB).
('09) 3 Ind Cas 33 (33) (DB) (All).
('13) 18 Ind Cas 747 (749) (DB) (Cal).
†('16) 3 AIR 1916 Mad 763 (764): 30 Ind Cas 188 (188, 189) (DB).
('23) 10 AIR 1923 PC 54 (54) (PC).
('37) 24 AIR 1937 Oudh 20 (23): 12 Luck 313 (DB).
[*See* ('24) 11 AIR 1924 All 877 (878). (Right to personal decree is different from the right given by covenant in deed to recover money by sale.)]
[*See also* (33) 20 AIR 1933 Lah 329 (330) (DB). (Sale of right of redemption and successful presentation suit—Pre-emptors defendants are not personally liable in absence of contract to that effect.)]
2. ('45) 32 AIR 1945 Oudh 65 (67, 69) : 20 Luck 179 *Kali* v. *Ram Autar*.
(But personal liability can be fastened on purchaser on basis of subsequent agreement to pay money between him and mortgagee).
('12) 34 All 63 (64) : 39 Ind App. 7 : 13 Ind Cas 304 (304) (PC).
†('09) 31 All 352 (358) (DB).
('16) 3 AIR 1916 All 232 (233): 38 All 209 (DB).
3. ('43) 30 AIR 1943 Nag 178 (184): I L R (1943) Nag 422 (DB).

O 34 Rule 6—Note 5.

1.† ('09) 1 Ind Cas 442 (443) (DB) (Cal).
('89) 16 Cal 540 (544) (DB).
('82) 4 All 3 (5) (DB).
('18) 5 AIR 1918 Mad 530 (530) (DB). (Personal liability of the mortgagor would ordinarily exist in the absence of a specific contract to the contrary.)
('22) 9 AIR 1922 Cal 52 (52, 53) (DB).
('16) 3 AIR 1916 Mad 13 (14) (DB).
† (32) 19 AIR 1932 Lah 164 (166, 167) : 13 Lah 259 (DB). (In all mortgages, personal covenant is presumed unless negatived by

English mortgage[3] involves, *prima facie*, a personal obligation to pay. Similarly, *prima facie*, there is no personal obligation to pay in a usufructuary mortgage or a mortgage by conditional sale.[4] See S. 58 of the Transfer of Property Act. Where the time for payment fixed under the decree *nisi* was enlarged on condition of the mortgagor paying interest not provided for in the decree, it was held that the mortgagor was *personally* liable for the payment of such interest.[5]

6. Personal decree against person not the mortgagor.— The word "defendant" in the rule means, as has seen in Note 4, the *mortgagor defendant*.[1] Where a mortgage bond was executed by the Court of Wards on behalf of a ward, a decree may be passed against the ward under this rule for the balance of mortgage-money due after the sale of the mortgaged proprty and appropriation of the sale proceeds.[2] A personal decree against the managing member of a Hindu joint family binds the junior members of the family though they were not parties to the suit.[3] See also the undermentioned case[3a].

Personal decree against the surety.—A surety who has contracted to make good personally the deficit found on sale of the mortgaged property does not become liable unless the property is found insufficient to repay the debt. Hence in a mortgage suit no conditional decree for the balance can be passed against the surety.[4]

7. Personal decree against the heirs of the mortgagor.— Where the mortgaged property is found to be insufficient to satisfy a mortgage decree obtained against the heirs of a mortgagor, a decree may be passed against them under this rule *to the extent of the assets of the deceased* in their hands.[1] Where a

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the nature and terms thereof—In certain classes, much more clearly implied covenant is required than in others.)
('37) 24 AIR 1937 Pat 261 (262) (DB).

2.† ('06) 29 Mad 491 (495) (DB).
('34) 21 AIR 1934 Pat 433 (435). (Additional sum paid by mortgagee to save property from sale—Mortgagee has right to decree under O. 34 R. 6.)
('06) 4 Cal L Jour 246 (248, 253) (DB).
('07) 5 Cal L Jour 287 (289) (DB).
('08) 30 All 388 (390) (DB).
('22) 9 AIR 1922 Nag 98 (99) : 18 Nag L R 145 (DB).

3. ('81) 7 Cal 394 (401) (DB).

4. (1900) 22 All 149 (159): 27 Ind App 58 (PC).
[*See also* ('32) 19 AIR 1932 Lah 164 (166, 167): 13 Lah 259 (DB). (In usufructuary mortgages in the absence of express covenant a much more clearly implied covenant is required than in other forms of mortgage —On the terms of a bond assumed to be a usufructuary mortgage, held personal covenant was clearly implied.)]

5. ('99) 12 C P L R 78 (79).

O 34 Rule 6—Note 6.

1. ('01) 23 All 439 (440) (DB).
('04) 26 All 507 (508, 509) (DB).
†. ('10) 7 Ind Cas 784 (785) (DB) (Cal).
†('16) 3 AIR 1916 Mad 763 (764): 30 Ind Cas 188 (188, 189) (DB).
('32) 19 AIR 1932 Cal 775 (779): 59 Cal 1314 (DB). (No personal decree is competent against puisne encumbrancers as such.)
('17) 4 AIR 1917 Oudh 241 (241). (Suit on mortgage impleading co-mortgagee as *pro forma* defendant—Payment to co-mortgagee found—No money decree can be passed against him in the suit—Suit dismissed.)
[*See also* ('41) 28 AIR 1941 Pat 416 (416) (DB). (Hypothecation by lessee of minerals to secure sums due by way of royalty—Suit by lessor to enforce hypothecation against lessee and sub-lessee—Decree—Sale proceeds insufficient—Application for personal decree against sub-lessees not competent.)
('31) 18 AIR 1931 All 631 (632): 53 All 695 (DB). (Persons not interested in hypotheca but joining as executants of the mortgage deed as sureties—Personal decree under this rule can be passed against such sureties also.)]

2. ('22) 9 AIR 1922 Nag 98 (100, 101): 18 Nag L R 145 (DB).

3. ('01) 22 All 408 (409, 410) (DB).

3a. ('49) 36 AIR 1949 Mad 1 (2) (FB), *Shankar Bhatta* v. *Shankar Upadhya*. (*Mortgage of joint family property by A and B in* 1931 *—C, other member of family not party—Personal covenant—Suit on mortgage in* 1941 *against A, B and C decreed—Property sold not realising full amount—Application for personal decree against A, B and C for balance—Remedy under personal covenant held barred—C not being mortgagor, personal covenant held could not be enforced against him.*)

4. ('48) 35 AIR 1948 Nag 123 (125) : I L R (1947) Nag 643, *Subhankhan* v. *Lalkhan*.

O 34 Rule 6—Note 7.

1. ('12) 14 Ind Cas 53 (55) (DB) (All).
('15) 2 AIR 1915 Lah 374 (374) (DB).
('31) 18 AIR 1931 All 368 (369) (DB). (In this case it was held that the property in question was not such assets.)
('09) 1 Ind Cas 442 (443) (DB) (Cal). (Hindu joint family—Mortgage by the father—

decree under this rule exempts the person and property of the sons of the mortgagor, who is the manager of a joint Hindu family, but a decree is passed against them to the extent of the *assets* of the mortgagor in their hands, the assets received by the sons by survivorship on the death of the father are liable under the decree.[2] But when the son's share is exempted from the mortgage decree against the father, it is also exempt from a decree under the present rule.[3]

8. Personal remedy under compromise decrees.— The fact that the original decree was a compromise decree is no bar to a personal decree being passed under this rule.[1] According to the High Courts of Bombay[2] and Calcutta[3], a compromise decree in a mortgage suit may be executed against the mortgagor personally without any decree being passed under R. 6 although it does not expressly provide for personal relief. But the Patna High Court has held that a decree under this rule is necessary in such a case.[4] Where the compromise decree itself expressly provides for personal relief, a fresh decree under this rule is not necessary.[5]

8a. Personal remedy under decree on award.— Where a mortgage suit is referred to arbitration and preliminary and final decrees are passed on the basis of such award, the fact that the award is silent as to personal liability is no bar to the plaintiff applying for a personal decree under this rule.[1]

9. Right of mortgagee to attach other properties of mortgagor before date fixed for payment of mortgage-money.— After the preliminary decree in a mortgage suit and before the date fixed for the payment of the mortgage-money, if there is a reasonable probability of the mortgaged property not

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Personal liability of sons confined to assets received.)

[*See* ('21) 8 AIR 1921 Pat 357 (357) (DB). (Personal decree against son's share and mortgage decree against father—Decree under R. 6 is necessary to proceed against father's other properties—Decree as it stands could be executed against son's share.)

('35) 22 AIR 1935 Lah 940 (941). (Personal decree cannot be enforced against heirs who were not impleaded in the mortgage suit.)]

2. ('10) 5 Ind Cas 146 (147) (DB) (Cal). [*See also* ('37) 24 AIR 1937 Lah 6 (7) (DB). (Manager of joint Hindu family executing mortgage—Other coparceners are liable to the extent of their interest in the joint family property and a personal decree can be passed to the extent of such property.)]

3. ('03) 1903 All W N 41 (42) (DB).

O 34 Rule 6—Note 8.

1. ('40) 27 AIR 1940 Oudh 90 (92): 15 Luck 95 (DB). (Compromise decree in mortgage suit providing for passing of preliminary decree and final decree—Decree further providing that if sale proceeds are found insufficient, the mortgagee may apply for personal decree—*Held*, personal decree could be passed.)

†('32) 137 Ind Cas 672 (672): 62 Mad L Jour 170 (173, 174) (PC). (Confirming AIR 1929 Cal 387.)

('33) 20 AIR 1933 Oudh 214 (215) (DB). (Application for personal decree is not barred unless excluded by compromise.)

('33) 20 AIR 1933 Oudh 520 (520): 9 Luck 211 (DB).

('09) 3 Ind Cas 443 (444) (Cal).

('26) 13 AIR 1926 Oudh 27 (28).

('36) 23 AIR 1936 Oudh 259 (260): 12 Luck 207 (DB). (Application for personal decree is not barred merely because compromise is silent as to right to personal decree.)

[*See* ('31) 18 AIR 1931 Oudh 422 (423, 424) (DB). (Compromise not contemplating personal liability—Decree embodying a clause for personal liability—Decree amended by deleting the clause.)]

2 ('41) 28 AIR 1941 Bom 90 (91): I L R (1941) Bom 299 (FB). (Consent decree directing payment of money and creating charge on specific property can be executed personally against the judgment-debtor if the charged properties are found insufficient to satisfy the decree—Overruling AIR 1920 Bom 95 and AIR 1941 Bom 71: ILR (1941) Bom 136.)

('30) 17 AIR 1930 Bom 208 (209): 54 Bom 352 (DB).

3. ('28) 15 AIR 1928 Cal 668 (669) (DB). [*See also* ('32) 119 AIR 1932 Cal 414 (415, 416) (DB).]

4. ('18) 5 AIR 1918 Pat 262 (263): 3 Pat L Jour 649 (DB).

5. ('45) 32 AIR 1945 Nag 289 (290): ILR (1945) Nag 643 (DB). *Ratanlal Harlalji* v. *Mt. Sagarbai.* (Compromise decree passed was such as to obviate necessity for passing a final decree under R 5 or personal decree under R 6 and was exemptable as such—Application for final decree dismissed—Decree-holder is precluded from applying under this rule.

('28) 15 AIR 1928 Oudh 490 (490): 3 Luck 411 (DB).

('36) 23 AIR 1936 Pat 568 (569): 15 Pat 345 (DB).

O 34 Rule 6—Note 8a.

1. ('36) 23 AIR 1936 Oudh 61 (63) (DB).

being sufficient to satisfy the mortgage-debt, the Court can order the attachment of the other properties of the mortgagor if it is satisfied as to the existence of the conditions laid down in the Civil Procedure Code O. 38 R. 5. The fact that under O. 34 R. 6 no personal decree can be obtained until the mortgaged properties are sold does not affect the plaintiff's rights under O. 38 R. 5. See O. 38 R. 5, Note 3 of the A.I.R. Commentaries on the Code of Civil Procedure, 4th (1944) Edition.

10. Where net proceeds of any such sale are found insufficient.— The opening words of the rule make it clear that a decree under the rule can only be passed after the mortgaged property has been sold and it is found that the sale proceeds are not sufficient to satisfy the mortgage-debt.[1] But if a personal decree is actually passed before the sale and the mortgagor does not object, he is estopped from questioning the validity of such personal decree later on.[2] If the mortgaged property, through no fault of the mortgagee, has been destroyed by fire or has otherwise ceased to exist or to be available for sale, the plaintiff is not bound to go through the farce of bringing the property to sale before applying for a decree under the rule.[3] Thus, where the properties directed to be sold by

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O 34 Rule 6—Note 10.

1. See Note 3.

2.† ('24) 11 AIR 1924 All 225 (226, 227): 46 All 32 (DB).

('33) 20 AIR 1933 Lah 831 (832). (Suit to enforce mortgage referred to arbitration—Award and decree thereon giving decree-holder choice of realizing amount from mortgaged property or any other immovable property of judgment-debtor—Decree-holder can validly proceed against property other than mortgaged one.)

3. ('49) 53 Cal W N 631 (633, 635) (DB), *Sailen Chand* v. *Promode Kumar*. (Mortgagor found to have no title to mortgaged property.)

('48) 35 AIR 1948 Mad 33 (35, 36): I L R (1947) Mad 731 (DB), *Kamakshi Ammal* v. *Ananthanarayana*. (Rule 6 does not apply to cases where the mortgagor is found, in an adjudication on binding on the mortgagee, to have had no right to mortgage the property and the decree for sale obtained by the mortgagee is declared to be null and void. In such cases however, the mortgagee's right to have a personal decree is provided for in S. 68, Transfer of Property Act.)

('45) 32 AIR 1945 Nag 289 (291): I L R (1945) Nag 643 (DB), *Ratanlal Harlalji* v. *Mt. Sagarbai*. (*Property sold free from mortgage under S. 138, C. P. Land Revenue Act and purchased by mortgagee—Mortgagee can still apply for personal decree.*)

('40) 27 AIR 1940 Pat 616 (617). (Mortgaged property ceasing to be available for sale by reason of another decree declaring mortgage to be invalid and restraining the mortgagee from executing his decree.)

†('15) 2 AIR 1915 Mad 452 (452): 38 Mad 677 (DB). (Mortgaged properties directed to be sold under the mortgage decree did not belond to mortgagor.)

('35) 22 AIR 1935 Lah 536 (537). (Mortgaged property held to be not saleable under certain provisions of the Alienation of Land Act.)

('34) 21 AIR 1934 Lah 174 (175): 15 Lah 607. (Mortgaged property not available owing to claim of third party—Personal decree can be passed.)

('11) 12 Ind Cas 439 (440) (DB) (Mad). (Mortgagor having no saleable interest in the mortgaged property.)

('21) 8 AIR 1921 Pat 49 (51): 6 Pat L Jour 106 (DB). (Mortgagee not allowed to sell a portion of the property.)

†('29) 16 AIR 1929 Cal 121 (123) (DB).

('24) 11 AIR 1924 Cal 209 (210): 50 Cal 718 (DB). (Portion of property sold for arrears of rent through no fault of the mortgagee.)

('28) 15 AIR 1928 Bom 323 (328) (DB). (Property destroyed by fire.)

†('28) 15 AIR 1928 All 71 (72, 73): 50 All 321 (DB). (Personal decree under such circumstances could be passed independently of the provisions of O. 34 R. 6.)

('19) 6 AIR 1919 Cal 951 (956): 45 Cal 702 (DB).

('20) 7 AIR 1920 Oudh 251 (252) : 23 Oudh Cas 145 (DB).

†('11) 14 Oudh Cas 217 (224): 9 Ind Cas 403 (406). (No bidder forthcoming because of prior mortgages exceeding the value of the property.)

('11) 14 Oudh Cas 62 (64): 9 Ind Cas 752 (753). (Application for sale dismissed on the ground of the mortgagor having no saleable interest in the property.)

('04) 26 All 25 (27). (Third person establishing his right to a portion of the mortgaged property—Sale of the remaining not sufficient to pay off the mortgage—Decree may be passed under R. 6.)

('33) 20 AIR 1933 Oudh 1 (3, 4): 8 Lck 217 (FB). (Do.)

[*See also* ('13) 20 Ind Cas 320 (321) (All). (Where the mortgagee negligently allows a third person to come in and sell a portion of the mortgaged property, he cannot afterwards come in under O. 34 R. 6.)

('34) 21 AIR 1934 Mad 82 (82). (Decree for sale of four items—Three sold and personal decree asked—Subsequent to mortgage fourth item sold to stranger representing to be unencumbered—Purchaser not party to mortgage suit—Mortgagee held entitled to

a mortgage decree are no longer available by reason of having been sold in execution of a mortgage decree obtained by a prior mortgagee, the plaintiff is not bound to bring the property to sale again before applying for a personal decree under this rule.[4] Similarly, where the mortgagee is unable to sell a portion of the mortgaged properties by reason of their being situated in a Native State which will not execute the decree of a British Indian Court and the sale proceeds of the remaining portion of the properties are not sufficient to satisfy the mortgage, the decree-holder is entitled to a personal decree against the judgment-debtor.[5] Similarly, where a mortgage of joint family property by the father of a Hindu joint family is found to be not for legal necessity, it has been held by the Madras High Court that a conditional decree may be passed against the father personally and against the son's share in the joint family property for the recovery of the balance that may remain due to the mortgagee after the sale of the *father's share of the mortgaged property* (without the son's share being put to sale).[6] Where a sale in execution of a decree on a mortgage is set aside on the ground that the mortgagor has no saleable interest in the mortgaged property, a personal decree may be passed against the mortgagor because the mortgagee having been compelled to refund the entire purchase-money, the net sale proceeds are *nil* and therefore insufficient to satisfy the mortgage-debt.[7]

A personal decree should not be passed against the mortgagor till the *entire* mortgaged property ordered to be sold has been sold and the proceeds are found insufficient to satisfy the mortgage-debt.[8] But it has been held that it is open to the mortgagee in the plaint to give up his claim against any portion of the mortgaged property and obtain a decree for sale in respect of the rest. If in such a case the sale proceeds of the portion ordered to be sold are not sufficient to satisfy the mortgage-debt, the plaintiff may obtain a personal decree against the mortgagor.[9] The undermentioned decisions[10] are inclined to a contrary view.

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personal decree.)]

[But see ('12) 14 Ind Cas 591 (592) (All).

('07) 29 All 260 (261). (Mortgagor found to have no saleable interest—Yet sale must precede application for personal decree.)]

4. ('33) 20 AIR 1933 Lah 792 (793) (DB).
('35) 22 AIR 1935 Oudh 260 (262) (DB).
('38) 25 AIR 1938 Pat 525 (526): 17 Pat 538 (DB).
('38) 42 Cal W N 47 (49).
† ('35) 22 AIR 1935 Lah 850 (852, 853): 17 Lah 67 (DB).
('34) 21 AIR 1934 Mad 726 (727).

5. ('21) 8 AIR 1921 Pat 49 (50, 51): 6 Pat L Jour 106 (DB).

6. †('20) 7 AIR 1920 Mad 479 (480, 481): 43 Mad 421: 55 Ind Cas 320 (321) (DB).
[*See also* ('33) 20 AIR 1933 Lah 768 (769, 770) (DB). (Mortgage of family property by father not for family necessity—Mortgagee can obtain personal decree against father and in execution bring entire family estate to sale unless debt is illegal or immoral.)]

7. †('27) 14 AIR 1927 All 395 (396): 49 All 506 (DB). (But this rule is not applicable where there is no sale at all in consequence of the mortgage decree itself becoming inoperative at the instance of a successful claimant to the mortgaged property.)
('32) 19 AIR 1932 All 358 (360) (DB). (Decree for sale inoperative, mortgagor being declared not to be owner of mortgaged property—Rule does not apply.)
[*See* ('32) 19 AIR 1932 All 475 (476) (DB). (Mortgagee getting final decree but no steps for sale since mortgagor's title was negatived in a subsequent suit by third party.)]

8. (1900) 22 All 404 (404) (DB).
('06) 33 Cal 890 (892) (DB).

9. ('49) 36 AIR 1949 All 427 (428): *Abdul Shakur* v. *Mahabir Prasad.* (Mortgagee relinquishing portion of mortgaged property in pursuance of declaration under S. 4, U. P. Debt Redemption Act—Decree for sale—Sale proceeds insufficient to satisfy decree—Mortgagee can obtain personal decree under O. 34, R. 6.)
* ('03) 25 All 79 (82) (DB).
('17) 4 AIR 1917 Pat 555 (555): 2 Pat L Jour 538: 42 Ind Cas 56 (56, 57) (DB). (Mortgage suit—Omission of small part of property in plaint by inadvertence—Application under rule is not barred.)
('06) 28 All 19 (20) (DB). (Decree for sale—Mortgagee relinquishing claim to portion of mortgaged property at the time of order absolute for sale—Sale of property directed to be sold insufficient—Mortgagee may obtain personal decree.)
†('07) 29 All 369 (371).
[*See also* ('47) 34 AIR 1947 Oudh 77 (78, 79): 21 Luck 577: 227 Ind Cas 186 (DB), *Irtiza Karim* v. *Misrilal.* Declaration under S. 4 (1), U. P. Debt Redemption Act by mortgagee—Court can pass decree under O. 34, R. 6.]

10. ('06) 33 Cal 890 (892) (DB). (Mortgagee releasing substantial portion of mortgaged property without consent or acquiescence of mortgagor—Mortgagee cannot do this to the detriment of mortgagor, so as to

The deficiency contemplated by the rule is one in regard to the money due in respect of the mortgage on which the final decree for sale is based. Hence, where after a final decree for sale, an arrangement is entered into between the parties for the payment of the decretal amount under which it is agreed that the money due in regard to *another* mortgage should be treated as also covered by the decree, an application for personal decree cannot be made in respect of such money. But a separate suit will lie for the recovery of such money.[11]

The sale of the mortgaged property need not be necessarily a *judicial sale*. The rule covers also a private sale.[12] Where the mortgagee himself purchases the mortgaged property in execution of his mortgage decree, with the leave of the Court, the leave to bid puts him in the same position as any other purchaser; he does not stand in any fiduciary relation to the mortgagor and is only bound to give credit for the amount bid by him and may apply for a personal decree for the balance of the mortgage-money remaining due after deducting such amount.[13]

Where a portion of the mortgaged property was acquired by the Government under the Land Acquisition Act, it was held by the Allahabad High Court[14] that the mortgagee's remedy was to bring to sale the rest of the property and then, if there is a balance due, to apply for a personal decree. But the Calcutta High Court[15] has held that where the mortgaged property is compulsorily acquired by the Government, the mortgage lien is transferred to the compensation money standing to the credit of the mortgagor in the Collectorate and the mortgagee is entitled, in execution of a decree for the sale of the mortgaged property, to take out such money without obtaining a further decree under the present rule.

See also Note 3.

11. "Amount due."— The "amount due" is the amount for the recovery of which a decree for sale has been previously passed.[1] Costs awarded to the mortgagee form an integral part of the "amount due."[2] A puisne mortgagee pay-

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impose upon him personal liability to which otherwise he would not be subject.)

('37) 24 AIR 1937 Oudh 252 (254): 13 Luck 129 (DB). (Compromise between decree-holder and one of the heirs of deceased mortgagor—Part of mortgaged property released in favour of the heir in lieu of certain sum—Remaining part sold—Mortgagee is not entitled of a personal decree for the balance.)

('37) 24 AIR 1937 Oudh 20 (23, 25): 12 Luck 313 (DB). (Suit for sale of mortgaged property—Mortgagee compromising suit with subsequent purchaser of equity of redemption—Mortgagee accepting a certain amount from him and releasing mortgaged property from liability—Mortgagee has no right to personal decree for balance against sons of deceased mortgagor.)

('20) 7 AIR 1920 Mad 221 (222): 51 Ind Cas 84 (85) (DB).

11. ('37) 24 AIR 1937 P C 256 (259): 64 Ind App 302: ILR (1938) 1 Cal 66: 31 Sind L R 637 (PC).

12† ('06) 2 All L Jour 353 (355) (DB).

('06) 28 All 660 (664) (DB).

('38) 25 AIR 1938 Rang 353 (356) (DB).

[But see ('14) 1 AIR 1914 Mad 251 (252): 23 Ind Cas 544 (545) (DB). (Mortgage decree against *A* and *B*—Private sale by *A* alone—*B* can insist on judicial sale being held before personal decree is passed against him.)]

13.†('89) 16 Cal 132 (137) (DB).

†('96) 18 All 31 (33).

('89) 16 Cal 682 (692): 16 Ind App 107 (PC).

('92) 19 Cal 4 (7) (DB). (Dissenting from 11 Cal 718.)

('04) 1 All L Jour 486 (487) (DB). (Decree-holder's failure to give the full decretal amount according to his undertaking to the Court was held to be an abuse of the process of the Court though he was not thereby disabled from applying for personal decree.)

[*See also* ('32) 19 AIR 1932 All 704 (706, 707): 54 All 448 (DB). (Decree-holder becoming one of the heirs of one of the deceased judgment-debtors can get a decree under this rule after deducting proportionate amount of deceased judgment-debtor's share of liability.)]

14. ('94) 16 All 78 (79).

15. ('07) 6 Cal L Jour 745 (748) (DB).

Rule 6—Note 11.

1. ('49) 36 AIR 1949 East Punj 213 (215). *Firm Daulat Ram* v. *Gurbaksh Singh.*

('29) 16 AIR 1929 All 15 (16) (DB).

2. ('08) 11 Oudh Cas 377 (378).

('08) 35 Cal 431 (433) (DB).

('89) 2 C P L R 94 (98).

('07) 30 Mad 464 (465) (DB).

('98) 20 All 523 (527) (FB).

('18) 5 AIR 1918 All 366 (367): 40 All 109 (DB).

('12) 17 Ind Cas 244 (245) (DB) (Mad).

('30) 17 AIR 1930 Oudh 328 (329) (DB).

ing off a prior encumbrance is entitled to a personal decree for the deficit due to him having paid off the prior mortgage.[3] It has been held that where after the final decree, the parties enter into an agreement for the enhancement of the interest payable to the decree-holder in consideration of certain concessions on the part of the decree-holder, the unpaid balance of such enhanced interest will come under the term "amount due."[4]

12. "Legally recoverable."—A personal decree cannot be passed in every suit for sale upon a mortgage; such a decree can be passed only where the defendant by his contract or otherwise is under a *personal obligation* to pay the mortgage-debt[1] and the plaintiff's right to enforce the personal obligation is *not barred by limitation* at the date of the suit for sale.[2]

For further discussion, see Note 17.

13. "Legally recoverable from the defendant otherwise than out of the property sold."—These words mean, by way of illustration, that the balance must be a balance which the mortgagee is not precluded, by the terms of the mortgage, from realizing otherwise than out of the property sold or a balance, the recovery of which is not barred by limitation.[1]

14. Prior and puisne mortgagees.— A puisne mortgagee is not a "defendant" against whom a *personal* decree may be passed, there being no privity of contract between him and the plaintiff.[1]

15. Costs against puisne mortgagee.— A prior mortgagee is not entitled to a personal decree for costs against a *puisne* mortgagee.[1] As seen in Note

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('16) 3 AIR 1916 Pat 1 (1): 2 Pat L Jour 51) (DB).
('10) 8 Ind Cas 32 (33) (All).
('14) 1 AIR 1914 All 444 (445).
[*See also* ('19) 6 AIR 1919 All 297 (298, 299): 41 All 473 (DB). (Costs of unsuccessful appeal by mortgagor may at mortgagee's option be added to mortgage-money or be recovered personally from mortgagor.)]
Also see O. 34 R. 2, N. 11; R. 5, N. 26 and R. 10, Note 8.
[But see ('44) 31 AIR 1944 Mad 553 (544): I L R (1945) Mad 165: 217 Ind Cas 37 (FB). *Purshothama Nair* v. *Raya Pandaram.* (Preliminary mortgage decree for sale—Appeal by non mortgagor defendant—Appeal dismissed and cros-objections allowed with costs on appellant—Sale of mortgaged properties for decretal amount inclusive of costs awarded against appellant—Sale proceeds found insufficient when personal remedy was barred—Decree for costs can still be executed against appellant—A I R 1932 Mad 155 : 55 Mad 332 foll.)]
[But see ('87) 14 Cal 185 (187, 188) (DB). (Court can in its exercise of discretion make such costs recoverable from mortgagor personally.)
('32) 19 AIR 1932 Mad 155 (156, 157): 55 Mad 332 (DB). (Notwithstanding amalgamation into mortgage-money as one lump sum, costs can be personally recovered if they remain due after sale of properties mortgaged.)
('31) 18 AIR 1931 Rang 153 (158): 9 Rang 186 (DB). (Costs may be personally recovered though personal remedy for mortgage-money and interest is time-barred.)]
3. ('04) 26 All 93 (95) (DB).
4. ('35) 39 Cal W N 1229 (1230).

O 34 Rule 6—Note 12.

1. ('49) 36 AIR 1949 Mad 1 (2) (FB), *Shankar Bhatta* v. *Shankar Upadhya.* (Mortgage of joint family property by *A* and *B* in 1931—*C* other member of family not party—Personal covenant—Suit on mortgage in 1941 against *A*, *B* and *C* decreed—Property sold not realising full amount—Application for personal decree against *A*, *B* and *C* for balance—Remedy under personal covenant held barred—*C* not being mortgagor, personal covenant held could not be enforced against him.)
('04) 28 Bom 630 (634) (DB).
[*See also* ('43) 30 AIR 1943 Nag 178 (183): I L R (1943) Nag 422 (DB). (Mortgagors minors are not personally liable—Liability extends to their interest in joint family property only.)]
2. ('49) 36 AIR 1949 Mad 1 (2) (FB), *Shankar Bhatta* v. *Shankar Upadhya.*
('39) 26 AIR 1939 Cal 26 (27)
('85) 7 All 502 (505): 12 Ind App 12 (PC).
('92) 14 All 513 (518) (DB).
('93) 15 All 331 (332).
('86) 12 Cal 389 (395, 396) (DB).
('10) 34 Bom 540 (545) (DB).
('22) 9 AIR 1922 Bom 237 (238): 46 Bom 848 (DB).
('37) 20 Nag L Jour 42 (46).
('38) 25 AIR 1938 Rang 134 (135, 138): 1938 Rang L R 6 (DB).

O 34 Rule 6—Note 13.

1. ('92) 14 All 513 (518) (DB).

Rule 6—Note 14.

1. ('30) 17 AIR 1930 Lah 791 (792) (DB).
('12) 17 Ind Cas 927 (930) (DB) (Cal).

6, the word "defendant" in this rule means only the *mortgagor defendant* and not necessarily those claiming title under him.

16. Insolvency of mortgagor.— Where pending a suit by a mortgagee on his mortgage, the mortgagor is declared an insolvent, the plaintiff can still proceed against the mortgaged property.[1] If the mortgaged property is not sufficient to pay the debt, and the mortgagor is personally liable under the mortgage, the mortgagee may prove for the balance in the insolvency proceedings along with the other creditors of the mortgagor, if the personal liability was not time-barred at the date of the institution of the suit on the mortgage.[2] The contrary view has been held in the undermentioned cases.[3]

Can the mortgagee obtain a personal decree under this rule in such a case? Yes, according to the Lahore High Court[4] and the Oudh Chief Court.[5] The decisions of the Allahabad High Court are conflicting.[6]

According to the undermentioned decisions of the Allahabad High Court[7] an order of adjudication of the mortgagor as an insolvent and his subsequent discharge do not affect the mortgagee's right to get a personal decree under this rule. But the correct view seems to be that the insolvency and the subsequent discharge of the mortgagor would not affect the mortgagee's right to a personal decree for the balance under this rule where he could not have proved for such balance under S. 47 of the Provincial Insolvency Act.[8]

17. Limitation.— As has been seen in Note 12, a balance is not "legally recoverable" if the personal remedy is *barred by limitation* at the date of the suit for sale. Article 132 of the Limitation Act is confined to suits to recover the mortgage-money *from the mortgaged property* and does not apply to the personal remedy under a mortgage.[1] The personal remedy is governed by the six years' period

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O 34 Rule 6—Note 15.

1. ('04) 26 All 507 (508, 509) (DB).
('01) 23 All 439 (440, 441) (DB).
[*See also* ('32) 19 AIR 1932 Cal 775 (779) : 59 Cal 1314 (DB). (No personal liability against puisne mortgagee as such.)]
[**See however** ('31) 18 AIR 1931 Rang 153 (159): 9 Rang 186 (DB). (Prior mortgagee's priority raised and found against—Costs ordered generally against him and mortgagor, held recoverable personally.)
('31) 18 AIR 1931 Rang 181 (183) (DB). (Mortgagor consenting to decree—Subsequent mortgagee contesting—Defences found against—Costs on contested sale against subsequent mortgagee and *ex parte* sale against mortgagor—Personal decree under this rule passed against mortgagor—Subsequent mortgagees is liable personally for difference of costs between contested and *ex parte* sales, since no personal decree can be passed against him.)
('38) 25 AIR 1938 Nag 237 (239) : ILR (1939) Nag 261 (DB). (Costs awarded against puisne mortgagee can be recovered personally from him—Such right is independent of whether O. 34 R. 6 is applicable or not.)]

O 34 Rule 6—Note 16.

1. ('11) 34 All 106 (107): 12 Ind Cas 587 (588) (DB).
2. ('42) 29 AIR 1942 Mad 151 (151). (Overruled in AIR 1942 Mad 273 : ILR (1942) Mad 448 on another point.)
('42) 29 AIR 1942 Mad 273 (274): ILR (1942) Mad 448 (DB). (But a debt of a secured creditor who has not realised, abandoned or valued his security is not provable in insolvency by reason of S. 47 of the Provincial Insolvency Act.)
('11) 34 All 106 (109): 12 Ind Cas 587 (588) (DB).
('25) 12 AIR 1925 Pat 438 (440) : 4 Pat 128 (DB).
('30) 17 AIR 1930 Oudh 20 (26) (DB).
3. ('39) 26 AIR 1939 All 401 (402): I L R (1939) All 492 (DB).
('32) 19 AIR 1932 All 336 (337): 54 All 428 (DB).
4. ('21) 8 AIR 1921 Lah 270 (270): 2 Lah 95 (DB).
5. ('30) 17 AIR 1930 Oudh 20 (26) (DB).
6. ('11) 34 All 106 (109): 12 Ind Cas 587 (588) (DB). (No.)
('39) 26 AIR 1939 All 401 (402): I L R (1939) All 492 (DB). (Yes.)
7. ('39) 26 AIR 1939 All 401 (402): I L R (1939) All 492 (DB).
('32) 19 AIR 1932 All 336 (337): 54 All 428 (DB).
8. ('42) 29 AIR 1942 Mad 273 (274): I L R (1942) Mad 448 (DB). (Overruling AIR 1942 Mad 151.)
('38) 25 AIR 1938 Lah 217 (218) (DB). Where he could have proved but has not done so, the liability is extinguished under S. 44 of the Provincial Insolvency Act and he cannot afterwards get a personal decree under this rule.)

O 34 Rule 6—Note 17.

1. ('85) 12 Cal 389 (395) (DB).
('26) 13 AIR 1926 P C 56 (59): 5 Pat 585: 53 Ind App 134 (PC). (Suit on personal covenant to realize deficiency in mortgage-debt—Art. 66 and not Art. 132 applies.)
('85) 7 All 502 (505): 12 Ind App 12 (PC).

of limitation in the case of registered instruments and by the three years' period in the case of unregistered instruments. See the A. I. R. Commentaries on the Limitation Act, 2nd (1942) Edn., Art. 116 Notes 19 to 21. As regards a personal decree for interest accrued within six years from the suit for sale, see *ibid*, Art. 132, Note 12, and the undermentioned case[1a]. The plaintiff's application for a personal decree has to be made under Art. 181 of the Limitation Act, within three years from the date on which the right to apply for a personal decree accrues. See *ibid*, Art. 181, Note 6.

Where a mortgage decree provides for the sale of the mortgaged property and for realization of any deficiency from the other properties of the mortgagor, the twelve years' period under S. 48 of the Code for enforcing the *personal* liability runs from the date of the decree and not from the date of the sale of the mortgaged property.[2]

18. Succession certificate.— A personal decree cannot be passed in favour of the heirs of a mortgagee in the absence of a succession certificate produced by them.[1] But a person who has succeeded to the estate of a deceased mortgagee by the right of *survivorship* need not produce a succession certificate before he can obtain a personal decree against the mortgagor.[2]

19. Notice.— Where a decree-holder applies for a personal decree against the judgment-debtor under this rule, the proper procedure for the Court is to issue notice to the judgment-debtor calling upon him to show cause why the application should not be granted and to hear his objection, if any.[1] But in the absence of fraud, a suit does not lie to set aside an *ex parte* personal decree under the rule, on the ground of failure to serve notice on the judgment-debtor.[2] An order directing execution to issue against the judgment-debtor personally without a supplemental decree under this rule should not be passed without notice to the judgment-debtor.[3]

20. Execution of personal decree.— An executing Court cannot entertain any question as to the validity of a personal decree which has become final.[1] (See Notes on S. 38 of the A. I. R. Commentaries on the Code of Civil

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('46) 33 AIR 1946 Lah 97 (102, 103): I L R (1945) Lah 355: 224 Ind Cas 135 (FB), *Kidar Nath* v. *Saraj-Ud-Din*. (Mortgage-debt subsisting but personal remedy in respect of principal barred by limitation—Covenant to pay interest independent of covenant to pay principal—Mortgagee can get personal decree for interest for period of six years preceding suit for sale.)

2. ('15) 2 AIR 1915 Cal 8 (8) (DB).
('27) 14 AIR 1927 P C 73 (74, 75): 54 Cal 500: 54 Ind App 129 (PC).
('21) 8 AIR 1921 Cal 456 (457) (DB).
('17) 4 AIR 1917 PC 85 (85) (PC).
[*See also* ('40) 27 AIR 1940 Oudh 90 (92): 15 Luck 95 (DB). (Compromise decree in mortgage suit providing for passing of preliminary decree and final decree—Decree also providing that if sale proceeds are found insufficient plaintiff was at liberty to apply for personal decree—Limitation for execution of the personal decree runs from the date of personal decree for purposes of S. 48, C. P. C.)]

O 34 Rule 6—Note 18.

1. ('08) 35 Cal 767 (772, 773) (DB).
†('07) 12 Cal W N 145 (147, 148) (DB).
('04) 28 Bom 630 (634) (DB).
2. ('22) 9 AIR 1922 Pat 529 (531): 1 Pat 387 (DB).

O 34 Rule 6—Note 19.

1. ('30) 17 AIR 1930 Lah 103 (104).
('16) 3 AIR 1916 Low Bur 20 (21): 8 Low Bur Rul 450. (But notice is not necessary possibly in cases in which the judgment and preliminary decree have expressly made him liable.)
2. ('12) 16 Ind Cas 5 (6) (DB) (All).
3. ('20) 7 AIR 1920 Cal 533 (534) (DB).
[*See also* ('15) 2 AIR 1915 All 397 (398): 38 All 7: 30 Ind Cas 792 (793) (DB). (Notice sent to the judgment-debtor—Latter not opposing application for personal decree—He cannot subsequently sue to set aside the decree.)]

O 34 Rule 6—Note 20.

1. ('17) 4 AIR 1917 Pat 330 (330, 331).
2. (1900) 2 Bom L R 225 (226, 227) (DB).
('49) 36 AIR 1949 East Punj 213 (215, 216) *Firm Daulat Ram* v. *Gurbaksh Singh*. [S. 34 applies to a personal decree under this rule.]
('45) 32 AIR 1945 Nag 289 (290) : ILR (1945) Nag '43 (DB), *Ratanlal Harlalji* v. *Mt. Sagarbani* (Order dismissing application for personal decree—Appeal lies.)

O 34 Rule 6—Note 21.

1. ('45) 32 AIR 1945 Mad 425 (425) : I L R (1946) Mad 299, *In re, Shanmukam*. (Application by assignee decree-holder under O. 21 R. 16 and O. 34, R. 6 for recognition of assignment and personal decree against defendant allowed—Appeal by defendant—Order on application under O. 34, R. 6 being

Procedure 4th (1944) Edn.) A mortgage decree, until it reaches the stage shown by the Transfer of Property Act, S. 90 (O. 34 R. 6), does not become a *money* decree to which S. 209 of the Code of 1882 (now S. 34) relates.[2]

If a personal decree passed under this rule is completely silent with respect to payment of future interest, a claim for the grant of future interest must be rejected by the executing Court.[3]

21. Appeal.— An order granting or refusing an application for a personal decree under the rule is a decree and appealable as such.[1] *Ad valorem* court-fee is payable on an appeal from such an order as well as on an appeal from a decree under the rule.[2] An application for a personal decree is not a "plaint" and an order returning it for presentation to the proper Court is therefore not appealable under Civil Procedure Code, O. 43 R. 1.[3] Where the original mortgage suit was valued at less than Rs. 5,000, an appeal from a personal decree in the suit lies under S. 21 of the Bengal, Agra and Assam Civil Courts Act (XII of 1887), to the District Judge and not to the High Court though the personal decree may be for a sum exceeding Rs. 5,000.[4]

22. Nature of proceedings under Rule 6.— Proceedings for a personal decree under this rule are not proceedings in *execution* but proceedings in the suit and the provisions of the Civil Procedure Code, Order 9 are, therefore, applicable thereto.[1]

23. Miscellaneous.

(1) An application for personal decree should be made to the Court which passed the decree for sale and not to the Court to which it was sent for execution.[1]

(2) A decree directing realisation from the other properties of the mortgagor if the mortgaged properties which are to be proceeded against first are not sufficient is not a *money* decree for purposes of registration.[2]

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decree, regular appeal and not miscellaneous appeal should be filed.)

('18) 5 AIR 1918 All 97 (97) : 40 All 553 (DB).

('33) 20 AIR 1933 All 429 (431) (DB). (Application under this rule held not maintainable—Order is decree.)

('32) 19 AIR 1932 All 336 (337): 54 All 428 (DB). (Appeal lies and no revision is competent.)

('45) 32 AIR 1945 Mad 425 (425, 426) : ILR (1946) Mad 299 *In re, Shanmugam.*

2. ('41) 28 AIR 1941 Pesh 56 (56) (DB).

('45) 32 AIR 1945 Mad 425 (425, 426) : ILR (1946) Mad 299 *In re. Shanmugam.*

('45) 32 AIR 1945 Mad 425 (425, 426): ILR (1946) Mad 299, *In re, Shanmugam.*

('45) 32 AIR 1945 Nag 289 (290): I L R (1945) Nag 643 (DB), *Ratanlal Harlalji* v. *Mt. Sagarbai.*

('18) 5 AIR 1918 All 97 (97): 40 All 553 (DB).

('24) 11 AIR 1924 All 292 (293) (DB).

†('13) 19 Ind Cas 971 (973) (DB) (Cal).

('15) 2 AIR 1915 Oudh 122 (123): 18 Oudh Cas 121.

('16) 3 AIR 1916 All 357 (358).

†('35) 62 Cal 568 (569): 164 Ind Cas 423 (424).

3. ('31) 18 AIR 1931 All 192 (193) (DB).

4. ('19) 6 AIR 1919 All 218 (219): 41 All 384 (DB)

O 34 Rule 6—Note 22.

1. ('30) 17 AIR 1930 All 841 (843): 52 All 839 (DB).

('32) 19 AIR 1932 All 466 (466) (DB). (Application under this rule is a proceeding in the suit.)

('30) 17 AIR 1930 Nag 188 (189): 26 Nag L R 154.

†('30) 17 AIR 1930 Rang 257 (258, 259): 8 Rang 316.

('06) 33 Cal 867 (870) (DB).

('05) 1 Nag L R 143 (145).

('36) 23 AIR 1936 Lah 388 (389). (Procedure applying to application under this rule is governed by Section 141.)

[*See* ('08) 35 Cal 767 (772) (DB) (*Ex parte* decree under R. 6 can be set aside under inherent power of Court.]

[*See also* ('43) 30 AIR 1943 Cal 372 (375): I L R (1943) 2 Cal 417 (DB). (An application under O. 34 R. 6, C. P. C., is an application for a new decree on the suit and is not an application for enforcing a judgment or decree.)

('48) 35 AIR 1948 411 123 (124): ILR (1947) All 791 (DB). *Zinul Hasan* v. *Rugujia Begam.*

('21) 8 AIR 1921 Pat 491 (493). (*Ex parte* decree passed by oversight under R. 6 can be set aside.)]

[**But see** ('06) 9 Oudh Case 288 (288).]

O 34 Rule 6—Note 23.

1. ('18) 5 AIR 1918 Mad 669 (670): 42 Ind Cas 953 (954, 955) (DB).

[*See* ('31) 18 AIR 1931 All 192 (192, 193)

(3) A simple mortgagee whose rights under the personal covenant have not been barred is a creditor of the mortgagor within S. 53 of the Transfer of Property Act and can sue to set aside an alienation of the other properties.[3]

(4) Order 20 Rule 11, Civil Procedure Code, empowering the Court to allow payment by instalments applies to an application for a personal decree under this rule.[4]

(5) A proceeding under this rule is not governed by S. 52 of the Transfer of Property Act because it is not a proceeding in which any right to *immovable* property is directly and specifically in question.[5]

(6) An assignment of the mortgage decree includes the supplemental decree under this rule.[6]

(7) So long as a decree has not been passed under this rule, it is open to the Court under O. 23 R. 3, Civil Procedure Code, to deal with any arrangement alleged to have been entered into between the parties in respect of the personal liability of the mortgagor and it makes no difference for this purpose whether liberty is reserved to the mortgagee in the preliminary or final decree for sale to make an application under this rule.[7]

Preliminary decree in redemption suit.

[a]R. 7. [New: Act IV of 1882, S. 92.] (1) In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree—

(*a*) ordering that an account be taken of what was due to the defendant at the date of such decree for—

(*i*) principal and interest on the mortgage,

(*ii*) the costs of suit, if any, awarded to him, and

(*iii*) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage-security, together with interest thereon; or

(*b*) declaring the amount so due at that date; and

(*c*) directing—

(*i*) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (*a*), or from the date on which such amount is declared in Court under clause (*b*), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10 together with subsequent interest on such sums respectively as provided in rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff at his cost free from the mortgage and from all incumbrances created by the defendant or any person claiming under

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(DB).]

2. ('09) 2 Ind Cas 511 (511) (DB) (Bom).
[**See however** ('33) 20 AIR 1933 Mad 63 (64): 56 Mad 339 (DB). (Mortgage decree for sale imposing personal liability in case of deficiency—Set-off can be given.)]

3. ('16) 3 AIR 1916 Mad 494 (494): 29 Ind Cas 62 (63) (DB).
[**See however** ('34) 21 AIR 1934 All 1064 (1065) (DB).]

4. ('11) 11 Ind Cas 736 (736) (DB) (Cal).

5. ('30) 17 AIR 1930 Oudh 93 (95): 5 Luck 625 (DB).

6. ('20) 7 AIR 1920 Pat 462 (463) (DB). (Even if that decree is not expressly mentioned in the deed of assignment.)

7. ('36) 23 AIR 1936 Mad 34 (39): 59 Mad 188 (FB).

him, or, where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary, put the plaintiff in possession of the property; and

(*ii*) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interests, the defendant shall be entitled to apply for a final decree—

(*a*) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold, or

(*b*) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

[See Rules 2, 4 and 9.]

a. See the foot-note to the text of Rule 2 of this Order.

Synopsis

1. Analogous law.
2. Amendments after 1908.
3. Scope of the rule.
4. Mode of taking accounts—Sub-rule (1), clause (a).
5. Interest.
6. Costs.
7. Subsequent costs, charges and expenses.
8. Subsequent interest as provided in Rule 11.
9. Pays into Court on a day within six months.
10. "Shall deliver up to the plaintiff..... all documents."
11. "Shall.....re-transfer the property to the plaintiff."
12. Procedure on default of payment.
13. Extension of time fixed for payment.
14. Form of decree.
15. Second suit for redemption. See Note 40 on Section 11 of the A. I. R. Commentaries on the Code of Civil Procedure, 4th (1944) Edition.
16. Who can redeem.
17. Trespass by mortgagor before redemption.
18. Court-fee.
19. Jurisdiction.
20. Appeal.

1. Analogous law.— This rule corresponds to S. 92 of the Transfer of Property Act which ran as follows:

"92. In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree ordering—

that an account be taken of what will be due to the defendant for the mortgage-money and for his costs of the suit, if any, awarded to him, on the day next hereafter referred to, or declaring the amount so due at the date of such decree;

that, upon the plaintiff paying to the defendant or into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff or to such person as he appoints, all documents in his pos-

session or power relating to the mortgaged property, and shall re-transfer it to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, when the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff into possession of the mortgaged property; and that if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold."

2. Amendments after 1908.— The rule has been amended by Act XXI of 1929. The general changes thus introduced are on the same lines as in the case of Rr. 2 and 4: See Notes on Rr. 2 and 4. Further, in case of default by the mortgagor in payment of the mortgage-money within the prescribed time, the old rule provided for foreclosure except where the mortgage was simple or usufructuary and for sale except where the mortgage was one by conditional sale. The present rule has been amended to suit the changes in S. 67 of the Transfer of Property Act as amended by Act XX of 1929. See Notes on Rule 2.

3. Scope of the rule.—As this rule corresponds to Rules 2 and 4, in most particulars, the Notes on Rules 2 and 4 may be consulted. The decree under this rule is *preliminary* and incapable of execution without a final decree being passed.[1] Order 34 contemplates only one preliminary decree being passed. Hence, it is irregular to first pass a decree for accounts and then again another preliminary decree for redemption. Such a decree for accounts if passed will only have the effect of an interlocutory order for accounts.[2] Where it is found that the money due to the mortgagee has already been paid, a final decree may be at once passed without any preliminary decree.[3] (See Rule 9 which expressly provides for this). A decree for possession on condition of the plaintiff's paying a certain sum within a certain time is not a preliminary decree within this rule.[4]

The rule applies only to a suit for redemption against a mortgagee, and not by one co-mortgagor against another who has redeemed the entire mortgage, for redemption of the plaintiff's share of the mortgaged property.[5] A compromise decree in a redemption suit which is itself capable of execution, does not require a final decree.[6] No application for a final decree can be made under this rule and Rule 8 where a decree had been passed under Section 92 of the Transfer of Property Act.[7]

Ordinarily, a suit for *an account* on a mortgage cannot be asked for, unless the mortgagor asks for *redemption* also.[8] The burden, in suits for redemption, is

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Order 34 R. 7—Note 3.

1. ('20) 7 AIR 1920 Upp Bur 43 (44, 45): 3 Upp Bur Rul 183.
('98) 22 Bom 771 (773) (DB).
('22) 9 AIR 1922 Bom 127 (128): 46 Bom 348 (DB). (Rules 7 and 8 are somewhat inconsistent.)
[*See* ('14) 1 AIR 1914 Nag 8 (13): 10 Nag I L R 150. (Every preliminary decree in a mortgage suit must be followed by a final decree.)]
2. †('25) 12 AIR 1925 All 707 (708): 47 All 803 (DB).
('24) 11 AIR 1924 Bom 33 (35) (DB).
('24) 11 AIR 1924 Oudh 140 (140, 141).
[*See also* ('74) 1874 Bom P J 7 (7) (DB). (Sum due to mortgagee for repairs—To be decided before decree and not left for a later stage in execution.)]
3. ('22) 9 AIR 1922 All 479 (479).
('26) 13 AIR 1926 Mad 305 (306).
4. ('24) 11 AIR 1924 Lah 635 (636). (Decree is capable of execution as it is.)
('13) 19 Ind Cas 856 (857) (DB) (Lah).
5. ('23) 10 AIR 1923 Lah 129 (131) (DB).
6. ('26) 13 AIR 1926 Mad 644 (644, 645).
7. ('14) 1 A I R 1914 Mad 392 (392) (DB). (Final decree under Rule 8 can only be made where there is preliminary decree under the present rule.)
8. ('81) 5 Bom 614 (616) (DB). Under the Dekkhan Agriculturists' Relief Act, XVII of 1879, S. 16, an agriculturist mortgagor has no right to sue his mortgagee for accounts only.)
('81) 5 Bom 604 (607) (DB).
[*See also*† ('43) 30 AIR 1943 Bom 65 (65): I L R (1943) Bom 71 (DB). (Mortgagee put in possession under a decree obtained on default in payment according to an agreement—On construction of terms mortgagee held not liable to account but could

on the mortgagor of proving the existence of a mortgage.[9] The mere fact that the defendant denies the mortgage is no ground for decreeing possession without any payment by the mortgagor.[10] A conditional decree for redemption on payment of the amount due may be passed even though the Court finds that the mortgage has not been satisfied out of the mortgaged property as alleged in the plaint.[11]

The rule applies to proceedings under the United Provinces Agriculturists' Relief Act, XXVII of 1934.[12]

For an instance of a decree for redemption of a Malabar *kanom*, see [13]

4. Mode of taking accounts—Sub-rule (1), clause (a).—It has been seen under R. 2, that the object of the Legislature is that complete accounts of all amounts due by either party to the other in respect of the mortgage transaction should be taken in a mortgage suit, so as to avoid unnecessary litigation. A mortgagee in possession is bound to account for the rents and profits of the property (see the Transfer of Property Act, S. 76), and the mortgagor is entitled to deduct from the mortgage-money all sums thus owed by the mortgagee.[1] Where

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only be redeemed on payment of whole amount.)]

9. ('43) 30 AIR 1943 All 393 (399, 400):ILR (1944) All 76: 212 Ind Cas 238 (FB), *Gur Saran* v. *Shib Singh.* (Redemption, suit for —Plaintiff not proving specific mortgage set up by him—Suit is liable to be dismissed.)

('31) 18 AIR 1931 Oudh 378 (379) : 7 Luck 94.

†('03) 27 Bom 271 (275, 276) (DB).

('05) 2 All L Jour 62 (64) (DB).

[*See also* ('74) 1874 Bom P J 304 (306). (Plaintiff need establish only a *prima facie* case—Then onus is shifted to defendant 5. Bom H C R 159 followed.)

('86) 1886 Bom P J 247. (Do.)]

10. ('69) 6 Bom H C R AC 9 (11, 12) (DB). (Plaintiff offered payment—Defendant denied mortgage *in toto*—Defendant mortgagee not entitled to costs of suit.)

11. ('80) 1 All 524 (525) (DB).

('01) 24 Mad 408 (411) (DB). (A mortgagor may plead in the alternative that the mortgage-money has been paid or that he is prepared to pay any sum that may still be found due.)

12. ('43) 30 AIR 1943 Oudh 433 (435): 19 Luck 286. (Hence Court has power to extend the time fixed for payment.)

13. ('46) 33 AIR 1946 Mad 251 (252): 225 Ind Cas 106 *Chathu Nayar* v. *Janaki Amma.* (Where a decree for redemption of a kanom directs delivery of possession of the property by the defendant to the plaintiff on the plaintiff depositing in Court the kanom amount and the value of improvements due to the defendant, the deposit of the aforesaid amounts though a condition precedent to the recovery of possession cannot be said to be a condition precedent to the filing of an execution petition by the plaintiff to recover possession.) NOTE:— In the case of a regular redemption decree payment of the mortgage money would be a pre-requisite for applying for final decree for redemption.

Order 34 R. 7—Note 4.

1. ('66) 1 Agra 132 (132 (DB). (Mortgagee not to be charged interest on income from property—But the income should be deducted from the interest due.)

†('99) 26 Cal 1 (7): 25 Ind App 241 (PC). Mortgagee entitled to deduct from the income sums spent properly for repair, etc.)

†('72) 14 Moo Ind App 443 (451) (PC). (Income from property to be first deducted from interest due to mortgagee.)

('66) 5 Suth W R 271 (276) (DB). (Nature of mortgagee's account and its proof explained.)

('72) 18 Suth W R 65 (67) (DB). (Surplus of income after deducting interest should be deducted from principal.)

('14) 1 AIR 1914 Mad 661 (661, 662): 21 Ind Cas 701 (702) (DB). (Mortgagee is bound to give credit to the mortgagor for all sums agreed to be paid by him but which he did not pay.)

('18) 5 AIR 1918 Mad 587 (588) (DB). (Mortgagee in possession liable to account for rents and profits, even after preliminary decree.)

('10) 13 Oudh Cas 32 (34): 5 Ind Cas 444 (445). (Accounts should be settled though not claimed by plaintiff.)

('27) 14 AIR 1927 Nag 302 (302).

('27) 14 AIR 1927 Oudh 208 (208). (Mortgagee to take part of usufruct for interest and pay the balance to mortgagor under the terms of the deed—Such balance can be claimed in the redemption suit.)

†('37) 24 AIR 1937 All 337 (339, 340) (DB).

[*See* ('70) 2 N W P H C R 207 (208, 209) (DB). (In redemption suits accounts must be made up before a decree is passed.)

('02) 26 Bom 363 (372) (DB). (Judge has to decide on the accuracy of the accounts presented by the parties.)]

[*See also* ('27) 14 AIR 1927 All 713 (713). (Rent payable by mortgagee but paid by mortgagor should be deducted from the mortgage-money.)

('32) 19 AIR 1932 Oudh 255 (260, 263, 264): 8 Luck 40 (DB). (Mortgagee getting possession also of properties exempt from mortgage—He obtained decrees for past rents against mortgagor as tenant—He is liable

the mortgagee has been in possession of the mortgaged property, the burden is on him to prove that the mortgage has not been satisfied out of the usufruct of the property.[2] In a suit to redeem a puisne mortgagee who has redeemed a prior mortgage, the mortgagor is liable to pay the amounts of both the mortgages.[3] Where a mortgagee is entitled to possession under his mortgage but has been obliged to file a suit against the mortgagor in order to obtain possession he is entitled to add the costs of such suit to the mortgage-money and to demand the same in the suit for redemption against him by the mortgagor.[4] (See the Commentaries on the Transfer of Property Act, Ss. 72 and 76.)

Where a prior mortgagee sues on his mortgage without impleading the puisne mortgagee, and purchases the property in execution of his decree, the puisne mortgagee subsequently suing for redemption, is bound to pay, not the sum for which the property was *sold*, but the amount due on the mortgage up to the date on which the prior mortgagee *obtained possession* after the purchase.[5] A Court can investigate accounts with a view to seeing whether the mortgage has been satisfied out of the usufruct, even though, in doing so, it has to deal with questions relating to properties lying outside its jurisdiction.[6] In a suit for the redemption of two distinct mortgages the accounts should be taken separately in respect of each mortgage.[7] A mortgagee who refused a valid tender of the mortgage-money does not thereby cease to be a mortgagee, and the subsequent accounts between him and the mortgagor should be included in the suit for redemption.[8] In a suit for redemption of a mortgage to which the sub-mortgagee also is joined as a party, the decree should direct accounts to be taken of the mortgage as well as of the sub-mortgage and should provide that out of the mortgage-money, the sub-mortgagee should be paid the amount due to him and the balance, if any, should be paid to the mortgagee.[9]

In suits for redemption the account should be taken up to the date of actual redemption or sale as the case may be.[10]

While passing a preliminary a decree for redemption under this rule the Court has power to appoint a commissioner for taking accounts of the mortgaged property.[11]

5. Interest.— In a suit for redemption, the mortgagee's right to interest is not limited to that accruing during the six years preceding the suit.[1] Where a mortgagee who is entitled to possession obtains a decree for possession, he is not entitled

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to account therefor in suit for redemption— But a separate suit for mesne profits accruing after date fixed for payment and before delivery of possession is not barred.)]

See O. 34 R. 2, Note 13; R. 9, Note 3 and also the following cases:

('26) 13 AIR 1926 Oudh 113 (118).

('10) 6 Ind Cas 336 (337, 338) (DB) (Cal).

2. ('83) 1883 All W N 90 (91). (Case governed by Regulation XV of 1793, S. 11, under which mortgagee was bound to produce and prove his accounts.)

3. ('05) 27 All 308 (310) (DB). (Plaintiff's failure to offer to redeem the first mortgage in his suit for redemption against subsequent mortgagee—Dismissal of plaintiff's suit held proper.)

4. ('41) 28 AIR 1941 Oudh 498 (501, 502): 16 Luck 812 (DB).

5. ('01) 24 All 185 (187) (DB).

('14) 1 AIR 1914 All 42 (42): 36 All 123 (DB).

6. ('80) 1 All 431 (432, 433) (DB).

7. ('90) 14 Bom 19 (23, 24) (DB).

8. †('07) 34 Cal 223 (228, 229) (DB).

9. (91) 15 Bom 692 (693) (DB).

('17) 4 AIR 1917 Oudh 141 (143): 42 Ind Cas 66 (67).

('06) 28 All 638 (641) (DB).

Also see O. 34 R. 2, Note 14.

10. ('08) 30 All 36 (37).

†('18) 5 AIR 1918 Mad 587 (588) (DB).

('12) 16 Ind Cas 184 (187) (DB) (Mad). (Accounts should be taken up to the date when possession is delivered.)

[*See also* ('35) 22 AIR 1935 Bom 122 (123) (DB). (Section 13 of the Dekkhan Agriculturists' Relief Act provides for account only up to date of suit—Thereafter this rule applies.)]

('35) 22 AIR 1935 Bom 97 (98) (DB). (Do.)

('38) 25 AIR 1938 Mad 405 (411) (DB).]

Also see O. 34 R. 9, Note 3.

('47) 34 AIR 1947 All 22 (24): 230 Ind Cas 225 (DB), *Triloki Nath* v. *Dalsinger*. (A Form No. 7A in Appendix D to Sch I, C. P. C. expressly provided for such appointment).

O. 34 R. 7—Note 5.

1. ('14) 1 AIR 1914 Lah 344 (345) (DB).

†('90) 14 Bom 113 (114, 115) (DB).

to any interest between the date of the decree and the date of the delivery of possession.[2]

In the absence of anything to contrary in the mortgage deed interest constitutes a charge on the property.[3]

6. Costs.— In a suit for redemption, the mortgagee defendant is entitled to all costs unless he has refused a valid tender of the mortgage-money or has otherwise been guilty of misconduct.[1] Such costs are part of the mortgage-money and in the absence of any express provision in the decree to the contrary, are not personally recoverable from the mortgagor.[2] Where the *plaintiff* mortgagor has been awarded costs in such a suit, he is entitled to set off the amount of his costs against the mortgage-money payable by him.[3]

7. Subsequent costs, charges and expenses.—The amendments introduced by the Transfer of Property (Amendment) Supplementary Act, XXI of 1929, have made clear that the mortgagee is entitled to charges and expenses properly incurred by him in respect of the mortgage security even *subsequent* to the preliminary decree. Although on this point, the rules were not so explicit before the above amendment as they are now, the law was recognized to be the same even under the old rules.[1]

8. Subsequent interest as provided in Rule 11. — Rule 7 sub-r. (1) cl. (c) (i) provides for the payment, by the mortgagor, of interest subsequent to the date fixed for payment under the preliminary decree up to the date of the actual realization of the mortgage-money. This point was not conceded under the old rules.[1]

9. Pays into Court on a day within six months.— A decree under this rule should state a period within which the mortgage-money should be paid.[1]

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2. ('89) 1889 All W N 177 (177). (Mortgagee was negligent in not executing his decree earlier.)

('43) 30 AIR 1943 Mad 109 (110): 207 Ind Cas 351. *Subramani* v. *Xisalakshi Ammal.* (Mortgagee to remain in possession in lieu of interest—After expiry of 3 years from date fixed for payment of principal interest at 12 P. C. P. A. payable in addition—Mortgagee is entitled to recover such interest in a suit for redemption.)

Order 34 R. 7—Note 6.

3. ('84) 8 Bom 190 (193) (DB).

('32) 19 AIR 1932 Oudh 123 (134): 7 Luck 454 (DB).

('91) 15 Bom 644 (645, 646) (DB). (Assumed.)

(1900) 13 C P L R 74 (75 to 77). (Where a mortgagor's notice asking mortgagee to submit full and true account was refused by the mortgagee—*Held*, mortgagee was not guilty of misconduct.)

('18) 5 AIR 1918 Mad 942 (945) (DB). (Laches.)

('05) 27 All 313 (317, 320) (DB).

('26) 13 AIR 1926 Mad 405 (406). (Costs of mortgagee in redemption suit are discretionary where he raises questions denying mortgagor's right to redeem.)

('24) 11 AIR 1924 Bom 172 (173). (Mortgagee contesting suits on the ground of transaction being sale and not mortgage—Mortgagee refused costs.)

('74) 1874 Bom P J 7 (7) (DB). (Mortgagee setting up fabricated mortgage—Costs refused.)

('46) 1946 ILR 97 (102) (DB), *Sagarmal* v. *Jwalasahai.* (The provisions of O. 34, R. 7 apply to the preliminary decree in a mortgagee suit and in such a decree only costs of the suit can be awarded to one party or to another. It is only at the time of final decree that the Court can take into consideration other costs, charges and expenses incurred by the mortgagee since the date of the preliminary decree under O. 34, R. 10 of C. P. Code.)

2. ('26) 13 AIR 1926 All 424 (425): 48 All 425 (DB).

†('25) 12 AIR 1925 All 492 (494) (DB). (Whether costs are a charge on the mortgaged property is a matter of interpretation of the Court's intention—Per Mukerji, J.)

Also see O. 34 R. 5, Note 26.

3. ('79) 4 Cal 742 (744). (Notwithstanding any claim that the defendant's attorney might have against the defendant in respect of the defendant's costs of the suit.)

('93) 17 Bom 32 (34).

Order 34 R. 7—Note 7.

1. ('18) 5 AIR 1918 Cal 1039 (1040): 44 Cal 448 (DB). (Suit for sale by mortgagee.)

Order 34 R. 7—Note 8.

1. ('26) 13 AIR 1926 Oudh 306 (307) (DB).

Order 34 R. 7—Note 9.

1. ('09) 1 Ind Cas 71 (72) (DB) (Cal).

('13) 1913 Pun Re No. 68: 18 Ind Cas 48 (49).

('74) 1874 Bom P J 7 (7) (DB).

This period may be *less* than six months.[2] In computing the period so fixed the date of the decree should be excluded.[3]

If the decree for redemption fixes no period for payment it must be taken as an ordinary decree to which Art. 182 of the Limitation Act would apply.[4] But where in a suit for sale by a puisne mortgagee, the preliminary decree directed the plaintiff to pay off the prior mortgage before bringing the mortgaged property to sale, but fixed no period within which the prior mortgage was to be paid off, it was held that, in this respect, the decree was a decree for redemption and the period allowable for payment of the prior mortgage amount could not exceed six months.[5] The rule requires the payment to be made *into the Court*. As to whether a payment made out of Court can be recognized by the Court, see Note 14 on Rule 5.

10. "Shall deliver up to the plaintiff.....all documents."— On payment of the mortgage-money, the mortgagor is entitled to the return of the mortgage bond,[1] and other documents relating to the title to the land. But where the mortgagee defendant has lost the title deeds, the *executing Court* cannot, in the absence of any express provision in the decree to that effect, compel him to give security for the value of the property.[2]

11. "Shall.....re-transfer the property to the plaintiff."— The mortgagee is bound, on redemption, to re-transfer the property to the mortgagor, free from the mortgage and from all encumbrances created by him. Thus, if he has leased the property to another, the lease is not binding on the mortgagor who can, therefore, eject the lessee as a trespasser.[1] The property must be transferred along with the *accretions*, if any, to the property. Thus, where the mortgagee taking advantage of his position as such, has taken a mortgage of the holding of a tenant, the mortgagor is entitled, on redemption, to the possession of the holding, provided he pays the amount due on its mortgage.[2] The rule requires that a mortgagee with possession should, on redemption, put back the mortgagor in possession.[3]

12. Procedure on default of payment.— The rule provides that on default by the mortgagor in the payment of the mortgage-money within the time allowed by the Court, the mortgagee is entitled to apply for a final decree for sale or foreclosure.[1] The present rule provides for a *decree for sale* in the case of

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2. ('27) 14 AIR 1927 PC 17 (17) (PC).
3. ('88) 1888 All W N 80 (80, 81).
4. ('13) 1913 Pun Re No. 68: 18 Ind Cas 48 (49).
('09) 1 Ind Cas 71 (72) (DB) (Cal).
('05) 28 Mad 211 (213) (DB).
('99) 23 Bom 592 (594) (DB).
('89) 13 Bom 567 (570, 571) (DB). (Redemption decree—No time fixed—Payment within 3 years open.)
5. ('21) 8 AIR 1921 All 56 (58): 43 All 320 (DB).

Order 34 R. 7—Note 10.

1. *See* ('26) 13 AIR 1926 All 741 (743): 49 All 78 (DB).
2. ('02) 12 Mad L Jour 63 (63, 64) (DB).

Order 34 R. 7—Note 11.

1. ('06) 3 All L Jour 517 (519).
2. ('09) 3 Ind Cas 395 (396, 397) (DB) (Cal).
3. ('10) 33 Mad 71 (73).
[*See also* ('10) 6 Ind Cas 336 (338) (DB) (Cal). (Mortgagor entitled to possession on payment as per decree—Subsequent possession by mortgagee renders him liable for mesne profits in subsequent suit by mortgagor.)]

Order 34 R. 7—Note 12.

1. ('42) 29 AIR 1942 Pesh 96 (96). (It is only the mortgagee and not the mortgagor who is entitled to apply for a decree for sale.)
[*See* ('01) 25 Bom 101 (103) (DB). (Omission to draw up proper decree under S. 92 of the Transfer of Property Act did not deprive mortgagee of his right to relief under S. 93.)]
[*See also* ('35) 22 AIR 1935 Mad 478 (479) (DB). (Mortgage executed by son—Suit for cancellation by father—Son found to be minor at the time of execution of mortgage—Debt found to be binding on family—Order that mortgage is to be cancelled on father paying amount within certain period—Amount not so paid—Mortgagee is entitled to apply under O. 34 R. 7 for sale of properties.)]
('74) 1874 Bom P J 7 (7) (DB). (Procedure on default to be provided for in the decree.)

any mortgage other than a usufructuary mortgage, a mortgage by conditional sale or an anomalous mortgage which provides only for foreclosure. It provides for a *decree for foreclosure* in the case of a mortgage by conditional sale or an anomalous mortgage which provides only for foreclosure. Under the rule, as it was before Act XXI of 1929, a decree for sale was provided for in the case of any mortgage other than one by *conditional sale*. And a decree for foreclosure was provided for in the case of any mortgage other than a simple or usufructuary one. These changes are in conformity with the changes in S. 67 of the Transfer of Property Act made by Act XX of 1929. See Notes on R. 3 for further information. The undermentioned cases[2] decided under the old rule are now only of academic interest.

In the case of a usufructuary mortgage, the default by the mortgagor in the payment of the mortgage money within the time allowed by the preliminary decree does not deprive him of his right to make the payment and to apply for final decree at any time.[3] The provisions of R 7 (1) (c) (ii) do not apply to a usufructuary mortgage and therefore the usufructuary *mortgagee* cannot apply for final decree on default of payment by the mortgagor.[4]

13. Extension of time fixed for payment.— The amendments in this rule and in Rule 8 made by Act XXI of 1929 make it clear that the Court can extend the time fixed for payment from time to time and that, till a decree for foreclosure is actually passed, or till the sale is *confirmed*, the mortgagor can redeem the property. The undermentioned cases[1] decided under the old rules have only an academic interest now. Time for payment may be extended though the period originally fixed may have expired.[2] The use of the expression "extend the time" in the new rule instead of the expression "postpone the day" which occurred in the proviso to old Rule 8 makes this clear.[3] Extension of time may be granted irrespective of the *nature of the mortgage* in question. Even though a decree for redemp-

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('31) 18 AIR 1931 Mad 592 (595): 54 Mad 708 (DB). (Subsequent mortgagee's redemption suit—Prior mortgagee defendant is a decree-holder and his transferee of the decree can apply for final decree on default of payment.)

2. ('99) 2 Oudh Cas 196 (198).
('01) 2 Upp Bur Rul 514.
('15) 2 AIR 1915 Low Bur 100 (101).
('02) 26 Bom 121 (127) (DB). (Usufructuary mortgage—Decree for foreclosure held improper.)
('28) 15 AIR 1928 Lah 355 (357) (DB). (Anomalous mortgage—A decree debarring the mortgagor from redeeming the mortgaged property was held proper.)
('46) 33 AIR 1946 Mad 38 (40, 41): 224 Ind Cas 543. *Angammal* v. *Muhammad Sulaiman.*
('46) 33 AIR 1946 Pat 99 (99, 100): 24 Pat 575 (DB). *Md. Azim* v. *Md. Sultan.*
('46) 33 AIR 1946 Pat 99 (99, 100): 24 Pat 575 (DB). *Mohd. Azim* v. *Md. Sultan.*

Order 34 R. 7—Note 13.

1. ('01) 2 Upp Bur Rul 582.
('93-1900) 1893-1900 Low Bur Rul 174.
('02) 5 Oudh Cas 82 (86, 87) (DB).
('88) 1888 All W N 119 (119) (DB).
('84) 1884 All W N 329 (330) (DB.)
('04) 1 All L Jour 300 (301).
('93) 16 Mad 214 (219) (DB).
('25) 12 AIR 1925 Oudh 255 (256): 28 Oudh Cas 46.
('24) 11 AIR 1924 All 818 (821, 822, 824): 46 All 864 (DB).
('91) 13 All 400 (403).
('94) 16 All 65 (68).
('89) 13 Bom (106, 108, 109) (DB).
('90) 13 Mad 267 (268) (DB).
('96) 19 Mad 40 (48, 52) (FB). (Mortgagor can redeem if mortgagee applies for sale; but he cannot apply himself for execution of his decree for redemption after the expiration of the time limited.)
('91) 15 Bom 644 (646) (DB).
('02) 24 All 479 (481) (DB).
('15) 2 AIR 1915 All 302 (302).

2. ('33) 20 AIR 1933 All 157 (158) (DB).

†. ('33) 20 AIR 1933 Mad 762 (763, 764): 57 Mad 398 (DB). (Suit for declaration of mortgagee as invalid and for possession—Portion of mortgage found to be valid and decree for possession conditional on payment of certain amount within certain period which was made charge on property—Decree is redemption decree and Court has power under O. 34 R. 7 to extend time for payment.)

†('06) 2 Nag L R 137 (140, 141, 143). (The burden of showing "good cause" for enlargement of time is on the mortgagor.)
('09) 2 Ind Cas 466 (466, 467) (All). (The application for extension of time need not be in writing.)
('02) 26 Bom 121 (126) (DB).
('27) 14 AIR 1927 Bom 175 (176) (DB).

3. *See* ('02) 26 Bom 121 (126) (DB).

4. ('28) 15 AIR 1928 All 480 (481): 50 All 882 (DB). (Mortgage by conditional sale.)
('46) 33 AIR 1946 Pat 99 (100): 24 Pat 575 (DB), *Mohd. Ozim* v. *Mohd. Sultan.*

tion may have been passed by the appellate Court, an application for extension of time should be made to the Court of *first instance* and not to the appellate Court.[5] Where, in a partition suit, the alienation of a certain property belonging to the joint family was found to be binding only to a limited extent and a decree was passed for possession thereof on condition of a certain amount being paid to the alienee within a fixed date, it was held that this was in effect a decree for redemption and that the Court could extend the time fixed for payment.[6] Section 148 of the Code does not apply to the extension of time fixed by a decree for redemption.[7] The limitation for an application for a final decree for redemption runs from *the date of payment* although the Court may have extended the period for payment originally fixed.[8] Where a preliminary decree is *simply confirmed* in appeal, there is a conflict of decisions as to whether the period fixed runs from the date of the decree of the Court of first instance. See Note 9 on S. 148 of the A. I. R. Commentaries on the Code of Civil Procedure, 4th (1944) Edition.

See also Note 18 on Order 34 Rule 2 and Note 7 on Order 34 Rule 8.

14. Form of decree.— For the form of a preliminary decree under this rule see Appendix D, Form Nos. 7, 7A, 7B and 7C. The decree ought not to contain unnecessary declarations.[1] It should not direct that the defendant should not be evicted till he has cut the crops sown by him.[2]

15. Second suit for redemption.— See Note 40 on Section 11 of the A. I. R. Commentaries on the Code of Civil Procedure, 4th (1944) Edition.

16. Who can redeem.— If a party, whose title is to some extent imperfect at the date of the institution of the suit, seeks to redeem and is able to prove a perfect title at the hearing of the case, he should have a decree for redemption. Thus, if a purchaser in execution sale of the equity or redemption sues for redemption before he has obtained a certificate of sale, but obtains such certificate before the hearing, he should have a decree for redemption.[1] In a suit by a purchaser of the equity of redemption, for redemption, the mortgagee cannot question the adequacy of the consideration for the sale.[2] See also S. 91 of the Transfer of Property Act.

17. Trespass by mortgagor before redemption.— Where a redemption decree has been made but the mortgagor, without having made any payment, unlawfully trespasses upon the property and dispossesses the mortgagee in possession, the latter can sue to recover back possession.[1]

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5. † ('09) 31 All 328 (329) : 2 Ind Cas 220 (221) (DB).
('17) 4 AIR 1917 All 239 (239) : 39 All 396 (DB).
('16) 3 AIR 1916 Mad 694 (695): 39 Mad 876: 31 Ind Cas 240 (240) (DB).
('01) 23 All 88 (89) (DB).
6. ('20) 7 AIR 1920 Mad 99 (100, 101): 43 Mad 357 (DB).
[*See also* ('33) 20 AIR 1933 Mad 762 (763, 764): 57 Mad 398 (DB).]
[*But compare* ('15) 2 AIR 1915 Oudh 226 (227): 18 Oudh Cas 58. (Powers to enlarge time can be exercised only in cases to which rule strictly applies.)]
7. ('12) 34 All 388 (390): 14 Ind Cas 240 (241) (DB).
8. † ('27) 14 AIR 1927 Bom 32 (34): 50 Bom 730 (DB).

Order 34 R.7—Note 14.

1. † ('81) 9 Ind App 21 21 (25, 26) (PC).
[*See* ('02) 1 Low Bur Rul 186 (187, 188, 189). (For form and contents of a redemption decree.)]
2. ('86) 8 All 502 (508, 509) (DB).

Order 34 R. 7—Note 16.

1. † (82) 6 Bom 139 (142, 143) (DB).
[*See also* ('29) 16 AIR 1929 Bom 337 (338) (DB). (Court can take note of events happening subsequent to suit and mould decree accordingly.)]
2. ('88) 1888 Bom P J 91 (91) (DB).
† ('68) 3 Agra 30 (31) (DB). (Passing of consideration cannot be questioned.)

Order 34 R. 7—Note 17.

1. ('25) 12 AIR 1925 Oudh 255 (255, 256): 28 Oudh Cas 46.

18. Court-fee.— See Section 7, Para. (ix) and Notes thereon in the A. I. R. Commentaries on the Court-fees Act, 2nd (1949) Edition.

19. Jurisdiction.— In suits for redemption, the value of the suit for purposes of jurisdiction is the amount of the *principal money* secured by the mortgage, and not the value of the *property* mortgaged.[1]

20. Appeal.— See Notes on Rules 2 to 6. Also see Notes on Section 97 of the A. I. R. Commentaries on the Code of Civil Procedure, 4th (1944) Edition. See also the undermentioned case.[1]

Final decree in redemption suit.

[a]R. 8. [New: Act IV of 1882, S. 93.] (1) Where, before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of this rule, the plaintiff makes payment into Court of all amounts due from him under sub-rule (1) of rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a final decree or, if such decree has been passed, an order—

(*a*) ordering the defendant to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(b) ordering him to re-transfer at the cost of the plaintiff the mortgaged property as directed in the said decree,

and, also, if necessary,—

(*c*) ordering him to put the plaintiff in possession of the property.

(2) Where the mortgaged property or a part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the plaintiff, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the defendant in this behalf,—

(*a*) in the case of a mortgage by conditional sale or of such an anomalous mortgage as is hereinbefore referred to in rule 7, pass a final decree declaring that the plaintiff and all persons claiming under him are debarred from all right to redeem the mortgaged property and, also, if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property; or

(*b*) in the case of any other mortgage, not being a usufructuary mortgage, pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale

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Order 34 R. 7—Note 19.

1. ('26) 13 AIR 1926 Oudh 346 (348): 2 Luck 221 (DB).

Order 34 R. 7—Note 20.

1. ('34) 21 AIR 1934 Pat 97 (99). (Direction by Court with regard to the mode in which account is to be taken is not preliminary decree and the order is not appealable as such.)

(after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same.

[See Rules 3, 5 and 7. See also C. P. C., O. 21 R. 89.]

a. See the foot-note to the text of Rule 2 of this Order.

Synopsis

1. Analogous law.
2. Amendments after 1908.
3. Scope of the rule.
4. Decree for redemption.
5. Redemption after due date.
6. Final decree for foreclosure or sale —Sub-rule (3).
7. Power to enlarge time.
8. Limitation.
9. Appeal.

1. Analogous law.— The rule corresponds to S. 93 of the Transfer of Property Act which ran as follows:

"93. If payment is made of such amount and of such subsequent costs as are mentioned in S. 94, the plaintiff shall, if necessary, be put into possession of the mortgaged property.

If such payment is not so made, the defendant may (unless the mortgage is simple or usufructuary) apply to the Court for an order that the plaintiff and all persons claiming through or under him be debarred absolutely of all right to redeem, or (unless the mortgage is by conditional sale) for an order that the mortgaged property be sold.

If he applies for the former order, the Court shall pass an order that the plaintiff and all persons claiming through or under him be absolutely debarred of all right to redeem the mortgaged property, and may, if necessary, deliver possession of the property to the defendant.

If he applies for the latter order, the Court shall pass an order that such property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance be paid to the plaintiff or other persons entitled to receive the same.

On the passing of any order under this section the plaintiff's right to redeem and the security shall, as regards the property affected by the order, both be extinguished:

Provided that the Court may, upon good cause shown, and upon such terms, if any, as it thinks fit, from time to time postpone the day fixed under S. 92 for payment to the defendant."

See the undermentioned case.[1]

2. Amendments after 1908.— The rule was amended by the Transfer of Property (Amendment) Supplementary Act, XXI of 1929, on the same lines as

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Order 34 R. 8—Note 1.

1. ('48) 35 AIR 1948 Oudh 238 (241, 242, 243, 244): 22 Luck 325 (DB). *Prayag Narain Trivedi* v. *Mohd. Ebrahim.* (There is nothing in the wording of the unamended S. 93 or any other section of the Transfer of Property Act to lead to the conclusion that a decree for sale, if not executed within the time allowed, operates as a decree for foreclosure. In fact in the case of a usufructuary mortgage, a decree for foreclosure is not to be passed. Hence, a failure to execute a decree and the order absolute for sale within the time allowed will not divest the mortgagor of his title to the mortgaged property, in the case of an usufructuary mortgage.
Where after the lapse of time for the execution of an order absolute for sale, the mortgagor and mortgagee continue to be unaware that the security had become extinguished, and that the mortgagor was entitled to get back possession of the property and the mortgagee continues in possession, such possession cannot be pleaded to be adverse to that of the mortgagor.)

Rules 3 and 5. The provision as to extension of time has been transferred to Rule 7: See Notes on Rules 3, 5 and 7. Under the old rule, a decree for sale could not be passed in the case of a mortgage by *conditional sale* only. Under the present rule, no decree for sale can be passed even in the case of *usufructuary* mortgages.

3. Scope of the rule.— The decree under Rule 7 is only a preliminary decree and a final decree under the present rule is necessary to terminate a suit for redemption.[1] As has been seen already in Note 4 on Rule 7, in a redemption suit there should be a complete settlement of all accounts between the parties in relation to the mortgage.[2] See also Rules 9 and 10, which show that accounts should be taken right up to the date of actual payment of mortgage-money and re-transfer of possession.[3]

4. Decree for redemption.— On payment of the mortgage-money before a final decree for sale or foreclosure is passed, the mortgagor is entitled to a final decree for redemption. A mortgagor can, however, exercise the right of redemption in the case of a decree for sale, at any time before the sale is confirmed though the final decree for sale may have been passed in the meanwhile. If the redemption is *after the final decree* for sale, the mortgagor will get an *order* for the delivery of the title deeds, etc., as indicated in sub-rule (1). If the mortgagor seeks to redeem the property *after the sale* and before it is confirmed, he must deposit for payment to the auction-purchaser five per cent. of the purchase-money in addition to the mortgage-money. Under sub-rule (1) all rights acquired by the mortgagee under the mortgage must, on redemption, be re-transferred to the mortgagor.[1] The mortgagee in possession need not vacate possession till he has received the *full* mortgage-money.[2]

A mortgagor is not disentitled to a decree for redemption simply because he has attached under his decree for costs against the mortgagee, the mortgage-money deposited by himself in Court to the mortgagee's credit, and withdrawn a portion of it.[3]

The mortgagee is not entitled to notice of payment into the Court of the mortgage-money under the preliminary decree.[4] Nor is the mortgagor required to make an application to the Court before paying in the money.[5] The refusal of the treasury officer to accept the mortgage-money though paid within the proper time does not amount to default by the judgment-debtor.[6] Where the mortgagor has paid into the Court the sum ascertained by the first Court, pending an appeal by the mortgagee as to the amount due, the mortgagor is entitled to credit for the amount paid though it *lapsed* to the Government through the failure of the mortgagee to take the money out of Court.[7] Payment to an unauthorized person does not discharge a mortgage.[8]

Order 34 R. 8—Note 3.

1. ('22) 9 AIR 1922 Bom 127 (128): 46 Bom 348 (DB).
('08) 33 Bom 273 (277).
2. ('20) 7 AIR 1920 Mad 531 (532) (DB).
3. [*See*] ('49) 36 AIR 1949 Mad 613 (614), *Satyanarayana* v. *Suryanarayana.* (Suit for redemption—Mortgager is entitled to have account taken of profits received by mortgager in possession for period after preliminary decree and before final decree—O. 34 read as a whole clearly indicates that such an account must necessarily be taken even in the absence of direction in the preliminary decree.)
('40) 27 AIR 1940 Cal 550 (552): ILR (1940) 1 Cal 544. (*A*, a mortgagee suing on his mortgage without impleading *B*, the assignee of equity of redemption, obtaining decree, buying property under the decree and entering into possession—*B* subsequently suing for redemption—Suit decreed —*B* depositing in Court the decretal amount but *A* appealing from the decree and continuing in possession—Appeal dismissed —*B* cannot claim accounts for the period subsequent to the deposit in Court. AIR 1925 Rang 13: 2 Rang 382 distinguished as being a case of a usufructuary mortgagee on whom there is a statutory obligation to account.)

Order 34 R. 8—Note 4.

1. ('20) 7 AIR 1920 Lah 239 (240).
2. ('20) 7 AIR 1920 Oudh 24 (24).
3. ('04) 27 All 392 (394, 395) (DB).
4. ('24) 11 AIR 1924 Mad 102 (102) (DB).
5. ('25) 12 AIR 1925 Oudh 255 (256): 28 Oudh Cas 46.
6. ('29) 16 AIR 1929 All 881 (882) (DB).
7. †('12) 16 Ind Cas 830 (831) (PC).
8. ('24) 11 AIR 1924 Lah 738 (740) (DB).

Order 34 R. 8—Note 5.

('46) 33 AIR 1946 Mad 38 (39 to 41): ILR

5. Redemption after due date.— The present rule makes it clear that though a mortgagor has failed to redeem the mortgaged property within the time allowed by the Court, he is entitled to do so at any time before a final decree for foreclosure is passed or a sale of the mortgaged property under a final decree for sale is confirmed. See Note 8.

In the case of a usufructuary mortgage it is only the plaintiff mortgagor who can apply for final decree. The mortgagee has no such right. The mortgagor can make the payment even after the period for payment of the amount declared due by the preliminary decree has expired and apply for final decree.

6. Final decree for foreclosure or sale—Sub-rule (3).—The provision as to the passing of a final decree for foreclosure under the circumstances indicated in the rule is imperative.[1] A final decree for foreclosure or sale can only be passed on an application by the mortgagee.[2] A final decree for *foreclosure* cannot be passed in the case of a *simple* mortgage.[3] The absence of any provision in the preliminary decree, for the passing of a final decree for sale or foreclosure, is no bar to the passing of such a decree.[4] An application for final decree should be made to the Court of first instance though the preliminary decree was modified in appeal.[5] In the undermentioned case[6] it was held that the *mortgagor himself* was entitled to apply for a final decree for sale, if he was not able to pay the mortgage-money.

7. Power to enlarge time.— The provision as to the enlargement of time contained in the proviso to the old R. 8 has now been transferred to the present Rule 7 by Act XXI of 1929. A payment of the amount due within the time fixed entitles the mortgagor to a final decree for redemption.[1] But the time can be extended by the Court for making such payment under this rule. The principles discussed in Note 18 on R. 2 apply in general to an extension of time under this rule. Time can be extended even though the time originally fixed has expired.[2] But no extension can be granted unless "good cause" is shown therefor.[3] Nor is the mortgagor entitled to an extension of time as a matter of *right*.[4] See also the A. I. R. Commentaries on the Code of Civil Procedure 4th (1944) Edn., S. 148, Note 9.

The power to extend time applies to all kinds of mortgages.[5] Ordinarily a

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(1947) Mad 334: 224 Ind Cas 543. *Angammal* v. *Md. Sulaiman.*

('46) 33 AIR 1946 Pat 99 (100): 24 Pat 575 (DB), *Mohd. Azim* v. *Mohd. Sultan.* In this case mortgagor was allowed to apply for final decree nearly seven years after the passing of preliminary decree.)

Order 34 R. 8—Note 6.

1. ('27) 14 AIR 1927 All 305 (305).
2. ('42) 29 AIR 1942 Pesh 96 (96). (Mortgagor cannot apply.)
('13) 19 Ind Cas 856 (857) (DB) (Lah).
3. ('15) 2 AIR 1915 Low Bur 100 (101): 27 Ind Cas 706 (706) (DB).
4. (1900) 25 Bom 101 (103) (DB).
('31) 18 AIR 1931 All 427 (428) (DB). (Subsequent mortgagee's suit for redemption—Prior mortgagee defendant can get final decree for sale though preliminary decree does not provide therefor.)
5. (1900) 23 Mad 521 (522, 523) (DB).
6. ('11) 36 Mad 32 (35): 12 Ind Cas 432 (433) (DB).

Order 34 R. 8—Note 7.

1. ('27) 14 AIR 1927 Bom 32 (34): 50 Bom 730 (DB).
2. ('09) 2 Ind Cas 466 (466) (All).
†('01) 26 Bom 121 (126) (DB).
('03) 28 Bom 102 (104) (DB).
('27) 14 AIR 1927 Bom 175 (175, 176) (DB). (Payment into Court by mortgagor after expiry of time fixed—Mortgagee not applying in time for final decree—Court is right in making the decree absolute and thus in effect extending the time of such payment.)
('06) 2 Nag L R 137 (143).
3. ('97) 19 All 180 (184) (DB).
('27) 14 AIR 1927 Oudh 586 (588). (Fact that mortgagee loses nothing by extension is "good cause.")
('03) 13 Mad L Jour 266 (267) (DB). (*Bona fide* mistake is "good cause.")
('12) 34 All 388 (390) : 14 Ind Cas 240 (241) (DB). (Do.)
('12) 18 Ind Cas 14 (16) (DB) (All). (Do.)
('19) 6 AIR 1919 Oudh 381 (382). (Mortgagee losing nothing by extension is "good cause.")
4.†('16) 3 AIR 1916 Mad 882 (882): 39 Mad 882.
('10) 7 Ind Cas 36 (38) (DB) (All).
5. ('28) 15 AIR 1928 All 480 (481): 50 All

mortgagor who seeks to pay the money after the time fixed must *apply* for extension.[6] The application need not, however, be in any prescribed form and even an application to pay the money may itself be treated as an application for extension.[7] But the application must be made to the Court of *first instance*, even though the decree may have been confirmed on appeal.[8]

It was held in the undermentioned cases[9] that the power to enlarge time under this rule applies to what are strictly suits for redemption. But where, in a partition suit, it was found that an alienation of joint family property was partially binding on the plaintiff and a decree was passed for possession against the alienee conditional on the payment of a certain sum of money to him within a certain time, it was held by the High Court of Madras[10] that the decree was *in effect* one for redemption, and that the time fixed by it could, therefore, be extended under this rule.

Even if the time is not extended, the mortgagor, as has been made clear by this rule, can redeem the property at any time before a final decree for foreclosure is passed, or a sale of the property is confirmed by the Court. And this was the practice followed even before the amendment under Act XXI of 1929 was made.[11] As to decrees passed before the Transfer of Property Act, see the undermentioned case.[12]

It has been held by the Chief Court of Oudh that even in the case of a *compromise decree* for redemption, the Court is entitled under this rule to extend the time in proper cases.[13]

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882 (DB). (Time can be extended even in case of mortgage by conditional sale.)

6. ('20) 7 AIR 1920 Upp Bur 43 (44): 3 Upp. Bur Rul 183.

7. ('20) 7 AIR 1920 Upp Bur 43 (44): 3 Upp Bur Rul 183.

8. ('09) 31 All 328 (329): 2 Ind Cas 220 (221) (DB).
†('16) 3 AIR 1916 Mad 694 (695): 39 Mad 876: 31 Ind Cas 240 (240) (DB).
('17) 4 AIR 1917 All 239 (239): 39 All 396 (DB).
('06) 3 All L Jour 829 (830).

9. ('21) 8 AIR 1921 All 304 (306) : 43 All 25 (DB).
('15) 2 AIR 1915 Oudh 226 (227): 18 Oudh Cas 58.

10. ('20) 7 AIR 1920 Mad 99 (101): 43 Mad 357 (DB).

11. ('92) 14 All 350 (353).
('09) 36 Cal 122 (127): 1 Ind Cas 780 (782) (DB). (Under S. 93, T. P. Act, the equity of redemption remained unforeclosed and the relation of mortgagor and mortgagee continued as also the time to redeem till the order absolute was made.)
('93-1900) 1893-1900 Low Bur Rul 174.
('03) 25 All 231 (233).
('89) 20 All 446 (447) (DB).
('02) 5 Oudh Cas 82 (86) (DB).
('06) 3 Cal L Jour 533 (535, 536) (DB). (Case of mortgage by conditional sale—Order absolute in terms of S. 89 passed—Mortgagor held entitled to redeem until an order in terms of S. 87 made by the Court debarring the mortgagor absolutely from redeeming the property.)
(1900) 27 Cal 705 (708) (DB). (Until an order for foreclosure absolute in proper form is made under S. 87, T. P. Act, the mortgagor can, upon a proper application, redeem the mortgaged property.)
('27) 14 AIR 1927 Bom 32 (35): 50 Bom 730 (DB). (Until final decree is passed relationship of mortgagor and mortgagee is not extinguished.)
('25) 12 AIR 1925 Oudh 649 (650) : 28 Oudh Cas 261.
('11) 14 Oudh Cas 10 (12): 9 Ind Cas 337 (338) (DB).
('15) 2 AIR 1915 All 302 (302).
('16) 3 AIR 1916 Oudh 138 (139): 19 Oudh Cas 30.
('02) 24 All 479 (481) (DB).
('04) 1 All L Jour 300 (301). (24 All 479 followed.)
('23) 10 AIR 1923 Oudh 236 (237): 26 Oudh Cas 306. (Property can be redeemed even after final decree.)
[*See* ('97) 19 All 205 (207, 208). (Suit by mortgagee for sale of mortgaged property—Sale could be avoided by payment under S. 291 of the Code of 1882—*Obiter.*)
('88) 10 All 1 (4) (DB).
('08) 31 Mad 354 (358) (DB). (Sale could be set aside by deposit under S. 310A of Code of 1882, now O. 21 R. 89.)]
Also see O. 34 R. 2, Note 18 and R. 3 Note 3.
[*But see* ('09) 2 Ind Cas 616 (616) (Mad).
('90) 13 Mad 267 (268) (DB). (Decree for redemption—Payment cannot be made after the period fixed.)]

12. ('96) 20 Bom 279 (280) (DB). (Section 93, T. P. Act, 1882, under which a plaintiff-mortgagor obtaining a decree for redemption had to show cause for extending the time allowed by the decree for redemption did not apply to decrees made before the Act was put in force.)

13. ('27) 14 AIR 1927 Oudh 586 (588).

See also Note 13 on O. 34 R. 7 and Note 18 on Order 34 Rule 2.

8. Limitation.— Article 181 of the Limitation Act applies to an application by the mortgagee for a final decree under this rule and time runs from the expiry of the period fixed for payment by the mortgagor. See the A. I. R. Commentaries on the Limitation Act, 2nd (1942) Edition, Art. 181, Note 5.

9. Appeal.— An order refusing to extend time is appealable under the Civil Procedure Code, O. 43 R. 1 (o).[1] But no appeal lies against an order "*granting* an extension of time.[2] It is doubtful whether an order merely refusing to pass a final decree but leaving it open to the mortgagee to apply again for such a decree is appealable as a decree.[3]

An order refusing an application under this rule praying from account from mortgagee in possession for period between preliminary decree and final decree is appealable.[4]

Recovery of balance on mortgage in suit for redemption.

[a]R. 8A. [New.] Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the defendant, the Court, on application by him, may, if the balance is legally recoverable from the plaintiff otherwise than out of the property sold, pass a decree for such balance.

[*Cf.* Rule 6.]

a. This rule was inserted by the Transfer of Property (Amendment) Supplementary Act (XXI of 1929), Section 5.

1. Scope of the rule.— This rule is new and was inserted by the Transfer of Property (Amendment) Supplementary Act, XXI of 1929. The rule provides for a personal decree being passed in a *suit for redemption* against the mortgagor where the proceeds of a sale held on the default of the mortgagor to pay the mortgage-money in time under a decree for redemption are not sufficient to satisfy the mortgage-debt. The rule corresponds to Rule 6, which provides for a personal decree being passed in a *suit for sale* by the mortgagee.

The words "the last preceding rule" refer to R. 8 *as amended* by Act XXI of 1929 under which no decree for sale can be passed in the case of a *usufructuary* mortgage as was possible under the old rule. Where, therefore, a decree for sale was passed in respect of a *usufructuary* mortgage under the old rule and a sale held in pursuance thereof, it was held that such a sale could not be said to have been held "under the last preceding rule" within the meaning of this rule, and that consequently no personal decree for the balance remaining due could be passed under this rule.[1]

Decree where nothing is found due or where mortgagee has been overpaid.

R. 9. [New.] Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant, if so required, to re-transfer the property and to pay to the plaintiff the amount which may be found due to him: and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

Order 34 R. 8—Note 9.

1. ('24) 11 AIR 1924 Bom 98 (98): 47 Bom 956 (DB).
2. †('16) 3 AIR 1916 Mad 694 (695): 39 Mad 876 (DB).
3. ('28) 15 AIR 1928 Lah 355 (356) (DB).
4. ('49) 36 AIR 1949 Mad 613 (614), *Satyanarayana* v. *Suryanarayana*.

Order 34 Rule 8A—Note 1.

1. ('33) 20 AIR 1933 Oudh 40 (41) (DB).

1. Scope of the rule.— This rule is new and gives effect to the practice followed in cases arising under the Transfer of Property Act[1] and in cases arising even previous thereto.[2]

If the Court finds that the mortgage has been discharged, a decree for redemption can be passed at once without the formality of a preliminary and final decree.[3] A mortgagee who continues in possession of the mortgaged property after the mortgage has been satisfied is liable for all the receipts from the property with interest from the time when the debt was fully paid off.[4] Extra court-fee in addition to the court-fee paid on the principal sum due need not be paid on the surplus profits that may be decreed to a mortgagor in a redemption suit.[5] A claim by a mortgagor for recovery of over-payment received by the mortgagee is a relief included in a suit for redemption to which Art. 148 of the Limitation Act applies.[6]

The rule applies to an enquiry under Sections 12 and 16 of the U. P. Agriculturists' Relief Act (XXVII of 1934).[7]

2. Deduction of costs payable to mortgagor.— The mortgagor is entitled to set off the costs awarded to him against the mortgage-money[1] in preference to the claim of the defendant-mortgagee's attorney for his costs of the suit.[2]

3. Claim for over-payments.— The intention of the Legislature being that a suit for redemption should include the *entire accounts* between the parties in relation to the mortgage, a separate suit for over-payments is barred under the Civil Procedure Code, S. 11 and O. 2 R. 2.[1] But mesne profits accruing *after* the date fixed for payment under the preliminary decree[2] or after the date of payment under the decree,[3] have been held to be recoverable by a separate suit. No such suit can, however, be brought for the profits accruing *before* such date.[4] See also O. 2 R. 2, Note 24 of the A. I. R. Commentaries on the Code of Civil Procedure, 4th (1944) Edition.

A Muhammadan mortgagee died leaving several heirs. One of them X received from the mortgagor moneys on account of the mortgage on the representation

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Order 34 Rule 9—Note 1.

1. ('07) 34 Cal 223 (233) (DB).
('1900) 25 Bom 115 (118) (DB).
('90) 14 Bom 19 (24) (DB).
('84) 6 All 303 (311) (DB).
('04) 27 All 351 (355) (FB).
('83) 7 Bom 185 (187) (DB).
[*See also* ('02) 26 Bom 661 (667, 668) (DB).]
2. ('81) 6 Cal 377 (378, 379) (DB).
('72) 18 Suth W R 65 (66) (DB).
3. ('22) 9 AIR 1922 All 479 (479).
4. ('29) 16 AIR 1929 Bom 337 (339) (DB).
[*See also* ('69) 1 N W P H C R 111 (113, 114) (DB). (Mortgagor entitled to excess profits with interest at the rate provided for mortgage-money.)]
5. ('31) 18 AIR 1931 Mad 479 (479).
('23) 10 AIR 1923 All 261 (262): 45 All 154 (DB).
6. ('22) 9 AIR 1922 Cal 189 (190, 191) (DB).
7. ('42) 29 AIR 1942 Oudh 391 (392): 18 Luck 183 (DB). (AIR 1939 All 88: ILR (1939) All 194 relied on.)

Order 34 R. 8—Note 2.

1. ('93) 17 Bom 32 (34).
2. ('79) 4 Cal 742 (743, 744).

Order 34 R. 8—Note 3.

1. ('07) 30 All 36 (37).
('1900) 25 Bom 115 (119) (DB).
('07) 31 Bom 527 (533, 534) (DB).
* ('89) 16 Cal 682 (691): 16 Ind App 107 (PC).
('07) 34 Cal 223 (233) (DB).
('20) 7 AIR 1920 Mad 531 (532) (DB).
('08) 30 All 225 (227) (DB).
('69) 6 Bom H C R 97 (99, 100) (DB).
†('36) 23 AIR 1936 Cal 200 (202).
[*See also* ('02) 26 Bom 661 (667) (DB). (Separate suit for mesne profits by mortgagee held barred.)]
Also see O. 34 R. 7, Note 4.
2.†('10) 6 Ind Cas 336 (337, 338) (DB) (Cal).
('20) 7 AIR 1920 Pat 106 (107): 5 Pat L Jour 595 (DB).
3.†('26) 13 AIR 1926 All 96 (97) (DB). (Question of such mesne profits is outside the scope of the redemption suit—O. 2 R. 2 is also not a bar to the suit as it is based on a distinct cause of action.)
('18) 5 AIR 1918 Mad 284 (284) (DB).
('38) 25 AIR 1938 Mad 405 (411) (DB).
4. ('05) 8 Oudh Cas 302 (303).
('36) 23 AIR 1936 Cal 200 (202). (Deposit by mortgagor under S. 83, Transfer of Property Act, refused by mortgagee in possession—Suit for redemption—Subsequent suit for mesne profits anterior to the date of redemption suit is barred—Mortgagee does not become trespasser on refusal.)
†('38) 25 AIR 1938 Mad 405 (411) (DB).

that he was solely entitled to the money. This was disputed by the other heirs of the mortgagee and they brought a suit against the mortgagor, on the mortgage impleading X as a defendant. It was found that X was not solely entitled to the mortgage-money. The suit was compromised as between the plaintiffs and the mortgagor. It was held that, on the equitable principle contained in this rule, the Court could pass a decree in the same suit in favour of the mortgagor against X for the amount paid to him by the mortgagor in excess of the share to which X was entitled.[5]

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[a]**R. 10. [New: Act IV of 1882, S. 94.] In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure, sale or redemption, the Court shall, unless in the case of costs of the suit the conduct of the mortgagee has been such as to disentitle him thereto, add to the mortgage-money such costs of the suit and other costs, charges and expenses as have been properly incurred by him since the date of the preliminary decree for foreclosure, sale or redemption up to the time of actual payment.**

Costs of mortgagee subsequent to decree.

[See Rules 2 to 8A and Civil Procedure Code, Section 35.]

a. Rules 10 and 11 were substituted by Section 6 of the Transfer of Property (Amendment) Supplementary Act (XXI of 1929) for the original Rules 10 and 11.

Synopsis.

1. Analogous law.
2. Amendments after 1908.
3. Mortgagee is ordinarily entitled to his costs.
4. "Such costs of the suit.....as have been properly incurred."
5. Costs of appeal.
6. "Other costs, charges and expenses."
7. Power of executing Court to add costs.
8. Costs awarded by decree, mode of realization.
9. Appeal.

1. Analogous law.— The role corresponds to Section 94 of the Transfer of Property Act which was as follows:

> "94. In finally adjusting the amount to be paid to a mortgagee in case of a redemption or a sale by the Court under this Chapter, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure, redemption or sale up to the time of actual payment."

2. Amendments after 1908.— The rule was substituted for the original rule by Act XXI of 1929. The rule is not retrospective and does not apply to mortgage decrees passed before the coming into force of the amending Act.[1]

3. Mortgagee is ordinarily entitled to his costs.— In a suit for sale, foreclosure or redemption, the mortgagee is ordinarily entitled to his costs unless his "conduct has been such as to disentitle him thereto."[1] For the scale on which costs are awarded, see the undermentioned cases.[2]

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5 ('36) 23 AIR 1936 Oudh 242 (245): 12 Luck 82 (DB).

Order 34 Rule 10—Note 2.

1. ('40) 27 AIR 1940 Mad 233 (235) (DB). (Redemption of usufructuary mortgage—Separate suit by mortgagor for taxes paid by him but which ought to have been paid by mortgagee held maintainable.)

Order 34 R. 8—Note 3.

1.† ('42) 29 AIR 1942 Mad 592 (593): I L R (1943) Mad 205 (DB). (Suit for redemption refused to accept insufficient deposit under S. 83 is not vexatious conduct.)

('39) 26 AIR 1939 Bom 322 (333) (DB). (Mortgagee disallowed costs.)

('32) 19 AIR 1932 Oudh 123 (134): 7 *Luck* 454 (DB).

('09) 2 Ind Cas 662 (669) (DB) (Cal).

('77) 1 Ind Jur (NS) 95.

4. "Such costs of the suit.....as have been properly incurred."— The mortgagor's liability in a mortgage suit cannot be enhanced by a final decree beyond the point indicated in the preliminary decree, except in so far as is provided for by the present rule.[1] It has been held by the Allahabad High Court that the rule refers only to costs incurred between the preliminary decree and the final decree and not to the costs incurred *subsequent to the final decree*, in execution proceedings.[2] The Chief Court of Oudh, on the other hand, has dissented from this view and held that the rule applies to all costs incurred in connection with the suit up to the time of *actual payment*, whether before or after the final decree.[3] It is submitted that the Oudh view accords more with the language of the rule than the Allahabad view.

5. Costs of appeal.—There is a conflict of decisions as to whether the costs of an unsuccessful appeal by the mortgagor from the preliminary decree in a mortgage suit can be added to the mortgage-money or should be recovered from the mortgagor personally. In some cases it has been held that such costs can be added to the mortgage-money,[1] while other cases hold that the rule refers primarily to costs incurred in the Court which prepares the final decree and that therefore the costs of appeal cannot be added to the mortgage-money but should be recovered personally from the mortgagor.[2] According to the undermentioned cases,[3] however,

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†(1900) 24 Mad 377 (386): 28 Ind App 46 (PC).

('13) 19 Ind Cas 474 (474) (Mad).

('12) 35 Mad 44 (46). (Improper defence to a redemption suit is a ground for refusing costs.)

('25) 12 AIR 1925 Mad 778 (779). (Redemption suit decreed—Costs claimed in second appeal by mortgagee—No misconduct on his part—Claim of costs not raised in lower appellate Court—Costs in trial Court only allowed.)

('26) 13 AIR 1926 Mad 405 (406). (Redemption suit—Unsustainable defences such as denial of right to redeem, excessive claim for improvements and also claim for enhanced revenue—Costs in Court's discretion.)

('78) 3 Bom 202 (203) (DB). (Where the bargain is usurious the Court would decline to award costs.)

('29) 16 AIR 1929 Cal 544 (544) (DB). (Co-mortgagee refusing to join in suit on mortgage but made a defendant—His costs are to be provided for as plaintiff's.)

('36) 23 AIR 1936 Lah 76 (77) (DB).

('29) 16 AIR 1929 Pat 397 (399) (DB). (Mortgagee refusing to accept valid tender and refusing to settle accounts—Suit on mortgage filed by him—He is not entitled to costs incurred after the tender.)

• ('39) 26 AIR 1939 Mad 654 (656): 1939 Mad W N 288 (290). (Suit for redemption —Mortgagee raising frivolous pleas without any justification is not only dissentitled to costs but would be liable to pay the costs of the mortgagor.)

[*See* ('38) 25 AIR 1938 Oudh 156 (160): 14 Luck 49 (DB). (Suit filed purely for accounts by mortgagor under S. 33, U. P. Agriculturist's Relief Act—Mortgagee not exercising his right to get a decree under S. 33 (2)—All points in defence decided against him—Mortgagee is not entitled to costs as O. 34 R. 10 does not apply.)

('36) 23 AIR 1936 Nag 34 (37): 31 Nag L R Sup 124 (DB). (Mortgage suit against father and sons—Decree against father alone—Costs claimed against sons on the ground that their shares may be eventually liable—Mortgagee held not so entitled because the sons' shares will not be liable by reason of the mortgage.)]

Also see O. 34 R. 2, Note 11.

2. ('10) 37 Cal 907 (913). (Costs on scale No. 2 against mortgagor who does not appear.)

('77) 1 Ind Jur (NS) 222. (Mortgage deed providing for costs as between attorney and client—Such costs were awarded.)

('81) 8 Cal L Rep 437 (438). (The practice is to make costs as between attorney and client and not as between party and party.)

O 34 Rule 10—Note 4.

1.†('97) 19 All 186 (188) (DB).

2. ('26) 13 AIR 1926 All 68 (69).

('26) 13 AIR 1926 All 722 (722): 48 All 682 (DB).

3. ('30) 17 AIR 1930 Oudh 328 (329) (DB).

O 34 Rule 10—Note 5.

1. ('48) 35 AIR 1948 Pat 127 (128) : 26 Pat 422 (DB). *Ram Rao* v. *Rajeshwar Rao.* (O 41 R. 35 to be read subject to O. 34—Court must be deemed to have intended what law enjoins—Party contending that departure from general rule was intended is to establish its contention from words used in judgment and decree—Real meaning must be formed in judgment and decree as interpreted in accordance with rules of O. 34.)

('19) 6 AIR 1919 All 297 (298, 299) : 41 All 473 (DB).

('18) 5 AIR 1918 Oudh 445 (445) (DB).

('24) 11 AIR 1924 All 104 (104): 45 All 630 (DB).

('26) 13 AIR 1926 All 343 (343). (Though the final decree had been passed before the dismissal of the appeal.)

('35) 22 AIR 1935 Oudh 452 (453). (But the Court of Appeal can order otherwise.)

2. ('13) 19 Ind Cas 384 (385) (All).

the question is one of *construction* of the appellate decree dismissing the appeal. See also the case noted below.[4]

6. "Other costs, charges and expenses."— This expression has been newly inserted by Act XXI of 1929 and gives effect to the practice followed before the Act, of adding such "costs, charges and expenses," incurred after the preliminary decree, to the mortgage-money.[1] The rule contemplates the *final* adjustment of the amount payable to mortgagee.[2]

7. Power of executing Court to add costs.— Costs which should have been but have not been included in a final decree cannot be claimed in execution.[1]

8. Costs awarded by decree, mode of realization.— *Prima facie*, the costs awarded in a mortgage suit against the mortgagor should be added to the mortgage-money and the mortgagor is not personally liable for the costs except when a decree can be passed against him under R. 6.[1] But under S. 35 of the Code, the Court has the power to make the mortgagor personally liable for the costs even in

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('14) 22 Ind Cas 42 (44) (All). (Appeal by one of the defendants—Appeal dismissed—Costs decreed against him only personally.)
('14) 1 AIR 1914 All 190 (191). (Especially where the final decree had been passed before the dismissal of the appeal.)

3. ('13) 19 Ind Cas 384 (385) (All).
('34) 21 AIR 1934 All 89 (92) (DB). (Appeal by some defendants only—Costs granted to mortgagee—Only appealing defendants are personally liable for such costs.)
†('13) 19 Ind Cas 729 (730) (All).
('25) 12 AIR 1925 All 492 (493) (DB).
[*See* ('37) 24 AIR 1937 Cal 547 (548). (Suit on mortgage against several defendants dismissed—Appellate Court granting decree to mortgagee and allowing costs to him as against contesting respondent only—Costs not forming part of final mortgage decree—Appellate decree for costs is final with respect to such respondent—Mortgagee can proceed to execute such decree without waiting for final mortgage decree.)]
[*See also* ('44) 31 AIR 1944 Mad 553 (554) : I L R (1945) Mad 165: 217 Ind Cas 37 (FB), *Purshothama Nair* v. *Raya Pandaram*. (Appeal by non-mortgagor deft—Appeal dismissed—Appellate decree expressly making appellant liable for costs—Decree holder can proceed against him for the costs.)

4. ('35) 22 AIR 1935 Mad 468 (472, 473) (DB). (Mortgage decree—Variation of decree on appeal as to method of computing compound interest—*Held*, it did not deprive respondent of his costs.)]

O 34 Rule 10—Note 6.

1. ('19) 6 AIR 1919 Low Bur 136 (137, 138). (Arrears of Government revenue paid by the mortgagee after preliminary decree, to prevent sale of mortgaged property, can be added to mortgage-money.)
('15) 2 AIR 1915 Cal 369 (370 (DB). (Rent decree against mortgagor—Deposit made by mortgagee to set aside execution sale of property in pursuance of such decree—Deposit amount can be added to mortgage-money.)
('18) 5 AIR 1918 Cal 1039 (1040): 44 Cal 448 (DB). (Money paid by mortgagee after preliminary decree either for rent or for supporting his title to mortgaged property can be added to mortgage-money.)
('91) 15 Bom 625 (639) (DB). (Ordinarily there is no personal liability for such costs and charges.)

2. ('38) 25 AIR 1938 Mad 405 (411) (DB). (Redemption suit—Claim of mortgagor to mesne profits up to the date of redemption decree should be included in the general account under O. 34 R. 10—Separate suit for such mesne profits will be barred.)
[*See also* ('46) 1946 J L R 97 (101, 102), (DB), *Sagarmal* v. *Jwalasahi*. (It is only at the time of final decree that the Court can to the into consideration other costs, charges and expenses incurred by the mortgagee since the date of the preliminary decree.)]

O 34 Rule 10—Note 7.

1. ('22) 9 AIR 1922 All 27 (28): 44 All 350 (DB). (Executing Court can only add execution costs to a decree in the course of execution proceedings—It cannot add to or amend the decree under execution.)

Rule 10—Note 8.

1. ('07) 30 Mad 464 (465, 466) (DB).
('14) 1 AIR 1914 All 444 (445). (Costs allowed by the decree become part of the debt secured by the mortgage.)
('18) 5 AIR 1918 All 366 (366, 367): 40 All 109: 43 Ind Cas 557 (559) (DB).
('08) 35 Cal 431 (433) (DB). (Decree for costs is a part of mortgage decree.)
†('98) 20 All 523 (528) (FB). (Overruling 1898 All W N 33.)
('99) 2 Oudh Cas 103 (109).
('89) 2 C P L R 94 (96, 98). (Upon final decree for foreclosure mortgagor's liability for costs also ceases.)
('35) 22 AIR 1935 Mad 101 (105): 58 Mad 418 (DB). (But where right of mortgagee to maintain suit is disputed this rule cannot be insisted on.)
†('38) 25 AIR 1938 Lah 188 (189): I L R (1938) Lah 148 (DB).
('31) 18 AIR 1931 All 124 (125) (DB).
('36) 23 AIR 1936 Pat 153 (156) (DB).
Also see O. 34 R. 2, Note 11; R. 4 Note 12; R. 5 Note 26 and R. 6 Note 11.

the first instance, in which case the mortgagor would be personally liable for the costs.[2]

9. Appeal.— In cases covered by O. 34, a mortgagee who has been deprived of his costs by the decision of a Court would be entitled as of right to appeal to a higher tribunal.[1]

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[a]**R. 11. [New.] In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely:—**

Payment of interest.

(*a*) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage—

(*i*) on the principal amount found or declared due on the mortgage,—at the rate payable on the principal, or, where no such rate is fixed, at such rate as the Court deems reasonable,

(*ii*) on the amount of the cost of the suit awarded to the mortgagee,—at such rate as the Court deems reasonable from the date of the preliminary decree, and

(*iii*) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security up to the date of the preliminary decree and added to the mortgage-money,—at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or failing both such rates, at nine per cent. per annum; and

(*b*) subsequent interest up to the date of realization or actual payment at such rate as the Court deems reasonable—

(*i*) on the aggregate of the principal sums specified in clause (*a*) and of the interest thereon as calculated in accordance with that clause; and

(*ii*) on the amount adjudged due to the mortgagee in respect

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2.†('87) 14 Cal 185 (188) (DB).
('07) 3 Nag L R 97 (100, 101).
('88) 10 All 179 (181).
('88) 10 All 127 (129).
('13) 19 Ind Cas 729 (730) (All). (*Held*, on construction of decree that the costs were recoverable personally.)
†('38) 25 AIR 1938 Mad 212 (213).
('38) 25 AIR 1938 Lah 188 (190): I L R (1938) Lah 148 (DB).
[*See* ('36) 23 AIR 1936 Pat 153 (156) (DB). (Costs cannot be awarded personally except against mortgagor.)]
[*See also* ('44) 31 AIR 1944 Mad 553 (554): ILR (1945) Mad 165: 217 Ind Cas 37 (FB), *Purushothama Nair* v. *Raya Pandaram*. (In a mortgage, the Court has power to pass a personal decree for costs against defendants who were not parties to the mortgage. AIR 1932 Mad 155: 55 Mad 332: Foll.)]
('31) 18 AIR 1931 Mad 272 (272) (DB). (Court can grant personal decree for costs against a party who is not a mortgagor and who raises frivolous and vexatious defences.)
Also see O. 34 R. 2, Note 11.

O 34 Rule 10—Note 9.

1. (39) 26 AIR 1939 Mad 654 (656). (NOTE —In ordinary cases, as seen in A. I. R. C. P. C., Note 29 on S. 35 an appeal as to costs will lie only under certain special circumstances.)

of such further costs, charges and expenses as may be payable under rule 10.

[See C. P. C., Section 34.]

a. See the foot-note to the text of Rule 10 of this Order.

Synopsis

1. Amendments after 1908.
2. Interest in mortgage suits.
3. Rule of damdupat.

See Note 16 on Section 34 of the A. I. R. Commentaries on the Code of Civil Procedure, 4th (1944) Edn.

1. Amendments after 1908.— The present rule is new. It was substituted for the old R. 11 which was repealed by Act XXI of 1929 and re-enacted as S. 94 of the Transfer of Property Act. Prior to Act XXI of 1929, there was no special statutory provision regarding interest in mortgage suits corresponding to the present rule.

2. Interest in mortgage suits.— This rule was inserted in the Code by Act XXI of 1929.

(A) Interest prior to the suit.

Interest cannot be claimed in every case as a matter of course. No interest is recoverable unless there is an express or implied *agreement* to pay interest[1] or unless it is recoverable under mercantile usage or under some statutory provision, such as the Interest Act, 1839 (See Note 7 on S. 34 of the A. I. R. Commentaries on the Code of Civil Procedure, 4th (1944) Edn.). Where there is an agreement to pay interest, the Court should decree it at the *agreed rate*, however high it may be,[2] unless it is penal,[3] or the rate of interest is excessive *and* the transaction is substantially unfair (see the Usurious Loans Act, 1918), in either of which cases

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O. 34 Rule 11—Note 2.

1.†('13) 40 Cal 514 (516) (DB).
('12) 16 Ind Cas 560 (560) (DB) (Mad). (Mortgage deed not providing for payment of interest—Separate document by mortgagor, undertaking to pay rent—Rent held could not be treated as interest on mortgage-money.)
('21) 8 AIR 1921 P C 100 (102): 23 Oudh Cas 150 (PC). (*Held*, on construction that interest became payable only after the period fixed for redemption.)
('66) 1866 Pun Re No. 64, p. 89 (89) (DB). (Right to interest—Waiver may be proved by non-payment.)
('04) 8 Cal W N 216 (218) (DB). (Mortgagee not entitled to interest for the day on which the money was advanced as also for the day on which the money was re-paid.)
(1864) 1864 Suth W R Gap No. 157 (157) (DB). (In absence of express provision for interest, interest need not be paid.)
('13) 35 All 302 (306) (DB). (Liability of Hindu son.)
[*See* ('05) 7 Bom L R 772 (790). (Bond providing for simple interest only and no rests —Only simple interest can be awarded.)
('01) 4 Oudh Cas 93 (95). (Liability of Hindu son under decree on mortgage against father.)]

2. ('85) 7 All 333 (336) (DB).
('33) 20 AIR 1933 All 70 (73): 54 All 1041 (DB).
('32) 19 AIR 1932 Cal 689 (690): 59 Cal 722 (DB).
('33) 20 AIR 1933 Lah 682 (684) (DB).
('96) 20 Bom 744 (745) (DB).
('83) 9 Cal 309 (314) (DB).
†('96) 18 Cal 164 (180): 17 Ind App 201 (PC).
('93) 20 Cal 360 (364) (DB).
('93) 20 Cal 366*n* (369*n*) (DB).
('94) 21 Cal 366 (374): 21 Ind App 1 (PC).
('97) 24 Cal 699 (703) (FB).
('04) 31 Cal 233 (240, 241).
('10) 5 Ind Cas 916 (916) (DB) (Mad.)
('82) 1882 Pun Re No. 40, page 118 (119).
(89) 1889 Pun Re No. 135, page 466 (467).
('08) 1908 Pun Re No. 110, page 503 (506).
('04) 28 Bom 371 (377).
('09) 5 Nag L R 37 (39): 2 Ind Cas 27 (28, 29). (Contract rate to be given even though interest is payable only on default of payment of instalments.)
[*See also* 2 Hay 644.
('34) 21 AIR 1934 Nag 264 (268): 30 Nag L R 331 (DB). (Mortgage debt to be paid by instalment and to carry interest at 9 per cent.—Enhanced rate at 12 per cent. on defaulted instalments—Exigible clause after five instalments—Payment of interest on defaulted instalments after whole amount has become payable cannot be reduced from 12 per cent. to 9 per cent.)]

3. ('43) 30 AIR 1943 Mad 109 (110, 111). (Redemption suit by vendee from mortgagor —Interest at 12 per cent. in addition to mortgagee enjoying property held penal but not wholly unenforceable—Court held justified in directing interest at six per cent. to mortgagee.)
†('15) 2 AIR 1915 Cal 796 (799): 42 Cal 652 (DB).
('37) 24 AIR 1937 Cal 654 (655): I L R

the Court may decree what it considers a reasonable rate of interest.[4] A stipulation for the payment of compound interest is not necessarily penal.[5] Nor does the mere fact that the rate of interest is excessive give rise to a presumption of undue influence where it is not proved that the lender was in a position to dominate the will of the debtor.[6] But it has been held by the Sind Chief Court that under this rule the Court has a discretion to *refuse* interest prior to suit in appropriate circumstances.[7] The interest decreed is a charge on the mortgaged property.[8]

Where the mortgagee is in possession of the mortgaged property, the income from the property should be applied in discharge of the interest payable to him.[9] But a mortgagee who is entitled to possession in lieu of interest cannot claim any interest for the period for which he fails to obtain possession on account of his own laches.[10]

The present rule and S. 72 of the Transfer of Property Act make it clear that interest is payable on the "costs and charges and expenses" properly incurred by the mortgagee in respect of the mortgage-security.[11]

See also the undermentioned decision.[12]

(1937) 1 Cal 300. (Condition of higher rate of interest on default of punctual payment of interest is penal and can be relieved against.)

[*See also* ('10) 32 All 448 (450): 5 Ind Cas 665 (665) (DB). (Stipulation for higher rate of interest with a provision for lower rate in case of punctual payments is not penal.)]

4. ('33) 20 AIR 1933 All 180 (184) (DB). (Contract at 24 per cent. compound interest with six monthly rests—Security ample—Interest reduced to 15 per cent. simple under the Usurious Loans Act.)
('33) 20 AIR 1933 Oudh 190 (190) (DB). (Interest of 187 per cent. is excessive and usurious—Only 24 per cent. simple interest was allowed.)
('12) 13 Ind Cas 401 (401) (DB) (All). (Mortgage by Hindu father of joint family property—Necessity of borrowing at excessive rate of interest not proved—Interest may be reduced.)
('12) 34 All 126 (128): 13 I. C. 5 (6) (DB). (Do.)

5. ('93) 20 Cal 360 (365) (DB).
('84) 6 All 63 (64) (DB). (Case of a money bond.)
('84) 6 All 61 (63) (DB). (Do.)
('80) 2 All 621 (622) (DB). (Do).
('80) 2 All 639 (641) (DB).
[*See* ('19) 6 AIR 1919 Oudh 228 (229). (*Held*, intention of parties was to pay compound interest.)
('81) 3 All 610 (628) (FB).
('35) 62 Cal L Jour 7 (9). (*Held*, on construction of the mortgage deed that compound interest could be awarded on default of payment of annual interest.)]

6.* ('24) 11 AIR 1924 P C 60 (65): 51 Ind App 101: 3 Pat 279 (PC).
('27) 14 AIR 1927 All 538 (538) (DB).

7. ('43) 30 AIR Sind 59 (64): I L R (1942) Kar 452 (DB).
NOTE.—See also sub-heading (c) under this Note where the question as to the nature of the Court's power under this Rule is discussed with reference to interest after the institution of the suit.

8. ('21) 8 AIR 1921 Pat (403) (405) (DB). (But interests as damages is not a charge on the property.)
('33) 20 AIR 1933 Lah 289 (290).
('90) 1890 Pun Re No. 147, page 469 (469) (FB.)
('94) 1894 Pun Re No. 121, page 465 (467) (DB).
† ('88) 1888 Pun Re No. 57, page 138 (140) (DB).
[***But see*** ('13) 40 Cal 514 (516, 517): 18 Ind Cas 80 (80) (DB). (Charge the nature of mortgage, whether of principal or interest must be express and cannot be raised by implication.)
('14) 1 AIR 1914 Lah 350 (352): 1914 Pun Re No. 94: 22 Ind Cas 837 (839) (DB). (Interest is not a charge on the property unless it is specifically made so.)]

9.† ('02) 24 All 521 (531): 28 Ind App 148 (PC).
('13) 21 Ind Cas 593 (594) (DB) (All).
('02) 5 Oudh Cas 155 (160) (DB).
('02) 5 Oudh Cas 286 (292) (DB).

10. ('93) 17 Bom 425 (428) (DB).
('09) 31 All 325 (328): 2 Ind Cas 221 (222) (DB).
('75) 7 N W P H C R 57 (58) (DB).
('06) 9 Oudh Cas 144 (145).
[*See also* ('89) 1889 All W N 177 (177). (Mortgagee not executing his decree for possession—Not entitled to interest in subsequent suit for redemption.)]

11. ('93) 1893 Pun Re No. 67, page 297 (300) (DB). (In the Punjab where the Transfer of Property Act does not apply, a different view was taken.)

12. ('40) 27 AIR 1940 Pat 376 (377). (Bihar Money-lenders Regulation of Transactions Act (VII of 1939), S. 7—Applicability—Preliminary decree passed in 1936 and confirmed in appeal in 1937—Section does not apply to the case though the final decree is passed after the coming into force of the Act as the question of interest prior to suit

(B) Post diem interest or interest after the date fixed in the mortgage deed for the payment of the mortgage-money.

The case law on this subject prior to the enactment of this rule may be summarized as follows: An intention to pay interest subsequent to the period fixed for redemption at the same rate as before might be implied in the absence of any agreement to the contrary.[13] Even if there was no intention to pay such interest, the Court could award it by way of *damages* for the breach of the contract to pay the mortgage-money at the stipulated time.[14] The contract rate of interest was ordinarily taken as the measure of damages,[15] though the Court could vary it if it considered it necessary.[16]

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is determined at time of preliminary decree and final decree merely works out the arithmetical results of the preliminary decree.)]

13. ('97) 19 All 39 (49, 50): 23 Ind App 138 (PC).
('98) 20 All 171 (180): 25 Ind App 9 (PC).
('33) 20 AIR 1933 Mad 171 (171). (But compound interest cannot be awarded unless specially agreed to.)
('35) 22 AIR 1935 Oudh 213 (216): 10 Luck 481 (DB).
('98) 22 Bom 107 (110, 111).
('98) 25 Cal 246 (249, 250) (DB).
('99) 22 Mad 339 (340) (DB).
('97) 20 Mad 149 (151) (DB).
('97) 20 Mad 371 (375) (DB).
(1900) 23 Mad 534 (535) (DB).
('12) 16 Ind Cas 216 (217) (DB) (All).
('14) 1 AIR 1914 Oudh 137 (139): 23 Ind Cas 871 (872) (DB).
('14) 1 AIR 1914 All 171 (172) (DB).
('15) 2 AIR 1915 Mad 398 (398): 26 Ind Cas 124 (124) (DB). (*Post diem* compound interest not recoverable unless expressly provided for.)
('15) 2 AIR 1915 Mad 1161 (1162) (DB).
('16) 3 AIR 1916 Lah 359 (359): 1916 Pun Re No. 5: 32 Ind Cas 821 (822) (DB).
('16) 3 AIR 1916 Oudh 313 (314): 19 Oudh Cas 166.
('16) 3 AIR 1916 Oudh 199 (202).
('18) 5 AIR 1918 Lah 88 (89): 1918 Pun Re No. 31.
('20) 7 AIR 1920 Oudh 187 (187).
('23) 10 AIR 1923 All 7 (10): 44 All 772.
('26) 13 AIR 1926 Oudh 378 (379).
('98) 1898 Pun Re No. 77, page 264 (266) (DB).
('05) 1905 Pun Re No. 92, page 282 (285).
('94) 4 Mad L Jour 260 (262, 263) (DB).
(1900) 10 Mad L Jour 101 (104).
('01) 11 Mad L Jour 183 (184, 185) (DB).
('01) 14 C P L R 49 (51, 52).
('93-1900) 1893-1900 Low Bur Rul 457.
('19) 6 AIR 1919 Mad 186 (186): 52 Ind Cas 313 (313) (DB). (Even intention to pay *post diem* compound interest may be implied.)
('19) 6 AIR 1919 Lah 279 (279): 1 Lah L Jour 116 (120) (DB).
('92) 1892 Pun Re No. 28, page 113 (115) (DB). (*Post diem* interest is charge on property.)
('22) 9 AIR 1922 Oudh 122 (122): 25 Oudh Cas 36.
('93) 15 All 339 (352): 20 Ind App 116 (PC). (Express agreement to pay *post diem* interest.)
[*See also* ('32) 19 AIR 1932 Nag 39 (40, 41): 28 Nag L R 1 (DB). (Terms of deed providing interest and payment by instalments —No provision nor indications as to interest after whole amount becomes payable—Presumption is of payment at reasonable rate.)]
[*But see* ('13) 35 All 534 (537): 21 Ind Cas 253 (254).]

14. ('95) 17 All 511 (517) : 22 Ind App 199 (PC).
('33) 20 AIR 1933 Mad 171 (171).
('88) 10 All 85 (90, 91) (DB).
('89) 11 All 416 (419, 420) (DB).
('86) 8 All 486 (490) (DB). (Principle is of compensation for breach of contract and not implied contract to pay *post diem* interest.)
('80) 2 All 617 (619) (DB).
('76) 2 Cal 41 (44) (DB).
('76) 25 Suth W R 189 (190) (DB).
('95) 18 Mad 331 (334) (DB).
('23) 10 AIR 1923 Lah 632 (633, 634): 4 Lah 406 (DB).
('17) 4 AIR 1917 Pat 510 (511) (DB).
('22) 9 AIR 1922 Lah 254 (257): 3 Lah 200 (FB).
('72-92) 1872-92 Low Bur Rul 570.
[*See* ('15) 2 AIR 1915 Lah 302 (303)]

15. ('86) 8 All 486 (489) (DB).
('33) 20 AIR 1933 Mad 171 (171).
('78) 1 All 603 (607) (DB).
('80) 2 All 617 (619) (DB).
('22) 9 AIR 1922 Lah 254 (257): 3 Lah 200 (FB).
('23) 10 AIR 1923 Lah 404 (405) (DB).
('23) 10 AIR 1923 Lah 632 (633): 4 Lah 406 (DB).
('10) 6 Ind Cas 664 (664) (Lah). (Even compound interest may be allowed.)

16. ('95) 17 All 511 (517): 22 Ind App 199 (PC).
('86) 8 All 486 (489, 490) (DB).
('80) 2 All 617 (619) (DB).
('76) 2 Cal 41 (43, 44) (DB).
('76) 25 Suth W R 189 (190) (DB).
('95) 18 Mad 248 (250) (DB).
('29) 16 AIR 1929 Lah 385 (385) (DB).
('92) 1892 Pun Re No. 73, page 266 (268) (DB).
('93) 6 C P L R 11 (12).
('02) 1902 Pun L R No. 95, page 367 (369).

See the following cases which were decided in respect of money bonds:

Post diem interest at a reasonable rate might also be decreed under the Interest Act of 1839 though there might be no agreement to pay such interest.[17] Such interest awarded either as damages,[18] or under the Interest Act,[19] was held not to constitute a charge on the mortgaged property though a contrary view also was held in the undermentioned cases.[20] It was also held that *post diem* interest claimed as damages for breach of contract could be recovered only for the period prescribed by the Limitation Act for a suit for compensation for such breach,[21] and that a claim for such damages would fail unless the mortgage suit was brought within the period of limitation for a suit for damages for breach of the contract.[22] But the Privy Council observed in the undermentioned case[23] that the claim was a recurring one and so long as the principal itself was not barred, *post diem* interest could be recovered for the six years (or three years, as the case may be), preceding the suit on the mortgage.

(C) Interest from institution of suit to the date fixed under the preliminary decree for the payment of the mortgage-money.

The same rules which should guide the Court with reference to interest accruing prior to the suit apply also till the date fixed under the decree for the payment of the mortgage-money. Hence, where there is a stipulated rate of interest, the Court is ordinarily bound to decree interest at that rate till the date fixed for payment of the decretal amount, however high it may be, unless it is *penal* or is excessive *and* the transaction is substantially unfair.[24] But it has been held by the

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('78) 3 Bom 131 (133) (DB).
('69) 11 Suth W R 68 (69) (DB).
('78) 14 Suth W R 450 (450) (DB).
('71) 15 SuthWR 284 (285) (DB).
('76) 25 Suth W R 318 (318) (DB).
('72) 1872 Pun Re No. 42, page 87 (88) (DB).

17. †('94) 21 Cal 274 (277, 278) (DB).
('97) 24 Cal 699 (703) (FB).
('95) 18 Mad 248 (250) (DB).
('95) 18 Mad 338n (338n) (DB).
('95) 5 Mad L Jour 154 (155) (DB).

18. ('96) 18 All 316 (319) (DB).
('91) 13 All 330 (336) (DB).
('92) 19 Cal 19 (24) (DB).
('95) 18 Mad 257 (261) (DB).
('94) 1894 Pun Re No. 114, page 437 (440) (DB).
('93) 6 C P L R 22 (23).

19. ('95) 17 All 581 (588, 589) (FB).
('97) 24 Cal 699 (703) (FB).

20. ('94) 21 Cal 274 (277, 278) (DB). (*Post diem* interest awarded under Interest Act.)
('95) 18 Mad 248 (250) (DB).
('02) 1902 Pun Re No. 95, page 427 (431) (DB).
[*See also* ('95) 17 All 511 (517): 22 Ind App 199 (PC). (Where the *post diem* interest awarded as damages was directed to be added to the principal in taking the accounts.)]

21. ('95) 18 Mad 257 (262) (DB).
†('22) 9 AIR 1922 Lah 254 (257): 3 Lah 200 (FB).
('97) 24 Cal 699 (703) (FB).

22. ('95) 17 All 581 (587) (FB).
('92) 19 Cal 19 (25) (DB).

23. ('37) 19 All 39 (47): 23 Ind App 138 (PC).
[*See also* (1887) 34 Ch D 721 (723, 724), *Marshfield* v. *Hutchings*. (Cited in 19 Halsbury, p. 101.)
('03) 1903 Pun L R No. 33, p. 95 (97). There is no limitation to a mortgagee's claim for interest in a suit for redemption.)]

24. ('40) 27 AIR 1940 Lah 333 (336): I L R (1940) Lah 658 (DB).
†('27) 14 AIR 1927 P C 1 (2): 54 Ind App 1: 54 Cal 161 (PC).
('35) 22 AIR 1935 All 1003 (1003).
('35) 22 AIR 1935 Pat 98 (99): 14 Pat 400 (DB).
('93) 20 Cal 279 (284, 285) (DB).
†('98) 26 Cal 39 (45): 25 Ind App 179 (PC).
('02) 29 Cal 43 (52) (DB).
('04) 31 Cal 138 (141) (DB).
('10) 5 Ind Cas 654 (656) (DB) (Cal).
('09) 4 Ind Cas 56 (57) (DB) (Cal).
('20) 7 AIR 1920 Cal 888 (888) (DB). (Any other arrangement is inadmissible under Section 92 of the Evidence Act.)
('06) 29 Mad 65 (67) (DB).
('97) 21 Mad 364 (365) (DB).
('11) 12 Ind Cas 18 (20) (Low Bur.)
('28) 15 AIR 1928 Lah 96 (96) (DB).
('28) 15 AIR 1928 Lah 192 (192) (DB).
('27) 14 AIR 1927 Lah 445 (447): 8 Lah 721 (DB).
('25) 12 AIR 1925 Cal 268 (269) (DB).
('18) 5 AIR 1918 Mad 558 (560) (DB).
('14) 1 AIR 1914 All 98 (99): 36 All 264 (DB).
('14) 1 AIR 1914 All 51 (52): 36 All 220 (DB).
('13) 18 Ind Cas 747 (748) (DB) (Cal).
('13) 18 Ind Cas 965 (968) (DB) (Cal).
('13) 20 Ind Cas 917 (917) (DB) (Mad).
('25) 12 AIR 1925 Pat 455 (459) (DB).
('21) 8 AIR 1921 Upp Bur 5 (7): 4 Upp Bur Rul 1.
* ('07) 34 Cal 150 (160, 161): 34 Ind App 9: 4 All L Jour 109 (113) (PC).
('06) 3 Cal L Jour 188 (194).
('02) 6 Cal W N 769 (771).
('05) 1 Nag L R 43 (46).
('99) 2 Oudh Cas 37 (40).
('18) 5 AIR 1918 Mad 558 (560) (DB).
('19) 6 AIR 1919 Oudh 69 (70). (Stipulated interest reduced as being penal—Reduced interest is to be granted.)

Federal Court that under this rule the Court has a discretion in awarding interest for the period after the institution of the suit and that it is not bound to award interest for such period at the contractual rate even though such rate may not be penal, excessive or substantially unfair.[25] The undermentioned decisions[26] to be contrary must, therefore, be held to be not good law. It has been held by the Patna High Court that under this rule, the Court cannot *refuse* interest for the period after the institution of the suit.[27] But the Allahabad High Court has held to the contrary.[28] As seen already under sub-heading (A) of this Note, the Sind Chief Court has held that a Court has discretion under this rule to refuse interest even for the period prior to the suit. Where the period originally fixed for payment is *extended* by the appellate Court or otherwise, the contract rate of interest is payable till the extended period.[29] Though the mortgagor pays into the Court the decretal amount before the date fixed in the decree for payment, he is bound to pay interest for the *entire period fixed*.[30]

The Calcutta High Court has held that the mortgagor is not entitled as of

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('22) 65 Ind Cas 709 (710) (DB) (Cal). (During proceedings to set aside *ex parte* decree suit pending and interest at contract rate allowable.)

('31) 18 AIR 1931 Nag 161 (163 to 165): 27 Nag L R 312 (DB). (Such interest is bound by the law of damdupat and C. P. C., S. 34 is inapplicable.)

('25) 12 AIR 1925 PC 280 (287): 52 Ind App 418: 5 Pat 135 (PC). (Trial Court granting interest after suit, on amount of personal decree and not on mortgage amount and directing taking of accounts—Successor has no power to award interest on mortgage amount after suit.

[*See* (1900) 2 Bom L R 225 (227) (DB).

('37) 24 AIR 1937 All 114 (115). (U. P. Agriculturists' Relief Act prevails over Order 34 in the matter of granting *pendente lite* interest in mortgage suits.)]

[*See also* ('13) 37 Bom 326 (339): 40 Ind App 68: 18 Ind Cas 909 (911) (PC). (Interest after suit not provided for in decree must be deemed to have been refused.)

(1900) 1900 Pun Re No. 3, page 8 (13) (DB). (Method of taking accounts indicated.)

('35) 22 AIR 1935 Bom 97 (98) (DB). (Suit for redemption under Dekkan Agriculturists' Relief Act—Interest can be granted under O. 34 R. 11 from date of suit till date of decree.)

('09) 5 Nag L R 37 (39): 2 Ind Cas 27 (28, 29). (Mortgagee entitled to contract rate—Allowed at 9 per cent. since he did not ask for more.)]

[***See however*** ('21) 8 AIR 1921 P C 100 (102): 23 Oudh Cas 150 (PC). (Where the Privy Council disallowed interest after the trial Court's decree, in view of mortgagee's misconduct.)]

The following cases holding that such interest was not payable till date fixed for payment, must be regarded as absolete:

('25) 12 AIR 1925 Bom 362 (362) (DB).

('86) 12 Cal 569 (579) (FB).

('74) 12 Beng L R 451 (468, 482) (SB).

[*See* ('35) 22 AIR 1935 Oudh 263 (263): 10 Luck 687 (DB). (Interest on costs can be awarded only from date of preliminary decree.)]

[*See also* ('99) 12 C P L R 78 (82). (Court granting extension of time on condition of mortgagor paying interest on decretal amount—Such interest does not form part of the mortgage money.)]

25. ('40) 27 AIR 1940 F C 7 (9): I L R (1940) Kar F C 45: 1940 F C R 31 (FC).

†('40) 27 AIR 1940 F C 20 (23): I L R (1940) Kar F C 33: 1940 F C R 61 (FC). (AIR 1940 F C 7: I L R (940) Kar F C 45: 1940 F C R 31 (FC) referred to.)

26. ('42) 29 AIR 1942 All 444 (445): I L R (1942) All 908 (DB). (For good reasons interest may be disallowed altogether—But if allowed it must under O. 34 R. 11 be allowed at contractual rate—Court must give reasons for not acting according to Rr. 4 and 11.)

('41) 28 AIR 1941 Pat 378 (382) (DB). (Rule 11 must be read with R. 4—Upto preliminary decree interest at contractual rate must be awarded unless penal or excessive—Court has discretion under this rule as regards the period after the preliminary decree.)

27. ('42) 29 AIR 1942 Pat 102 (104): 21 Pat 167 (DB).

28. ('42) 29 AIR 1942 All 444 (445): I L R (1942) All 908 (DB).

29. ('30) 17 AIR 1930 Pat 380 (382).

('22) 9 AIR 1922 Oudh 268 (269).

('15) 2 AIR 1915 All 313 (314).

†('27) 14 AIR 1927 P C 1 (2): 54 Ind App 1: 54 Cal 161 (PC). (Six months' period of redemption will be counted from the date of the appellate decree where the first Court's decree is varied.)

[***See however*** ('32) 19 AIR 1932 Pat 332 (334) (DB). (After amendment of 1929, interest at bond rate till period of grace is discretionary.)]

30. ('43) 30 AIR 1943 Lah 275 (280): ILR (1944) Lah 24 (FB).

('05) 1 Nag L R 106 (107, 108).

('19) 6 AIR 1919 Sind 70 (70): 12 Sind L R 59.

[*See* ('33) 20 AIR 1933 Nag 22 (23): 28 Nag L R 345 (DB). (Amount of interest till date of payment fixed in the preliminary decree to be included in valuation under S. 110, C. P. Code.)]

[***But see*** ('81) 7 Cal L Rep 206 (214) (DB). (This case decided prior to the Transfer of Property Act and is therefore obsolete.)

('81) 7 Cal L Rep 267 (268). (Do.)]

right to, nor is the Court bound to grant, interest at all for the period between the date of the decree and the date of redemption. It is only if interest is legally recoverable and the Court in its discretion deems fit to allow it that the interest has to be calculated at the agreed rate.[30a]

The words "principal amount found due or declared due on the mortgage" mean only the principal amount due under the mortgage without interest till date of suit. Therefore, a mortgagee is entitled to interest from the date of suit to the date fixed for payment at the contract rate only on the principal amount due under the mortgage and not on the total amount due on the date of suit.[31] But it has been held that where the interest has become part of the principal in accordance with the terms of the mortgage deed, the mortgagee is entitled to interest on such interest also.[32] See also the case cited below.[33]

(D) Interest from date fixed in the decree for payment till realization.

The Court can decree interest even for the period subsequent to the date fixed for payment in the decree till realization.[34] The scheme of the Code being that after the date fixed in the decrce for payment the relationship between the parties passes from the domain of *contract* into that of *judgment*, the Court is not bound to award interest, after such date, at the contract rate, but may award such interest at any rate that it considers *reasonable*.[35] The undermentioned cases[36] which held that the Court was bound to award the contract rate till payment are not good law.

30a ('49) 36 AIR 1949 Cal 414 (417): I L R (1945) 1 Cal 210, *Nemai Chand Sen* v. *Ram Kewal Sha*. (Agreement to pay interest until realization does not entitle mortgagee to get interest ex-debite justifial for period between date of decree and date of redemption.)
('44) 48 Cal W N 736 (738, 739).

31. ('33) 20 AIR 1933 Oudh 128 (129): 8 Luck 315 (DB).
('35) 22 AIR 1935 Oudh 263 (263): 10 Luck 687 (DB).
[***But see*** ('37) 24 AIR 1937 ALL 114 (114) (*Obiter.*)]

32. ('37) 24 AIR 1937 All 442 (444): I L R (1937) All 584 (DB). (Words "on the principal amount found or declared due" in O. 34 R. 11 (a) (i) refer not only to principal sum but also to amount due on interest which has become part of principal in accordance with the terms of the deed.)
[*See* ('41) 28 AIR 1941 Pat 378 (382) (DB). (Mortgage bond allowing compound interest—This must be allowed up to preliminary decree unless penal or excessive.)]
[*See also* ('34) 21 AIR 1934 Oudh 473 (474, 475) (DB.)]

33. ('44) 48 Cal W N 736 (742). (Bengal Money-lenders Act S. 31 (a) supersedes O. 34 R. 11 (a) and (b) of C. P. C.—Loan advanced before that Act—No interest can be allowed for period between date of decree and date fixed for redemption or for period thereafter notwithstanding any agreement to contrary—Dissenting from AIR 1944 Cal 322: ILR (1943) 2 Cal 364 and AIR 1942 Cal 128: ILR (1942) 1 Cal 414.)

34.† ('01) 23 All 181 (193): 28 Ind App 35 (PC).
('06) 28 All 223 (224) (PC).
('99) 21 All 361 (373) (FB).
('97) 24 Cal 766 (773).
* ('07) 34 Cal 150 (161): 34 Ind App 9 (PC).
('08) 35 Cal 221 (225): 35 Ind App 28: 4 Nag L R 1 (PC).
('19) 6 AIR 1919 Mad 231 (232): 42 Mad 465: 51 Ind Cas 67 (68) (DB).
('26) 13 AIR 1926 Lah 11 (12) (DB).
('04) 17 C P L R 164 (168, 169).
('99) 2 Oudh Cas 37 (44).
('36) 23 AIR 1936 P C 63 (65): 63 Ind App 114: 15 Pat 210 (PC). (Such interest can also be granted under S. 34, C. P. Code.)
[***See however*** ('44) 31 AIR 1944 Cal 322 (323): ILR (1943) 2 Cal 364 (DB). (Case governed by Bengal Money-lenders Act—Mortgage bond providing for interest till realization of the amount—Interest subsequent to date fixed for redemption cannot be allowed as O. 34 R. 11 (b) is overridden by S. 31 of that Act.)]

35. (49) 36 AIR 1949 Cal 414 (417): ILR (1945) 1 Cal 210, *Nemai Chand Sen* v. *Ram Kewal Sha*. [O. 34, R. 11 (b) completely supersedes and puts an end to agreement as regards payment of subsequent interest.]
('44) 48 Cal W N 736 (739).
('41) 28 AIR 1941 Pat 378 (382).
('07) 29 All 322 (324) (DB).
('32) 19 AIR 1932 Cal 689 (690): 59 Cal 722 (DB). (It is not obligatory on Court to give such interest in all cases—It may be refused in certain circumstances.)
('33) 20 AIR 1933 Oudh 128 (129): 8 Luck 315 (DB). (With regard to future interest Court has a discretion—Discretion exercised by trial Court will not be interfered with unless there are sufficient grounds.)
('35) 22 AIR 1935 Pat 98 (98): 14 Pat 400 (DB).
('04) 31 Cal 138 (141) (DB).
(1900) 23 Mad 637 (642).
('06) 29 Mad 170 (171) (DB).
('09) 3 Ind Cas 289 (290) (DB) (Cal).
('11) 7 Nag L R 14 (14, 15): 10 Ind Cas 695 (696, 697). (Despite a provision to the contrary in the mortgage bond.)
('13) 18 Ind Cas 362 (363) (DB) (Mad).
('15) 2 AIR 1915 Cal 679 (679) (DB). (18) 5 AIR 1918 Cal 151 (153) (DB). (In this case the decree did not provide for any

Future interest after the date fixed for payment is to be paid on the aggregate of the principal, interest and costs awarded by the decree.[37] The present rule makes it clear that such future interest forms part of the mortgage-money and is not a simple money claim.[38] The proper stage for decreeing future interest is at the time of passing the final decree.[39] Subsequent interest not mentioned in the final decree must be taken as refused.[40] But an agreement between the parties for the payment of future interest may be given effect to though the final decree does not provide for it.[41] When future interest is decreed, it must be paid till the confirmation of the sale.[42]

In the matter of subsequent interest this rule has been modified by S. 31 of the Bengal Money Lenders Act, 1940. In the matter of, Pre-Act Loans S. 31 (a) imposes a ban on the exercise of discretion given under this rule and does not allow any interest at all. In the matter of Post-Act loans S. 31 (b) limits interest for both the periods, under R. 11 (a) and (b), to six per cent. per annum.[43]

3. Rule of damdupat.— See Note 16 on Section 34 of the A. I. R. Commentaries on the Code of Civil Procedure, 4th (1944) Edition.

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future interest from the date fixed in the decree for payment and so much interest was therefore allowed.)
('19) 6 AIR 1919 Mad 231 (232): 42 Mad 465 (DB).
('22) 9 AIR 1922 Pat 386 (387): 6 Pat L Jour 676 (DB).
('25) 12 AIR 1925 Pat 455 (458, 459) (DB).
(1900) 2 Bom L R 225 (227) (DB).
('02) 6 Cal W N 769 (771).
('15) 2 AIR 1915 Oudh 31 (56) (DB).
* ('07) 34 Cal 150 (161): 34 Ind App 9 (PC). (26 Cal 39 explained.)
('15) 2 AIR 1915 Lah 113 (114, 115): 1915 Pun Re No. 22 (DB).
(1900) 3 Oudh Cas 129 (155) (DB).
('01) 5 Cal W N 653 (654) (DB).
('18) 5 AIR 1918 Oudh 224 (224).
†('13) 18 Ind Cas 535 (542) (PC). (Future interest may even be refused.)
('14) 1 AIR 1914 Oudh 289 (290).
('35) 22 AIR 1935 Oudh 263 (264): 10 Luck 687 (DB). (Interest subsequent to date fixed for payment is ordinarily calculated at 6 per cent.)
('10) 5 Ind Cas 61 (61) (DB) (Cal).
('37) 24 AIR 1937 Lah 894 (895). (Successor of Judge passing decree cannot exercise discretion of granting future interest.)
[*See also* ('42) 29 AIR 1942 Cal 367 (368): I L R (1942) 1 Cal 395. (Preliminary decree awarding interest on the principal amount for the period between the said preliminary decree and the date fixed for payment—Such interest held interest within the meaning of S. 2 (8), Bengal Moneylenders Act (X of 1940) as the principal retains the character of loan up to the latter date on which the judgment-debtor's liability passes into the domain of judgment.)]

36. ('01) 11 Mad L Jour 7 (8) (DB).
('03) 30 Cal 953 (960) (DB).

37. ('40) 27 AIR 1940 F C 7 (9): I L R (1940) Kar F C 45: 1940 F C R 31 (FC). (Interest at 6 per cent. per annum granted.)
* ('07) 34 Cal 150 (161): 34 Ind App 9 (PC).
('09) 3 Ind Cas 291 (300) (DB) (Cal).
('09) 3 Ind Cas 289 (290) (DB) (Cal).
('26) 13 AIR 1926 All 119 (120).
('23) 10 AIR 1923 Oudh 241 (241): 26 Oudh Cas 59 (DB).
('21) 8 AIR 1921 Upp Bur 5 (8): 4 Upp Bur Rul 1. (Interest at 9 per cent. allowed.)
('12) 16 Ind Cas 374 (375) (DB) (Cal). (If there was a valid tender of the mortgage-money, interest thereon would cease though the appellate decree afterwards enhanced the amount found due.)
('19) 6 AIR 1919 Mad 231 (232): 42 Mad 465 (469) (DB).
[*See however* ('32) 19 AIR 1932 Oudh 255 (263): 8 Luck 40 (DB). (Trial Court's discretion to award future interest on the principal sum alone not interfered with in appeal.)]

38. [***But see*** ('94) 16 All 269 (270). (Contrary view in this case is no longer good law.)

39. (21) 8 AIR 1921 Pat 352 (352): 5 Pat L Jour 598 (DB).
('18) 5 AIR 1918 Cal 151 (153) (DB).
[*See* ('17) 4 AIR 1917 Pat 582 (583, 584) (DB). (Future interest not given by preliminary decree—Final decree awarding future interest cannot be questioned in execution.)]

40. (21) 8 AIR 1921 Pat 352 (352): 5 Pat L Jour 598 (DB).
[*See* ('37) 24 AIR 1937 Lah 894 (895). (Space for future interest left blank—Court must be assumed to have refused such interest.)]
[***But see*** ('31) 18 AIR 1931 Oudh 47 (48) (DB). (Preliminary decree providing for future interest—Mortgagee is entitled to such interest though final decree does not provide for it.)]

41. ('12) 17 Ind Cas 936 (940) (DB) (Cal).
('04) 28 Bom 393 (397) (DB).

42. ('06) 33 Cal 846 (848) (DB).
†('19) 6 AIR 1919 All 253 (254): 41 All 526 (528) (DB).
('38) 25 AIR 1938 Nag 54 (56): I L R (1938) Nag 456.
('37) 24 AIR 1937 Rang 193 (194) (DB).
('49) 36 AIR 1949 Cal 414 (417): I L R (1945) 1 Cal 210. *Nemai Chand Sen* v. *Ramkewal Sha.*

R. 12. [New: Act IV of 1882, S. 96.] Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

Sale of property subject to prior mortgage.

[See Civil Procedure Code, Section 73 sub-section (1) clause (b).]

Synopsis

1. Transfer of Property Act, Section 96.
1a. Scope of the rule.
2. Sale of property subject to prior mortgage.
3. Sale free from prior mortgage.
4. Where a prior mortgage is a usufructuary one.
5. Sale by the Court subject to a charge.

1. Transfer of Property Act, Section 96.— The present rule corresponds to the old S. 96 of the Transfer of Property Act of 1882 which was repealed in 1908. That section ran as follows:

> "*96.* If any property the sale of which is directed under this chapter is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold."

By the Transfer of Property (Amendment) Act XX of 1929 a new S. 96 has been inserted in the Transfer of Property Act which deals with a different subject.

1a. Scope of the rule.— This rule confers upon the Court the power of directing a sale free from the prior mortgage subject to two conditions, namely, that the property must be one the sale of which is directed under this Order and there must be consent of the prior mortgagee. When these conditions are satisfied, the Court has full power in its *discretion* to direct the sale free from the prior mortgage.[1] The rule does not require the consent of the plaintiff or of anybody else besides that of the prior mortgagee.[2] Nor is it necessary that a decree for sale on the puisne mortgage must have been passed before this rule can apply. Hence this rule will enable the Court in a puisne mortgagee's suit to pass a preliminary decree for sale free from the prior mortgage, providing that the prior mortgagee should be paid first out of the sale proceeds.[3] But where a decree on a puisne mortgage is passed and such decree is satisfied by the mortgagor, a prior mortgagee although a defendant in the suit cannot thereafter come in under this rule and ask that the property be sold in order to discharge the debt due to him.[4] The right to apply under this rule is not confined to the plaintiff decree-holder. The Court can exercise the power under this rule on the application of anybody or even of its own motion.[5] But the rule does not contemplate an enquiry as to whether a stranger to the suit is a prior mortgagee or not. The rule contemplates the *admitted* existence of a prior mortgagee. Hence, where in the course of the execution proceedings, a stranger comes forward alleging himself to be a prior mortgagee and asking that the procedure under this rule should be applied to him, the Court cannot enter into any enquiry as to the existence of the prior mortgage and apply the procedure under this rule.[6]

2. Sale of property subject to prior mortgage.— The Explanation to

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Order 34 Rule 12—Note 1a

1.† ('35) 22 AIR 1935 Mad 453 (454).
2. ('35) 22 AIR 1935 Mad 453 (454).
3. ('43) 30 AIR 1943 Mad 455 (456). (A I R 1935 Mad 660 distinguished.)
4. ('35) 22 AIR 1935 Mad 660 (663) (DB).
5. ('43) 30 AIR 1943 Mad 455 (456). (A I R 1935 Mad 660 distinguished.)
('35) 22 AIR 1935 Mad 453 (454).
6. ('37) 24 AIR 1937 Mad 554 (554, 555). (Even if such inquiry is allowable executing Court will be exercising its discretion wrongly in entering on any such inquiry.)

O. 34 R. 1 makes it clear that the prior mortgagee is not a necessary party to a suit for a sale on the puisne mortgage. Hence, a puisne mortgagee can bring the mortgaged property to sale under his own decree subject to a prior mortgage.[1] The contrary view, taken in the undermentioned cases[2] decided under the Transfer of Property Act, is obsolete.

As to whether a person having two mortgages on the same property can sue on his puisne mortgage, reserving his rights under the first mortgage, see Notes on S. 67A in the commentaries on the Transfer of Property Act.

3. Sale free from prior mortgage.— The rule clearly implies that without the prior mortgagee's consent, property cannot be sold free of his mortgage, in execution of a decree for sale on a subsequent mortgage.[1] In the absence of such consent, the sale under a decree on a puisne mortgage can only be subject to the prior mortgage though there may be no express reservation of the prior mortgagee's rights.[2] Although the prior mortgagee may be joined as a party to the suit on the puisne mortgage, it is not incumbent on him to assert and prove his priority where his mortgage or his priority is not impugned. (See under sub-heading "suits by puisne mortgagee against the mortgagor and the prior mortgagee" in Note 40 on S. 11 of the A. I. R. Commentaries on the Code of Civil Procedure, 4th (1944) Edn.) The priority, therefore, cannot be lost merely because the prior mortgagee does not establish it in such a case.[3]

See also the undermentioned cases.[4]

4. Where a prior mortgage is a usufructuary one.—*(a) Sale free of prior mortgage—* A usufructuary mortgagee, as such, cannot sue for sale on his mortgage. There is, therefore, a conflict of opinions as to whether a prior usufructuary mortgagee, with whose consent the property is sold under this rule in execution of a decree on a puisne mortgage, is entitled to share in the sale pro-

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O. 34 R 12 Note—2.

1.†('95) 22 Cal 33 (46) (DB).
('34) 21 AIR 1934 All 73 (75) (DB), (Prior mortgagee not impleading subsequent mortgagee—Sale in execution—Purchaser made party to subsequent mortgagee's suit— He can claim under O. 34 R. 12 to sell property free from incumbrance and that he should be paid in first instance or may redeem subsequent mortgage.)
('96) 23 Cal 795 (798) (DB).
[*See* ('07) 29 All 205 (206) (DB). (In this case this principle was applied to the case of a mortgaged property subject to a prior charge.)]
[*See also* ('35) 22 AIR 1935 Lah 218 (221) (DB). (Defendant having prior and subsequent mortgage rights impleaded in suit in the capacity of subsequent mortgagee—He can claim the benefit of this rule in execution on the basis of his prior mortgage.)]
Also see Order 34 Rule 1, Note 10.
2. ('91) 13 All 432 (438, 439, 453) (FB).
(1900) 22 All 212 (214) (DB).

O. 34 Rule 12 Note—3.

1.†('20) 7 AIR 1920 P C 81 (83): 47 Cal 662: 47 Ind App 11 (PC).
('13) 6 Low Bur Rul 144 (145): 19 Ind Cas 2 (2) (DB).
('24) 11 AIR 1924 All 307 (308): 46 All 414 (DB).
[*See also* ('35) 22 AIR 1935 Mad 660 (663) (DB).]
2. ('42) 29 AIR 1942 Cal 138 (140) (DB). (In the absence of order giving prior mortgagee a prior charge on the sale proceeds, no consent to sale of property free of prior mortgagee's rights can be inferred from the mere fact that the sale of property in certain order was made at the instance of the prior mortgagee.)
('06) 29 Mad 84 (86) (DB).
3. ('42) 29 AIR 1942 Cal 138 (141) (DB).
†. ('20) 7 AIR 1920 P C 81 (83): 47 Cal 662: 47 Ind App 11 (PC).
('30) 17 AIR 1930 Lah 1063 (1065) (DB). (Prior mortgagee's assignee.)
('15) 2 AIR 1915 Cal 570 (571) (DB).
('29) 16 AIR 1929 Oudh 463 (466): 4 Luck 250 (DB). (But if the priority is attached the prior mortgagee who has been made a party must establish it.)
('37) 24 AIR 1937 Cal 446 (449) (DB).
[*See* (08) 31 Mad 425 (429) (DB). (No implication that puisne mortgagee not required to redeem when prior mortgagee is a party.)]
Also see Order 34 Rule 1, Note 10.
4. ('92) 14 All 509 (511, 512) (DB). (Prior mortgagee appropriating portion of sale proceeds is estopped from alleging want of consent.)
('34) 21 AIR 1934 Cal 842 (844): 61 Cal 956 (DB). (Calcutta Municipal Act, 1923, S. 205—Sale in execution of mortgage decree of house in Calcutta by Registrar (Original Side)—Arrears of taxes to municipality due—No mention of arrears in proclamation—Liability to pay—Amount is to be paid out of purchase-money.)

ceeds. The High Court of Madras[1] has held that he can, on the ground that this rule applies to all mortgages whether simple or usufructuary or whether the mortgages are in favour of the *same person* or different persons. The High Court of Allahabad,[2] on the other hand, has held that he cannot do so. It has, however, been held that where a puisne mortgagee redeems a prior usufructuary mortgagee, he can bring the mortgaged property to sale for the amounts due under both the mortgages.[3]

(b) Sale subject to prior mortgage— As to sale of mortgaged property *subject* to a prior usufructuary mortgage, See Note 2.

5. Sale by the Court subject to a charge.— A statement in a certificate of sale that the sale is subject to a charge is not conclusive against the purchaser when it is sought to enforce the charge by a suit.[1] A person who sells property subject to an encumbrance which has been recognized by the Court cannot claim a re-sale on the ground that the encumbrance has been found to be void.[2] Mortgages noted in the proclamation of sale as claims upon the property sold should not necessarily be entered in the certificate of sale or be computed as part of the purchase-money, unless the existence of the mortgages has been either admitted by the parties or established by a decree or declared under the Civil Procedure Code, O. 21 R. 62.[3] When a sale is subject to encumbrances, the vendor is no longer liable for their satisfaction nor is he entitled to any benefit that the vendee might obtain therefrom.[4]

Application of proceeds.

R. 13. [New: Act IV of 1882, S. 97.] (1) Such proceeds shall be brought into Court and applied as follows:

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale;

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made;

fourthly, in payment of the principal money due on account of that mortgage; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, 1882.

[*Cf.* C. P. C., S. 73, Sub-s. (1), cl. (c).]

1. Transfer of Property Act, Section 97.— The present rule corresponds to S. 97 of the Transfer of Property Act. That section was as follows:

"*97.* Such proceeds shall be brought into Court and applied as follows:
first, in payment of all expenses incident to the sale or properly incurred in any attempted sale;

O. 34 Rule 12 Note—4.

1. ('07) 30 Mad 408 (409, 410) (DB).
2. ('04) 26 All 14 (17, 18) (DB).
3. ('04) 26 All 14 (18) (DB).

O. 34 Rule 12—Note 5.

1. ('93) 16 Mad 207 (213) (DB).
2. ('99) 23 Bom 759 (760, 761) (DB). (*Semble*—He may sue for declaration.)
3. † ('94) 18 Bom 175 (176, 177) (FB).
4. * ('09) 31 All 583 (589) : 36 Ind App 203 : 3 Ind Cas 793 (794) (PC).

secondly, if the property has been sold free from any prior mortgage, in payment of whatever is due on account of such mortgage;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made;

fourthly, in payment of the principal money due on account of that mortgage; and lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or, if there be more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

Nothing in this section or in S. 96 shall be deemed to affect the powers conferred by Section 57."

2. Application of proceeds.— Compare S. 73 of the Code of Civil Procedure. It has been held that although this rule in terms applies only when the sale is ordered under R. 12, i.e., when the sale is free of the prior mortgage, the principle of the rule applies also to cases of sales *subject* to a prior mortgage, and that even in such cases, the proceeds should first be applied towards the interest and costs of the mortgage under which the sale is held and then only towards the principal.[1] But the undermentioned decision[2] holds that where there is no prior mortgage and hence, there is no question of the applicability of this rule, the proceeds of sale must first be applied towards the principal and then to the interest and costs. This rule is intended to regulate the position as between the mortgagor and the mortgagee. It does not apply to a case of suretyship.[3]

Where a sale is held in enforcement of a prior mortgage, a puisne mortgagee receiving an amount from out of the surplus sale proceeds *by virtue of his security* is bound to apply them only in satisfaction of his mortgage-debt, though the mortgagor may have paid the money towards other debts.[4]

3. "Whatever is due to the prior mortgagee."— Each of the prior encumbrancers is entitled to interest at the contract rate up to the date of the *confirmation* of the sale, that being the earliest date when the money really becomes available for distribution.[1]

4. "Person proving himself to be interested in the property sold." —This expression includes a subsequent encumbrancer,[1] but does not include him if the existence or validity of the subsequent encumbrance is challenged by the mortgagor.[2] A subsequent mortgagee who has obtained a decree on his mortgage but has allowed it to become time-barred is not a person interested in the property

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O. 34 Rule 13—Note 2.

1. ('41) 28 AIR 1941 Lah 386 (391, 392): I L R (1941) Lah 740 (FB). (AIR 1938 Lah 289: ILR (1938) Lah 403 overruled: AIR 1928 Lah 901 approved.)
('13) 21 Ind Cas 691 (693) (DB) (Mad.)
[*See also*] ('45) 32 AIR 1945 Mad 392 (393, 394), *Sanyasappa Rao* v. *Papi Naidu*. (When moneys are realised in execution of a mortgage decree in the absence of something in the decree itself to indicate that a contrary appropriation or application of the sale proceeds was intended or directed, the amount realised should first be appropriated towards interest and costs of the suit and the appeal and the balance alone should be applied to the payment of the principal amount.]
2. ('31) 18 AIR 1931 Rang 153 (157, 158): 9 Rang 186 (DB).
[*See also* ('32) 19 AIR 1932 Mad 155 (156, 157): 55 Mad 332 (DB).]
3.† ('35) 22 AIR 1935 Lah 334 (335) (DB). (Contract by surety for payment of interest —Rule does not apply as claim for interest due by surety is claim apart from claim upon mortgage and is separate cause of action—Sale proceeds cannot therefore be deemed to have been appropriated towards interest.)
4. ('03) 30 Cal 953 (958, 959) (DB).

O. 34 Rule 13—Note 3.

1. ('10) 8 Ind Cas 4 (6) (DB) (Cal.)

O. 34 Rule 13—Note 4.

1. ('26) 13 AIR 1926 Mad 101 (105).
('94) 18 Bom 684 (688) (DB).
2. ('27) 14 AIR 1927 All 467 (468): 49 All 636 (DB).

sold.[3] It was held in the undermentioned case[4] that the holder of two successive mortgages on the same property, who failed to include the second mortgage in his suit on the first mortgage, could claim the surplus sale proceeds under this rule as a puisne encumbrancer. That position will, it is conceived, be different in cases governed by S. 67A of the Transfer of Property Act which has been newly introduced by Act XX of 1929. A mere unsecured creditor is not a person "interested in the property sold." But after the subsequent encumbrances are satisfied, he can proceed against the balance, if any, payable to the mortgagor.[5]

5. Appeal or Revision.— No appeal lies against an order passed under this rule. A revision also will not lie in a large majority of cases as no question of law will probably be involved. If however the order under this rule is found prejudicial it might be possible for the parties to take action under S. 151 Civil P. C.[1]

R. 14. [New: Act IV of 1882, S. 99] (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2.

Suit for sale necessary for bringing mortgaged property to sale.

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has not been extended.

Synopsis

1. Transfer of Property Act, Section 99.
2. Scope and object of the rule.
3. Applicability of the rule to the enforcement of a charge.
4. Applicability of the rule to the enforcement of security bonds.
5. "Mortgagee," meaning of, under this rule.
6. "Decree for the payment of money in satisfaction of a claim arising under the mortgage."
7. Effect of sale in contravention of the rule.
8. Position of purchaser at such sale. See Note 7.
9. Attachment of the property is not prohibited.
10. Transferee of money decree from mortgagee, if bound by the restrictions against the mortgagee.
11. "Otherwise than by instituting a suit."
12. Sale of mortgaged property for claim unconnected with the mortgage.
13. Order 2 Rule 2 of the Code of Civil Procedure.
14. Consent decree.
15. "Decree."

TOPIC INDICATOR

Applicability only if mortgage is valid and enforceable. See Note 6.

Applicability to Revenue Courts. See Note 2.

Inapplicability to a mortgage created by the decree itself and not existing prior thereto. See Note 6.

Inapplicability to judicial sales before the Transfer of Property Act. See Note 2.

Mortgagee himself purchasing contrary to this rule—Effect. See Note 7.

Purchase in a sale in enforcement of money decrees of third person. See Note 12.

Sale under Public Demands Recovery Act—What passes at. See Note 11.

Sales prior to the Transfer of Property Act—What interest passed. See Note 7.

Sub-rule (2). See Note 2.

3.† ('25) 12 AIR 1925 All 6 (8) (DB).

4. ('07) 30 Mad 353 (355) (DB). (But he was not entitled to maintain a suit for sale on the second mortgage.)

5. ('94) 18 Bom 684 (687, 688) (DB).

O. 34 Rule 13—Note 5.

1. ('42) 1942 Aj. M. L. J. 51 (52), *Kanwal Nain Hamir Singh* v. *Pan Mal Lodha.*

1. Transfer of Property Act, Section 99.— This rule corresponds to S. 99 of the Transfer of Property Act, which ran as follows:

"*99.* Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under S. 67, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43."

The following difference may be noted, namely, that while S. 99 applied even to cases in which the mortgagee had obtained a money decree on a claim *unconnected* with the mortgage, R. 14 is expressly confined to cases where a money decree has been obtained on a claim *arising under the mortgage.* See Note 12.

2. Scope and object of the rule.— As has been seen in Note 19 on Rule 5, a sale in execution of a decree on a mortgage passes the interests of both the mortgagor and the mortgagee, while a sale in execution of a *money* decree conveys only the interest of the mortgagor, namely the equity of redemption. The object of the present rule is to prevent the mortgagee from bringing to sale the bare equity of redemption in execution of a money decree which he may obtain in respect of a *claim arising under the mortgage.*[1] Thus, where a mortgagee obtains a simple money decree for the interest that has accrued due on the mortgage, or obtains a money decree for the mortgage-debt undr S. 68 of the Transfer of Property Act, he cannot attach and sell the *mortgaged properties* in execution of the said decree though he can proceed against the person or other properties of the mortgagor. If he wants to proceed against the mortgaged properties he is bound to bring a suit for sale again, and such a suit will not be barred by the provisions of the Civil Procedure Code, Order 2, Rule 2.

The reason of the rule is the avoidance of several evils which are likely to result if a mortgagee is allowed to bring the mortgaged properties to sale in execution of a money decree which he has obtained on a claim arising under the mortgage.[2] Such a sale would deprive the mortgagor summarily of the right of redemption without giving him any of the facilities which an ordinary suit for sale ensures. Being subject to the unascertained claim of the mortgagee, the property would not fetch a fair value at the sale and the mortgagee would be enabled to purchase it at an unduly low price. If a stranger purchased it at the sale without notice of the mortgage he would be subjected to great hardship unless the mortgagee could be held to be estopped from asserting his rights under the mortgage against such a purchaser.[3]

Apart from the statutory provisions contained in this rule and S. 90 of the Trusts Act, there is no *general* prohibition against a mortgagee purchasing the mortgaged property at a compulsory sale, such as a sale in execution or for arrears of revenue. Thus, there is nothing to prevent a puisne mortgagee from purchasing the mortgaged property at a sale in execution of a decree on the prior mortgage. A purchase by the mortgagee of the mortgaged property at a sale for arrears of revenue is similarly not open to any objection where the default in the payment

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Order 34 Rule 14—Note 2.

1. ('43) 30 AIR 1943 Pat 282 (283): 22 Pat 207 (DB).
2. ('11) 9 Ind Cas 1034 (1036, 1037) (DB) (Cal).
† ('99) 22 Mad 372 (376) (SB).
('05) 32 Cal 296 (316): 32 Ind App 23 (PC).
†('02) 26 Bom 88 (104, 105) (SB).
('95) 17 All 520 (521) (DB).
('25) 12 AIR 1925 Sind 156 (157) (DB).
('24) 11 AIR 1924 Pat 20 (22): 2 Pat 787 (DB). (Mortgage decree ending in compromise—Rule does not apply.)
†('16) 3 AIR 1916 Pat 252 (253, 254): 2 Pat L Jour 55 (DB).
('92) 2 Mad L Jour 188 (190) (DB).
3. ('11) 9 Ind Cas 1034 (1036, 1037) (DB) (Cal).
('95) 17 All 520 (521, 522) (DB).
('36) 23 AIR 1936 All 663 (666) (DB).
[*See also* ('43) 30 AIR 1943 Mad 202 (204): ILR (1943) Mad 418 (DB). (Rule 14 aims at affording to the mortgagor a measure of protection against the mortgaged property being sold at a disadvantage.)]

of the revenue has in no way been due to him.[4] The rule is retrospective in effect being a rule of procedure, and applies to decrees passed even prior to its coming into force.[5]

The rule is intended for the benefit of the mortgagor[6] and so it is open to him to waive the benefit of the rule. When he has thus waived the benefit of the rule, it is not for third parties to object under this rule, to the sale of the properties. Thus, where the mortgagor has agreed to the sale of the properties in execution of a money decree obtained by the mortgagee in respect of the mortgage amount, another creditor of the mortgagor who has attached the properties in execution of his own decree cannot object under this rule to the sale of the properties.[7] See also Note 14.

The rule does not preclude a *suit* for money in respect of a claim arising under the mortgage. The rule only precludes the sale of the mortgaged property in execution of the decree obtained in such suit.[8] It has been held by the Bombay High Court that the rule does not apply to a sale held by the revenue authorities under S. 86 of the Bombay Land Revenue Code at the instance of the mortgagee.[9]

The rule does not apply to the Punjab, the Transfer of Property Act not having been extended thereto.[10] See sub-rule (2). See also the undermentioned cases.[11]

When S. 99 of the Transfer of Property Act was in force, it was held that the section applied to Civil Courts and Revenue Courts.[12] It was also held that the section applied to mortgages created before the Transfer of Property Act,[13] but not to judicial sales held and perfected before the date of the Act.[14]

The rule prevents only a *sale* of the mortgaged property under a money decree in respect of a claim arising under the mortgage. It does not prevent the *attachment* of the mortgaged property under such a decree. See Note 9.

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4. ('43) 30 AIR 1943 Mad 202 (205): ILR (1943) Mad 418 (DB). (Mortgage decree for sale of properties *A* and *B*—Decree directing that *A* should be sold first and then if necessary, *B*—Mortgagee purchasing *A* at revenue sale, for a small amount and then seeking to proceed against *B*—His action comes neither under this Rule nor under S. 90 of the Trusts Act where he has not been responsible for the revenue default.)
5. ('11) 35 Bom 248 (252): 10 Ind Cas 815 (816) (DB).
6. ('43) 30 AIR 1943 Pat 282 (283): 22 Pat 207 (DB).
('44) 31 AIR 1944 Pat 5 (7): 22 Pat 320 (323) (DB). (The apparent intention of the Legislature is that the mortgagors should not be prejudiced in their right of redemption otherwise than under a suit for sale under the mortgage so that the Court may adjudicate upon all rights and liabilities of the parties *inter se*.)
7. ('37) 41 Cal W N 1133 (1135).
8. ('36) 40 Cal W N 343 (345) (DB).
[*See also* ('36) 23 AIR 1936 Rang 47 (48). (Mortgagee paying revenue and land tax in respect of mortgaged property—He is not bound to add such money to principal mortgage-money—Suit for such money is competent.)]
9. ('42) 29 AIR 1942 Bom 278 (279): ILR (1942) Bom 608 (DB). (Rent note by mortgagor in favour of mortgagee—Rent in arrears—Mortgagee applying for sale under S. 86—Sale of equity of redemption—Sale is binding on mortgagor and is not affected by R. 14.)
10. ('11) 1911 Pun Re No. 15:9 Ind Cas 549 (551).
('35) 22 AIR 1935 Lah 672 (675): 16 Lah 640 (FB).
('07) 1907 Pun Re No. 2, page 18. (Principle of S. 99, T. P. Act, applied to the Punjab.)
('28) 15 AIR 1928 Lah 209 (211).
('19) 6 AIR 1919 Lah 439 (439): 1918 Pun Re No. 88 (DB). (In view of sub-r. (1) even the principle of Rule 14 does not apply in the Punjab.)
[*See also* ('31) 18 AIR 1931 Lah 483 (485): 13 Lah 143 (DB). (Decree for sale not a necessary preliminary to sale of equity of redemption.)]
11. ('11) 5 Sind L R 71 (76, 77): 11 Ind Cas 192 (195) (DB). (Prior to extension of Transfer of Property Act to Sind in 1915, Rule 14 did not apply to Sind.)
('29) 16 AIR 1929 Pat 439 (440) (DB). (Rule does not apply to Sonthal Parganas as the Transfer of Property Act has not been extended to those territories.)
12. ('96) 18 All 325 (327) (DB).
13. ('87) 10 Mad 129 (130, 131) (DB).
14. ('96) 19 Mad 382 (384) (DB).
('06) 29 Mad 421 (423) (DB).
('99) 23 Bom 119 (121) (DB).
('35) 22 AIR 1935 Oudh 183 (187): 10 Luck 293 (DB).

See also the undermentioned case.[15]

3. Applicability of the rule to the enforcement of a charge.— By force of Rule 15, this rule applies to charges as well as to mortgages.[1] It applies, however, only to a charge which exists *prior* to the decree for money and not to one which is created for the first time *by* the decree as in the latter case the decree cannot be said to be obtained in satisfaction of a claim arising under the mortgage. See Note 6. In such a case, therefore, the charge can be enforced in execution without any fresh suit for sale being filed.[2] Thus, where, in a suit for maintenance by a Hindu widow, the maintenance decreed is made a charge on certain property, the widow can enforce the charge by applying for sale of the property in execution and cannot be compelled to file a suit for sale.[3] As to the right of the decree-holder to proceed against the *other* properties of the judgment-debtor, see Notes on Order 34 Rule 15.

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15. ('33) 20 AIR 1933 Nag 211 (213) (DB). (Award by Registrar of Co-operative Societies, directing sale of mortgaged property does not militate against Rule 14.)

Order 34. R, 14—Note 3.

1. ('49) 36 AIR 1949 Mad 143 (144), *Venkata Chalapathi Rao* v. *Kanchayya.*
('40) 27 AIR 1940 Pat 283 (285) (DB).
('99) 12 C P L R 26 (27).
('05) 1 Nag L R 117 (119).
† ('95) 22 Cal 859 (863) (DB).
†('20) 7 AIR 1920 Mad 183 (186): 43 Mad 786 (DB).
('20) 7 AIR 1920 Pat 521 (522): 5 Pat L Jour 248. (Mortgagee's charges on mortgaged property for Government revenue paid by him.)
('18) 5 AIR 1918 Cal 705 (706, 707): 45 Cal 530 (DB).

2. ('46) 33 AIR 1946 Pat 216 (217): 223 Ind Cas 173, *Sheonandan Pondey* v. *Asarfikuer.*
† ('19) 6 AIR 1919 Bom 56 (59) : 43 Bom 631 (DB).
('34) 21 AIR 1934 All 524 (524) (DB).
†('34) 21 AIR 1934 Bom 241 (242) (DB).
('34) 21 AIR 1934 Cal 327 (327): 60 Cal 1467. (Money decree creating charge—Separate suit to enforce charge is not maintainable in view of S. 47—This rule also does not apply.)
†('35) 22 AIR 1935 Nag 129 (130, 131) (DB).
('34) 21 AIR 1934 Nag 83 (84). (A case of maintenance decree creating a charge.)
†('34) 21 AIR 1934 Nag 147 (149): 30 Nag L R 325 (DB). (Compromise decree for money—Charge created on certain properties—Decree can be executed by sale of charged properties without suit under S. 67, T. P. Act.)
('33) 20 AIR 1933 Pat 306 (400, 401): 12 Pat 359 (DB). (Decree creating charge for future maintenance can be passed and executed.)
('18) 5 AIR 1918 Pat 380 (382, 383) (DB). Decree based on award which created charge on property for maintenance—Decree is capable of execution personally.)
†('29) 16 AIR 1929 Bom 227 (227) (DB).
* ('26) 13 AIR 1926 Mad 194 (196, 197) (DB).
('31) 18 AIR 1931 Mad 603 (603) (DB).
('25) 12 AIR 1925 Mad 1101 (1103) (DB). (Creation of a charge by the decree in a money suit does not convert the suit into a mortgage suit and make the provisions of Order 34 applicable.)
('28) 15 AIR 1928 Lah 209 (210, 212).
('32) 19 AIR 1932 All 439 (440): 54 All 763 (DB). (Compromise charging property for payment—Subsequent decree on compromise—Charge held to be prior to decree—*Obiter.*)
[*See* ('36) 159 Ind Cas 804 (804) (DB) (Mad). (Decree for money declaring charge for unpaid purchase-money—Decree cannot be enforced against charged property without a suit for sale, the charge being prior to decree.)]
[*See also* ('36) 23 AIR 1936 Pat 289 (291, 292): 15 Pat 545 (DB). (Money decree providing for payment in instalments on judgment-debtor executing security bond hypothecating property— Default—Property charged can be sold in execution.)]
[**But see** ('97) 2 Cal W N 33 (33, 34). (Case under S. 99. T. P. Act—Charge created by the decree in respect of certain sum ordered to be paid monthly—Proper course for its enforcement is not simply to make application, but either to apply for an order in the nature of a decree for an account and sale or else to institute a suit for enforcing it.)
('95) 22 Cal 859 (863, 864) (DB). (Case decided under S. 99, T. P. Act, which was not clear as Rule 14 on this question.)
('95) 22 Cal 903 (908). (Do.)]

3. ('46) 33 AIR 1946 Pat 216 (217): 223 Ind Cas 173. *Sheonandan Pandey* v. *Asarfi Kuer.*
('20) 7 A I R 1920 Pat 636 (639) (DB).
* ('22) 9 AIR 1922 Cal 35 (37) (DB).
('16) 3 AIR 1916 Pat 252 (254): 2 Pat L Jour 55 (DB).
†('18) 5 AIR 1918 Mad 668 (668) (DB).
('19) 6 AIR 1919 Mad 894 (895, 896) (DB).
('01) 24 Mad 689 (694) (DB).
* ('92) 19 Cal 139 (146) (FB).
('26) 13 AIR 1926 Pat 31 (31, 32): 4 Pat 693 (DB.)
('39) 26 AIR 1939 All 579 (580) (DB).

4. Applicability of the rule to the enforcement of security bonds.— Under S. 145 of the Code, the liability of a surety for a judgment-debtor can be enforced summarily in execution proceedings, in so far as the surety has made himself personally liable. But, suppose, besides making himself personally liable, he mortgages some property as security. Can the property be sold in execution without a suit for sale? On this question, there is a conflict of decisions. It has been held by the High Courts of Allahabad,[1] Bombay,[2] Madras[3] and Patna[4] that this rule does not apply to such a case as there is no *decree for money* against the surety within the meaning of this rule and that therefore the property can be sold without resort to a *suit* for sale. But the High Court of Calcutta[5] has held that the rule applies and is an absolute bar to the sale of the mortgaged property without a regular suit for sale. See also the A. I. R. Commentaries on the Code of Civil Procedure, 4th (1944) Edn., section 145, Note 8.

Where the security bond is given to the *Court* and not to any named person, there is no mortgage, the Court not being a juridical person and the proper procedure to enforce the security is by a summary order for the sale of the property covered by the bond, unless the surety pays the amount of security within a specified date.[6]

Where a money decree is ordered to be paid in instalments on the judgment-debtor executing a security bond hypothecating immovable property for the satisfaction of the decree and default is committed in the payment of instalments, the hypothecated property can be sold in execution of the decree and a fresh suit is not necessary. The reason is that the hypothecation being made *after* the money decree, such decree is not one in satisfaction of a claim arising under the mortgage.[7]

('37) 24 AIR 1937 Pat 654 (655) (DB).
[*See also* ('99) 26 Cal 441 (448). (To avoid difficulty in executing decree for maintenance the better course would be to appoint a receiver with power to sell in case of default by the judgment-debtor.)]
[*But see* ('95) 22 Cal 903 (908). (Case decided under S. 99, Transfer of Property Act.)
('07) 17 Mad L Jour 217 (217) (DB). (Do.)]

O. 34 Rule 14—Note 4.

1. ('95) 17 All 99 (101, 102) (DB).
* ('80) 2 All 604 (610, 612) (FB).
†('16) 3 AIR 1916 All 57 (59, 60): 38 All 327 (DB).
2. ('88) 12 Bom 411 (414) (DB).
†('26) 13 AIR 1926 Bom 279 (279): 50 Bom 339 (DB).
3. ('90) 13 Mad 1 (3, 4) (DB).
† ('26) 13 AIR 1926 Mad 194 (196, 197) (DB).
4. ('17) 4 AIR 1917 Pat 596 (596): 2 Pat L Jour 197 (DB).
[*See* ('17) 4 AIR 1917 Pat 489 (489) (DB).]
[*See however* ('16) 3 AIR 1916 Pat 61 (62): 37 Ind Cas 397 (398, 399) (DB). (Compromise in money suit reference to mortgage already executed—Property cannot be sold otherwise than by suit for sale.)]
5. ('05) 32 Cal 494 (496) (DB).
('95) 22 Cal 25 (28) (DB).
('88) 15 Cal 497 (502) (DB).
('15) 2 AIR 1915 Cal 533 (533): 27 Ind Cas 365 (366) (DB). (If, however, the rights under the mortgage are abandoned, the properties may be sold in enforcement of the personal liability.)
†[*But see* ('13) 18 Ind Cas 900 (904) (FB) (Cal). (Case under S. 99. T. P. Act—In view of its peculiar facts. held S. 99 did not apply.)]
6. †('19) 6 AIR 1919 P C 55 (59): 22 Oudh Cas 212: 42 All 158: 46 Ind App 228 (PC).
('95) 17 All 99 (101) (DB).
('03) 30 Cal 1060 (1062, 1063) (DB).
†('26) 13 AIR 1926 Cal 889 (891, 892): 54 Cal 1 (DB).
('24) 11 AIR 1924 Cal 485 (487): 51 Cal 150 (DB).
('03) 7 Cal W N 914 (916) (DB).
('34) 21 AIR 1934 Cal 64 (67): 60 Cal 1298 (DB). (A security bond executed by a judgment-debtor for the purpose of removing an attachment before judgment can be enforced in the course of execution.)
* ('36) 23 AIR 1936 Mad 589 (591). (Security bond can be enforced in execution by sale of the property even if the property is subsequently alienated, to the extent of the sum secured thereunder.)
[*See* ('99) 26 Cal 246 (249) (DB). (Security bond given to Registrar was held to constitute mortgage and require the formalities of a mortgage).]
7. ('34) 21 AIR 1934 All 524 (524) (DB).
* ('36) 23 AIR 1936 Pat 289 (291, 292): 15 Pat 545 (DB).
[*See also* ('40) 27 AIR 1940 All 196 (197) (DB). (Security bond given for getting stay of execution—Property can be sold in enforcement of bond without recourse to suit for sale.)

5. "Mortgagee," meaning of, under this rule.— "Mortgagee" includes the holder of a charge. See Note 3.

6. "Decree for the payment of money in satisfaction of a claim arising under the mortgage."— Section 99 of the Transfer of Property Act applied though the claim on which the money decree was obtained was totally *unconnected* with the mortgage. The present rule applies only to cases in which a money decree is obtained on a claim *arising under the mortgage*.[1] For further information on this aspect of the subject, See Note 12. It follows from the language of the rule that the mortgage should be one *existing* prior to the decree and not one created by the decree itself.[2] The rule also presupposes that the mortgage is *valid and enforceable* at the time of the passing of the money decree. If the mortgage is invalid or has become unenforceable through the efflux of time, or any other reason, the rule does not apply and is no bar to the sale of the property under the money decree.[3] But a mere statement by the mortgagee that he gives up the mortgage right will not put an end to the mortgage so as to make this rule not applicable.[4]

O. 34 Rule 14—Note 6.

1.†('44) 31 AIR 1944 Pat 5 (7, 8, 9): 22 Pat 320 (DB), (Usufructuary mortgage and lease back to mortgagor held part of same mortgage transaction and property not liable to be sold in execution of decree obtained on lease.)

†('16) 3 AIR 1916 Pat 252 (253): 2 Pat L Jour 55 (DB).

2. ('49) 36 AIR 1949 Mad 143 (144), *Venkata Chalapathi Rao* v. *Kanchayya*.

('29) 16 AIR 1929 Pat 439 (440) (DB).

('34) 21 AIR 1934 All 524 (524) (DB). (As per decree defendant executing security bond for due payment by instalments—On failure decree-holder applying for sale in execution—Rule does not apply.)

('34) 21 AIR 1934 Bom 241 (242) (DB).

('35) 22 AIR 1935 Nag 129 (130) (DB). (Charge created in decree on specified properties for payment of decretal amount—Decree can be executed and charged property can be sold—No separate suit is necessary.)

('26) 13 AIR 1926 Mad 194 (196, 197) (DB).

('16) 3 AIR 1916 Pat 252 (253): 2 Pat L Jour 55 (DB).

('22) 9 AIR 1922 Cal 35 (37) (DB).

('09) 3 Sind L R 120 (121): 4 Ind Cas 606 (606) (DB). (Even under S. 99, T. P. Act, same was the rule.)

('36) 23 AIR 1936 Pat 289 (291, 292): 15 Pat 545 (DB). (Money decree providing for payment in instalments on judgment-debtor executing security bond hypothecating property—Property can be sold in execution on default of payment.)

[*See also* ('35) 22 AIR 1935 All 179 (180). (Judgment-debtor hypothecating his property to decree-holder by security bond—Application for execution of money decree by sale of hypothecated property—Objection by judgment-debtor that suit on bond should be instituted first is not maintainable.)

3. ('42) 29 AIR 1942 Pat 50 (51): 20 Pat 751 (DB). (Suit on mortgage of joint family property executed by father—Mortgage found invalid to certain extent and simple money decree for such amount passed against father—Decree-holder can attach and sell mortgaged property in execution—Rule 14 is no bar.)

†('21) 8 AIR 1921 Mad 477 (478) (DB).

('35) 22 AIR 1935 All 507 (508). (Suit on mortgage of joint family property executed by father—Mortgage found to be invalid to certain extent and simple money decree for such amount passed against father—Creditor can attach and sell mortgaged property in execution of simple money decree.)

('20) 7 AIR 1920 All 165 (165): 42 All 566 (DB) (Do.)

†('17) 4 AIR 1917 All 470 (472): 39 All 36 (DB). (Rule applies only to the case of a subsisting mortgage and not to the case of a dead and defunct mortgage.)

('29) 16 AIR 1929 All 580 (581) (DB). (Mortgage declared to be invalid and simple money decree passed—Rule does not apply.)

('21) 8 AIR 1921 All 131 (133): 43 All 677 (DB).

('29) 115 Ind Cas 829 (829) (DB) (Mad.) (In this case the principle was applied to a case where the mortgagee decree-holder had given up his rights under the mortgage.)

('20) 7 AIR 1920 Mad 319 (320) (DB). (Rule does not apply to mortgage which was not brought into operation owing to the fact that a prescribed condition precedent had not been fulfilled.)

('30) 17 AIR 1930 Mad 138 (141): 53 Mad 670 (DB). (Suit on mortgage—Finding that the mortgagor had no title to the property at the time of the mortgage—Money decree passed—Judgment-debtor subsequently acquiring interest in the property by inheritance—*Held* that the decree-holder could sell the property.)

('36) 23 AIR 1936 All 8 (9): 1935 All W R 1216 (1217) (DB). (Suit on basis of mortgage—Court finding that amount was not charged on property and passing a money decree—Rule does not apply.)

4.†('37) 24 AIR 1937 Mad 501 (502).

('35) 22 AIR 1935 Rang 132 (133): 13 Rang 292 (DB).

The rule refers to a simple money suit because it is only in such a case that there can be any question of bringing another suit for sale on the mortgage. Thus, where a mortgagee sues for sale in respect of a part of the mortgaged property and after the sale of such part in execution of the decree in the suit obtains a personal decree under O. 34 R. 6, such a decree can be executed by sale of the exempted part of the mortgaged property. The reason is that in such a case the suit for sale has already been brought and a fresh suit for sale in respect of the exempted portion would be barred under the Civil Procedure Code, Order 2 Rule 2.[5]

7. Effect of sale in contravention of the rule.— A sale in contravention of the rule can be prevented by an objection being taken at any time before the sale takes place.[1] But if it does actually take place, it is not void but is only voidable at the instance of the mortgagor or of any other person having an interest in the equity of redemption.[2] The contrary view held in the undermentioned cases[3] cannot be considered to be good law. The proper remedy to set aside a sale held in contravention of the rule is by an application under S. 47 of the Code and not by a separate suit.[4] The application should be made before the *confirmation* of the sale. After the sale has been confirmed, it cannot be set aside unless owing to fraud or other reasons the mortgagor was kept in ignorance of the sale proceedings prior to the sale.[5] Where the sale is held after due notice to the judg-

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('36) 23 AIR 1936 All 663 (665) (DB).
[*See however* ('39) 26 AIR 1939 Oudh 126 (128) (DB). (In suit upon mortgage of ancestral property sons challenging validity of mortgage—Mortgagee giving up security and obtaining money decree against mortgagor—In execution, mortgagee held entitled to bring mortgaged property to sale—O. 34 R. 14 held did not apply as mortgage no longer subsisted.)]

5.†('38) 25 AIR 1938 All 341 (341, 342): I L R (1938) All 466 (DB).

O. 34 R. 14—Note 7.

1. ('18) 5 AIR 1918 Cal 705 (706): 45 Cal 530 (537): 41 Ind Cas 73 (76) (DB).
('06) 8 Bom L R 576 (577) (DB).
('05) 2 All L Jour 356 (357) (DB).
[*See also* ('07) 4 All L Jour 787 (789).]

2. ('47) 34 AIR 1947 Mad 72 (73), *Panchapagesa* v. *Rajamani.*
('45) 32 AIR 1945 Cal 322 (325) (DB), *Sudhamoyee* v. *Jessore Loan Co.* 35 Cal 61 (FB), Foll.]
('17) 4 AIR 1917 Pat 608 (609, 610): 2 Pat L Jour 587 (DB).
†('20) 7 AIR 1920 Cal 363 (366): 47 Cal 377 (FB). (Mortgagor must set aside auction sale within time to enforce his right of redemption.)
* ('05) 8 Oudh Cas 327 (337) (DB).
('10) 6 Ind Cas 47 (49) (DB) (Cal.)
('19) 6 AIR 1919 Cal 1008 (1009) (DB). (Follows 6 Ind Cas 47 Cal.)
('07) 30 Mad 313 (315) (DB).
('99) 22 Mad 347 (348) (DB).
†('08) 35 Cal 61 (66) (FB).
* ('05) 32 Cal 296 (316) : 32 Ind App 23 (PC).
('08) 30 All 146 (148) (DB).
('05) 27 All 517 (523, 524, 525) (DB).
†('26) 13 AIR 1926 Lah 490 (491, 492) (DB).
('21) 8 AIR 1921 Bom 285 (287): 45 Bom 174 (DB).
('16) 3 AIR 1916 Bom 61 (62): 41 Bom 357 (DB).
* ('15) 2 AIR 1915 All 70 (72): 37 All 165 (FB).
('12) 14 Ind Cas 780 (781) (DB) (Bom).
('26) 97 Ind Cas 256 (256) (All).
('35) 22 AIR 1935 Oudh 183 (187): 10 Luck 293 (DB). (Sale in contravention of S. 99, T. P. Act, is only voidable.)
[*See* ('07) 30 Mad 362 (365) (DB).]

3. ('89) 12 Mad 325 (328) (DB).
('99) 22 Mad 241 (245) (DB).
('91) 14 Mad 74 (75, 76) (DB).
('93) 16 Mad 436 (437) (DB).
('06) 33 Cal 113 (115) (DB).
('06) 33 Cal 283 (286) (DB).
('03) 30 Cal 463 (465, 466) (DB).
('99) 26 Cal 164 (166) (DB).

4. ('07) 9 Bom L R 462 (464, 466) (DB).
('06) 30 Mad 313 (315) (DB). (Though the property may have been brought by a stranger.)
('99) 22 Mad 347 (349) (DB).
* ('08) 35 Cal 61 (66, 80) (FB).
('06) 28 All 681 (682) (DB).
†('26) 13 AIR 1926 Lah 490 (492) (DB).
('21) 8 AIR 1921 Bom 285 (288): 45 Bom 174 (DB).
('12) 14 Ind Cas 780 (781) (DB) (Bom).
†('05) 8 Oudh Cas 327 (337) (DB).
('47) 34 AIR 1947 Mad 72 (73), *Panchapagesa* v. *Rajamani.* (Violation of O. 34 R 14 confers on person affected only a right to have the sale set aside either by way of application or by way of suit if such a suit is maintainable—Application or suit should be filed within time provided by law,—Suit brought more than 1 year after confirmation of sale held barred under Art 12, Lim. Act.)

5 ('08) 35 Cal 61 (80) (FB).
†('16) 3 AIR 1916 Lah 196 (198): 1916 Pun Re No. 18: 33 Ind Cas 802 (804) (DB). (Mortgagor was party to execution proceed-

ment-debtor he cannot subsequently question its validity.[6]

Once the sale is confirmed, the purchaser gets a good title to the property and is not liable to be redeemed subsequently by the mortgagor.[7] The fact that the mortgagee himself has purchased the property with the leave of the Court makes no difference.[8] In the undermentioned cases,[9] however, it was held that if the mortgagee himself is the purchaser, the mortgagor's right of redemption is not affected. It is submitted that the latter view is not correct for two reasons—

(1) Section 60 of the Transfer of Property Act recognizes the possibility of the extinguishment of the equity of redemption by its becoming vested in the mortgagee, and,

(2) a decree-holder who buys with the leave of the Court is in the same position as any other purchaser.

Section 47 and O. 21 R. 92, Civil Procedure Code, do not apply to persons who are not parties to the sale proceedings and therefore such persons can object to the sale by a separate suit even subsequent to its confirmation.[10]

A sale of the mortgaged property in execution of a money decree is subject to the encumbrances covering the property at the time inasmuch as only the mortgagor's interest passes at such a sale.[11] (Compare the undermentioned cases,[12] decided prior to the Transfer of Property Act, in which it was held that the mortgagee's interest also passed at such a sale.)

But a mortgagee decree-holder who, while bringing the mortgaged property to sale under a money decree, fails to disclose his mortgage, is stopped from asserting his rights under the mortgage against an innocent auction-purchaser.[13]

An application for sale made in contravention of R.14 is not one in accordance with law within the meaning of Art. 182 of the Limitation Act. See the A. I. R. Commentaries on the Limitation Act, 2nd (1942) Edn., Art. 182, Note 52.

8. Position of purchaser at such sale.— See Note 7.

9. Attachment of the property is not prohibited.— The rule prohibits only the *sale* of the mortgaged property under a money decree for the mortgage-debt.

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ings relating to a money-decree—Equity of redemption sold—Mortgagor raised no objection—*Held*, good title passed to purchaser.)

†('15) 2 AIR 1915 All 70 (72): 37 All 165 (FB).

('04) 1 All L Jour 360 (363) (DB).

('05) 2 All L Jour 123 (124, 125) (DB).

('08) 30 All 146 (149) (DB).

[*See also* ('09) 4 Ind Cas 1096 (1096, 1097) (DB) (Mad).]

6. (1900) 10 Mad L Jour 110 (111) (DB).

7. ('07) 30 Mad 313 (315) (DB).

('96) 18 All 325 (327, 328) (DB).

('27) 14 AIR 1927 Mad 1135 (1135).

†('17) 4 AIR 1917 Mad 592 (594) (DB).

†('15) 2 AIR 1915 All 70 (72): 37 All 165 (FB).

[*See however* ('14) 1 AIR 1914 All 343 (346): 36 All 516 (DB).]

8. ('16) 3 AIR 1916 Lah 196 (198): 1916 Pun Re No. 18 (DB).

('23) 10 AIR 1923 Cal 121 (129) (DB).

†('26) 13 AIR 1926 Lah 490 (491, 492) (DB).

('07) 30 Mad 362 (366) (DB).

('08) 1908 All W N 48 (48) (DB). (Purchase by assignee of mortgagee.)

* ('89) 16 Cal 682 (692): 16 Ind App 107 (PC).

('92) 19 Cal 4 (7) (DB).

†('36) 23 AIR 1936 Bom 177 (181) (DB).

9. ('09) 3 Sind L R 17 (30): 1 Ind Cas 952 (953) (DB). (This case was decided before the provisions of T. P. Act were applied to Sind.)

('10) 6 Ind Cas 47 (49, 50) (DB) (Cal).

('99) 22 Mad 347 (349) (DB).

('98) 22 Bom 624 (629) (DB).

('14) 1 AIR 1914 All 343 (346): 36 All 516 (DB).

('70) 5 Beng L R 450 (459, 460). (Case before the Transfer of Property Act.)

10. ('99) 22 Mad 372 (376, 377) (SB).

('07) 4 All L Jour 787 (789).

11. ('01) 14 C P L R 17 (20).

('80) 4 Mad 1 (38, 39) (FB).

†('75) 1 All 240 (242, 243) (FB).

12. ('80) 4 Bom 57 (63) (DB).

('81) 7 Cal 677 (680, 681) (DB).

('76) 1 Cal 337 (353) (DB).

('75) 23 Suth W R 187 (190, 192) (FB).

[*See also* ('78) 2 Mad 108 (112) (DB).]

13. See O. 21 R. 66 Note 11.

The rule does not preclude the mere *attachment* of the property in execution of such a decree.[1]

10. Transferee of money decree from mortgagee, if bound by the restrictions against the mortgagee.— Under S. 49 of the Code a transferee of a decree in respect of a claim *arising under the mortgage* holds it subject to the equities which the judgment-debtor might have enforced against the decree-holder. Hence, the transferee of a money decree obtained by the mortgagee in respect of such a claim is bound by the restrictions imposed by this rule against the mortgagee.[1] The transferee of a money decree, *not in respect of the mortgage*, obtained by the mortgagee against his mortgagor, is not barred under this rule, from selling the judgment-debtor's equity of redemption. See Note 11.

11. "Otherwise than by instituting a suit."— As has been seen in Note 2, the effect of this rule is that where a mortgagee has obtained a simple money decree on his mortgage, he cannot bring the mortgaged property to sale in execution of such decree but must file a separate suit for sale in enforcement of the mortgage and such a suit would not be barred despite the provisions of the Civil Procedure, Code, O. 2 R. 2.[1] A decree in a suit on the mortgage bond, which does not *provide for the sale* of the mortgaged property, is only a simple money decree though it may declare the existence of a lien on the property covered by the bond.[2] On the other hand, a decree on a mortgage bond which, though not drawn up in the form prescribed for a decree for sale, yet provides for the *sale* of the property in case of default by the mortgagor, is not a simple money decree and Rule 14 is no bar to the sale of the mortgaged property in execution thereof.[3]

O. 34 R. 14—Note 9.

1.†('13) 18 Ind Cas 201 (202) (DB) (Oudh).
('07) 31 Bom 462 (463) (DB).
†('95) 22 Cal 813 (817) (DB).
('98) 25 Cal 262 (269, 270) (SB).
('08) 31 Mad 33 (35) (DB).
(06) 8 Bom L R 576 (577).
('08) 32 Bom 205 (207) (DB).

O. 34 R. 14—Note 10.

1. ('01) 14 C P L R 35 (36).
('20) 7 AIR 1920 Bom 202 (203): 44 Bom 366.
†('07) 31 Bom 462 (463, 464) (DB).
('08) 11 Oudh Cas 231 (233, 234) (DB).
('08) 31 Mad 33 (34) (DB).
[*See* ('95) 22 Cal 813 (816) (DB).]

O. 34 R. 14—Note 11.

1. ('40) 27 AIR 1940 Pat 283 (285, 286) (DB).
('31) 18 AIR 1931 All 65 (68): 52 All 964 (DB).
†('35) 22 AIR 1935 Lah 672 (675): 16 Lah 640 (FB).
('97) 1 Cal W N 80 (81) (DB). (Landlord taking a mortgage of the tenant's holding as security for the rent—He cannot bring the holding to sale otherwise than by a suit for sale.)
('04) 26 All 223 (224) (DB).
('20) 7 AIR 1920 Bom 56 (57): 44 Bom 981 (DB).
('87) 10 Mad 129 (130, 131) (DB). (Decree for arrears of interest—Mortgaged property cannot be sold without suit for sale.)
('98) 2 Cal W N 320 (321).
('02) 29 Cal 537 (542) (DB). (*Semble*—Attachment and sale under the Bengal Public Demands Recovery Act, III of 1913, do not confer on the purchaser the mortgagee interest of the Government—Such interest can pass only to a purchaser of sale under a decree under S. 67 of the T. P. Act.)
('35) 22 AIR 1935 Rang 132 (133): 13 Rang 292 (DB).
('36) 23 AIR 1936 All 663 (665) (DB). (Mortgagee giving up mortgage security and obtaining a money decree—Mortgaged property cannot be sold in execution as the mortgage is not extinguished.)
('37) 24 AIR 1937 Mad 501 (502).
Also see Note 13.

2. ('17) 4 AIR 1917 Cal 82 (84) (DB).
('05) 28 All 58 (59, 60).
('18) 5 AIR 1918 Cal 705 (706, 707): 45 Cal 530 (DB).
('09) 3 Ind Cas 537 (538) (DB) (All).

3. ('97) 20 Mad 78 (79) (DB).
('04) 31 Cal 922 (927) (DB).
†('98) 25 Cal 580 (583) (DB).
('99) 26 Cal 166 (170, 171) (DB).
('86) 12 Cal 436 (437) (DB).
('02) 24 All 549 (552) (DB).
†('24) 11 AIR 1924 Pat 20 (22): 2 Pat 787 (DB).
('24) 11 AIR 1924 Cal 645 (646) (DB).
('48) 35 AIR 1948 Pat 192 (194) (DB), *Shyamsundar Kuer* v. *Mathura Prasad*. (Where the effective portion of a decree is as follows: "It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold," this is not a decree for the payment of money within the meaning of R. 14 of O. 34 but is in terms a decree for sale under O. 34, R. 5 (3).)
[*See* ('09) 3 Ind Cas 999 (1000) (Cal).]

The rule applies also to usufructuary mortgages. When the mortgagee has obtained a money decree for the mortgage amount in such a case, he cannot bring the mortgaged property to sale in execution of the decree. He must bring a suit for sale for that purpose. He can bring such a suit though, if he had not obtained a money decree for the mortgage amount, he could not have done so, on account of the mortgage being a usufructuary one.[4]

Where a mortgagee has given up all his rights under the mortgage, the rule is no bar to the sale of the mortgaged property in execution of a money decree for the mortgage debt.[5] See Note 6.

It has been held by the Calcutta High Court[6] that the rule does not apply to a suit for *contribution* brought by a co-mortgagor who has redeemed the entire mortgage and claims a charge on the shares of the other cosharers for the proportionate amounts due by them. The reason given is that such a suit is not a mere suit for money but a development of the suit on the mortgage.

Under the Civil Procedure Code, O. 33 R. 13 and S. 47, the charge which the Government has on the subject-matter of the suit for the court-fee payable in cases where the plaintiff has been allowed to sue as a pauper is enforceable by proceedings in execution and not by a separate suit.[7]

12. Sale of mortgaged property for claim unconnected with the mortgage.— Section 99 of the Transfer of Property Act prohibited a sale of the mortgaged property in execution of a money decree obtained by the mortgagee although the decree was upon a claim unconnected with the mortgage.[1] The present rule applies only if the decree for money is in satisfaction of a claim *arising under the mortgage* and not to a decree on a claim *unconnected* with the mortgage.[2] *A fortiori* there is no bar to the sale of the mortgaged property in execution of a money decree obtained by a third person or to the mortgagee purchasing the property at such a sale.[3] Even S. 99 of the Transfer of Property Act was no bar to such

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4. ('06) 29 Mad 424 (425) (DB).
†('31) 18 AIR 1931 All 350 (351) (DB).
('07) 30 Mad 408 (409) (DB).
('99) 26 Cal 164 (165, 166) (DB).
5. ('29) 115 Ind Cas 829 (829) (DB) (Mad).
('26) 13 AIR 1926 Bom 279 (280): 50 Bom 339 (DB).
†('39) 26 AIR 1939 Oudh 126 (128) (DB). (Suit upon mortgage by father—Sons challenging validity of mortgage—Mortgagee giving up security and obtaining money decree—O. 34 R. 14 does not apply as the mortgage no longer subsists.)
[*See also* ('31) 18 AIR 1931 All 350 (351). (Real test in such cases is whether the mortgage security existed at the time the money decree was passed.)
[*But see* ('08) 30 All 146 (148) (DB). (Case under the Transfer of Property Act.)]
6. †('28) 15 AIR 1928 Cal 191 (192) (DB).
7. ('96) 18 All 419 (421) (DB).
('06) 33 Cal 1040 (1046).

O. 34 R. 14—Note 12.

1. ('03) 30 Cal 463 (465) (DB).
('94) 21 Cal 34 (36, 37) (DB).
†('91) 14 Mad 74 (75) (DB).
('07) 1907 Pun Re No. 2, page 18 (21, 22.)
('05) 32 Cal 296 (316): 32 Ind App 23 (PC). (The observations of Privy Council indicate that in their opinion the principle of S. 99 need not be applied to claims unconnected with the mortgage.)
†('94) 16 All 415 (416, 417) (DB).
2. ('47) 34 AIR 1947 Oudh 135 (136): 22 Luck 26: 228 Ind Cas 201 (DB), *District Board Fyzabad* v. *Mt. Ram Kishore.*
('44) 31 AIR 1944 Pat 5 (9, 11): 22 Pat 320 (324) (DB). (The Court must be satisfied that the transaction in question was a part and parcel of the mortgage transaction itself.)
('13) 7 Sind L R 11 (16): 20 Ind Cas 523 (525) (DB).
('15) 2 AIR 1915 Cal 427 (428): 42 Cal 780 (DB).
†('16) 3 AIR 1916 Lah 196 (198): 1916 Pun Re No. 18 (DB).
†('18) 5 AIR 1918 Mad 668 (668) (DB).
('23) 10 AIR 1923 Cal 121 (126) (DB).
('26) 13 AIR 1926 Mad 194 (196, 197) (DB).
('35) 22 AIR 1935 All 179 (180). (Application for execution of money decree by attachment and sale—Part of property hypothecated to decree-holder under security bond—Objection by judgment-debtor that suit on bond should be instituted first is not maintainable.)
†('39) 26 AIR 1939 All 579 (580) (DB).
3. ('18) 5 AIR 1918 Cal 475 (476) (DB). (Mortgagee is competent to purchase equity of redemption brought to sale at instance of stranger decree-holder.)
†('19) 6 AIR 1919 Pat 47 (50) (DB). (Do.)
[*See also* ('39) 26 AIR 1939 Mad 436 (436, 437). (Mortgage executed in favour of Hindu father—Promissory note in favour

a sale or purchase.[4] Similarly, there is no bar to the mortgagee purchasing the mortgaged property at a sale for arrears of revenue where he has not been in any way responsible for the default in paying the revenue.[5]

The following are cases showing what are and what are not "claims arising under the mortgage":

(1) Where a usufructuary mortgagee grants a lease of the property to the mortgagor, a claim for rent accruing under the lease is not a claim arising under the mortgage[6] unless the lease formed part of the mortgage transaction.[7] The undermentioned decisions[8] proceed on the view that the claim for rent in such a case would be one arising under the mortgage apart from any question of the lease and the mortgage being parts of the same transaction

(2) Where a mortgagee holds two distinct mortgages on two different properties of the same mortgagor, he can bring to sale one of the properties in execution of a money decree which he has obtained on the mortgage of the *other* property.[9]

(3) A claim for costs awarded to a usufructuary mortgagee in a suit for possession against the mortgagor is not a claim arising *under the mortgage*

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of son for interest due on mortgage-money—Suit by son on promissory note—Decree—Execution by attachment and sale of mortgaged properties is not barred.)]

4. ('04) 7 Oudh Cas 307 (310) (DB). (Purchase by mortgagee of mortgagor's right—Fair price paid—*Held* that the purchase extinguished mortgagor's right of redemption.)
('01) 24 Mad 96 (111, 113) (DB). (*Held* that mortgagee purchaser obtained an absolute title such as stranger purchaser would have got.)
('03) 27 Mad 428 (429) (DB).
('12) 15 Ind Cas 589 (592) (DB) (Mad).
('05) 7 Bom L R 816 (818). (Transferee of money bond from mortgagee was not subject to the restrictions imposed by S. 99.)
(1902) 1902 App Cas 461 (463, 464), *Reeve* v. *Lisle*. (A mortgagee can purchase equity of redemption by agreement subsequent to and independent of the original mortgage transactions.)
('20) 7 AIR 1920 Cal 363 (365): 47 Cal 377 (FB). (*Obiter*—Per Sanderson, C. J.)
(03) 27 Bom 297 (300, 301) (DB). (It is open to both mortgagor and mortgagee to enter into a contract subsequent to mortgage for the sale of the mortgaged property to the mortgagee.)
[*See* ('95) 1895 All W N 1 (2).]
[But see (1900) 23 Mad 377 (381, 382, 383) (DB). (The mortgagee's liability to be redeemed continued after such sale.)]

5. ('43) 30 AIR 1943 Mad 202 (205): ILR (1943) Mad 418 (DB).

6. †('44) 31 AIR 1944 Pat 5 (7, 8, 9): 22 Pat 320 (DB).
('20) 7 AIR 1920 Pat 723 (724) (DB). (Mortgagee in possession obtaining decree for rent against mortgagor-lessee—Equity of redemption could be sold in execution of that decree.)
('20) 7 AIR 1920 Cal 363 (366): 47 Cal 377 (FB).
('14) 1 AIR 1914 Cal 910 (912) (DB).
[See also ('42) 29 AIR 1942 Bom 278 (279): ILR (1942) Bom 608 (DB). (Rent note by mortgagor in favour of the mortgagee—Rent in arrears—Mortgagee applying under S. 86, Bombay Land Revenue Code—Collector ordering sale of mortgagor's equity of redemption—Sale is binding and is not affected by R. 14—R. 14 does not apply to sale under S. 86.)]

7. ('44) 31 AIR 1944 Pat 5 (9, 11): 22 Pat 320 (331) (DB). (The question whether the two transactions are part and parcel of the same transaction is not a question of fact but one of law which can be raised in second appeal.)
('43) 1943 Aj. M. L J 1 (2), *Mohammad Sayed* v. *Imam Ali*. AIR 1927 P C 32: 50 Mad 180: 54 Ind App 68 (PC), Foll.)
†('21) 8 AIR 1921 Bom 285 (287): 45 Bom 174 (DB).
('20) 7 AIR 1920 Bom 202 (203) : 44 Bom 366. (Rent claim held arising out of mortgage within this rule and mortgaged property could not be sold—Mortgagee cannot do so even by assigning decree.)
('25) 12 AIR 1925 Mad 127 (128).
('27) 14 AIR 1927 Cal 884 (885): 55 Cal 104 (DB).
('40) 27 AIR 1940 Mad 59 (60): 1939 Mad W N 1145 (1147). (Even if the decree for arrears of rent is for a period subsequent to the expiry of the lease during which the tenant was holding over, it would make no difference to the applicability of O. 34 R. 14.)

8. ('43) 30 AIR 1943 Pat 282 (283, 284): 22 Pat 207 (DB). (AIR 1920 Pat 723 held to have lost force after AIR 1927 P C 32: 50 Mad 180: 54 Ind App 68 (PC) holding that mortgagee is entitled to be paid the rent due to him before he can be redeemed.)
('36) 23 AIR 1936 All 708 (710).

but one arising by virtue of the decree made by the Court in the suit for possession.[10]

(4) Subsequent to a usufructuary mortgage of the right to receive certain offerings at a temple, the parties agreed between themselves that the mortgagor should pay to the mortgagee a certain sum of money annually in lieu of the offerings; a decree was then obtained by the mortgagee, on the basis of this agreement, for the arrears of the annual payments, and it was held that the annual payments formed an essential part of the mortgage-money and hence the decree came within the mischief of Rule 14.[11]

(5) A mortgagee who has obtained a mortgage decree, as well as a money decree on an independent claim, can sell the property for the consolidated sum and realize from the sale proceeds the amount of the decree he has for the mortgage-debt.[12]

(6) A mortgagee can bring to sale the equity of redemption in execution of a simple money decree obtained by him on account of land revenue which he has had to pay to save the property.[13]

(7) Where an accountant in the service of a District Board executes a surety bond in favour of the Board and subsequently embezzlements having been discovered the Board institutes a suit based on his misconduct for the recovery of the money embezzled, the suit cannot be said to be one for payment of money in satisfaction of a claim arising under the bond within the meaning of Rule 14.[14]

13. Order 2 Rule 2 of the Code of Civil Procedure.— This rule expressly provides that O. 2 R. 2 shall not be a bar to a second suit for sale on a mortgage when the mortgagee has merely obtained a money decree on his mortgage, under which he cannot bring the mortgaged property to sale by virtue of this rule.[1] There was a conflict of decisions on this question prior to the Transfer of Property Act. See the undermentioned cases.[2]

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9. ('25) 12 AIR 1925 Bom 239 (240): 49 Bom 208 (DB).
[*See however* ('09) 4 Ind Cas 1126 (1126) (DB) (Mad). (Section 99, T. P. Act, applies to cases where there is more than one mortgage.)]
10. ('13) 35 All 518 (520): 20 I. C. 896 (898) (DB).
11. †('19) 6 AIR 1919 All 435 (438, 439): 41 All 399 (DB).
12. ('10) 6 Nag L R 20 (26): 5 Ind Cas 701 (704, 705).
('09) 31 All 114 (115): 1 Ind Cas 162 (163) (DB).
13. ('35) 22 AIR 1935 Rang 438 (439).
('36) 23 AIR 1936 Rang 47 (48). (Mortgagee paying revenue and land tax in respect of mortgaged property—He is not bound to add such money to principal mortgage-money—Suit for such money is competent.)
14. ('47) 34 AIR 1947 Oudh 135 (136): 22 Luck 26:228 Ind Cas 201 (DB) *District Board Fyzabad* v. *Ram Kishore*. (Simple money decree obtained—No realisation under decree—Second suit on surety bond held was barred by O. 2, R. 2.)

O. 34 R. 14—Note 13.

1. ('40) 27 AIR 1940 Pat 283 (285) (DB). (Same rule applies to charges.)
('04) 7 Oudh Cas 314 (317) (DB).
('34) 21 AIR 1934 Cal 73 (76): 60 Cal 1197 (DB).
('90) 3 C P L R 170 (171, 172).
('21) 8 AIR 1921 Mad 183 (191): 44 Mad 301 (DB).
('14) 1 AIR 1914 All 98 (98): 36 All 264 (DB).
('30) 17 AIR 1930 All 286 (287): 51 All 974 (DB).
('21) 63 Ind Cas 303 (307, 308) (DB) (Pat). (Suit on the personal covenant on the mortgage—Subsequent suit on the security itself not barred.)
('37) 24 AIR 1937 Mad 501 (502). (Suit on mortgage—Mortgagee stating in plaint that he has given up his mortgage right and is suing on mortgage as simple money bond—Subsequent suit for sale is not barred as the statement in plaint cannot extinguish the mortgage.)
[*See* ('28) 15 AIR 1928 Lah 269 (270) (DB).]
Also see Note 11.
[But see ('33) 20 A I R 1933 Bom 51 (54, 55): 57 Bom 346 (DB). (Charge on moveables—Personal decree alone got—O. 2 R. 2 bars subsequent suit to enforce the charge since Order 34 applies only to immovables—But pleas and rights in defence are not barred.)]
2. ('81) 3 All 297 (302, 303). (Second suit also was not barred by *res judicata*.)

Even after the execution of the decree for money has become time-barred, the mortgagee can sue for sale under this rule.[3]

If, however, the prior decree was a decree providing for sale of the mortgaged property though not strictly drawn up in the form prescribed for a decree for sale, this rule does not apply and a second suit for sale is barred by *res judicata*.[4] See Note 11. Similarly, if the mortgagee sues for sale but is content to take only a simple money decree he cannot subsequently sue again for sale. Such a suit will also be barred by *res judicata*. The exemption in this rule is only from the Civil Procedure Code, O. 2 R. 2 and not from section 11.[5]

Further, this rule relieves the mortgagee only from the restrictions imposed by the Civil Procedure Code, O. 2 R. 2 on the splitting of *remedies*. The restriction as to splitting of *claims* is not affected by it.[6] Thus, a suit for interest alone brought at a time when the principal also had become due is a bar to a subsequent suit for the principal.[7]

14. Consent decree.— This rule does not apply to cases in which a decree for money is passed against the mortgagor by consent. The reason is that the benefit under the rule is intended only for the mortgagor, and so he can *waive* it by consenting to a money decree being passed for the mortgage amount.[1]

15. "Decree,"— An order directing a surety for a judgment-debtor to pay the amount secured is not a decree for the payment of money within the meaning of this rule and hence, the rule does not preclude the sale of the property covered by the security bond, by proceeding in execution without a suit for sale being filed.[1] See Note 4. Although a decree providing for the sale of the equity of redemption for arrears of interest due under the mortgage is contrary to the provisions of S. 99 of the Transfer of Property Act, it cannot be objected to in execution.[2] See Note 7.

('81) 7 Cal 78 (81) (DB).
*('83) 9 Cal 651 (655) (DB).
('80) 2 All 838 (839).
('81) 7 Cal 714 (716) (FB). (3 Cal 363 overruled.)

3. ('87) 9 All 23 (25, 26) (DB).

4. ('97) 24 Cal 473 (487, 488) (DB).
('22) 9 A I R 1922 Bom 237 (237): 46 Bom 848 (DB).

5.†('33) 20 AIR 1933 Rang 158 (159, 160). (Plaintiff can have the same properties attached and sold in execution—This rule is no bar as there is no existing mortgage on account of the fact that the relief as to sale is refused in the first suit.)
('09) 31 All 19 (20) (DB).
('06) 33 Cal 849 (852) (DB).
[*See also* ('36) 23 AIR 1936 All 8 (9). (Mortgagee suing for sale or foreclosure—Court holding that the money claimed was not charged on the property and passing simple money decree—Decree can be executed against the mortgaged property as fresh suit for sale on mortgage would be barred by *res judicata*.)]

6. ('01) 25 Bom 161 (167, 168) (DB).

7. ('09) 2 Ind Cas 265 (266) (DB) (Cal).
[*See* ('30) 17 AIR 1930 Lah 148 (149) (DB). (Interest alone can be claimed where the principal has not become due.)]

O. 34 R. 14—Note 14.

1. ('25) 12 AIR 1925 Sind 156 (157) (DB). (Compromise provided for sale of property in execution.)
('10) 32 All 377 (380): 5 Ind Cas 419 (420) (DB).
('35) 22 AIR 1935 Nag 129 (130) (DB).
('04) 31 Cal 922 (927) (DB).
('24) 11 AIR 1924 Cal 645 (646) (DB).
†('22) 9 AIR 1922 Cal 35 (38) (DB).
('11) 9 Ind Cas 939 (939) (DB) (Mad.)
[*See also* ('37) 41 Cal W N 1133 (1135). (In this case, not only was there a consent decree for money but the parties had also subsequently agreed that on default in payment of the decretal amount the mortgaged properties should be sold—It was held that another decree-holder who had attached the properties could not object to the sale.)]
[But see ('32) 19 AIR 1932 All 439 (440): 54 All 763 (DB). (Suit on pro-note—Compromise decree charging properties specified—Compromise silent as to mode of enforcement—*Held*, this rule applied.)]

O. 34 R. 14 Note—15.

1. ('17) 4 AIR 1917 Pat 489 (489) (DB).
('17) 4 AIR 1917 Pat 596 (596): 2 Pat L Jour 197 (DB). (Property pledged by surety can be sold in execution.)

2. ('04) 31 Cal 922 (927) (DB).
('45) 32 AIR 1945 Cal 322 (324, 325) (DB).

Mortgages by the deposit of title-deeds and charges.

[a]**R. 15. [New.] All the provisions contained in this Order which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds within the meaning of section 58, and to a charge within the meaning of section 100 of the Transfer of Property Act, 1882.**

[*Cf.* S. 96 of Act IV of 1882.]

a. Substituted by the Transfer of Property (Amendment) Supplementary Act (XXI of 1929), Section 7, for the original Rule 15.

Provincial Amendment

OUDH

Read the present Rule 15 as Rule 15 (1) and *add* as sub-rule (2), the following:

"(2) Where a decree orders payment of money and charges it on immovable property on default of payment, the amount can be realized by sale of that property in execution of that very decree."

1. Amendments after 1908.— The rule has been substituted for the old R. 15 by the Transfer of Property (Amendment) Supplementary Act, XXI of 1929. The main changes effected in the rule are—

(1) The words "which apply to a simple mortgage" have been substituted for the words "as to the sale or redemption of the mortgaged property."

(2) The words "mortgage by deposit of title-deeds within the meaning of S. 58" are new.

2. Scope of the rule.— By force of this O. 34 R. 6 applies also to suits to enforce charges.[1] Similarly, under Rule 14, if the charge-holder first sues and obtains a money decree for a claim arising under the charge, a second suit for sale in enforcement of the charge will not be barred by the Civil Procedure Code, O. 2 R. 2.[2] The rule makes the provisions of the Code apply only *so far as may be.* Hence, where a charge is declared by a decree, which in its terms is final and itself provides for the sale of the properties in case of default, no fresh final decree is necessary.[3] In the undermentioned case[3a] where the decretal amount was declared to be a charge on certain properties but no decree either preliminary or final was passed for sale of the charged properties it was held that the decree operated only as a money decree together with a declaration of charge upon the properties and the sale of the properties in execution of the decree was therefore in contravention of this rule.

The effect of a decree on a charge is the same as that of a decree on a mortgage.[4]

3. Charge.— See the Commentaries on the Transfer of Property Act, Section 100, Note 15.

4. Creation of charge by operation of law.—See, *ibid*, Section 100, Note 11.

O. 34 R. 15—Note 2.

1. ('42) 29 AIR 1942 Sind 83 (85): ILR (1942) Kar 168.
('30) 17 AIR 1930 Oudh 10 (11) (DB).
('05) 2 All L Jour 379 (385) (DB).
†('32) 19 AIR 1932 Cal 775 (780, 781): 59 Cal 1314 (DB).
[*See also* ('35) 22 AIR 1935 Nag 129 (131) (DB). (Charge created in decree over properties for payment of decretal amount—Decree-holder should exhaust remedy against charged property before proceeding against other property.)]
2. ('49) 36 AIR 1949 Mad 143 (144). *Venkata Chalapathi Rao* v. *Kanchayya.*
('40) 27 A I R 1940 Pat 283 (285) (DB).
3. ('30) 17 AIR 1930 Nag 17 (19).
[*See also*] ('45) 32 AIR 1945 Cal 322 (324, 325) (DB). *Sudhamoyee* v. *Jessore Loan Co.* (Court passing final decree for sale all at once—Decree though irregular not a nullity.)
3a. ('45) 32 AIR 1925 Cal. 322 (324, 325) (DB), *Sudhamayee* v. *Jessore Loan Co.* (The sale was not however, void altogether on that account.)
4. ('37) 24 AIR 1937 Cal 129 (138): ILR (1937) 1 Cal 203 (DB).

5. Creation of charge by act of parties.—See, *ibid*, Section 100, Notes 5 and 7.

6. Charge under Rent Acts.—See, *ibid*, Section 100, Note 12.

7. Priority as between rent decree and mortgage decree.— See, *ibid*, Notes on S. 73 and Note 6 on Section 101.

8. Invalid mortgage, if creates a charge.—See, *ibid*, Section 100, Note 14.

9. Right of maintenance.— See, *ibid*, Section 100, Note 30.

10. Claim for dower.— See, *ibid*, Section 100, Note 31.

10a. Charge created by decree.— This rule applies only to a charge within the meaning of S. 100 of the Transfer of Property Act. As has been seen in the Commentaries on the Transfer of Property Act, S. 100, Note 28 there is a conflict of opinions as to whether a charge created by a decree is one within the meaning of S. 100.

Where a decree orders the payment of money and also creates a charge on certain properties, the effect is not to negative the right of the decree-holder to proceed against the other properties of the judgment-debtor unless such a right is expressly or by necessary implication excluded by the terms of the decree.[1] Such a decree itself amounts to a personal decree and no fresh personal decree is necessary in such a case.[2] Further according to the undermentioned decisions,[3] it is not necessary that the decree-holder should proceed in the first instance only against the properties which have been specifically charged. But the contrary view was taken in the cases noted below[4] in which it was held that the decree-holder could not proceed against the other properties unless he had first exhausted his remedies against the properties charged. It will be noticed that such a decree is not an ordinary decree for sale under Rules 4 and 5 of this Order and the provisions of Rule 6 cannot, therefore, apply to such a case.[5] The question of the liability of other properties and the manner of proceeding against them is, therefore, one of construction of the decree in each case.[6] Where a decree for maintenance is

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O. 34 R. 15—Note 10a.

1. ('42) 29 AIR 1942 Sind 83 (84, 85): ILR (1942) Kar 168.
('41) 28 AIR 1941 Bom 90 (92): ILR (1941) Bom 299 (FB). (Remarks in AIR 1941 Bom 71: ILR (1941) Bom 136, disapproved.)
2. ('41) 28 AIR 1941 Bom 90 (91): ILR (1941) Bom 299 (FB). (AIR 1920 Bom 95, overruled.)
('32) 19 AIR 1932 Cal 775 (781): 59 Cal 1314 (DB).
3. ('42) 29 AIR 1942 Nag 58 (59): I L R (1942) Nag 159.
('42) 29 AIR 1942 Sind 83 (84, 85): I L R (1942) Kar 168.
4. ('43) 30 AIR 1943 Bom 158 (159): ILR (1943) Bom 292. (AIR 1941 Bom 71: ILR (1941) Bom 136, followed and held not overruled on this point by AIR 1941 Bom 90: ILR (1941) Bom 299 (FB.))
('41) 28 AIR 1941 Bom 71 (76, 77): ILR (1941) Bom 136.
5. ('42) 29 AIR 1942 Sind 83 (85): I L R (1942) Kar 168.
6. ('40) 27 AIR 1940 Bom 276 (277): I L R (1940) Bom 640. (Decree for possession in favour of vendee declaring charge for vendor's unpaid price—Decree also providing that if price was not paid within certain time vendor was to recover it by sale of the charged property—*Held* that the decree could not be construed as a personal decree and the vendor was not entitled to enforce it by sale of other properties unless he obtained a personal decree under Order 34 Rule 6.)
('39) 26 AIR 1939 Bom 206 (207). (Compromise decree for maintenance—Charge created on certain immovable property and decree providing that in case of default decree-holder might proceed either against the charged property or against other immovable property—*Held*, she could not proceed against moveable property. Distinguishing AIR 1933 Mad 33: 56 Mad 343.)
('33) 20 AIR 1933 Mad 33 (33): 56 Mad 343. (Decree providing concurrent remedies —Charged properties need not be exhausted first.)
('32) 19 AIR 1932 Cal 775 (781): 59 Cal 1314 (DB). (Solenamah—Decree creating charge and incorporating personal liabliity in case of deficiency—Fresh personal decree held not necessary.)

passed charging several properties the Court can regulate the order in which the properties should be proceeded against. The Court has the same power in such cases as it has got in executing a mortgage decree for sale.[7] (See Order 34 Rule 4, Note 10.)

11. Mortgage by deposit of title deeds.— See the Transfer of Property Act, Ss. 58 and 96. Section 96 of that Act makes the provisions of the Transfer of Property Act as to simple mortgages applicable to mortgages by deposit of title deeds. Similarly, the present rule makes the provisions of O. 34, which are applicable to simple mortgages, applicable also to mortgages by deposit of title deeds.

12. Charges enforceable by sale.— As the remedy of a simple mortgagee is only to sue for sale of the mortgaged property, so the charge-holder's remedy is also to sue for sale. But if the sale proceeds of the property charged are not sufficient to satisfy the charge and if the balance is legally recoverable from the debtor's other properties or from him personally, then a personal decree may be obtained under R. 6. See Note 2. The general principle that at a sale under a mortgage decree, the auction-purchaser takes the security free of the mortgage does not apply in the case of a recurring charge. In such a case even though the charged property may be sold in execution of a decree for arrears already accrued, the liability in respect of future payments will ordinarily remain after the sale and the property in the hands of the auction-purchaser will be subject to the charge in respect of such payments.[1]

13. Charge on the surplus sale proceeds of sale for arrears of revenue or rent.— See Notes on S. 73 in the Commentaries on the Transfer of Property Act.

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7. ('44) 31 AIR 1944 Nag 25 (27): I L R (1944) Nag 230 (DB).

O. 34 R. 15—Note 12.

1. ('40) 27 AIR 1940 Cal 60 (62).

SCHEDULE I—APPENDIX D.

DECREES

[NOTE:— The Forms mentioned in the Rules of O. 34 only are given here.]

[a]No. 3.

PRELIMINARY DECREE FOR FORECLOSURE.

(Order XXXIV, rule 2.—Where accounts are directed to be taken.)

(*Title.*)

This suit coming on this day, etc.; It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following:—

(i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal, or where no such rate is fixed at six per cent. per annum or at such rate as the Court deems reasonable);

(ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received;

(iii) an account of all sums of money properly incurred by the plaintiff up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security, together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent. per annum);

(iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. And it is hereby further ordered and decreed that any amount received under clause (*ii*) or adjudged due under clause (*iv*) above, together with interest thereon, shall first be adjusted against any sums paid by the plaintiff under clause (*iii*) together with interest thereon, and the balance, if any, shall be added to the mortgage-money or as the case may be, be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(*i*) that the defendant do pay into Court on or before the day of , or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due, and the sum of Rs. for the costs of the suit awarded to the plaintiff;

(*ii*) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R.11 of O.34 of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff shall be at liberty to apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if

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[a]. Forms 3 to 11 were substituted by S. 8 and Schedule of the Transfer of Property (Amendment) Supplementary Act of 1929 (XXI of 1929).

so required, deliver up to the plaintiff quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 3A.

PRELIMINARY DECREE FOR FORECLOSURE.

(O. 34, R. 2—Where the Court declares the amount due.)

(*Title.*)

This suit coming on this day, etc.; It is hereby declared that the amount due to the plaintiff on his mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage security, together with interest thereon, and the sum of Rs. for the costs of this suit awarded to the plaintiff, making in all the sum of Rs.

2. And it is hereby ordered and decreed as follows:—

(*i*) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court of the said sum of Rs.

(*ii*) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, reconvey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall if so required, deliver up to the plaintiff quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 4.

FINAL DECREE FOR FORECLOSURE.

(O. 34, R. 3.)

(*Title.*)

Upon reading the preliminary decree passed in this suit on the day of and further orders (if any) dated the day of and the application of the plaintiff dated the day of for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the said mortgage:

It is hereby ordered and decreed that the defendant and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned; *[and (*if the defendant be in possession of the said mortgaged property*) that the defendant shall deliver to the plaintiff quiet and peaceable possession of the said mortgaged property.]

2. And it is hereby further declared that the whole of the liability whatsoever of the defendant up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished.

No. 5

PRELIMINARY DECREE FOR SALE.

(O. 34 R. 4.—Where accounts are directed to be taken.)

(*Title.*)

This suit coming on this day, etc.; It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following:—

(*i*) an account of what is due on this date to the plaintiff for principal

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* Words not required to be deleted.

and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);

(*ii*) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received;

(*iii*) an account of all sums of money properly incurred by the plaintiff up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security, together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or failing both such rates, at nine per cent, per annum);

(*iv*) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. And it is hereby further ordered and decreed that any amount received under clause (*ii*) or adjudged due under clause (*iv*) above, together with the interest thereon, shall first be adjusted against any sums paid by the plaintiff under clause (*iii*), together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(*i*) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due and the sum of Rs. for the costs of the suit awarded to the plaintiff;

(*ii*) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit, and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the mortgage and clear of and from all encumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the plaintiff shall produce before the Court, or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

6. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

7. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty

(where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 5A.

PRELIMINARY DECREE FOR SALE.

(O. 34, R. 4—When the Court declares the amount due.)

(*Title.*)

This suit coming on this day, etc.; It is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage-security, together with interest thereon, and the sum of Rs. for the costs of the suit awarded to the plaintiff, making in all the sum of Rs.

2. And it is hereby ordered and decreed as follows:—

(*i*) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court, the said sum of Rs. ;

(*ii*) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realized by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

5. And it is hereby further ordered and decreed that, if the money realized by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 6.

FINAL DECREE FOR SALE. (O. 34, R. 5)

(*Title.*)

Upon reading the preliminary decree passed in this suit on the day of and further orders (if any) dated the day of and the application of the plaintiff dated the day of for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the mortgage:

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part there of be sold, and that for the purposes of

such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

2. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into the Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the plaintiff for such costs of the suit including the costs of this application and such costs, charges and expenses as may be payable under Rule 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

No. 7.

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR A DECREE FOR FORECLOSURE IS PASSED.

(O. 34, R. 7—Where accounts are directed to be taken.)

(*Title.*)

This suit coming on this day, etc.; It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following:—

(*i*) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum at such rate as the Court deems reasonable);

(*ii*) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by order or for the use of the defendant or which, without the wilful default of the defendant or such person, might have been so received;

(*iii*) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or failing both such rates, at nine per cent. per annum);

(*iv*) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. It is hereby further ordered and decreed that any amount received under clause (*ii*) or adjudged due under clause (*iv*) above, together with interest thereon, shall be adjusted against any sums paid by the defendant under clause (*iii*) together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed:

(*i*) that the plaintiff do pay into Court on or before the day of , or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs. for the costs of the suit awarded to the defendant;

(*ii*) that, on such payment, and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property free from the said motgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under

whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant shall be at liberty to apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed thereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 7A.

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR A DECREE FOR SALE IS PASSED.

(O. 34, R. 7.—Where accounts are directed to be taken.)

(*Title.*)

This suit coming on this day, etc.; It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following:—

(*i*) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);

(*ii*) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by the order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received;

(*iii*) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security together with inetrest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent. per annum);

(*iv*) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. And it is hereby further ordered and decreed that any amount received under clause (*ii*) or adjudged due under clause (*iv*) above, together with interest thereon, shall first be adjusted against any sums paid by the defendant under clause (*iii*) together with interest thereon, and the balance, if any, shall be added to the mortgage-money, or, as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that, upon such report of the Commissioner being received, it shall be confirmed and countersigned subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(*i*) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due and the sum of Rs. for the costs of the suit awarded to the defendant:

(*ii*) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, reconvey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall, if so required, deliver up

to the plaintiff quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

6. And it is hereby further ordered and decreed that the money realized by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same.

7. And it is hereby further ordered and decreed that, if the money realized by such sale shall not be sufficient for payment in full of the amount payable to the defendant as aforesaid, the defendant shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such direction as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 7B.

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR A DECREE FOR FORECLOSURE IS PASSED

(O. 34, r. 7.—Where the Court declares the amount due.)

(Title.)

This suit coming on this day, etc.; It is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage-security together with interest thereon, and the sum of Rs. for the costs of the suit awarded to the defendant, making in all the sum of Rs.

2. And it is hereby ordered and decreed as follows:—

(*i*) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court the said sum of Rs. ;

(*ii*) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims, and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property

No. 7C.

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR A DECREE FOR SALE IS PASSED.

(O. 34, r. 7—Where the Court declares the amount due.)

(*Title.*)

This suit coming on this day, etd.; It is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage-security together with interest thereon, and the sum of Rs. for the costs of this suit awarded to the defendant, making in all the sum of Rs.

2. And it is hereby ordered and decreed as follows:—

(i) that the plaintiff do pay into Court on or before the day of or any later date up to which time the payment may be extended by the Court the said sum of Rs. ;

(*ii*) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under Rule. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property to the plaintiff free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to the same.

5. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for the payment in full of the amount payable to the defendant as aforesaid, the defendant shall be at liberty (where such remedy is open to him under the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion. and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE

Description of the mortgaged property.

No. 7D.

FINAL DECREE FOR FORECLOSURE IN A REDEMPTION SUIT ON DEFAULT OF PAYMENT BY MORTGAGOR.

(O. 34, r. 8.)

(*Title.*)

Upon reading the preliminary decree in this suit on the day of and further orders (if any) dated the day of , and the application of the defendant day of for a final decree and after hearing the parties, and it appearing that the payment as directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage:

It is hereby ordered and decreed that the plaintiff and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned* [and (*if the plaintiff be in possession of the said mortgaged property*) that the plaintiff shall deliver to the defendant quiet and peaceable possession of the said mortgaged property.]

2. And it is hereby further declared that the whole of the liability whatsoever of the plaintiff up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished.

No. 7E.

FINAL DECREE FOR SALE IN A REDEMPTION SUIT ON DEFAULT OF PAYMENT BY MORTGAGOR.

(O. 34, r. 8.)

(*Title.*)

Upon reading the preliminary decree passed in this suit on the day of and further orders (if any) dated the day of , and the application of the defendant dated the day of for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage:

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold and that for the purposes of such sale the defendant shall produce before the Court, or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

2. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the defendant for such costs of this suit including the costs of this application and such costs, charges and expenses as may be payable under R. 10, together with the subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same.

No. 7F.

FINAL DECREE IN A SUIT FOR FORECLOSURE, SALE OR REDEMPTION WHERE THE MORTGAGOR PAYS THE AMOUNT OF THE DECREE.

(O. 34, rr. 3, 5 and 8.)

(*Title.*)

This suit coming on this day for further consideration and it appearing that on the day of , the same the mortgagor or being a person entitled to redeem, has paid into Court all amounts due to the mortgagee under the preliminary decree dated the day of ; It is hereby ordered and decreed that:—

(*i*) the mortgagee do execute a deed of re-conveyance of the property in the aforesaid preliminary decree mentioned in favour of the mortgagor *[or, as the case may be, who has redeemed the property] or an acknowledgment of the payment of the amount due in his favour;

(*ii*) the mortgagee do bring into Court all documents in his possession and power relating to the mortgaged property in the suit.

And it is hereby further ordered and decreed that, upon the mortgagee executing the deed of re-conveyance or acknowledgment in the manner aforesaid,—

(*i*) the said sum of Rs. be paid out of Court to the mortgagee;

(*ii*) the said deeds and documents brought into the Court be delivered out of Court to the mortgagor *[or the person making the payment] and the mortgagee do, when so required, concur in registering, at the cost of the mortgagor *[or other person making the payment], the said deed of re-conveyance or the acknowledgment in the office of the Sub-Registrar of ; and

(*iii*) *[if the mrotgagee, plaintiff or defendant, as the case may be, is in possession of the mortgaged property] that the mortgagee do forthwith deliver possession of the mortgaged property in the aforesaid preliminary decree mentioned to the mortgagor *[or such person as aforesaid who has made the payment].

No. 8

DECREE AGAINST MORTGAGOR PERSONALLY FOR BALANCE AFTER THE SALE OF THE MORTGAGED PROPERTY.

(O. 34, rr. 6 and 8-A.)

(*Title.*)

Upon reading the application of the mortgagee (the plaintiff or defendant, as the case may be and reading the final decree passed in the suit on the day of and the Court being satisfied that the net proceeds of the sale held under the aforesaid final decree amounted to Rs. and have been paid to the applicant out of the Court on the day of and that the balance now due to him under the aforesaid decree is Rs.

And whereas it appears to the Court that the said sum is legally recoverable from the mortgagor (plaintiff or defendant, as the case may be) personally;

It is hereby ordered and decreed as follows:—

That the mortgagor (plaintiff or defendant, as the case may be) do pay to the mortgagee (defendant or plaintiff, as the case may be) the said sum of Rs. with further interest at the rate of six per cent, per annum from the day of

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* Words not required to be deleted.

(the date of payment out of Court referred to above) up to the date of realization of the said sum, and the costs of this application.

No. 9.

PRELIMINARY DECREE FOR FORECLOSURE OR SALE.

[Plaintiff .... 1st Mortgagee,

vs.

Defendant No. 1 .... Mortgagor.
Defendant No. 2. .... 2nd Mortgagee.]

(O. 34, rr. 2 and 4.)

(*Title.*)

The suit coming on this day, etc.; It is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) incurred by the plaintiff in respect of the mortgage-security with interest thereon and the sum of Rs. for the costs of this suit awarded to the plaintiff, making in all the sum of Rs.

(*Similar declarations to be introduced with regard to the amount due to defendant No. 2 in respect of his mortgage if the mortgage-money due thereunder has become payable at the date of the suit.*)

2. It is further declared that the plaintiff is entitled to payment of the amount due to him in priority to defendant No. 2* [or (if there are several subsequent mortgagees) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively:—]

3. And it is hereby ordered and decreed as follows:—

(*i*) (*a*) that defendants or one of them do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs. due to the plaintiff; and

(*b*) the defendant No. 1 do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs. due to defendant No. 2; and

(*ii*) that, on payment of the sum declared to be due to the plaintiff by defendants or either of them in the manner prescribed in clause (*i*) (*a*) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant No.

(who has made the payment), or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims, and also free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant No.

(who has made the payment) quiet and peaceable possession of the said property.

(*Similar declarations to be introduced, if defendant No. 1 pays the amount found or declared to be due to defendant No. 2 with such variations as may be necessary having regard to the nature of his mortgage.*)

4. And it is hereby further ordered and decreed that, in default of payment as aforesaid of the amount due to the plaitniff, the plaintiff shall be at liberty to apply to the Court for a final decree—

(*i*) *[*In the case of a mortgage by conditioned sale or an anomalous mortgage where the only remedy provided for in the mortgage deed is foreclosure and no sale*] that the defendants jointly and severally shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver to the plaintiff quiet and peaceable possession of the said property; or

(*ii*) *[*In the case of any other mortgage*] that the mortgaged property or a sufficient part thereof shall be sold; and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property; and

(*iii*) *[*in the case where a sale is ordered under clause 4 (ii) above*] that the money realised by such sale shall be paid into Court and be

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*Words not required to be deleted.

duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may have been passed in this suit and in payment of the amount which the Court may adjudge due to the plaintiff in respect of such costs of this suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to defendant No. 2; and that if any balance be left, it shall be paid to the defendant No. 1 or other persons entitled to receive the same; and

(*iv*) that, if the money realised by such sale shall not be sufficient for payment in full of the amounts due to the plaintiff and defendant No. 2, the plaintiff or defendant No. 2 or both of them, as the case may be, shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amounts remaining due to them respectively.

5. And it is hereby further ordered and decreed—

(*a*) that if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No. 1 makes default in the payment of the said amount, defendant No. 2 shall be at liberty to apply to the Court to keep the plaintiff's mortgage alive for his benefit and to apply for a final decree (*in the same manner as the plaintiff might have done under clause 4 above*)—

*[(*i*) that the defendant No. 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to defendant No. 2 quiet and peaceable possession of the said property;] or

*[(*ii*) that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property;]

and (*b*) (if on the application of defendant No. 2 such a final decree for foreclosure is passed), that the whole of the liability of defendant No. 1 arising from the plaintiff's mortgage or from the mortgage of defendant No. 2 or from this suit shall be deemed to have been discharged and extinguished.

6. And it is hereby further ordered and decreed *[*in the case where a sale is ordered under clause 5 above*]—

(*i*) that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount paid by defendant No. 2 in respect of the plaintiff's mortgage and the costs of the suit in connexion therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount; and that the balance, if any, shall then be applied in payment of the amount adjudged due to defendant No. 2 in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of this suit and such costs, charges and expenses as may be payable to defendant No. 2 under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to defendant No. 1 or other persons entitled to receive the same; and

(*ii*) that, if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of the plaintiff's mortgage or defendant No. 2's mortgage, defendant No. 2 shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amount of the balance.

7. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

Note.— See the undermentioned case.[1]

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*Words not required to be deleted.

No. 10.

PRELIMINARY DECREE FOR REDEMPTION OF PRIOR MORTGAGE AND FORECLOSURE OR SALE ON SUBSEQUENT MORTGAGE.

[Plaintiff .... 2nd Mortgagee,

vs.

Defendant No. 1 .... Mortgagor,
Defendant No. 2 1st Mortgagee.

(O. 34, Rr. 2, 4 and 7.)

(*Title.*)

The suit coming on this day, etc; It is hereby declared that the amount due to defendant No. 2 on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs.
for principal, the sum of Rs.
for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by defendant No. 2 in respect of the mortgage-security with interest thereon and the sum of Rs.
for the costs of this suit awarded to defendant No. 2, making in all the sum of Rs.

(*Similar declarations to be introduced with regard to the amount due from defendant No.* 1 *to the plaintiff in respect of his mortgage if the mortgage-money due thereunder has become payable at the date of the suit.*)

2. It is further declared that defendant No. 2 is entitled to payment of the amount due to him in priority to the plaintiff* [or (if there are several subsequent mortgagees) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively:—]

3. And it is hereby ordered and decreed as follows:—

(*i*) (a) that the plaintiff or defendant No. 1 or one of them do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs. due to defendant No. 2; and

(*b*) that defendant No. 1 do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs. due to the plaintiff; and

(*ii*) that, on payment of the sum declared due to defendant No. 2 by the plaintiff and defendant No. 1 or either of them in the manner prescribed in clause (*i*) (*a*) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, defendant No. 2 shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff or defendant No. 1 (whoever has made the payment), or to such person as he appoints, and defendant No. 2 shall, if so required, reconvey or re-transfer the said property free from the said mortgage and clear of and from all encumbrances created by defendant No. 2 or any person claiming under him or any person under whom he claims, and also free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff or defendant No. 1 (whoever has made the payment) quiet and peaceable possession of the said property.

(*Similar declarations to be introduced, if defendant No.* 1 *pays the amount found or declared due to the plaintiff with such variations as may be necessary having regard to the nature of his mortgage.*)

4. And it is hereby further ordered and decreed that, in default of payment as aforesaid, of the amount due to defendant No. 2, defendant No. 2 shall be at liberty to apply to the Court that the suit be dismissed or for a final decree—

(*i*) *[*in the case of a mortgage by conditional sale or an anomalous mortgage where the only remedy provided for in the mortgage-deed is foreclosure and not sale*] that the plaintiff and defendant No. 1 jointly and severally shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver to the defendant No. 2 quiet and peaceable possession of the property; or

(*ii*) *[*In the case of any other mortgage*] that the mortgaged property or a sufficient part thereof shall be sold; and that for the purposes of such sale defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property; and

(*iii*) *[*in the case where a sale is ordered under clause* 4 (ii) *above*] that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) in pay-

ment of the amount payable to defendant No. 2 under the decree and any further orders that may be passed in this suit and in payment of the amount which the Court may adjudge due to defendant No. 2 in respect of such costs of the suit and such costs, charges and expenses as may be payable to the plaintiff under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to the plaintiff and that, if any balance be left, it shall be paid to defendant No. 1 or other persons entitled to receive the same; and

(*iv*) that, if the money realised by such sale shall not be sufficient for payment in full of the amounts due to defendant No. 2 and the plaintiff, defendant No. 2 or the plaintiff or both of them, as the case may be, shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amounts remaining due to them respectively.

5. And it is hereby further ordered and decreed,—

(*a*) that, if the plaintiff pays into Court to the credit of this suit the amount adjudged due to defendant No. 2 but defendant No. 1 makes default in the payment of the said amount, the plaintiff shall be at liberty to apply to the Court to keep defendant No. 2's mortgage alive for his benefit and to apply for a final decree (*in the same manner as the defendant No. 2 might have done under clause 4 above*)—

*[(*i*) that defendant No. 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property;] or

*[(*ii*) that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property;]

and (*b*) (if on the application of defendant No. 2 such a final decree for foreclosure is passed), that the whole of the liability of defendant No. 1 arising from the plaintiff's mortgage or from the mortgage of defendant No. 2 or from this suit shall be deemed to have been discharged and extinguished.

6. And it is hereby further ordered and decreed (*in the case where a sale is ordered under clause 5 above*)—

(*i*) that the money realized by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount paid by the plaintiff in respect of defendant No. 2's mortgage and the costs of the suit in connection therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount; and that the balance, if any, shall then be applied in payment of the amount adjudged due to the plaintiff in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable to the plaintiff under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to defendant No. 1 or other persons entitled to receive the same; and

(*ii*) that if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of defendant No. 2's mortgage or the plaintiff's mortgage, defendant No. 2 shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amount of the balance.

7. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

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* Words not required to be deleted.

No. 11.

PRELIMINARY DECREE FOR SALE

[Plaintiff .... Sub or derivative mortgagee

vs.

Defendant No. 1. .... Mortgagor.
Defendant No. 2. .... Original mortgagee.]

(O. 34, r. 4.)

(*Title.*)

This suit coming on this day, etc.: It is hereby declared that the amount due to defendant No. 2 on his mortgage calculated up to this day of is the sum of Rs.
for principal, the sum of Rs.
for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security together with interest thereon and the sum of Rs.
for the costs of the suit awarded to defendant No. 2, making in all the sum of Rs.

(*Similar declarations to be introduced with regard to the amount due from defendant No. 2 to the plaintiff in respect of his mortgage.*)

2. And it is hereby ordered and decreed as follows:—

(*i*) that defendant No. 1 do pay into Court on or before the said day of or any later date up to which time for payment may be extended by the Court the said sum of Rs.
due to defendant No. 2

(*Similar declarations to be introduced with regard to the amount due to the plaintiff, defendant No. 2 being at liberty to pay such amount.*)

(*ii*) that, on payment of the sum declared due to defendant No. 2 by defendant No. 1 in the manner prescribed in clause 2 (*i*) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff and defendant No. 2 shall bring into Court all documents in their possession or power relating to the mortgaged property in the plaint mentioned, and all such documents (except such as relate only to the sub-mortgage) shall be delivered over to defendant No. 1, or to such person as he appoints, and defendant No. 2 shall, if so required, re-convey or re-transfer the property to defendant No. 1 free from the said mortgage clear of and from all incumbrances created by defendant No. 2 or any person claiming under him or any person under whom he claims, and free from all liability arising from the mortgage or, this suit and shall, if so required, deliver up to defendant No. 1 quiet and peaceable possession of the said property; and

(*iii*) that, upon payment into the Court by defendant No. 1 of the amount due to defendant No. 2, the plaintiff shall be at liberty to apply for payment to him of the sum declared due to him together with any subsequent costs of the suit and other costs, charges and expenses, as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall then be paid to defendant No. 2; and that if the amount paid into the Court be not sufficient to pay in full the sum due to the plaintiff, the plaintiff shall be at liberty (if such remedy is open to him by the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 2 for the amount of the balance.

3. And it is further ordered and decreed that if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, the plaintiff shall bring into the Court all documents, etc. [as in sub-clause (*ii*) of clause 2].

4. And it is hereby further ordered and decreed that, in default of payment by defendants Nos. 1 and 2 as aforesaid, the plaintiff may apply to the Court for a final decree for sale, and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold; and that for the purposes of such sale the plaintiff and defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in their possession or power relating to the mortgaged property.

5. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount due to the plaintiff as specified in clause 1 above with such costs of the suit and other costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to defendant No. 2; and that, if any balance be left, it shall be paid to defendant No. 1 or other persons entitled to receive the same,

6. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amounts payable to the plaintiff and defendant No. 2, the plaintiff or defendant No. 2 or both of them, as the case may be, shall be at liberty (if such remedy is open under their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 2 or defendant No. 1 (as the case may be) for the amount of the balance.

7. And it is hereby further ordered and decreed that, if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No. 1 makes default in payment of the amount due to defendant No. 2, defendant No. 2 shall be at liberty to apply to the Court for a final decree for foreclosure or sale (as the case may be)—(*declarations in the ordinary form to be introduced according to the nature of the defendant No. 2's mortgage and the remedies open to him thereunder*).

8. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

APPENDIX II.

[a]THE BENGAL LAND (CONDITIONAL SALES) REGULATION, 1798.

Bengal Regulation I OF 1798.

(*9th January*, 1798.)

A Regulation to prevent fraud and injustice in conditional sales of land under deeds of bai-bil-wafa or other deeds of the same nature.

Preamble.

1. It has been long a prevalent practice in the Province of Bihar to borrow money on the mortgage and conditional sale of landed property, under a stipulation that, if the sum borrowed be not repaid (with or without interest) by a fixed period, the sale shall become absolute. This species of transfer has, in the above province, been usually denominated bai-bil-wafa; and the same transaction is common in Bengal, under an instrument termed kat-kabala.

It doubtless exists also under deeds of the above or similar denominations in Orissa and Benares: and since the promulgation of the rules respecting interest contained in Regulation XV, 1793[b] it has become more prevalent, particularly in the Province of Bihar, wherein instances have occurred in which persons lending money on bai-bil-wafa, in order to render the sale absolute, and thereby possess themselves of the landed property of the borrower, have denied the tender or evaded receiving payment of the money due to them within the period limited for the discharge of it.

In such cases, the proof of the tender falls on the borrower; and, if he fail in the proof of it for want of legal evidence, he is liable to lose his estate.

It is necessary therefore for the security of the borrower, in such transactions, that he should have the means of establishing before a Court of Judicature his having tendered, or being ready to pay, within the stipulated period, the amount due from him to the lender; who, if he mean to act fairly, will also derive a benefit from a clear rule being laid down, whereby it may be readily ascertained whether the borrower was willing to redeem his property by the payment of the money lent upon it within the period agreed upon between the parties, or whether, from his having omitted to perform the conditions of such redemption, the sale is become absolute and the property included therein finally transferred to the lender.

For the above purpose, and for the prevention of other abuses in the transactions referred to, the Central Government has passed the following rules, to be considered in force in the Provinces of Bengal, Bihar, Orissa and Benares, from the date of the receipt of this Regulation by the several Courts respectively.

Procedure for borrower of money on conditional sale of land who desires to redeem it by paying money lent.

2. In all instances of the loan of money on bai-bil-wafa, or on the conditional sale of landed property, as explained in the preamble to this Regulation, however denominated, the borrower, who may be desirous to redeem his land by the payment of the money lent upon it, with any interest due thereon, within the stipulated period, is at liberty, on or before the date stipulated, either to tender and pay to the lender the amount due to him, taking such precautions as he may think necessary to establish such tender and payment, if evaded or denied, or without any tender to the lender, to deposit the amount due to him, on or before the stipulated date, in the Diwani Adalat of the city or zila in which the land may be situated; and the Judge receiving the same shall furnish the party with a written receipt for the amount, specifying on what date, and for what purpose, such deposit may have been made,

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a. The whole of Reg. I of 1798, except such parts as relate to interest, was declared to be in force in the Punjab by the Punjab Laws Act, 1872 (IV of 1872), S. 3 and Sch. I.

b. Regulation XV of 1793 was repealed by the Repealing Act. 1868 [(VIII of 1868), S. I and Schedule.]

He shall also at the same time cause a written notice of such deposit to be delivered to the lender; and on the application of the latter, and his surrender of the conditional bill of sale, or showing satisfactory cause why it cannot be surrendered, shall pay him the amount deposited, and take his acknowledgment, to remain among the records of the Court.

That there may be no doubt to what amount the deposit in question is to be made, it is required to be as follows:—

When the lender has not obtained possession of the lands, the deposit is to be the principal sum lent, with the stipulated interest thereon, not exceeding the legal rate of twelve per cent. per annum, or, if interest be payable and no rate has been stipulated, with interest at the established rate of twelve per cent.; but, if the lender has held possession of the land, the principal sum borrowed only need be deposited, leaving the interest to be settled on an adjustment of the lender's receipts and disbursements during the period he has been in possession.

In either case, a deposit, made as above required, shall be considered to preserve to the borrower his full right of redemption; and, if the land be in the possession of the lender, shall entitle him to demand the immediate recovery thereof, subject to the adjustment of accounts specified in the following section:

Provided however that, if the borrower in any case shall deposit a less sum than above required, alleging that the sum so deposited is the total amount due to the lender for principal and interest, after deducting the proceeds of the lands in his possession, or otherwise, such deposit shall be received and notice given to the lender as above directed; and if the amount so deposited be admitted by the lender, or be established on investigation, to be the total amount due to him, the right of redemption shall be considered to have been fully preserved to the borrower, who will not however in such cases be entitled to the recovery of his lands, until it be admitted or established that he has paid the full amount due from him.

When lender has possessed land, and adjustment of accounts is necessary, he is to account for proceeds of estate.

3. In all instances wherein the lender on a bai-bil-wafa, or similar conditional sale, may have been put in possession of the land, and an adjustment of accounts may consequently become necessary between him and the borrower, the lender is to account to the borrower for the proceeds of the estate whilst in his possession, on the principles prescribed with regard to mortgages and interest in Regulation XV, 1793, as far as the same may be applicable to the nature of the case.

But such part of section 10 of the above Regulation as directs that the mortgages therein referred to are to be considered as cancelled and redeemed whenever the principal sum, with the simple interest due upon it, shall have been realised from the usufruct of the mortgaged property, or otherwise liquidated by the mortgagee, being inapplicable to the conditional sales referred to in this regulation, it is hereby declared not to apply thereto.

Tips not to be considered legal tender unless accepted by lender.

4. A tip for the repayment of money lent on the conditional sales referred to in this Regulation shall not be considered a legal tender unless accepted as such by the lender; the proof of which acceptances shall be the lender's giving up the bill of sale, or giving a written acknowledgment that he has received back the money lent by him.

Regulation not to alter contract between parties.

5. Nothing in this Regulation being intended to alter the terms of contract settled between the parties in the transactions to which it refers (illegal interest excepted), the several provisions in it are to be construed accordingly, and any question of right between the parties is to be regularly brought before and determined by the Courts of Civil Justice.

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[a]THE BENGAL LAND (REDEMPTION ANR FORECLOSURE) REGULATION, 1806.

Bengal Regulation XVII OF 1806.

(11*th September*, 1806.)

A Regulation for extending to the Province of Benares the rates of interest on future loans, and provisions relative thereto, contained in Regulation XV, 1793[b]; *also for a general extension of the period fixed by Regulations I.* 1798, *and XXXIV*[b] 1803 *for the redemption of mortgages and conditional sales of land, under deeds of bai-bil-wafa, kat-kabala or other similar designation.*

What shall entitle mortgagor or his representative to redeem before final foreclosure, after application by mortgagee for foreclosure.

7. In addition to the provisions made in the Provinces of Bengal, Bihar, Orissa and Benares, by Regulation I, 1798, and in the Ceded and Conquered Provinces by Regulation XXXIV, 1803,[b] for the redemption of mortgages and conditional sales of land, under deeds of bai-bil-wafa, kat-kabala or any similar designation, it is hereby provided that, when the mortgagee may have obtained possession of the land on execution of the mortgaged-deed, or at any time before a final foreclosure of the mortgage, the payment or established tender of the sum lent under any

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a. Ss. 7 and 8 of Reg. XVII of 1806 were declared to be in force in the Punjab, by the Punjab Laws Act, 1872 (IV of 1872), S. 3 and Sch. I.

b. Reg. XV of 1793 was repealed by the Repealing Act, 1868 (VIII of 1868) and Reg. XXXIV of 1803 by the Laws Local Extent Act, 1874 (XV of 1874), S. 9 and Sch. VII.

such deed of mortgage and conditional sale, or of the balance due, if any part of the principal amount shall have been discharged, or when the mortgagee may not have been put in possession of the mortgaged property, the payment or established tender of the principal sum lent, with any interest due thereupon, shall entitle the mortgagor and owner of such property, or his legal representative, to the redemption of his property, before the mortgage is finally foreclosed in the manner provided for by the following section; that is to say, at any time within one year (Bengal, Fasli or Willaiti, according to the era current where the mortgage may take place) from and after the application of the mortgagee to the zila or city Court of Diwani Adalat for foreclosing the mortgage and rendering the sale conclusive in conformity with S. 8 of this Regulation:

Provided that such payment or tender be clearly proved to have been made to the lender and mortgagee or his legal representative; or that the amount due be deposited, within the time above specified, in the Diwani Adalat of the zila or city in which the mortgaged property may be situated, as allowed for the security of the borrower and mortgagor, in such cases, by Section 2, Regulation I, 1798, and Section 12, Regulation XXXIV, 1803,[b] the whole of the provisions contained in which sections, as applied therein to the stipulated period of redemption, are declared to be equally applicable to the extended period of one year, granted for an equitable right of redemption by this Regulation.

Procedure for mortgagee or conditional vendee desirous to foreclose mortgage or render conditional sale absolute.

8. Whenever the receiver or holder of a deed of mortgage and conditional sale, such as is described in the preamble and preceding sections of this Regulation, may be desirous of foreclosing the mortgage and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent before the sum lent is repaid, he shall (after demanding payment from the borrower or his representative) apply for that purpose by a written petition, to be presented by himself, or by one of the authorised vakils of the Court, to the Judge of the zila or city in which the mortgaged land or other property may be situated.

The Judge, on receiving such written application, shall cause the mortgagor or his legal representative to be furnished, as soon as possible, with a copy of it; and shall at the same time notify to him by a parwana under his seal and official signature that, if he shall not redeem the property mortgaged in the manner provided for by the foregoing section within one year from the date of the notification, the mortgage will be finally foreclosed and the conditional sale will become conclusive.

BOMBAY REGULATION V OF 1827.

(1*st January*, 1827.)

CHAPTER V.

OF THE DISPOSAL OF PROPERTY MORTGAGED OR PLEDGED.

[a]**15.** *First.*—When a creditor is placed in possession of property by mortgage or otherwise, as security for a debt, his claim over such property shall, in the absence of other special agreement, constitute his sole security for payment of the debt, or such part of it as the said property may have been given in security for, and interest thereon is to be considered as included in the said security.

Second.—If the property yield profit, and no stipulation has been made respecting the disposal of the said profit, or payment of interest on the debt, the profit shall be considered as equivalent for the interest.

Third.—In the absence of any special agreement, or recognised law or usage to the contrary, either party may at any time, by the institution of a civil suit, cause the property to be applied to the liquidation of the debt, the surplus, if any, being restored to the owner.

THE MESNE PROFITS AND IMPROVEMENTS ACT, 1855.

Act No. XI of 1855.

(27*th March*, 1855.)

An Act relating to mesne profits and to improvements made by holders under defective titles in cases to which the English law is applicable.

Preamble.

WHEREAS it is expedient, in cases to which the English law is applicable, to limit the liability for mesne profits and to secure to bona fide holders under defective titles the value of improvements made by them; It is enacted as follows:

No person chargeable with rent bona fide paid to holder under defective title.

1. No person shall be chargeable with any rents or profits of any immovable property which he has bona fide paid over to any person of whom he bona fide held the same, notwithstanding it may afterwards appear that the person to whom such payment was made had no right to receive such rents or profits.

Value of improvements made by bona fide holders under defective titles secured to them.

2. If any person shall erect any building

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a. Section 15 is repealed by the Transfer of Property Act, 1882 (4 of 1882), in the whole of the province of Bombay other than the scheduled Districts, i.e. the villages belonging to the following Mehwassi Chiefs:—

(1) The Parvi of Kathi. (2) The Parvi of Nal. (3) The Parvi of Singpur. (4) The Walwi of Gaohalli. (5) The Wassawa of Chikhli. (6) The Parvi of Navalpur.

See Notification No. 5947, dated the 27th October 1892, *Bombay Government Gazette*, 1892, Pt. I, p. 1071.

or make an improvement upon any lands held by him *bona fide* in the belief that he had an estate in fee-simple, or other absolute estate, and such person, his heirs or assigns, or his or their under-tenants, be evicted from such lands by any person having a better title, the person who erected the building or made the improvement, his heirs or assigns, shall be entitled either to have the value of the building or improvement so erected or made during such holding and in such belief, estimated and paid or secured to him or them, or, at the option of the person causing the eviction, to purchase the interest of such person in the lands at the value thereof irrespective of the value of such building or improvement:

Amount how fixed.

Provided that the amount to be paid or secured in respect of such building or improvement shall be the estimated value of the same at the time of such eviction.

Act to apply only to cases governed by English law.

3. Nothing in this Act contained shall extend to any case to which the English law is not applicable.

THE TRUSTEES' AND MORTGAGEES' POWERS ACT 1866.

Act No. XXVIII of 1866.

(*24th October*, 1866.)

An Act to give to Trustees, Mortgagees and others, in cases to which English Law is applicable, certain powers now commonly inserted in Settlements, Mortgages and wills, and to amend the Law of property and relieve Trustees.

Preamble.

WHEREAS it is expedient that in cases to which English law is applicable certain powers and provisions usually inserted in settlements, mortgages, wills and other instruments should be made incident to the estates of the persons interested so as to dispense with the necessity of inserting the same in terms in every such instrument, and that in such cases trustees should be relieved; It is enacted as follows:—

"Interpretation clause."

1. In the construction of this Act, unless there be something repugnant in the subject or context,—

"Immovable property."

"immovable property" shall include land, any benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth:

"Mortgage."

"mortgage" shall be taken to include every instrument by virtue whereof immovable property is in any manner conveyed, pledged or charged as security for the repayment of money or money's worth lent, and to be reconveyed or released on satisfaction of the debt:

"Mortgagor."

"mortgagor" shall be taken to include every person by whom any such conveyance, pledge or charge as aforesaid shall be made:

"Mortgagee."

"mortgagee" shall be taken to include every person to whom or in whose favour any such conveyance, pledge or charge as aforesaid is made or transferred; and

"High Court."

"High Court" means a court which is a High Court for the purposes of the Government of India Act, 1935.

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Powers of Mortgagees.

Powers incident to mortgages.

6. Where any principal-money is secured or charged by deed on any immovable property, or on any interest therein, the person to whom such money shall for the time being be payable, his executors, administrators and assigns, shall, at any time after the expiration of one year from the time when such principal-money shall have become payable, according to the terms of the deed, or after any interest on such principal-money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have the following powers to the same extent (but no more) as if they had been in terms conferred by the person creating the charge, namely:

1st. a power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property, from time to time, in like manner:

2nd, a power to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of the property in manner hereinafter mentioned.

Receipts for purchase-money sufficient discharges.

7. Receipts for purchase-money given by the person or persons exercising the power of sale hereby conferred shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase-money.

Notice to be given before sale;

8. No such sale as last aforesaid shall be made until after six months' notice in writing given to the person or one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of such property;

but purchaser relieved from inquiry as to circumstances of sale.

but when a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that no such notice as afore-

said had been given; but any person damnified by any such unauthorized exercise of such power shall have his remedy in damages against the person or persons selling.

Application of purchase-money.

9. The money arising by any sale effected as aforesaid shall be applied by the person receiving the same as follows:

first, in payment of all the expenses incident to the sale or incurred in any attempted sale;

secondly, in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made; and

thirdly, in discharge of all the principal moneys then due in respect of such charge;

and the residue of such money shall be paid to the person entitled to the property subject to the charge, his executors, administrators or assigns, as the case may be.

Conveyance to purchaser.

10. The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to and vest in the purchaser the property sold for all the estate and interest therein which the person who created the charge had power to dispose of:

Provided that nothing herein contained shall be construed to authorize the mortgagee of a term of years to sell and convey the fee-simple of the property comprised therein in cases where the mortgagor could have disposed of such fee-simple at the date of the mortgage.

Owner of charge may call for title-deeds and conveyance of legal estate.

11. At any time after the power of sale hereby conferred shall have become exercisable, the person entitled to exercise the same shall be entitled to demand and recover from the person entitled to the property subject to the charge all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed or surrendered to and were then vested in him for all the estate and interest which the person creating the charge had power to dispose of;

and, where the legal estate shall be outstanding in a trustee, the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made.

Appointment of receiver.

12. Any person entitled to appoint or obtain the appointment of a receiver as aforesaid may, from time to time, if any person or persons has or have been named in the deed of charge for that purpose, appoint such person or any one of such persons to be receiver, or if no person be so named, then may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require such last-mentioned person or persons to appoint a fit and proper person as receiver, and if no such appointment be made within ten days after such requisition, then may in writing appoint any person he may think fit.

No person shall be ineligible for the office of receiver merely because he is an officer of the High Court.

Receiver deemed to be the agent of the mortgagor.

13. Every receiver appointed as aforesaid shall be deemed to be the agent of the person entitled to the property subject to the charge, who shall be solely responsible for his acts or defaults, unless otherwise provided for in the charge.

Powers of receiver.

14. Every receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the rents, issues and profits of the property of which he is appointed receiver, by suit, distress or otherwise in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of.

Receiver may be removed, and new receivers appointed.

15. Every receiver appointed as aforesaid may be removed by the like authority, or on the like requisition as before provided with respect to the original appointment of a receiver, and new receivers may be appointed from time to time.

Receiver to receive commission not exceeding five per cent.

16. Every receiver appointed as aforesaid shall be entitled to retain out of any money received by him, in lieu of all costs, charges and expenses whatsoever, such a commission, not exceeding five per centum on the gross amount of all money received, as shall be specified in his appointment, and if no amount shall be so specified, then five per centum on such gross amount.

Receiver to insure if required.

17. Every receiver appointed as aforesaid shall, if so directed in writing by the person entitled to the money secured by the charge, insure and keep insured from loss or damage by fire, out of the money received by him, the whole or any part of the property included in the charge which is in its nature insurable.

Application of moneys received by him.

18. Every receiver appointed as aforesaid shall pay and apply all the money received by him in the first place in discharge of Government revenue and of all taxes, rates and assessments whatsoever, and in payment of his commission as aforesaid, and of the premiums

on the insurances, if any; and in the next place in payment of all interest accruing due in respect of any principal-money then charged on the property over which he is receiver, or on any part thereof; and, subject as aforesaid, shall pay all the residue of such money to the person for the time being entitled to the property subject to the charge, his executors, administrators or assigns.

—This part to relate to charges by way of mortgage only.

19. The powers and provisions contained in sections 6 to 18 of this Act, both inclusive, relate only to mortgages or charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt.

THE SPECIFIC RELIEF ACT, 1877.
Act No. I Of 1877.

Specific performance in case of part performance of contract to lease.

S. 27A. Subject to the provisions of this Chapter, where a contract to lease immoveable property is made in writing signed by the parties thereto or on their behalf, either party may, notwithstanding that the contract, though required to be registered, has not been registered, sue the other for specific performance of the contract if,

(*a*) where specific performance is claimed by the lessor, he has delivered possession of the property to the lessee in part performance of the contract; and

(*b*) where specific performance is claimed by the lessee, he has, in part performance of the contract, taken possession of the property, or, being already in possession, continues in possession in part performance of the contract, and has done some act in furtherance of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

This section applies to contracts to lease executed after the first day of April 1930.

THE CROWN GRANTS ACT, 1895.
Act No. XV Of 1895.

(10*th October*, 1895.)

An Act to explain the Transfer of Property Act, 1882, *so far as relates to grants from the Crown, and to remove certain doubts as to the powers of the Crown in relation to such grants.*

WHEREAS doubts have arisen as to the extent and operation of the Transfer of Property Act, IV of 1882, and as to the power of the Crown to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, and it is expedient to remove such doubts; It is hereby enacted as follows:—

Title and extent.

1. (1) This Act may be called the Crown Grants Act, 1895. (2) It extends to all the Provinces of India.

Transfer of Property Act, 1882, *not to apply to Crown grants.*

2. Nothing in the Transfer of Property Act, IV of 1882, contained shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made by or on behalf of the Crown to, or in favour of, any peson whomsoever; but every such grant and transfer shall be construed and take effect as if the said Act had not been passed.

Crown grants to take effect according to their tenor.

3. All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding.

THE INDIAN REGISTRATION ACT, 1908.
Act No. XVI of 1908

PART III.
OF REGISTRABLE DOCUMENTS.

Documents of which registration is compulsory.

17. (1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—

(a) instruments of gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:—

Provided that the Provincial Government may, by order published in the Official Gazette, exempt from the operation of this sub-section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

(2) Nothing in clauses (b) and (c) of sub-section (1) applies to—

(i) any composition deed; or

(ii) any instrument relating to shares in a Joint Stock Company, notwithstanding that the assets of such Company consist in whole or in part of immovable property; or

(iii) any debenture issued by any such Company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(iv) any endorsement upon or transfer of any debenture issued by any such Company; or

(v) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

(vi) any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding; or

(vii) any grant of immovable property by the Crown; or

(viii) any instrument of partition made by a Revenue Officer; or

(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883; or

(x) any order granting a loan under the Agriculturists' Loans Act, 1884, or instrument for securing the repayment of a loan made under that Act; or

(xa) Any order made under the Charitable Endowments Act, 1890, (VI of 1890), vesting any property in a treasurer of Charitable Endowments or divesting any such Treasurer of any property or;

(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or

(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue Officer.

Explanation—A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase-money.

(3) Authorities to adopt a son, executed after the first day of January 1872 and not conferred by a will, shall also be registered.

Documents of which registration is optional.

18. Any of the following documents may be registered under this Act, namely:—

(*a*) instruments (other than instruments of gift and wills) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of a value less than one hundred rupees, to or in immovable property;

(*b*) instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest;

(*c*) lease of immovable property for any term not exceeding one year and leases exempted under Section 17;

(*cc*) instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of a value less than one hundred rupees, to or in immovable property;

(*d*) instruments (other than wills) which purport or operate to create, declare, assign, limit or extinguish any right, title or interest to or in movable property;

(*e*) wills; and

(*f*) all other documents not required by section 17 to be registered.

PART X.

OF THE EFFECTS OF REGISTRATION AND NON-REGISTRATION.

Time from which registered document operates.

47. A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration.

Registered documents relating to property when to take effect against oral agreements.

48. All non-testamentary documents duly registered under this Act, and relating to any property, whether movable or immovable, shall take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession and the same constitutes a valid transfer under any law for tht time being in force:

Provided that a mortgage by deposit of title-deeds as defined in section 58 of the Transfer of Property Act, 1882, shall take effect against any mortgage-deed subsequently executed and registered which relates to the same property.

Effect of non-registration of documents required to be registered.

49. No document required by section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall—

(*a*) affect any immovable property comprised therein, or

(*b*) confer any power to adopt, or

(*c*) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered.

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of section 53A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument.

THE MUSSALMAN WAKF VALIDATING ACT, 1913.

Act No. VI Of 1913.

(*7th March* 1913.)

An Act to declare the rights of Mussalmans to make settlements of property by way of "wakf" in favour of their families, children and descendants.

WHEREAS doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes; and whereas it is expedient to remove such doubts; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called the Mussalman Wakf Validating Act, 1913.

(2) It extends to all the Provinces of India.

Definitions

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "Wakf" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable.

(2) "Hanafi Mussalman" means a follower of the Mussalman faith who conforms to the tenets and doctrines of the Hanafi School of Mussalman law.

Power of Mussalmans to create certain wakfs.

3. It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes:—

(*a*) for the maintenance and support wholly or partially of his family, children or descendants, and

(*b*) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated:

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character:

Wakfs not to be invalid by reason of remoteness of benefit to poor, etc.

4. No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf.

Saving of local and sectarian custom.

5. Nothing in this Act shall affect any custom or usage whether local or prevalent among Mussalmans of any particular class or sect.

THE HINDU TRANSFERS AND BEQUESTS ACT, 1914.

Madras Act No. I Of 1914

(*14th February* 1914.)

An Act to declare the rights of Hindus to make transfers and bequests in favour of unborn persons (in the Mufassal of Madras.)

Preamble.

WHEREAS it is expedient to declare the rights of persons governed by the Hindu law to make transfers and bequests in favour of unborn persons; It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Hindu Transfers and Bequests Act, 1914."

Application and extent.

2. (1) This Act shall apply to all transfers *inter vivos* and wills made by persons governed by the Hindu law who are domiciled within the limits of the Presidency of Madras.

(2) In the case of transfers *inter vivos* or wills executed before the date of this Act, the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to such date: Provided that nothing contained in this section shall affect bona fide transferees for valuable consideration in whom the right to any property has vested prior to the date of the Act.

Explanations—Hindus governed by the Marumakkattayam or the Aliyasantana law shall be deemed to be persons governed by the Hindu law for the purposes of this Act.

Disposition for the benefit of person not in existence.

3. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition.

Limitations and conditions.

4. The limitations and provisions referred to in S. 3 shall be the following, namely—

(*a*) in respect of dispositions by transfers *inter vivos*, those contained in Chap. II of the Transfer of Property Act, 1882, and

(*b*) in respect of dispositions by will, those contained in Ss. 113, 114, 115 and 116 of the Indian Succession Act, 1925.

[*Note.*— Sections 3 and 4 were substituted for the original Ss. 3, 4 and 5, by the Transfer of Property (Amendment) Supplementary Act XXI of 1929, S. 11, which came into force on the 1st April 1930. The original Ss. 3, 4 and 5 were as follows:—

"3. A transfer inter vivos or disposition by will of any property shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer or the death of the testator, as the case may be.

4. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of the transfer and the minority of some persons who shall be in existence at the expiration of that period and to whom, if he attains full age, the interest created is to belong.

5. No bequest is valid whereby the vesting of the thing bequethed may be delayed beyond the lifetime of one or more persons living at the testator's decease and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the thing bequeathed is to belong."]

THE HINDU DISPOSITION OF PROPERTY ACT, 1916.
Act No. XV Of 1916.

(28*th September*, 1916.)

An Act to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition.

WHEREAS it is expedient to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called the Hindu Disposition of Property Act, 1916.

(2) It extends, in the first instance, to all the Provinces of India, except the province of Madras: Provided that the Provincial Government may, by notification in the Official Gazette, extend this Act to the province of Madras.

Dispositions for the benefit of person not in existence.

2. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not in existence at the date of such disposition.

Limitations and conditions.

3. The limitations and provisions referred to in S. 2 shall be the following, namely:—

(*a*) in respect of dispositions by transfer *inter vivos* those contained in Chap. II of the Transfer of Property Act, 1882, and

(*b*) in respect of dispositions by will, those contained in Ss. 113, 114, 115 and 116 of the Indian Succession Act, 1925.

[*Note.*—"Chapter II" was substituted for "Ss. 13, 14 and 20," by the Transfer of Property (Amendment) Supplementary Act, XXI of 1929, S. 12, which came into force on the 1st April 1930.

The words and figures "Ss. 113, 114, 115 and 116 of the Indian Succession Act, 1925" were substituted for the words and figures "Ss. 100 and 101 of the Indian Succession Act, 1865" by the Transfer of Property (Amendment) Supplementary Act, XXI of 1929, section 12.]

4. (Omitted by the Transfer of Property (Amendment) Supplementary Act, XXI of

1929, Section 12.)

[*Note.*— The original S. 4 was as follows:

4. Where a disposition of property fails by reason of any of the limitations referred to in S. 3, any disposition intended to take effect after or upon failure of such prior disposition also fails.]

Application of this Act to the Khoja community

5. Where the Provincial Government is of opinion that the Khoja community in the Province or any part thereof desire that the provisions of this Act should be extended to such community, it may, by notification in the Official Gazette, declare that the provisions of this Act, with the substitution of the word "Khojas" or "Khoja," as the case may be, for the word "Hindus" or "Hindu" wherever those words occur shall apply to that community in such area as may be specified in the notification and this Act shall thereupon have effect accordingly.

THE HINDU TRANSFERS AND BEQUESTS (CITY OF MADRAS) ACT, 1921.

ACT No. VIII Of 1921.

(27th *March* 1921.)

An Act to declare the rights of Hindus to make transfers and bequests in favour of unborn persons in the City of Madras.

WHEREAS it is expedient to declare the rights of Hindus to make transfers and bequests in favour of unborn persons in the City of Madras; It is hereby enacted as follows:—

Short title.

1. This Act may be called the Hindu Transfers and Bequests (City of Madras) Act, 1921.

Application and extent.

2. (1) This Act shall apply to all transfers *inter vivos* and wills made by persons governed by the Hindu law who are domiciled within the limits of the Ordinary Original Civil Jurisdiction of the High Court of Madras.

(2) In the case of transfers *inter vivos* or wills executed before the date of this Act, the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to the 14th February 1914:

Provided that nothing contained in this section shall affect *bona fide* transferees for valuable consideration in whom the right to any property has vested prior to the date of this Act.

Explanation.—Hindus governed by the Marumakkattayyam or the Aliyasantana law shall be deemed to be persons governed by the Hindu law for the purposes of this Act.

Disposition for the benefit of person not in existence.

3. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfers *inter vivos* or by will shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition.

Limitations and conditions.

4. The Limitations and provisions referred to in section 3 shall be the following namely—

(*a*) in respect of disposition by transfer *inter vivos*, those contained in Chap. II of the Transfer of Property Act, 1882, and

(*b*) in respect of disposition by will, those contained in Ss. 113, 114, 115 and 116 of the Indian Succession Act, 1925.

[*Note*:—Sections 3 and 4 were substituted for the original Ss. 3, 4 and 5, by the Transfer of Property (Amendment) Supplementary Act XXI of 1929, S. 13, which came into force on the 1st April 1930. The original Ss. 3, 4 and 5 were as follows:

"3. A transfer *inter vivos* or disposition by will of any property shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer or the death of the testator, as the case may be.

4. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of the transfer and the minority of some person who shall be in existence at the expiration of that period and to whom if he attains full age, the interest created is to belong.

5. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one of more persons living at the testator's decease and the minority of some persons who shall be in existence at the expiration of that period and to whom, if he attains full age, the thing bequeathed is to belong."]

THE MUSSALMAN WAKF VALIDATING ACT, 1930.

Act No. XXXII Of 1930.

(25*th July*, 1930.)

An Act to give retrospective effect to the Mussalman Wakf Validating Act, 1913.

WHEREAS the Mussalman Wakf Validating Act, VI of 1913, does not apply to wakfs created before its enactment;

AND WHEREAS it is expedient to validate such wakfs without infringing any rights contrary thereto which may have already accrued or been acquired;

It is hereby enacted as follows:—

Short title.

1. This Act may be called the Mussalman Wakf Validating Act, 1930.

Act VI of 1913 *to apply retrospectively.*

2. The Mussalman Wakf Validating Act, VI of 1913, shall be deemed to apply to wakfs created before its commencement:

Provided that nothing herein contained shall be deemed in any way to affect any right, title, obligation or liability already acquired, accrued or incurred before the commencement of this Act.

THE PAYMENT OF TAXES (TRANSFER OF PROPERTY ACT, 1949.

Act No. XXII Of 1949.

(22*nd April* 1949.)

An Act to make provision for the payment of taxes before transfers of property are registered in certain cases.

WHEREAS it is expedient to make provision for the payment of taxes before transfers of property are registered in certain cases; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called the Payment of Taxes (Transfer of Property) Act, 1949.

(2) It extends to all the Provinces of India.

Application of Act.

2. This Act shall apply to any person—

(i) who, on account of the setting up of the Dominions of India and Pakistan, or on account of civil disturbances or the fear of such disturbances, leaves or has, since the 14th day of August 1947, left any place in the Provinces of India for any place outside India, or who, since the said date, has been residing in any place outside India; or

(ii) who, in the opinion of any of the Income-tax authorities specified in subsection (1) of section 5 of the Indian Income-tax Act, 1922 (XI of 1922), or a Custodian of Evacuee Property or a Collector, is likely to leave the Provinces of India with the intention of settling in any place outside the Provinces of India, and in respect of whom a declaration that he is a person to whom this Act applies has been received from any such Income-tax authority, Custodian of Evacuee Property or Collector by the registering officer of the area in which any property belonging to such person is situate.

Payment of taxes before registration of documents.

3. (1) Where any document required to be registered under the provisions of clause (*a*), clause (*b*), *clause* (*c*) or clause (*e*) of subsection (1) of section 17 of the Indian Registration Act, 1908 (XVI of 1908), purports to transfer, assign, limit or extinguish any right, title or interest in any property, other than agricultural land, belonging to any person to whom this Act applies, no registering officer appointed under the said Act shall register any such document, unless it is certified by the Income-tax Officer of the area in which the property is situate in respect of the person whose right, title or interest in the property is to be so transferred, assigned, limited or extinguished under the terms of the document that—

(*a*) such person is not liable to assessment or taxation under the Indian Income-tax Act, 1922 (XI of 1922), the Excess Profits Tax Act, 1940 (XV of 1940), of the Business Profits Tax Act, 1947 (XXI of 1947);

(*b*) such person has either paid or made satisfactory provision for the payment of all existing or anticipated liabilities under any of the Acts specified in clause (*a*) of this sub-section; or

(*c*) the Income-tax Officer is otherwise satisfied that the registration of the document will not prejudicially affect the recovery of all existing or anticipated liabilities referred to in clause (*b*) of this sub-section.

(2) Every Income-tax Officer refusing to issue a certificate under the provisions of subsection (1) shall make an order of refusal and record his reasons therefor and, on application made by any person claiming to be affected by such order, shall, subject to the payment of such fee as may be prescribed, furnish him with a copy of the order.

Recovery of taxes where property has been transferred without a certificate.

4. (1) Where, in respect of the transfer made on or after the seventh day of February 1948, in the Provinces of Bombay, West Bengal, East Punjab, Bihar, Delhi and Ajmer-Merwara, and in any other Province on or after the date on which the Transfer of Property (India) Ordinance, 1948 (III of 1948) was made applicable to that Province, of any right, title or interest in any immovable property other than agricultural land, belonging to any person to whom this Act applies, the Income-tax Officer of the area where the property is situate is satisfied, after giving such person notice in this behalf for a period of not less than one month, that no certificate in the terms mentioned in section 3 would have been issued to him if this Act had been in force on the date the transfer was made, he may forward a statement to the Collector showing the existing and anticipated liabilities by way of taxes in respect of all or any of the parties to the transfer.

(2) On receipt of any statement under subsection (1), the Collector shall proceed to recover the total amount shown in such statement as if it were an arrear of land revenue, and for the purpose of such recovery proceedings he may treat the property transferred as aforesaid as if it belonged to all or any of the persons named in the statement.

Right of appeal

5. An appeal shall lie against the order of

any Income-tax Officer refusing to issue a certificate under the provisions of sub-section (2) of section 3 to the Commissioner of Income-tax to whom the Income-tax Officer is subordinate, if presented to such Commissioner within thirty days from the date of the order, and the Commissioner may pass such orders thereon as he may think fit.

Effect of Act over other laws.

6. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Bar of suits.

7. No suit, prosecution or other legal proceeding shall lie against the Central Government or any person or authority in respect of anything which is in good faith done or intended to be done under this Act.

Power to make rules.

8. The Central Government may make rules for the purpose of carrying into effect the objects of this Act, and, in particular, prescribe the fee payable under sub-section (2) of section 3.

Effect of expiry of Ordinance XXI of 1948.

9. On the expiry of the Payment of Taxes (Transfer of Property) Ordinance, 1948 (XXI of 1948), sectioon 6 of the General Clauses Act, 1897 (X of 1897) shall apply as if the Ordinance had then been repealed by a Central Act.

APPENDIX III.

RULES FRAMED BY HIGH COURTS (ORIGINAL SIDE.)

Rules of the Original Side of the High Court of Bombay Made Under the Transfer Of Property Act, 1882.

CHAPTER XXX.

Application under Section 83.

585. Every application under S. 83 shall be made by a verified petition, stating the facts.

Payment into Court of costs and expenses under S. 83 or any subsequent section. Costs to be estimated and certified.

586. Unless otherwise ordered, there shall be paid into Court, in addition to the sum deposited under S. 83 or any subsequent section, a sum sufficient to provide for the fees and charges of the Court and for the mortgagee's costs of obtaining payment out of Court; and also when such payment is made under S. 83, a further sum to provide for the mortgagee's costs of transferring the property, and causing such transfer to be registered; such costs to be estimated and certified by the Taxing Master.

Order for payment of money into Court under S. 83.

587. Every order for payment of money into Court, under S. 83, shall specify the sums to be paid, and the purpose for which each sum is intended.

Service of notice under S. 83.

588. Unless otherwise ordered, the applicant or his Attorney shall serve, or cause to be served, the notice to be given under S. 83.

Of notice of payment under any subsequent rule.

589. When money is paid into Court under O. XXXIV, R. 2 of the Code of Civil Procedure, or under any subsequent rules of the said order, the person making such payment shall forthwith give written notice thereof to the person or persons on whose account such payment is made.

Application for mortgagee.

590. Every application by a mortgagee to obtain payment of money out of Court shall be on a verified petition.

Affidavit of service of notice or order.

591. Unless otherwise ordered, whenever any notice or order is served under the Act or under the rules, an affidavit in proof of such service shall be filed as soon as possible thereafter.

Disallowances where tender refused.

592. Where it shall appear that previous to any payment into Court under S. 83 or any subsequent section a sufficient tender was made to, and refused by, the mortgagee, he shall not be allowed to obtain payment of the amount deposited in Court to meet his claim, without deduction of the fees and charges of the Court, nor shall be allowed his costs of obtaining such payment. Except as aforesaid, or when otherwise ordered the mortgagee shall be allowed all costs properly incurred by him.

When interest disallowed.

593. If through default on the part of the mortgagee it becomes necessary to obtain an enlargement of time under O. XXXIV, R. 3 or R. 8 of the Code of Civil Procedure, no interest shall be allowed for the enlarged time without a special order in that behalf.

Order for payment of money out of Court under S. 83 or any subsequent section.

594. On an application for payment of money out of Court, under S. 83 or any subsequent section by a mortgagee who has complied with the orders of the Court and the provisions of the Act and of the rules made in this behalf, so far as they relate to him, or apply to his case, and has, when required so to do, transferred the property and possession free from encumbrance, and caused such transfer to be registered and accounted for the documents of title which were held by him, the Court shall make such order or orders as to it shall seem fit for the disposal of the capital sum and interest thereon, and of the fund for costs and expenses.

Decree absolute for foreclosure, O. XXXIV, R. 3 or R. 8, C. P. C.

595. Every decree absolute for foreclosure under O. XXXIV, R. 3 R. 8 of C. P. C., shall direct that possession of the property be given to the mortgagee except where he is already in possession. It shall be drawn up with a recital of the decree and the proceedings had there under and with a full description of the property.

Conveyance of property sold under O. XXXIV, R. 4 of C. P. C. or any subsequent rule.

596. where immovable property is sold under O. XXXIV, R. 4 of C. P. C., or any subsequent rule the purchaser may on application to a Judge in Chambers, obtain a certificate of sale as evidence of the title to the property sold to him and may also, at his own costs, obtain a conveyance from the mortgagor.

Order under S. 83 how enforced.

597. Every enforceable order made under S. 83 may be enforced under the provisions of the Code of Civil Procedure, and shall for that purpose be deemed to have been made in a suit instituted under that Code.

Rules relating to sales by Commissioner to apply to sales under the Civil Procedure Code.

598. Rules relating to sales by the Commissioner for taking accounts so far as they are applicable shall apply to all sales by the Court under O. XXXIV, Rr. 4 and 5 or 7 and 8 of Civil Procedure Code.

Meaning of the Act in this Chapter.

599. In this Chapter the Act means "The Transfer of Property Act, 1882," and the Sections referred to are the sections of that Act.

BOMBAY CITY CIVIL COURT RULES.

(2) The following Rules[1] are made under Section 104 of the Transfer of Property Act, 1882, in so far as they relate to proceedings taken in the Bombay City Civil Court to be established under the Bombay City Civil Court Act XI of 1948. The Rules will come into effect from the date of the establishment of the Bombay City Civil Court following the notification to be issued by the Provincial Government under Section 3 of the Bombay City Civil Court Act, 1948:—

[1] Published with notification No. G|84-A|1395, dated 4-8-1948.

Application under Section 83.

1. Every application under Section 83 of the Transfer of Property Act shall be made by a verified petition, stating the facts.

Payment into Court of costs and expenses under Section 83, or any subsequent Section: Cost to be estimated and certified.

2. Unless otherwise ordered, there shall be paid in to Court, in addition to the sum deposited under Section 83 or any subsequent Section, a sum sufficient to provide for the fees and charges of the Court and for the mortgagee's costs of obtaining payment out of Court; and also, when such payment is made under Section 83, a further sum to provide for the mortgagee's costs of transferring the property, and causing such transfer to be registered; such costs to be estimated and certified by the Registrar.

Order for payment of money into Court under Section 83.

3. Every order for payment of money into Court, under Section 83, shall specify the sums to be paid, and the purpose for which each sum is intended.

Service of notice under Section 83.

4. Unless otherwise ordered, the applicant or his Advocate shall serve, or cause to be served, the notice to be given under Section 83.

Of notice of payment under any subsequent rule.

5. When money is paid into Court under O. XXXIV, r. 2 of the Code of Civil Procedure, or under any subsequent rules of the said Order, the person making such payment shall forthwith give written notice thereof to the person or persons on whose account such payment is made.

Application by mortgagee.

6. Every application by a mortgagee to obtain payment of money out of Court shall be on a verified petition.

Affidavit of service notice or order.

7. Unless otherwise ordered, whenever any notice or order is served under the Act or under the rules, an affidavit in proof of such service shall be filed as soon as possible thereafter.

Disallowances where tender refused.

8. Where it shall appear that previous to any payment into Court under Section 83 or any subsequent section a sufficient tender was made to, and refused by, the mortgagee, he shall not be allowed to obtain payment of the amount deposited in Court to meet his claim, without deduction of the fees and charges of the Court, nor shall be allowed his costs of obtaining such payment. Except as aforesaid, or when otherwise ordered the mortgagee shall be allowed all costs properly incurred by him.

When interest disallowed.

9. If through default on the part of the mortgagee it becomes necessary to obtain an enlargement of time under O. XXXIV, r. 3 or r. 8 of the Code of Civil Procedure, no interest shall be allowed for the enlarged time without a special order in that behalf.

Order for payment of money out of Court under Section 83 or any subsequent section.

10. On an application for payment of money out of Court under Sedtion 83 or any subsequent section by a mortgagee who has complied with the orders of the Court and the provisions of the Act and of the Rules made in this behalf, so far as they relate to him, or apply to his case, and has, when required so to do, transferred the property and possession free from encumbrance, and caused such transfer to be registered and accounted for the documents of title which were held by him, the Court shall

make such order or orders as it shall deem fit for the disposal of the capital sum and interest thereon, and of the fund for costs and expenses.

Decree absolute for foreclosure, O. XXXIV, r. 3 or r. 8 of Civil Procedure Code.

11. Every decree absolute for foreclosure under O. XXXIV, r. 3 or r. 8 of Civil Procedure Code shall direct that possession of the property be given to the mortgagee except where he is already in possession. It shall be drawn up with a recital of the decree and the proceedings had there under with a full description of the property.

Conveyance of property sold under O. XXXIV, r. 4 of Civil Procedure Code or any subsequent rule.

12. Where immoveable property is sold under O. XXXIV, r. 4 of Civil Procedure Code or any subsequent rule the purchaser may, on application to a Judge in Chambers, obtain a certificate of sale as evidence of title to the property sold to him and may also at his own costs, obtain a conveyance from the mortgagor.

Order under section 83 how enforced.

13. Every enforceable order made under section 83 may be enforced under the provisions of the Code of Civil Procedure, and shall for that purpose be deemed to have been made in a suit instituted under that Code.

Rules relating to sales by Commissioner to apply to sales under the Civil Procedure Code.

14. Rules relating to sales by the Commissioner for taking accounts so far as they are applicable shall apply to all sales by the Court under O. XXXIV, rr. 4 and 5 or 7 and 8 of Civil Procedure Code.

RULES FRAMED BY THE CALCUTTA HIGH COURT

Application under S. 83.

1. Every application under S. 83 shall be made by a verified petition stating the facts.

Payment into Court and expenses under S. 83. costs to be estimated of certified.

2. Unless otherwise ordered, there shall be paid into Court, in addition to the sum deposited under S. 83, or any subsequent section, a sum sufficient to provide for the fees and charges of the Accountant-General and the Bank of Bengal, and for the mortgagee's costs of obtaining payment out of the Court; and also when such payment is made under S. 83, a further sum to provide for the mortgagee's costs of obtaining payment out of the Court; and also when such payment is made under S. 83, a further sum to provide for the mortgagee's costs of transferring the property, and causing such transfer to be registered, and costs to be estimated and certified by the Taxing Officer.

Order of payment of money into Court under S. 83.

3. Every order for payment of money into Court under S. 83, shall specify the sums to be paid, and purpose for which such sum is intended.

Service of notice under S. 83.

4. Unless otherwise ordered, the applicant or his attorney shall serve, or cause to be served, the notice to be given under S. 83.

Of notice of payment under any subsequent section.

5. When money is paid into Court under S. 86 or under any subsequent section, the person making such payment shall forthwith give written notice thereof to the person or persons on whose account such payment is made.

Application for payment of money out of Court under S. 87 (c).

6. Every application by a mortgagee to obtain payment of money out of Court shall be by a verified petition.

And, when made under S. 83, it shall be shown where the property has been transferred, and where the applicant was in possession, possession delivered up, free from encumbrance and whether the transfer has been registered. The documents of title which were held by the applicant shall also be accounted for.

Or under S. 86 or S. 92.

Or, when made under S. 86 or S. 92, it shall be shown that the provisions of such section have been complied with.

To be on notice.

7. Every application under the last preceding rule shall be on notice to the person by whom, or on whose behalf, the money was paid, or to his attorney, unless the Court shall think fit to dispense with such notice.

Affidavit of service of notice or order.

8. Unless otherwise ordered, whenever any notice, or order, is served under the Act, or under these rules an affidavit, or affirmation, in proof of such service, shall be filed as soon as possible thereafter.

Cost of mortgage. Disallowances where tender refused.

9. Where it shall appear that previous to any payment into Court under S. 83, or any subsequent section a sufficient tender was made to, and refused by the mortgagee, he shall not be allowed to obtain payment of amount deposited in Court to meet his claim, without deduction of the fees and charges of the Accountant—General and the Bank, nor shall he be allowed his costs of obtaining such payment. Except as aforesaid, or when otherwise ordered, the mortgagee shall be allowed all costs properly incurred by him.

When interest disallowed.

10. If through default on the part of the plaintiff it becomes necessary to obtain an enlargement of time under S. 87, no interest shall be allowed for the enlarged time.

Order for payment of money out of Court under S. 83 or any subsequent section.

11. On an application for payment of money out of Court, under S. 83, or any subsequent section, by a mortgagee, who has complied with the orders of the Court and the

provisions of the Act and of these rules, so far as they relate to him, or apply to his case and has when required so to do transferred the property and possession, free from incumbrance, and caused such transfer to be registered, and accounted for the documents of title which were held by him, the Court shall make such order or orders as to it shall seem fit for the disposal of the capital sum and interest thereon, and of the fund for costs and expenses.

Decree for sale to provide for payment of amount of deficiency.

12. Every decree for sale under the Act shall direct that, if the proceeds of sale shall not be sufficient to satisfy the decree, the defendant (if the original mortgagor) shall personally (or if the representative in estate of the original mortgagor shall out of his estate) pay the amount of the deficiency.

Final foreclosure order under S. 87 or S. 93.

13. Every final order for foreclosure, under S. 87 or S. 93, shall direct that possession of the property be given to the mortgagee, except where he is already in possession. It shall also, at the option of the mortgagee, be drawn up with a recital of the decree and the proceedings had thereunder, and with a full description of the property, or without any such recital or description.

Conveyance of property sold under S. 88 or any subsequent section.

14. Where immoveable property is sold under S. 88 or any subsequent section, the purchaser may, on application to a Judge in Chambers, obtain a certificate of sale, as evidence of the title to the property sold to him, and may also, at his own costs, obtain a conveyance from the mortgagor.

Order under S. 83 how enforced.

15. Every enforceable order made under S. 83, may be enforced under the provisions of the Code of Civil Procedure, and shall for that purpose be deemed to have been made in a suit instituted under that Code.

Rules repealed.

16. Rules 45 and 46 of the rules of the 1st August 1877 (Rules 431 and 432 Belchamber's R. & O., pp. 200, 201), relating to sale by the Registrar, are hereby repealed.

Rules amended.

From R. 50 of the same rules shall be omitted the words "unless otherwise ordered the costs of such applications in the case of a person under disability shall be part of the costs of the sale, and in other cases shall be borne and paid by the defaulting party."

At the end of R. 58 of the same rules shall be added the words "or the grant to him of a certificate of sale."

Rules relating to sales by Registrar to apply to sales under the Act.

17. Rules 387 to 449 (Belchambers' R. and O., pp. 189 to 295), relating to sales by the Registrar as modified by the last preceding rule, and so far as they are applicable shall apply to all sales by the Court under Ss. 88 and 89 or 92 and 93.

Money rules to apply to payments under these rules.

18. The money Rr. 579 (a) to 641 (Belchambers' R. and O., pp. 240 to 253) shall also, so far as they are applicable, apply to the payment of money into Court, and out of Court, under these rules.

Form.

19. The form set forth in the annexed schedule shall be followed with such variations as the circumstances of each case may require.

The following additional rule has also been made by the Calcutta High Court.

Every certificate or report of the Registrar or other reference stating what is due to the mortgagee in mortgage-suit, shall, on being confirmed by effluxion of time or otherwise, be submitted in open Court to a Judge exercising original civil jurisdiction, in order that it may be countersigned by him, and the period for payment under Ss. 86, 88 or 92 of the Transfer of Property Act shall run from the date of such counter-signature, which shall be deemed to be a declaration of the amount under the provisions of those sections.

The Procedure of the Courts was regulated by the following Circular Order.

(1) An application under S. 89 of the Transfer of Property Act shall be made by means of a verified petition stating the facts.

(2) If the Court passes an order directing that the property or any part of it shall be sold, it shall issue a proclamation of sale and cause it to be served in the manner provided by the Code of Civil Procedure for the service of proclamation regarding the sale of immoveable property.

(3) Sections 286 to 294, both inclusive of the Code of Civil Procedure shall apply to such sales.

(4) Sections 304 to 319, both inclusive and Ss. 328 to 335 of the Code of Civil Procedure, shall apply to proceedings subsequent to sale under a mortgage.

(5) The procedure to be followed in the execution of a decree passed under S. 90 of the Transfer of Property Act is that prescribed by the Code of Civil Procedure.

ORIGINAL SIDE RULES OF THE HIGH COURT OF JUDICATURE AT MADRAS.

Order XXIX—Mortgages and Charges.

(A) General.

1. Every plaint shall contain an allegation that the plaintiff has caused a search to be made in the office of the Registrar of Assurance of the district, or sub-district, in which the immoveable property comprised in the mortgage, or subject to the charge sued on, is situate, for a period of not less than twelve years prior to the date of presentation of the plaint, or, for the period subsequent to the mortgage sued on, whichever may be shorter, and that he is not aware that any person,

other than the persons mentioned in the plaint, has any interest in the said property. The certificate of the Registrar of Assurances, stating the result of the search, shall be filed with the plaint.

The cost of making the search, and filing the certificate shall be costs in the cause. Provided that a plaint which does not comply with the above provisions shall be returned for amendment under Order VI, Rule 17 of the Civil Procedure Code, and shall be rejected under order VI, Rule 18 of the Code, if it be not amended within the time fixed.

2. The plaint shall be in one of Forms Nos. 47 to 50, inclusive with such variations as circumstances may require.

3. Where there are several parties to a suit claiming successive charges or incumbrances on the mortgaged property, the Court shall determine their respective rights and priorities and insert in its decree a declaration with respect thereto as in Form No. 51.

4. The Court shall determine whether the defendant is responsible personally, and to any and what extent, for the repayment of the mortgage monies and a declaration with respect thereto shall be inserted in the decree as in Forms Nos. 57 and 58.

5. If, in any suit or matter, it is found necessary to take an account, an interim decree shall be drawn up in Form No. 56, with such variations, as circumstances may require.

6. A sale of mortgaged property shall be conducted in manner prescribed by Order XVIII of these rules. Provided that, if leave to bid is granted to the plaintiff or applicant, and, unless the Court otherwise orders, the sum allowed to be bid shall be not less than the whole amount then due for principal, interest, and costs; and, in the event of the property being sold in lots, not less than the market value of each lot in respect of which the bid is made.

7. If a money decree only is obtained, the decree shall not direct execution to issue against the mortgaged property.

(B) Simple mortgages and charges.

Suits for sale.

8. At the trial of the suit the Court shall, if possible, ascertain the amount of principal and interest which will be due under the mortgage on the day fixed for payment, and shall determine the extent of the liability of the defendant therefor. A decree shall then be drawn up in Form No. 57, and the case shall be ordered to be posted in Chambers on the first convenient day after the day limited for payment by the defendant.

9. On the adjourned day—

(1) If the defendant has paid the amount due under the decree into Court, the Court may pass an order in Form No. 59.

(2) If the defendant has made default in payment, the Court may, on the oral application of any party for the sale of the mortgaged property, pass an order for sale in Form No. 60.

(3) In default being made by the defendant, the plaintiff does not appear and the defendant appears or if neither party appears, the Court may adjourn the suit and direct that no order for sale shall be passed except on notice to the other party.

10. If an order for sale is passed on the application of the defendant the Court may direct that the defendant shall have the conduct of the sale and be entitled to the further costs of the proceedings.

11. If at any time it is made to appear to the Court that the plaintiff, or other party having the conduct of the sale, has failed to comply with any order of the Court or any of the provisions of these rules, or is not proceeding with due diligence, the Court may give the further conduct of the suit to any other party; or may refuse to allow to the plaintiff or such other party any further costs of suit, or interest on the mortgage monies.

12. If the sale is confirmed, the Court may pass an order in Forms Nos. 61 or 62.

Suits for Redemption.

13. At the trial of the suit the Court shall determine whether the plaintiff is entitled to redeem the mortgaged property, and, if possible, shall ascertain the amount of principal and interest which will be due under the mortgage on the day fixed for redemption, and a decree shall then be drawn up, in Form No. 63, and the case ordered to be posted in Chambers on the first convenient day after the day fixed for payment by the plaintiff.

14. If it is found necessary to take an account, an interim decree shall be drawn up in Form No. 56; and, at the adjourned hearing, the Judge may declare the amount due on taking the account, and, if the balance is found to be against the plaintiff, may appoint a day for payment by him, and declare the aggregate amount of principal, interest and costs due on that day, and thereupon an order shall be drawn up in Form No. 64, and the suit shall be adjourned to a day as soon as possible after the day so fixed. If the balance is found against the defendant, the Judge may at once pass a decree directing payment thereof to the plaintiff, and, if the defendant is in possession of the mortgaged property, directing delivery thereof to the plaintiff, and payment of mesne profits, and may make such order as to the costs of the suit as is just.

15. If the plaintiff proves that a valid tender of the mortgage-money has been made, the Judge may pass a decree, as in Form No. 65.

16. On or before the day to which the case is posted the plaintiff may apply to the Judge by summons in Chambers, to appoint a further day for payment, and thereupon the Judge may, for sufficient cause, and upon such terms

as he thinks fit, postpone payment to a fixed day, and adjourn the further hearing to a day as soon as possible after such day, as in Form No. 66.

17. If, on the adjourned day, it appears that the mortgage-monies have not been paid by the plaintiff, and if no further time for payment is granted, the defendant may apply for the sale of the mortgaged property, and thereupon the Judge may pass an order for sale, as in Form No. 67.

(C) English Mortgages, and Mortgages by Conditional Sale.

Suits for Foreclosure or Sale.

18. At the trial of the suit, the Court shall, if possible, ascertain the amount of principal and interest which will be due under the mortgage on the day fixed for payment and a decree shall be drawn up, in Form No. 68; and the case shall be ordered to be posted in Chambers on the first convenient day after the day limited for payment by the defendant.

19. When there are several successive incumbrances, the Court may fix a day for payment by the defendants, or any of them, or may allow several periods of redemption to the several incumbrances, in succession according to their respective priorities, as in Forms Nos. 69 and 70.

20. Unless otherwise ordered a decree absolute for foreclosure, shall be drawn up in Form No. 71; and a final decree upon redemption by the defendant shall be drawn up in Form No. 72.

21. If, in a suit other than on a mortgage by a conditional sale, the Court, upon the application of any party, thinks fit to pass an order for sale of the mortgaged property, in lieu of a decree for foreclosure, the order may be made conditional upon the applicant paying into Court, within a fixed period, a sum sufficient to provide for the expenses of the sale, and upon the applicant, other than the plaintiff, also paying into Court the amount of interest at the date of the application due on the principal amount, the estimated costs of the plaintiff of the sale and the costs of the suit already incurred by the plaintiff, or any of the said sums. If the application is made by the defendant, and unless otherwise ordered, the order shall direct that in default of compliance with any of the conditions, and of payment of the mortgage-monies within the period fixed by the Court, the defendant shall be foreclosed as in Form No. 73.

Subject to the foregoing provisions, the rules relating to a suit for sale under a simple mortgage shall apply to a suit or decree for sale under an English mortgage.

Suits for Redemption.

22. If it is necessary to take an account, and unless the Court otherwise orders, an interim decree for redemption by the mortgagor shall be drawn up in Form No. 74, and the suit shall be ordered to be posted in Chambers, on the first convenient day after the day fixed for redemption for further consideration.

23. If the plaintiff pays the amount fixed by the interim decree, a final decree may be made similar to that in Form No. 72.

24. If the plaintiff makes default in payment, and the mortgage is not by conditional sale, the Court may, on the application of the defendant, pass a decree absolute for foreclosure, similar to that in Form No. 71, or an order for sale of the mortgaged property or a sufficient part thereof as in Form No. 67.

If the mortgage is by conditional sale, the Court may pass a decree similar to that in Form No. 71.

25. In taxing the costs awarded by the interim decree, the taxing officer may include the costs of the stamp paper and other costs necessary for the preparation of the deed of reconveyance of the mortgaged property or of acknowledgment of payment of the mortgage-monies.

26. Subject to the foregoing provisions, the rules relating to a suit for the redemption of a simple mortgage shall, so far as applicable, apply to a suit for the redemption of an English mortgage, a mortgage by conditional sale and a usufructuary mortgage.

(D) Deposit in Court of Mortgage-monies.

27. When a mortgagor desires, under the provisions of the Transfer of Property Act, 1882, to deposit in Court the amount due on his mortgage, he shall file an affidavit, entitled in the matter of the mortgage, and the said Act, and stating the facts of the case.

28. (1) Unless otherwise ordered, the mortgagor shall, in addition to the amount due on his mortgage, deposit in Court a sum sufficient to provide for the costs of the mortgagee, of obtaining payment out of Court of the mortgage-monies, and of reconveying the mortgaged property, or executing an acknowledgment of the discharge of the mortgage, as the case may be and of registering the said reconveyance or acknowledgment in the office of the Registrar of Assurances of the district or sub-district in which the mortgaged property is situate.

(2) If, by the terms of the mortgage, the mortgagee is entitled to notice before payment or tender of the mortgage-monies the mortgagor shall, in addition to the said sums, deposit in Court a sum sufficient to provide for any subsequent interest to which the mortgagee may be entitled.

29. Notice of the deposit shall be in Form No. 75, and shall, subject to the provisions of S. 102 of the said Act, be taken out and served on the mortgagee in manner prescribed for service of summons on a defendant. The notice shall require the mortgagee to deposit in Court the mortgage deed and all documents in his possession or power relating to the mortgaged property.

30. The Court by endorsement on the affi-

davit or otherwise may order the deposit to be received. Such order shall specify the several sums to be paid into Court, and the purpose for which each sum is intended.

31. Every application by a mortgagee for payment out of any monies paid into Court, under S. 83 or S. 102 of the said Act, shall be by original petition, as in Form No. 76, entitled in the matter of the mortgage, and shall specify the documents in his possession or power relating to the mortgaged property; and shall be accompanied by the mortgage deed and the said documents, and a draft deed of reconveyance of the mortgaged property, or acknowledgment of discharge of the mortgage, as the case may be. The Registrar shall appoint a day for the hearing of the petition, and notice thereof in Form No. 77, shall be served on the mortgagor, not less than five days before the said day.

32. The draft deed of reconveyance, or acknowledgment shall, if so required by either party, be settled by the Registrar and, if approved, shall be signed by him as approved.

At the hearing, the Court may, if the provisions of the said Act and these rules have been complied with, pass an order that upon the mortgagee bringing into Court a reconveyance or acknowledgment of discharge, as agreed on or settled by the Registrar, duly stamped and executed, the monies in Court be paid out to the mortgagee.

33. If it is made to appear to the Court that, previously to payment of any monies into Court, under S. 83 or S. 102 of the said Act, a sufficient tender was made to, and refused by the mortgagee, he shall not be allowed the costs of obtaining payment, out of the said monies. Except as aforesaid, or unless the Court otherwise orders, a mortgagee shall be allowed all costs properly incurred by him and he shall not be compelled to execute the reconveyance or acknowledgment until such costs have been paid.

APPENDIX IV

CONVEYANCING FORMS.

1. CONTRACT FOR SALE.

This Agreement made on the (*date in words*).....*between* A. B., etc. (hereinafter called the seller) of the one part and C. D., etc. (hereinafter called the buyer) of the other part

Witnesses as follows:—

(1) The seller agrees to sell and the buyer agrees to buy all that house and compound situated at.....and more particularly described in the schedule hereto.

(2) The seller A. B. is the absolute and full owner of the property agreed to be sold.

(3) The price agreed upon is Rupees (*in words*).....of which a sum of Rupees.....has been paid as earnest-money by the buyer to the seller (the receipt of which sum the seller hereby acknowledges) and the balance shall be paid at the time of the sale-deed.

(4) The property is to be conveyed free from all encumbrances.

(5) The sale-deed shall be executed on or before the.....

(6) The buyer has satisfied himself about the title of the seller to the said property before executing this agreement

or

Within eight days from the date of this agreement the seller shall produce all the title deeds and any other deed proving his title to the property agreed to be sold at (*place*)..... for inspection of the buyer and that if the seller shall not be able to prove a marketable title to the property agreed to be sold, the buyer shall be at liberty to rescind this agreement and to demand the return of the earnest-money paid by him.

(7) The property is believed to be correctly described in the schedule hereto and if any error or omission in the description is discovered the same shall not cancel this agreement.

(8) If the sale is not completed by the date fixed, owing to the default of the buyer, the seller shall be entitled, at his option to terminate this contract. If the seller chooses to so terminate the contract, the buyer shall forfeit the earnest-money. But if the seller does not choose to terminate the contract, the buyer shall be bound to pay interest at.....per cent. per annum on the balance of the purchase-money till the completion of the sale.

(9) If the sale is not completed by the date fixed owing to the default of the seller, the buyer shall be entitled, at his option, to terminate this contract. If he chooses to do so, he shall be entitled to a compensation of Rs. .....in addition to the return of the earnest-money paid by him. But if he does not choose to put an end to this contract, he will be entitled to compensation of Rs.....which he may deduct out of the balance of the purchase-money to be paid by him.

(10) The costs of execution, stamp duty and costs of registration will be borne by the buyer or|and seller, wholly|half and half.

(11) The seller shall deliver possession of the said house to the purchaser on the date of execution of the sale deed.

(12) All taxes and other charges of like nature due up to the date of the execution of

the sale-deed in respect of the house agreed to be sold will be paid by the seller and the taxes and charges due thereafter will be paid by the buyer.

(13) The seller will be entitled to receive all rents and profits of the property agreed to be sold accruing up to the date of the execution of the sale-deed.

In witness whereof the parties hereto have signed this Agreement on the.....

Signatures
(*Seller*).....
(*Buyer*).....

(Schedule.)

2. CONTRACT FOR SALE.

(*Subject to incumbrances and where the buyer is to be put in possession before execution of sale-deed.*)

Commencement as in Form No. 1.

(1) (*Same as Cl.* (1) *in Form No.* 1.)

(2) (*Same as Cl.* (2) *in Form No.* 1.)

(3) (*Same as Cl.* (3) *in Form No.* 1.)

(4) The sale shall be subject to the following encumbrances:

(i) Mortgage dated
(ii) Mortgage dated } (*Description of mortgages.*)

(5) (*Same as Cl.* (6) *in Form No.* 1.)

(6) The buyer shall submit within fifteen days from the date of this agreement a draft of the sale deed to the seller for his approval. The sale deed shall be executed within eight days from the date of the submission of the draft.

(7) The buyer shall be immediately put into possession of the property agreed to be sold by the seller. But taking of such possession of the buyer shall not in any way affect the rights of the buyer to cancel this agreement in case the seller fails to make out a marketable title. Nor shall it in any manner whatsoever prejudice the rights of the parties under this agreement.

(8) (*Same as Cl.* (10) *in Form No.* 1.)

(9) (*Same as Cl.* (7) *in Form No.* 1.)

(10) (*Same as Cl.* (8) *in Form No.* 1.)

(11) (*Same as Cl.* (9) *in Form No.* 1.)

In witness whereof the parties hereto have signed this agreement on the.....

Signatures
(*Seller*).....
(*Buyer*).....

(Schedule.)

3. CONTRACT FOR SALE OF LEASEHOLD INTEREST.

This Agreement made on the (*date in words*)..... between A. B., etc., (hereinafter called the seller) of the one part and C. D., etc., (hereinafter called the buyer) of the other part

Witnesses as follows:—

(1) The seller agrees to sell and the buyer agrees to buy all that etc.,.....and more particularly described in the schedule hereto held by him under a lease dated.....at the yearly rent of Rs.....between E. F., etc. (Lessor) of the one part and the seller (Lessee) of the other part for the unexpired term of..... years from the (*date*).....subject to the covenants and conditions in the lease and on the part of the lessee to be observed and performed.

(*Rest of the Clauses as in Form No.* 1 *or* 2 *according to the terms agreed to between the parties.*)

4. SALE OF A HOUSE.

This sale-deed made on the (*date in words*) .....day of.....one thousand nine hundred and.....between A. B., etc. (hereinafter called the seller) of the one part (and C. D., etc. thereinafter called the buyer of the other part

Witnesses as follows:—

(1) By an agreement dated.....the seller has agreed to sell and the buyer has agreed to buy all that house situated at.....and more particularly described in the schedule hereto.

(2) The price agreed is the sum of rupees six thousand and five hundred (Rs. 6,500 only) and has been received by the seller from the buyer in the following manner:

(i) Rupees five hundred (Rs. 500 only) received as earnest-money on..... at the time of the said agreement.

(ii) The balance, namely, Rupees six thousand (Rs. 6,000 only) received at the time of the execution|registration of this sale-deed.

(3) In consideration of the said sum of Rupees six thousand and five hundred (Rs. 6,500 only) and in pursuance of the said agreement the seller as the sole and full owner of the said house does hereby transfer to the buyer by way of sale the said house to hold the same as absolute owner free from encumbrances.

(4) That the possession of the property sold has been delivered to the purchaser on (*date*).....

(5) The seller hereby covenants with the buyer that the buyer may at all times hereafter hold, possess and enjoy the said property without any obstruction or distrubance by the seller or any person claiming through or under him.

(6) The seller further covenants that he or any person claiming through or under him shall at the request and costs of the buyer execute and do all acts and deeds reasonably required for effectively assuring the said property to the buyer.

(7) The words "seller" and "buyer" will include the heirs, legal representatives, successors and assigns of the parties hereto respectively.

In witness whereof the parties hereto have put their signatures on the.....

Signatures.

(Schedule.)

---

5. SALE-DEED.

(Part of the price retained by buyer to pay off a prior mortgage.)

Commencement as in Form No. 4.

(1) In consideration of the price of Rupees six thousand and five hundred (Rs. 6,500 only) as detailed hereafter the seller as owner of all that house situated at.....and more particularly described in the schedule hereto does hereby transfer to the buyer by way of sale the said house to hold the same to the buyer as absolute owner free from encumbrances.

(2) Out of the said consideration of Rupees six thousand and five hundred (Rs. 6,500 only) the sum of Rupees five hundred (Rs. 500 only) has been received by the seller from the buyer in cash at the time of the execution of this sale-deed; and the balance, namely, Rupees six thousand (Rs. 6,000 only) has been retained by the buyer for redemption of the mortgage on the said property dated..... executed by the seller in favour of E. F. to secure the principal sum of Rs.....with interest at.....therein stated which sum of Rs. .....with interest from the date of the aforesaid mortgage bound up to the date hereof remains owing.

(3) The buyer hereby covenants with the seller that he shall immediately pay the said sum of Rupees six thousand (Rs. 6,000 only) to the said E. F. and discharge the aforesaid mortgage and shall at all times keep indemnified the seller and his estate from the claims of the said E. F. under the aforesaid mortgage.

(4) The seller hereby covenants with the buyer as follows:

(i) if the amount due to E. F. on the aforesaid mortgage-bond on the date hereof is found to exceed the said sum of Rupees six thousand (Rs. 6,000 only) the seller shall pay the excess to the buyer with interest at.....per cent. per annum from the date hereof.

(ii) If from any cause whatsoever a lesser amount than that retained in the hands of the buyer is required for the satisfaction of the mortgage in favour of E. F., the seller would be entitled to receive the balance of the amount retained.

(iii) The said property is free from any encumbrance other than the aforesaid mortgage.

(iv) (*Same as Cl.* (5) *in Form No.* 4.)

(v) (*Same as Cl.* (6) *in Form No.* 4.)

(5) (*Same as Cl.* (7) *in Form No.* 4.)

In witness whereof the parties hereto have signed this sale-deed on the.....

Signatures.

(Schedule.)

---

6. SALE SUBJECT TO ENCUMBRANCE.

Commencement as in Form No. 4.

(1) By a mortgage-deed dated.....executed by the seller in favour of E. F., the said seller mortgaged all that house situated at..... and more particularly described in the schedule hereto to the said E. F. to secure the principal sum of Rupees (*in words*)..... with interest at the rate therein mentioned.

(2) In consideration of the price of Rupees five hundred (Rs. 500) received at the time of the execution of this sale-deed (receipt of which sum the seller hereby acknowledges) the said seller as owner of the property hereinbefore mentioned and more particularly described in the said schedule hereto does hereby transfer by way of sale the said property to the said buyer to hold the same to the said buyer subject to the encumbrance created by the said mortgage-deed executed in favour of the said E. F. but free from any other encumbrance.

(3) The said buyer hereby covenants with the seller that he shall pay to the said E. F., the said principal sum of Rs. (*in words*)..... and all interest due or to become due as and when the same becomes payable and shall keep the said seller and his estate indemnified from and against the claims of the said E. F. under the aforesaid mortgage.

(4) The said seller hereby covenants with the buyer as follows:

(i) (*Same as Cl.* (5) *in Form No.* 4.)

(ii) (*Same as Cl.* (6) *in Form No.* 4.)

(5) (*Same as Cl.* (7) *in Form No.* 4.)

In witness whereof the parties hereto have put their signatures on the.....

Signatures.

(Schedule.)

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7. SALE OF MORTGAGEE RIGHTS

(The word 'transfer' may also be used in the place of 'sale'.)

Commencement as in Form No. 4.

(1) By a mortgage-deed dated.....executed by one E. F. in favour of the seller, the said E. F. mortgaged all that house situated at.....and more particularly described in the said mortgage-deed to secure the principal sum of Rupees (*in words*).....with interest at.....etc.

(2) In consideration of the sum of Rupees (*in words*).....paid by the buyer to the seller at the time of the execution of this sale-deed (the receipt of which sum the seller hereby acknowledges) the said seller does

hereby transfer to the said buyer all that principal sum of Rupees (*in words*).....secured by the aforesaid mortgage-deed and all interest due and to become due for the same and the full benefit of all rights, remedies and securities conferred upon the said seller by the aforesaid mortgage-deed to hold the same to the buyer absolutely.

(3) For the consideration aforesaid the seller does hereby transfer to the buyer all his interest as a mortgagee in the said property mortgaged to him and more particularly described in the aforesaid mortgage-deed, to hold the same to the buyer subject to the right of redemption subsisting therein under the aforesaid mortgage-deed.

(4) The seller hereby covenants with the buyer that the said seller has not, at any time heretofore, done anything so as to release or encumber the mortgage-money or the interest in the property hereby transferred.

(5) (*Same as Cl.* (7) *in Form No.* 4.)

In witness whereof etc. (*as in Form No.* 4.)

Signatures.

---

8. SALE OF LEASEHOLD INTEREST.

Commencement as in Form No. 4.

(1) The seller is in possession of all that .....etc. and more particularly described in the schedule hereto held under a lease dated .....granted to the seller by E. F. etc. (Lessor) at a yearly rent of Rupees.....for a term of.....years and subject to the covenants and conditions therein contained.

(2) In consideration of the sum of Rupees (*in words*).....paid at the time of the execution of this sale-deed by the buyer to the seller (the receipt of which sum the seller hereby acknowledges) the seller as lessee does hereby transfer to the buyer all the aforesaid property comprised in the said lease and more particularly described in the schedule hereto to hold the same to the buyer for the unexpired period of the said term of.....years subject to the payment of the aforesaid rent and subject to the covenants and conditions contained in the lease and to be observed and performed by the lessee.

(3) The buyer hereby covenants with the seller as follows:

(i) The said buyer shall at all times hereafter pay the aforesaid yearly rent and observe and perform the covenants, and conditions contained in the aforesaid lease and on the part of the lessee to be observed and performed.

(ii) The said buyer shall keep the seller indemnified from claims of the said E. F. under the aforesaid lease-deed.

(4) The seller hereby covenants with the buyer as follows:

(i) (*Same as Cl.* (5) *in Form No.* 4.)

(ii) (*Same as Cl.* (6) *in Form No.* 4.)

(iii) The said seller has paid the rent and observed and performed the covenants and conditions contained in the lease up to the date of the execution of this sale-deed.

(iv) The said seller has not done anything which will invalidate or forfeit the said lease.

(5) (*Same as Cl.* (7) *in Form No.* 4.)

In witness whereof etc.

(Schedule.)

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9. SALE BY GUARDIAN OF A MINOR.

This sale-deed made on (*date in words*)..... between A. B., etc., minor by his guardian, C. D., etc. (hereinafter called the seller) of the one part and E. F., etc., (hereinafter called the buyer) of the other part

Witnesses as follows:—

(1) The said seller is a minor and is badly in need of money to pay off the arrears of Government revenue in respect of the estate which he holds. The non-payment of the arrears of revenue would result in a sale of the estate of the said seller.

(2) In order to pay off the said arrears of revenue and in consideration of the sum of Rupees (*in words*).....paid by the said buyer to the said C. D. such guardian at the time of the execution of the sale-deed or deposited by the buyer on behalf of the seller in the Treasury (the receipt of which sum the said seller by the said C. D. hereby acknowledges) the said seller as owner by the said C. D. as such guardian does hereby transfer by way of sale to the said buyer all that house, etc.....and more particularly described in the schedule hereto to hold the same to the buyer as absolute owner.

(3) The said C. D. on behalf of the seller hereby covenants with the buyer as follows:

(i) The seller has not done anything whereby the property sold is incumbered or whereby he is hindered from transferring it.

(ii) (*Same as Cl.* (5) *in Form No.* 4.)

(iii) (*Same as Cl.* (6) *in Form No.* 4.)

(4) (*Same as Cl.* (7) *in Form No.* 4.)

(5) (*If the sale is by a certified guardian*) Previous sanction of the Court of.....has been obtained (*vide* Order dated.....) to effect this sale.

In witness whereof, etc.

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10. SALE BY HINDU WIDOW.

Commencement as in Form No. 4.

(1) The seller is the widow of deceased E. F., etc., a Hindu and is in possession of the property left by him as his heir.

(2) The said E. F., in his lifetime contracted certain debts. The names of the creditors and the particulars of their debts are given in the first schedule hereto. The debts still subsist and the interest on the same is day by day increasing.

(3) The said E. F. has left a house situated at (*place*).....and more particularly described in the second schedule hereto. He has also left other landed property described in the third schedule hereto.

(4) The income from the property described in the third schedule hereto is just sufficient to maintain the seller herself. There is no other source of income to pay off the debts and in order to pay the same the seller considers the sale of the property described in the second schedule hereto necessary.

(5) In order to pay off the said debts and in consideration of Rupees.....retained by the buyer for payment of the debts of the said creditors mentioned in the first schedule hereto the seller does hereby transfer by way of sale to the buyer all that, house etc..... and more particularly described in the second schedule hereto to hold the same as absolute owner free from encumbrances.

(6) The buyer hereby covenants with the seller that he shall pay the said sum of Rupees to the creditors named in the first schedule hereto and shall keep the seller indemnified from the claims of said the creditors.

(7) The seller hereby covenants with the buyer as follows:

(i) (*Same as Cl.* (5) *in Form No.* 4.)

(ii) (*Same as Cl.* (6) *in Form No.* 4.)

(8) (*Same as Cl.* (7) *in Form No.* 4.)

In witness whereof etc.

[Schedule I (see clause 2).

Schedule II (see clause 3).

Schedule III (see clause 3).]

11. SALE BY HINDU FATHER.

(*For payment of his antecedent debt.*)

Commencement as in Form No. 4.

(1) The seller and his sons, W X and Y Z, are the members of a Mitakshara joint Hindu family.

(2) The said seller borrowed a sum of Rupees.....from one E. F. etc. on a money-bond dated.....for the purpose of defending himself in the Civil suit filed against him by one G. H. etc. in the Court of.....The money due on the said money-bond with interest up to the date of the execution of this sale-deed comes to Rupees.....

(3) The family owns a house situated at .....and more particularly described in the schedule hereto.

(4) As there is no other means of raising the money the seller considers the sale of the said house necessary to pay off the said debt.

(5) In order to pay off the said debt and in consideration of the sum of Rupees..... out of which the sum of Rupees.....has been paid by the buyer to the seller at the time of the execution of this sale deed (the receipt of which sum the seller hereby acknowledges and the sum of rupees.....is to be paid by the buyer to the seller at the time of registration of this sale-deed the seller does hereby transfer by way of sale to the seller all that house situated at.....and more particularly described in the schedule hereto to hold the same as absolute owner free from encumbrances.

(6) (*Same as cl.* (5) *in Form No.* 4.)

(7) (*Same as Cl.* (6) *in Form No.* 4.)

(8) (*Same as Cl.* (7) *in Form No.* 4.)

In witness whereof etc.

(Schedule.)

12. SIMPLE MORTGAGE-DEED.

This mortgage-deed made on (*in words*) .....day of.....one thousand nine hundred and.....between A. B., etc. (hereinafter called the mortgagor) of the one part and C.D., etc. (hereinafter called the mortgagee) of the other part

Witnesses as follows:—

(1) In consideration of the sum of Rupees (*in words*).....of which the sum of Rupees (*in words*).....has been paid by the mortgagee to the mortgagor at the time of the execution of this mortgage-deed (the receipt of which sum the mortgagor hereby acknowledges) and the sum of Rupees (*in words*) .....is agreed to be paid by the mortgagee to the mortgagor at the time of the registration of this mortgage-deed the mortgagor covenants with the mortgagee that he shall repay the said sum of Rupees (*in words*)..... to the mortgagee with interest at the rate of .....per cent. per annum on the.....day of.....

(2) As security for the aforesaid consideration of Rupees.....and for the interest thereon the mortgagor does hereby mortgage, by way of simple mortgage, to the mortgagee all that house situated at.....and more particularly described in the schedule hereto.

(3) The mortgagor hereby covenants with the mortgagee as follows:

(i) The property hereby mortgaged is free from any encumbrance.

(ii) If the said sum of Rupees..... with interest thereon shall not be paid on the day of.....according to the covenant aforesaid it shall be competent for the mortgagee at any time thereafter to cause the said property to be sold and to apply the proceeds of such sale in the first place in payment of the costs attending such sale or otherwise incidental to the security and next in payment of the moneys then owing upon the security. The balance, if any, shall then be paid to the mortgagor.

(iii) Should the proceeds of the sale be found insufficient to satisfy the claim of the mortgagee it shall be competent for him to recover the balance from the person and other property of the mortgagor.

(4) The expressions "mortgagor" and "mortgagee" include if necessary, their respective

heirs, legal representatives, successors and assigns.

In witness whereof the said mortgagor has signed this mortgage-deed on the.....

Signed in the presence of

Signature

(*mortgagor*).....

Witnesses:—1
2

(Schedule.)

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13. SIMPLE MORTGAGE-DEED.

(*Payable by instalments.*)

Commencement as in Form No. 12.

(1) In consideration of the sum of Rupees (*in words*).....paid by the mortgagee to the mortgagor at the time of the execution of this mortgage-deed (the receipt of which sum the mortgagor hereby acknowledges) the mortgagor hereby covenants with the mortgagee as follows:

(i) Interest shall be payable at the rate of.....per cent. per annum on the said sum.

(ii) The mortgagor shall repay to the mortgagee the said sum of rupees (*in words*).....in five equal yearly instalments (of Rupees.....each) payable on.....in each year commencing from.....

(iii) The whole of the amount of interest due on the date fixed for payment of an instalment shall be paid along with such instalment.

(iv) The defaulted instalments shall carry interest at the rate of.....per cent. per annum.

(v) If default is made in the payment of any two of such instalments on the dates fixed with interest then due the whole money remaining due shall become payable at once and interest payable thereafter will be at the rate of.....per cent. per annum.

(2) As security for the consideration aforesaid and for interest thereon the mortgagor does hereby mortgage, by way of simple mortgage, to the mortgagee all that house situated at.....and more particularly described in the schedule hereto.

(3) The mortgagor hereby covenants with the mortgagee as follows:

(i) The property hereby mortgaged is free from any encumbrance.

(i) If default is made in payment of any two instalments on the dates fixed with interest then due and the whole of the money remaining due becomes payable at once as hereinbefore provided it shall be competent for the mortgagee, at any time, thereafter, to cause the said property to be sold and to apply the proceeds of the sale, in the first place, in payment of the costs attending such sale or otherwise incidental to the security and, next, in payment of the moneys then owing upon the security. The balance, if any, shall be paid to the mortgagor.

(iii) Should the proceeds of the sale be found insufficient to satisfy the claims of the mortgagee it shall be competent for him to recover the balance from the person and other property of the mortgagor.

(4) (*Same as Cl.* (4) *in Form No.* 12.)

In witness whereof the said mortgagor has signed this mortgage-deed on the.....

Signed in the presence of

Signature

(*mortgagor*).....

Witnesses: 1
2

(Schedule.)

---

14. MORTGAGE BY CONDITIONAL SALE.

Commencement as in Form No. 12.

(1) In consideration of the sum of Rupees .....paid by the mortgagee to the mortgagor at the time of the execution of this mortgage-deed (the receipt of which sum the mortgagor hereby acknowledges) the mortgagor does hereby transfer by way of conditional sale to the mortgagee all that house situated at..... and more particularly described in the schedule hereto on condition that if the mortgagor repays the said sum of Rupees.....with interest thereon at the rate of.....the sale hereby made shall become void, (or on condition that if etc.....the said C. D. shall transfer the said property to the said A. B.) (or on condition that if the mortgagor makes default in repayment of the said sum or Rupees.....with interest at the rate of.....per cent. per annum on the..... day of.....the sale hereby made in favour of the mortgagee shall become absolute.)

(2) (*Same as Cl.* (4) *in Form No.* 12).

In witness whereof etc.

(Schedule.)

---

15. ENGLISH MORTGAGE.

Commencement as in Form No. 12.

(1) (*Same as Cl.* (1) *in Form No.* 12.)

(2) For the consideration aforesaid the mortgagor does hereby transfer to the mortgagee all that house situated at.....and more particularly described in the schedule hereto to hold the same to the said mortgagee absolutely; Provided always that on repayment of the said sum of Rupees (*in words*).....with interest thereon on the.....day of.....according to the covenant aforesaid the said mortgagee shall at the request and cost of the said mort-

gagor, re-transfer the said property to the mortgagor.

(3) The mortgagor hereby covenants with the mortgagee that the property hereby transferred is free from encumbrances.

(4) (*Same as Cl.* (4) *in Form No.* 12.)

In witness whereof etc.

---

16. MEMORANDUM OF A MORTGAGE BY DEPOSIT OF TITLE DEEDS.

This Memorandum made on the (*in words*) .....day of.....one thousand nine hundred and.....by me A. B., etc.

Witnesses as follows:—

Being indebted to C. D., etc., in the sum of Rupees (*in words*).....as per details given in the first schedule hereto the documents of title to immoveable property specified in the second schedule hereto have been today delivered by me to the said C. D. in the Town of Calcutta as collateral security for the payment of the said sum of Rupees..... with interest at the rate of.....per cent. per annum on the.....day of.....

In witness whereof I the said A. B. have signed this memorandum on the.....

(Schedule.)

---

17. MEMORANDUM OF MORTGAGE BY DEPOSIT OF TITLE DEEDS.

This Memorandum made by A. B. on this day.....witnesses as follows:—

That I, A. B., herewith hand over to you C. D. a list of my documents of title fully described in the schedule annexed, which I, A. B. have already delivered to you C. D. as collateral security for the loan of Rs.....borrowed by me. The terms and conditions of the aforesaid loan have been noted in your books (or have been fully set out in our correspondence.)

In witness whereof I the said A. B. have put my signature this day of.....

---

18. USUFRUCTUARY MORTGAGE.

(*Rents and profits to be appropriated in lieu of interest.*)

Commencement as in Form No. 12.

(1) In consideration of the sum of Rupees (*in words*).....paid by the mortgagee to the mortgagor at the time of the execution of this mortgage-deed (the receipt of which sum the mortgagor hereby acknowledges) the mortgagor does hereby mortgage, by way of usufructuary mortgage, to the mortgagee all that property described in the schedule hereto to hold and retain possession thereof as security for and until repayment of the said sum of Rupees (*in words*).....to the mortgagee in the manner hereinafter appearing.

(2) The mortgagor hereby covenants with the mortgagee that for the purpose aforesaid he shall immediately deliver possession of the said property to the mortgagee.

(3) The parties hereby agree as follows:

(i) The mortgagee on entering into possession shall receive rents and profits of the said property and after deducting the expenses incurred for the management of the property and the collection of such rents and profits and after paying the Government revenue and other public dues charged on the said property shall appropriate the balance in lieu of interest on the said sum of Rupees.....

(ii) The mortgagor shall be entitled to recover possession of the property hereby mortgaged after..... years from the date hereof on repayment of the said principal sum of Rupees.....* (Provided that if the mortgagor does not pay the principal sum at the stipulated time, the mortgagee, thereafter, would be entitled to six months' notice before payment of the principal money.)

(4) The mortgagor covenants with the mortgagee that the property hereby mortgaged is free from any encumbrance.

(5) (*Same as Cl.* (4) *in Form No.* 12.)

In witness whereof etc.

---

19. USUFRUCTUARY MORTGAGE.

(*Rents and profits to be appropriated in payment of interest and principal.*)

Commencement as in Form No. 12.

(1) In consideration of the sum of Rupees (*in words*).....paid by the mortgagee to the mortgagor at the time of the execution of this mortgage-deed (the receipt of which sum the mortgagor hereby acknowledges) the mortgagor does hereby mortgage, by way of usufructuary mortgage, to the mortgagee all that property described in the schedule hereto to hold and retains possession thereof as security for and until repayment of the said sum of Rupees (*in words*).....with interest thereon to the mortgagee in the manner hereinafter provided.

(2) The mortgagor covenants with the mortgagee that interest at the rate of.....per cent. per annum shall be payable on the said sum of rupees (*in words*).....or on balance thereof may remain due for the time being after appropriation of the rents and profits in the manner hereinafter provided.

(3) The parties hereby agree

(i) that the mortgagee on entering into possession of the property hereby mortgaged shall receive rents and profits of the said property and after deducting the expenses incurred for the management and the collection of such rents and profits and after paying the

---

* Note—Such a provision may be added in case of mortgage of fields, etc., to avoid dispute as to right to standing crops.

Government revenue and other public dues charged on the said property shall appropriate the balance first in payment of the interest due and next in reduction or payment of the principal money.

(ii) The mortgagee shall be entitled to remain in possession of the property hereby mortgaged till the whole of the principal money and the interest thereon is satisfied from the rents and profits of the property as hereinbefore provided and the mortgagor shall be entitled to recover possession of the said property on such satisfaction.

(4) The mortgagor covenants with the mortgagee that

(i) the property hereby mortgaged is free from any encumbrance.

(ii) (*Same as Cl.* (2) *in Form No.* 18).

(5) (*Same as Cl.* (4) *in Form No.* 12.)
In witness whereof etc.

---

20. ANOMALOUS MORTGAGE.

Commencement as in Form No. 12.

(1) In consideration of the sum of Rupees (*in words*).....paid by the mortgagor to the mortgagee at the time of the execution of this mortgage-deed (the receipt of which sum the mortgagor hereby acknowledges) the mortgagor does hereby mortgage in the manner hereinafter provided to the mortgagee all that property described in the schedule hereto.

(2) (*Same as Cl.* (2) *in Form No.* 19.)

(3) The parties hereby agrees as follows:

(i) The mortgagee shall hold and retain possession of the said property, shall receive rents and profits of the same and after deducting the expenses incurred for management of the property and the collection of such rents and profits and after paying the Government revenue and other public dues charged on the said property shall appropriate the balance first in payment or reduction of the interest due and next in payment or reduction of the principal money.

(ii) The mortgagee shall remain in possession of the property hereby mortgaged for a period of ten years from the date hereof.

(iii) If the whole of the said sum of Rupees (*in words*).....with interest due is not paid off from the rents and profits of the property as hereinbefore provided within the aforesaid period of ten years the mortgagor shall pay the mortgagee so much of the said sum as shall then remain unpaid with interest thereon.

(iv) If the whole of the said amount of Rupees (*in words*).....with interest thereon is paid off from the rents and profits of the said property within the said period of ten years or the mortgagor pays to the mortgagee so much of the amount as remains due as aforesaid the mortgagor shall be entitled to recover possession from the mortgagee.

(v) If the mortgagor does not pay the money as aforesaid it shall be competent for the mortgagee at any time thereafter to cause the said property to be sold and to apply the proceeds of such sale first in payment of the costs attending such sale or otherwise incidental to the security and next in payment of the moneys then owing upon the security. The balance, if any, shall then be paid to the mortgagor.

(vi) (*Same as Cl.* (3) (iii) *in Form No.* 12.)

(vii) (*Same as Cl.* (3) (*i*) *in Form No.* 12.)

(4) (*Same as Cl.* (4) *in Form No.* 12.)
In witness whereof etc.

---

21. SUB-MORTGAGE.

Commencement as in Form No. 12.

(1) By a simple mortgage-deed dated the .....executed by one E. F., etc. in favour of the mortgagor the property described in the said mortgage-deed and in the schedule hereto was mortgaged to secure the principal sum of Rupees (*in words*).....and interest in accordance with the covenants therein contained.

(2) The said principal sum of Rupees (*in words*).....with interest thereon from the date of the said simple mortgage-deed up to the date hereof remains due on the said simple mortgage-deed.

(3) (*Same as Cl.* (1) *in Form No.* 12.)

(4) As security for the aforesaid consideration of Rupees (*in words*).....and for the interest thereon the mortgagor does hereby transfer to the mortgagee all that debt secured by the said simple mortgage-deed and all the rights and remedies under the same.

(5) (*Rest of the clauses would be as a simple mortgage—See Form No.* 12.)

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22. LEASE DEED.

(*Term fixed.*)

This lease-deed made on the (*in words*) .....day of.....one thousand nine hundred and.....between A. B., etc. (hereinafter called the lessor) of the one part and C. D., etc. (hereinafter called the lessee) of the other part

Witnesses as follows:—

(1) In consideration of the monthly rent of Rupees (*in words*).....payable on the last

date of each month the lessor does hereby grant by way of lease to the lessee all that property situated at.....and more particularly described in the schedule hereto to hold the same for the period of ten years from the (*in words*).....day of.....one thousand nine hundred and.....

(2) The lessor hereby covenants with the lessee as follows:

(i) The lessor shall put the lessee in possession of the said property on the said.....day of.....

(ii) The lessee, if he pays the rent reserved by this lease and performs other covenants and conditions binding on him, shall hold the said property during the said term of ten years without interruption by the lessor or any person claiming under him.

(iii) The lessor shall, during the said term of ten years, pal all taxes and other public dues charged on the said property and that the lessee shall be entitled at his option, to pay such taxes and deduct the same from the rent payable by him or recover the same from the lessor.

(iv) The lessor shall keep during the period of the lease the said property in good repair and habitable condition.

(3) The lessee hereby covenants with the lessor as follows:

(i) The lessee shall pay to the lessor the said monthly rent of Rupees..... on the dates fixed.

(ii) The lessee shall, on the determination of the lease at the expiry of the said period of ten years or otherwise, put the lessor into possession of the property hereby leased.

(4) The parties hereby agree that if the monthly rent hereby reserved remains in arrear for one month after the due date the lessor shall be entitled to re-enter on the property hereby leased and put an end to the lease.

In witness whereof the parties hereto have signed this lease deed on the.....

Signatures
(1) (*Lessor*).....
(2) (*Lessee*).....
(Schedule.)

---

23. LEASE DEED.

(*Term not fixed.*)

Commencement as in Form No. 22.

(1) In consideration of the monthly rent of Rupees (*in words*).....payable on the last day of each month the lessor does hereby grant by way of lease to the lessee all that house situated at.....and more particularly described in the schedule hereto to hold the same to the lessee (from month to month) from the.....day of.....

(2) The lessor hereby covenants with the lessee as follows:

(i) (*Same as Cl.* (2) (*i*) *in Form No.* 22.)

(ii) (*Same as Cl.* (2) (*iv*) *in Form No.* 22.)

(iii) The lessee, if he pays the rent reserved by this lease and performs other covenants and conditions binding on him shall hold the said property till the determination of the lease by a proper notice to quit.

(iv) The lessor shall, during the continuance of the lease, pay all taxes and other public dues charged on the said property.

(3) The lessee, hereby, covenants with the lessor as follows:

(i) (*Same as Cl.* (3) (*i*) *in Form No.* 22.)

(ii) The lessee shall, on the determination of the lease by a proper notice to quit or otherwise, put the lessor into possession of the property hereby leased.

In witness whereof etc.

---

24. LEASE-DEED.

(*Lease with clause for renewal.*)

Commencement as in Form No. 22.

(1)
(2) } (*Same as Cls.* (1) (2) *and* (3) *in Form No.* 22.)
(3)

(4) The parties hereby agree as follows:

(i) (*Same as Cl.* (4) *in Form No.* 22.)

(ii) At the option of the lessee the lessor shall, at the expiration of the period of this lease, grant a new lease of the property hereby leased to the lessee on the terms herein contained.

In witness whereof etc.

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25. PERMANENT LEASE.

Commencement as in Form No. 22.

(1) In consideration of a yearly rent of Rupees (*in words*).....payable on the..... day of.....in each year the lessor does hereby grant by way of lease to the lessee all that land described in the schedule hereto to hold the same in perpetuity from the.....day of .....

(2) The lessor hereby covenants with the lessee as follows:

(i) (*Same as Cl.* (2) *in Form No.* 22.)

(ii) The lessee, if he pays the rent reserved by this lease and performs other covenants and conditions binding

on him, shall hold the said property in perpetuity without interruption by the lessor or any person claiming under him.

(3) The lessee hereby covenants with the lessor as follows:

(i) The lessee shall pay to the lessor the said yearly rent of Rupees..... on the dates fixed for the same.

(ii) The lessee shall pay all taxes and other cases charged on the said property accruing due after the said .....day of.....

(4) The parties hereby agree that if the yearly rent reserved by this lease remains in arrears for two months after the due date the lessor shall become entitled to re-enter on the said property and put an end to the lease.

In witness whereof etc.

---

26. SUB-LEASE.

Commencement as in Form No. 22.

(1) In consideration of the monthly rent of Rupees (*in words*).....payable on the last date of each month the lessor does hereby grant by way of lease to the lessee all that house situated at.....and more particularly described in the schedule hereto and held by the said lessor under a lease-deed dated..... executed between E. F., etc. (as lessor) and the said lessor (as lessee) to hold the same for the period of five years from.....day of.....

(2) The lessor hereby covenants with the lessee as follows:

(i) (*Same as Cl.* (2) (i) *in Form* No. 22.)

(ii) (*Same as Cl.* (2) (ii) *in Form No.* 22.)

(iii) The lessor shall perform the covenants and conditions contained in the lease executed between the said E. F. and the lessor and binding on the lessor as such lessee.

(iv) (*Same as Cl.* (2) (iv) *in Form No.* 22.)

(3) (*Same as Cl.* (3) *in Form No.* 22.)

(4) (*Same as Cl.* (4) *in Form No.* 22.)

In witness whereof etc.

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27. NOTICE TO QUIT BY LESSOR.

(*Month to month or year to year tenancy.*)

To

C. D., etc.

Under the lease-deed dated.....you hold the.....(*description of the property*) as may lessee from.....day of.....

Please now take notice that I, A. B., etc., hereby terminate the lease and ask you to quit the premises and to deliver possession of the same to me on the.....day of..... being the last day of the.....(month or year as the case may be) of the tenancy.

Dated.....

Signed.....
(*Lessor*)

---

28. NOTICE TO QUIT BY LESSEE.

(*Month to month or year to year tenancy.*)

To

A. B., etc.

Under the lease deed dated.....I, C. D. etc. hold the..... (*description of the property*) as your lessee from.....day of .....

Please now take notice that I hereby terminate the lease on the.....day of..... being the last day of.....(month or year as the case may be) the tenancy and shall quit the premises and deliver of the same to you on the said day.

Dated.....

Signed.....
(*Lessee*)

---

29. NOTICE OF INTENTION TO DETERMINE LEASE ON FORFEITURE.

To

C. D., etc.

(1) Under the lease-deed dated..... you hold (*description of the property*)..... as my lessee.

(2) The said lease-deed contains a provision that if the monthly rent reserved thereby remains in arrears for one month after the due date the lessor shall have a right to re-enter on the premises and determine the lease.

(3) The rent for the month commencing on the.....day of.....was payable on the.....day of.....but was not paid till the.....day of.....and remains in arrears for one month after the due date.

(4) Please now take notice that in accordance with the said provision for re-entry contained in the said lease I intend to determine the said lease and require you to quit the said premises and deliver possession of the same to me within.....days of the service of this notice.

Dated.....

Signed.....
(*Lessor*)

---

30. DEED OF EXCHANGE.

This Deed of Exchange made on the (*in words*).....day of.....one thousand nine hundred and.....between A. B., etc. of the one part and C. D., etc. of the other part

Witnesses as follows:—

(1) A. B. is the owner of the property described in the first schedule hereto and C. D. is the owner of the property described in the second schedule hereto.

(2) In consideration of the transfer by the said C. D. of the property described in the second schedule hereto to A. B. and in consideration of the transfer by the said A. B. of the property described in the first schedule hereto to C. D. the said A. B. does hereby transfer by way of exchange to the said C. D. the property described in the first schedule hereto and the said C. D. does hereby transfer by way of exchange to the said A. B. the property described in the second schedule hereto to hold the same to the said C. D. and A. B. respectively as absolute owners.

(3) The parties hereby agree with each other as follows:

(i) Each party may at all times hereafter hold, possess and enjoy the property transferred to him without any obstruction or disturbance by the other or any person claiming through or under him.

(ii) The property transferred by each party is free from any encumbrance.

(iii) Each party or any person claiming through or under him shall, at the request and cost of the other, execute the deeds and do all acts reasonably required for effectively assuring the property transferred to the other.

(4) The reference to the said A. B. and C. D. to the word 'party' in this deed will, if necessary, include the heirs, legal representatives, successors and assigns of the said A. B. and C. D. or the 'party'.

In witness whereof the parties hereto have signed this deed on the.....

(Signature of A. B.).....
(Signature of C. D.).....

(Schedule I.)

(Schedule II.)

---

31. GIFT DEED.

This Deed of Gift made on the (*in words*) .....day of.....one thousand nine hundred and.....between A. B., etc., (hereinafter called the donor) of the one part and C. D., etc., (hereinafter called the donee) of the other part

Witnesses as follows:—

(1) Out of love and affection for the donee the donor does hereby voluntarily transfer by way of gift to the donee all that house situated at.....and more particularly described in the schedule hereto to hold the same absolutely for ever free from encumbrances.

(2) The donor hereby covenants with the donee that the donor or any person claiming through or under him shall at the request of the donee execute and do all acts and deeds reasonably required for effectively assuring the said premises to the donee.

In witness whereof the said donor has signed this deed of gift on the.....

Signed in the presence of
Witnesses (1).....
(2).....

(Signature).....

(Schedule.)

(Note:— Where possible it is advisable to obtain an endorsement of the donee showing his acceptance of the transfer of gift.)

---

32. GIFT DEED.

(*Revocable*)

Commencement as in Form No. 31.

(1) Out of love and affection for the donee the donor does hereby voluntarily transfer by way of gift to the donee all that house situated at.....and more particularly described in the schedule hereto to hold the same to the donee free from encumbrances subject to the agreement herein after contained.

(2) The parties hereto hereby agree that should the said donee predeesease the said donor this transfer shall stand revoked and the said premises shall revert to the donor and shall form part of his estate in the same manner as if this transfer had not been made.

(3) (*Same as Cl.* (2) *in Form No.* 31.)

In witness whereof the parties hereto have signed this deed on the.....

Attestation of witness (1).....
(2).....

(Signature of donor).....
(Signature of donee).....

(Schedule.)

---

33. TRANSFER OF AN ACTIONABLE CLAIM.

This deed of Transfer made on the (*in words*).....day of.....one thousand nine hundred and.....made between A. B., etc., (hereinafter called the transferor) of the one part and C. D., etc., (hereinfter called the transferee) of the other part

Witnesses as follows:—

(1) One E. F., etc., has executed a money bond in favour of the transferor on the..... day of.....for the principal sum of Rupees.....with interest at the rate of..... per cent. per annum.

(2) In consideration of the sum of Rupees .....paid by the transferee to the transferor at the time of the execution of this deed (the receipt of which sum the transferor hereby acknowledges) the transferor does hereby transfer to the transferee all that principal sum of Rupees.....with interest due and to become due hereafter for the same under the said bond and full benefits thereof and all the rights and remedies thereunder to hold the same to the transferee absolutely.

(3) The transferor hereby covenants with the transferee as follows:

(i) The said principal sum of Rupees.....with interest thereon is still

due and owing to the transferor by the said E. F.

(ii) The transferor shall not do any such thing whereby the transferee may be prevented from recovering the said sum of Rupees.....with interest thereon from the said E. F. or whereby the rights of the transferee under this transfer may be prejudiced or affected.

In witness whereof the transferor has signed this deed on the.....

---

34. NOTICE OF TRANSFER OF AN ACTIONABLE CLAIM.

(*By transferor*)

To
E. F., etc.

I, A. B., etc., hereby give you notice that by the deed of transferor dated.....I have transferred to one C. D., etc., (state the name and also the address of the transferee) absolutely the principal sum of Rupees..... which you owe me under the bond dated..... with interest already due and to become due hereafter on the same.

Dated.....

Signed.....
(*Transferor*)

---

35. NOTICE OF TRANSFER OF AN ACTIONABLE CLAIM.

(*By transferee*)

To
E. F., etc.

I, C. D., etc., hereby give you notice that by the deed of transfer dated.....A. B., etc., has transferred to me absolutely the principal sum of Rupees.....which you owe to the said A. B. under the bond dated..... with interest thereon already due and to become due hereafter.

The said A. B. has refused to sign notice of the aforesaid transfer. Hence this notice by me.

Dated.....

Signed.....
(*Transferee.*)
(*Address of the transferee*).....

---

36. TRANSFER OF LIFE POLICY.

Commencement as in Form No. 33.

(1) By a policy of insurance on the life of the transferor granted by.....Co. dated..... and numbered.....the sum of Rupees..... is assured to be paid on the event of the transferor's attaining the age of.....years or his earlier death.

(2) In consideration of the sum of Rupees (*in words*).....paid by the transferee to the transferor at the time of the execution of this deed (the receipt of which sum the transferor hereby acknowledges), the transferor as beneficial owner does hereby transfer to the transferee all right, title and interest in, to, or under the said policy and all moneys and benefits thereby assured to the transferee absolutely.

(3) The transferor hereby covenants with the transferee as follows:

(i) The said policy is now in full force and effective.

(ii) The transferor shall pay to the .....Co. all the premiums which will become payable under the said policy hereafter.

(iii) The transferor shall not do or knowingly suffer anything whereby the said policy may be rendered void or voidable or whereby the transferee may be prevented from receiving the moneys and the benefits thereby assured.

In witness whereof the transferor has signed this deed of transfer on the.....
Witness (at least one)

Signed.....
(*Transferor*)

---

37. TRANSFER OF LIFE POLICY BY ENDORSEMENT.

(*Conditional*)

I, A. B., etc., do hereby assign to C. D. etc., my wife out of love and affection all my right, title and interest in, to, or under the within written Policy of Insurance No.....on my life and all moneys and benefits thereby assured, subject, however, to the condition that should the said C. D. predecease me then this assignment shall be inoperative and the moneys and the benefits assured by the said policy shall form part of my estate in the same manner as if this assignment had never been made.

Dated.....

Signed.....
(*Assignor*)

Witness (at least one)

---

38. NOTICE OF TRANSFER OF LIFE POLICY.

To
.....Co.

Sir,

I, A. B., etc., hereby give you notice that I have transferred the Policy No..... granted by you on my life to C D etc.

I herewith enclose for your perusal..... (state the nature of the document i.e., whether it is the endorsement on the Policy or the separate deed of transfer or a copy certified to be correct by both the transferor and the transferee.)

Please acknowledge receipt of this notice.

Dated.....

Yours faithfully,

Signed.....

APPENDIX V.

INDEX TO AUTHORS AND STATUTES CITED.

NOTE.—Star indicates reference to foot-notes under the Note.

N—Note; O—Order; Pre—Preamble; R—Rule; S—Section.

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S. 9, N. 35 S. 6 N 23*
S. 11, N. 40 S 60 N 26, 48; S 92 N 30*; O 34 R 7 N 15
S. 11, N. 40, 116 S 62 N 9
S. 11, N. 123 and 125 O 34 R 6 N 3
S. 34, N. 16 O 34 R 2 N 10; R 11 N 3
S. 60, N. 7 S 3 N 22*
S. 64, N. 5 S 91 N 25*; S 100 N 11*
S. 64, N. 15 S 40 N 21
S. 65, N. 14 O 34 R 1 N 19
S. 97, N. 1 O 34 R 5 N 24
S. 97, N. 5 O 34 R 5 N 24
S. 141 S 52 N 12*
S. 145 S 67 N 23; S 100 N 8
S. 145, N. 2b S 58 N 13*
S. 145, N. 8 O 34 R 14 N 4
S. 148, N 9 O 34 R 2 N 17; R 3 N 4
O. 1, R. 8, N. 11 S 53 N 25*
O. 1 R. 9 O 34 R 1 N 4
O. 2, R. 2, N. 10 S 92 N 30
O. 2, R. 2, N 18 S 68 N 5* S 76 N 21*
O. 2, R. 2, N. 18 & 24 S 64 N 10*
O. 2, R. 2, N. 24: O 34 R 9 N 3
O. 6, R. 4, N. 2 S 53 N 33*
O. 6, R. 7 S 105 N 70
O. 9, R. 9, N. 1 S 52 N 10*
O. 21, R 35, N 6 S 44 N 4
O. 21, R. 46, N. 4 S 3 N 2* S 8 N 17*; S 58 N 35*
O. 21, R. 63, N. 19 S 53 N 34
O. 21, R. 89 S 105 N 3
O. 21, R. 94, N. 8 S 58 N 43
O. 22, R. 2, N. 2 S 91 N 10*
O. 22, R. 10, N. 10 O 34 R 1 N 14
O. 24, R. 3, N. 2 S 84 N 8*
O. 33, R. 10 S 100 N 11*
O. 34 R. 1 S 91 N 45
O. 34, R. 1, N. 8 S 67 N 22
O. 34, R. 1. N. 9 S 58 N 5

—A. I. R. Commentaries on the Code of Civil Procedure (*contd.*)
O. 34, R. 1 N. 10 S 61 N 9; S 67 N 19*; S 92 N 30
O. 34, R. 1, N. 12 S 91 N 21
O. 34, R. 1, N. 19: S 67 N 19, 20
O. 34, R. 4, N. 9 S 98 N 4
O. 34, R. 5, N. 13 S 67 N 11*
O. 34, R. 5, N. 19 S 58 N 43
O. 34, R. 6, N. 10 S 82 N 19*
O. 34, R. 12, N. 4 S 67A N 5
O. 34 R 14 S 6 7 N 31
O. 34, R 14, N. 3 S 100 N 28*
O. 34, R. 14*, N. 4 S 67 N 23; S 100 N 8
O. 34, R. 14, N. 7 S 60 N 23*
O. 34, R. 15, N. 2 S 100 N 25*, 28*

Code of Criminal Procedure 2nd (1941) Edn., S. 88, N. 7 S 91 N 26

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S. 7 (i) N. 20 O 34 R 3 N 14
S. 7 (ix) O 34 R 7 N 18
S. 17, N. 9 S 67A N 9
Sch. I, Art. 1, N. 8 O 34 R 5 N 25

The Indian Limitation Act, 2nd (1942) Edn., S. 3, N. 14 15 S 61 N 6*
S. 13, N. 15, Ill. 4 S 92 N 29*
S. 18, N. 4 S 34 N 3*
S. 19, N. 31 S 3 N 12*
S. 22 O 34 R 1 N 21
S. 23, N. 6 S 55 N 9*
S. 23, N. 7 S 55 N 9*
S. 26, N 1 S 6 N 9*
S. 28, N. 5 S 105 N 79*
Art. 3, N. 5 S 105 N 37*
Art. 59, N. 6 S 67 N 5*
Art. 61, N. 7 S 92 N 3
Art. 62, N. 12 S 55 N 9*
Art. 63 N. 1 S 67 N 6:* S.68 N 14*
Art. 83, N 7 S 55 N 14*
Art. 91 S 126 N 12
Art. 97 S 55 N 9*
Art. 99, N. 1 S 82 N 15*

—A. I. R. Commentaries on the Indian Limitation Act (*contd.*)
Art. 111 S 55 N 14*
Art. 116 S 68 N 21; S 73 N 14*
Art. 116, N. 15 S 55 N 9* 14*
Art. 120 S 73 N 14*
Art. 120, N. 23 S 53 N 35
Art. 131, N. 2, 3 S 105 N 79*
Art 131, N 9 S 105 N 79*
Art. 132 S 82 N 13*
Art. 132, N. 7 S 55 N 12
Art. 132, N. 10 S 82 N 17* S 92 N 28; S 95 N 9
Art. 132, N. 11 S 73 N 14*
Art. 132, N. 14 S 92 N 3, 27, 28; S 95 N 9
Art. 132, N. 23 S 67 N 5*; S 67A N 8
Art. 132, N. 24 S 67 N 5*
Art. 132, N. 26 S 61 N 6*
Art 134 S 60 N 52
Art. 139, N. 11 S 105 N 80*
Art. 139, N. 19 S 105 N 81
Arts. 142 & 144, N. 4 S 105 N 13*, 19*, 37*
Arts. 142 & 144, N. 7 S 60 N 53
Arts. 142 & 144, N. 18 S 105 N 79*
Arts. 142 & 144, N. 28 S 60 N 53
Arts. 142 & 144, N. 35, 36 S 44 N 4
Arts. 142 & 144 N. 59 S 111 N 17*
Arts. 142 & 144, N. 60 S 105 N 82; S 123 N 10*
Arts. 142 & 144, N. 78 S 105 N 79
Arts. 142 & 144, N. 78, 86 S 105 N 83
Arts. 142 & 144, N. 84, 8* S 67 N 30
Arts. 142 & 144 N. 86 S 108 (n) N 1*
Art. 145, N. 2 S 3 N 24*
Art. 148 S 60 N 52; S 62 N 11; S 91 N 46
Art. 148, N. 1a. S 62 N 2*
Art. 148, N. 2 S 92 N 28

Indian Limitation Act (*contd.*)
Art. 148, N. 3 S 92 N 15, 28; S 95 N 9
Art. 148, N. 5 S 76 N 5*
Art. 148, N. 18 S 83 N 6
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Vol. 15 S 53 N 24*;
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Vol. 18 S 54 N 18*
S 91 N 13*; S 105 N 14*; S 113 N 1*, 2*, 4*; S 115 N 1*
Vol. 19 S 55 N 12*, 20*
Vol. 20 S 100 N 2*; S 108 all cls.
Vol. 21 S 58 N 39*; S 84 N 3*
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CENTRAL ACTS

Agriculturists' Loans Act, 12 of 1884 S 73 N 5, 11*
Bengal, Agra and Assam Civil Courts Act, 12 of 1887 O 34 R 6 N 21
Bengal Rent Act, 10 of 1859 S 3 N 25; S 108 (l) N 6*; S 114 N 2
Bengal Tenancy Act, 8 of 1885 S 48 N 15; S 52 N 39; S 62 N 60; S 73 N 8, 9; S 83 N 17; S 92 N 6; S 101 N 6; S 105 N 21, 60
Cantonments Act, 2 of 1924, S. 287—Applicability of S. 59, T. P. Act to Cantonments S 59 N 2; S 123 N 11
Central Provinces Court of Wards Act, 24 of 1899, S. 31 S 7 N 3*
Central Provinces Tenancy Act, 11 of 1898 S 115 N 2, 3
Chota Nagpur Incumbered Estates Act, 6 of 1876—S. 12a S 7 N 7*
Code of Civil Procedure
—8 of 1859 S 60 N 23
—10 of 1877, S. 111 S 76 N 10, 22
—14 of 1882 S 103 N 1; S 104 N 1
S. 13 Expl. IV S 67A N 1
S. 43 S 67A N 1
S 244 S 52 N 18*
S. 248 S 104 N 1*
S. 258 S 104 N 1*
S. 291 S 91 N 34; S 104 N 1*
S. 310a S 2 N 6; S 104 N 1*
S. 311 S 104 N 1*
S. 375 S 83 N 3*
S. 376 S 83 N 10
S. 411 S 48 N 14
Ch. 19 S 104 N 1
—5 of 1908 S 2 N 5*; S 3 N 22; S 5 N 4; S 6 N 6*, 16, 30; S 8 N 15; S 60 N 44; S 104 N 1; S 105 N 70
S. 2 (12) S 105 N 66
S. 11 S 55 N 7*; S 92 N 27; O 34 R 14 N 13
S. 11, Expl. IV S 67A N 1; S 76 N 21
Suit to enforce rights acquired by subrogation, bar of S 92 N 27
S. 15 S 52 N 9, 10; S 83 N 14
Ss. 15, 16 and 17—Redemption suit—Jurisdiction S 83 N 14
S. 16 S 83 N 14
S. 17 S 67A N 6; S 83 N 14
S. 34 S 104 N 1*
S. 47 S 52 N 40; S 53 N 14; S 92 N 27; O 34 R 14 N 7, 11
Suit to enforce rights acquired by subrogation, bar of S 92 N 27
Transferee pendente lite, if party within S 52 N 40
S. 49 S 132 N 2; O 34 R 14 N 10
S. 51 (d) S 91 N 27
S. 52 S 128 N 5
S. 60 S 6 N 1; S 6 N 23; O 34 R 5 N 20
Contingent interest, attachment of S 21 N 4
S. 60 (1) cl. (g) S 6 N 24
S. 60, sub-s. (1), cl. (m) S 21 N 4
S. 60 (1) cl. (n) S 6 N 13
S. 64 S 6 N 30*
S. 92 S 67 N 5
S. 99 O 34 R 1 N 19
S. 141 S 52 N 12*; S 83 N 3
S. 144 S 76 N 22*
S. 145 S 100 N 8; O 34 R 14 N 4
S. 148 O 34 R 7 N 13
O. 1 R. 8—Suit to avoid fraudulent transfer S 53 N 24
O. 1 R. 10 S 92 N 27
O. 1 R. 10 (5) S 52 N 28*
O. 2 R. 2 S 55 N 7; S 62 N 10 S 67A N 1; S 68 N 5; S 76 N 21; S 82 N 24; S 92 N 27; S 130 N 8; O 34 R 6 N 3; R 14 and N 2, 13
Redemption suit—Failure to claim contribution—Subsequent suit for contribution, if barred S 82 N 24
Suit to enforce rights acquired by subrogation, bar of S 92 N 27
O. 4 R. 1 S 52 N 10
O. 5 S 57 N 14
O. 6 R 4 S 53 N 33
O. 6 R. 15—Verification of pleadings S 83 N 19
O. 8 R. 6 S 76 N 10, 22
O. 12 R. 6 S 130 N 13
O. 21 S 54 N 3
O. 21 R. 2 O 34 R 5 N 14
O. 21 R. 46 S 8 N 17; S 58 N 35
Usufructuary mortgage, if a debt S 58 N 35
O. 21 R. 54 S 8 N 17*
Usufructuary mortgage, attachment of S 58 N 35
O. 21 R. 58 S 52 N 12
O. 21 R. 62 S 68 N 7
O. 21 R. 63 S 52 N 12*; S 53 N 14, 23, 24; S 68 N 7
O. 21, R. 69 S 60 N 26; S 91 N 34
O. 21, R. 69 (3) S 91 N 34
O. 21, R. 72 (3) S 60 N 23
O. 21, R. 73 S 136 N 2, 5
O. 21, R. 83 S 52 N 37; O 34 R 5 N 20
O. 21, R. 89 S 2 N 6; S 60 N 26; S 72 N 3; S 82 N 2; S 92 N 24; S 105 N 3
Commission paid under, whether expenses properly incurred within S. 95, T. P. Act S 95 N 3
O. 21, R. 92 O 34 R 14 N 7
O. 21, R. 100 S 52 N 12, 35*
O. 21, R. 101 S 52 N 27*
O. 21, R. 102 S 52 N 40
O. 21, R. 103 S 53 N 13*
O. 22, R. 10 S 52 N 40; S 91 N 10; S 92 N 27*
O. 23, R. 3—Deposit of mortgage-money, proceedings for—Compromise in S 83 N 3
O. 24 S 83 N 9
Mortgage suit, deposit of mortgage-money, after filing of S 83 N 9
Redemption suit, deposit in S 83 N 10
O. 31 S 103 N 1
O. 32 S 84 N 10; S 103; S 103 N 1, 2, 6
O. 32, R. 3 S 103 N 6
O. 32, R. 4 S 103 N 6
O. 33, R. 10—Charge un-

Code of Civil Procedure, 5 of 1908 (*contd.*)
der S. 100 N 11
O. 33, R. 13 O 34 R 14 N 11
O. 34 S 58 N 30; S 82 N 9; S 91 N 31; S 100 N 28; S 104 N 1
O. 34, R 1 S 67 N 19; S 67A N 1, 5; S 91 N 7, 21, 26*, 37*, 45; S 92 N 12
Prior mortgagee not necessary party S 92 N 30
O. 34, R. 1 Expl. S 92 N 30
O. 34, R. 3 S 60 N 16, 26; S 67 N 1; S 91 N 10; S 92 N 7
O. 34, R. 3 (3) S 60 N 26
O. 34, R. 4 S 56 N 7, 10, 12; S 60 N 16
Suit to enforce charge—Preliminary decree under S 100 N 25
O. 34, R. 4 (2) S 67 N 12
O. 34, R. 4 (3) S 67 N 18
O. 34, R. 5 S 54 N 19; S 56 N 12; S 60 N 16, 26; S 67 N 1; S 91 N 10; S 92 N 7
O. 34, R. 6 S 2 N 5*; S 52 N 14; S 60 N 16; S 65 N 10; S 67 N 17; S 68 N 16; S 73 N 14
Personal decree in suit to enforce charge S 100 N 25
O. 34, R. 7 S 60 N 16; S 83 N 17*
O. 34, R. 8 S 60 N 16, 26; S 91 N 10; S 92 N 7; S 93 N 1
O. 34, R. 8 (3A) S 60 N 26
O. 34, R. 10 S 94 N 1
O. 34, R. 11 S 94 N 1, 2
Interest part of mortgage money S 58 N 17
O. 34, R. 12 S 96 N 1; S 97
O. 34, R. 12 and S. 57, T. P. Act, compared S 57 N 3
O. 34, R. 13 S 97
O. 34, R. 14 S 2 N 5; S 67 N 31; S 68 N 18; S 99; S 100 N 12*; S 100 N 25; S 100 N 28
Applicable to charge S 100 N 25
Voidable, sale in contravention of S 60 N 23
O. 34, R. 15 S 96 N 1; S 100 N 25, 27
Charge created by decree, applicability to S 100 N 28
O. 41, R. 6 O 34 R 5 N 20
Code of Civil Procedure, of 1872 (*contd.*)
Sch. III, Para 11 S 43 N 4
Sch. III S 7 N 7
Code of Criminal Procedure, 5 of 1898 S 2 N 5*
—S. 88
Attachment under — Provincial Government— Right to redeem on S 91 N 26
Sale under lis pendens, if affected by S 52 N 33
—S. 88 (7) S 91 N 26
—S. 89 S 52 N 33
—S. 145 S 106 N 43
Coinage Act, 23 of 1870 S 84 N 5*
Coinage and Paper Currency Act, 22 of 1899 S 84 N 5*
Companies Act, 7 of 1913
S. 2 (16) S 137 N 3
—S. 109 S 100 N 10*
Floating charge, registration of S 100 N 10
Mortgage by company, registration of S 59 N 12
Contract Act, 9 of 1872 Pre N 2; S 4 N 3; S 4 N 4; S 5 N 7; S 137 N 2
—Applicability of, to mortgage of future crops S 3 N 4
—Ch. VII S 118 N 1; S 120 N 1
—Chapters and sections of T. P. Act, part of S 4; S 4 N 2
—Preamble Pre N 2
—S. 4 S 122 N 2
—S. 11 S 103 N 3; S 105 N 22
Competent to contract S 7 N 3
—Ss. 11 and 12, Competency to contract S 103 N 3
—S. 12 S 7 N 3; S 103 N 3
—S. 14 S 41 N 12
—S. 15 S 126 N 6
—S. 16 S 126 N 9
—S. 17—Fraud, defined S 6 N 32; S 34 N 3; S 78 N 2
—S. 18—Misrepresentation, defined S 78 N 3; S 126 N 8
—S. 19 S 4 N 4; S 55 N 2; S 126 N 6, 7
—S. 19, Para. 2nd S 55 N 2*
—S. 19A S 4 N 4; S 126 N 9
—S. 20 S 41 N 12*; S 55 N 1; S 126 N 11
.... Applicability to transfer S 4 N 4
—S. 21 S 41 N 12*
—S. 22 S 126 N 11
—S. 23 S 6 (h); S 6 N 3, 27, 35; S 14 N 10; S 25 N 2, 9; S 68 N 13*; S 130 N 17
—S. 23, Ill. (g) S 6 N 32
—S. 24—Applicability to transfer S 4 N 4
—S. 25 S 53 N 17; S 55 N 1*
Applicability to transfer S 4 N 4
Code of Civil Procedure, 5 of 1908 (*contd.*)
—S. 34 S 33 N 1, 2
—S. 36 S 25 N 2
—S. 37 S 14 N 10; S 84 N 8*
—S. 38 S 60 N 14; S 84 N 8*
Tender—Essentials of S 84 N 5
—Ss. 38 and 45—One co-mortgagee if can give valid discharge S 60 N 14
—S. 39 S 58 N 18*; S 60 N 5; S 105 N 3*
Applicability to transfer S 4 N 4
Sale—Contract of— Refusal to perform S 55 N 1, 2, 5
—S. 40 S 65 N 11*
—S. 41 S 101 N 4
—S 42 S 65 N 11*
—S. 43 S 47 N 1
—S. 46—Time for performance S 55 N 14
—S. 49 S 84N 5
—S. 54 S 60 N 5
—S. 55—Lessee's right to rescind lease S 108 (b) N 3
—S. 62 S 130 N 5
—S. 64 S 58 N 24; S 105 N 22*
—S. 65 S 53 N 9; S 55 N 1; S 58 N 24; S 59 N 8, 15; S 68 N 13; S 105 N 22*
Applicability — Mortgage by minor S 68 N 13
Applicability to transfer S 4 N 4
Application of, on residance of fraudulent transfer S 53 N 8
—S. 69 S 55 N 8, 9, 17; S 65 N 10; S 72 N 8, 9; S 76 N 8; S 82 N 14; S 92 N 10; S 95 N 3*, 8, 9*
Principle of reimbursement S 92 N 1
Subrogation and right under S. 69, distinction between S 92 N 3
—S. 70 S 55 N 8, 11; S 76 N 8; S 82 N 14; S 95 N 3*, 8; S 108 (f) N 2
—S. 73 S 55 N 9, 14; S 65 N 10
—S. 74 S 55 N 3; S 60 N 34, S 83 N 17
—S. 77 S 118 N 2*
—S. 96 S 92 N 1
—S. 126 S 133 N 4*
—S. 127 S 133 N 4*
—S. 128 S 133 N 4*
—S. 140 S 92 N 14
—S. 140 S 91 N 37*
—S. 141 S 91 N 37*; S 100 N 29*
Rights of surety on payment S 92 N 14

Rights of Surety on payment (*contd.*)
—S. 150 S 108 (a) N 1
—S. 172—Pledge of moveables S 58 N 11
—S. 182 S 3 N 42*
—S. 200 S 106 N 38
—S. 200, Ill. (b) S 106 N 38
—S. 229 S 3 N 28, 41; S 106 N 38
Ss. 231, 232 S 132 N 2

Co-operative Societies Act, 2 of 1912 S 52 N 9*; O 34 R 2 N 17

Court-fees Act, 7 of 1870, S 17 S 67A N 9

Crown Grants Act, 15 of 1895 Pre N 4*; S 11 N 5; S 105 N 1, 25; S 106 N 47; S 108 (c) N 7; S 115 N 1; App. II
—Lease by Government, S. 115, T. P. Act, if applies S 115 N 1
—S. 2 S 35 N 5; S 54 N 2; S 107 N 12
—Ss. 2, 3 Pre N 4; S 10 N 2

Dekkhan Agriculturists' Relief Act, 17 of 1879 S 41 N 6*; S 58 N 33*; S 67 N 22*; S 76 N 20*
—Accounts between mortgagor and mortgagee S 76 N 13
—Mortgagee in possession— S. 76, T. P. Act does not apply: S 76 N 3
—Redemption under S 60 N 5
—S. 10A S 58 N 33
Whether prevails over S. 41, T. P. Act S 41 N 6
—S. 12 S 67A N 1*
—S. 13 S 67A N 1*
—S. 15 O 34 R 5 N 27
—S. 22 S 58 N 9
—S. 44 O 34 R 5 N 27
—S. 63A S 59 N 2

Easements Act, 5 of 1882 S 6 N 9
—S. 10 S 66 N 9
—S. 13 S 8 N 13
—S. 30 S 37 N 4, 7
—S. 57 S 108 (a) N 1
—S. 60 S 105 N 13

Electricity Act, 9 of 1910, S. 9 (2) S 58 N 4*

Evidence Act, 1 of 1872
—S. 16 S. 106 N 45
—S. 16, Ill. (b) S 106 N 45
—Ss. 68 to 71—Attestation, proof of S 59 N 8
—S. 91 S 105 N 44
—S. 92 S 55 N 9; S 105 N 64; S 118 N 6; S 122 N 16
Sale or mortgage—Oral evidence S 58 N 33
—S. 92 (4) S 105 N 11
—S. 101 S 38 N 11*

Evidence Act, 9 of 1910 (*contd.*)
—S. 103 S 40 N 17
—S. 106 S 40 N 17
—S. 108—No presumption as to time of death S 24 N 3
—S. 109 S 105 N 71
—S. 111 S 126 N 9
—S. 114 S 60 N 6; S 105 N 44, 45; S 106 N 45
—S. 114, Ill. (b) S 106 N 45
—S. 115 S 41 N 11, 21, 23; S 43 N 2; S 78 N 10; S 105 N 20
Distinction between S. 115 S. 41, T. P. Act S 41 N 2
—S. 116 S 105 N 59, 85; S 111 N 17
Lessee's estoppel S 105 N 79
Tenant cannot deny landlord's title S 111 N 17

General Clauses Act, 1 of 1868—S. 2 (5) S 107 N 8
10 of 1897 S 3 N 1, 3, 6; S 36 N 6; S 41 N 22; S 133 N 3
Person defined S 5 N 3
S. 3 S 51 N 8*
Definitions, applicability of, to Transfer of Property Act S 3 N 1
S. 3, Cl. (7)—British India defined S 1 N 1
S. 3, Cl. (20)—Good faith, defined S 41 N 22; S 50 N 2; S 51 N 8
S. 3 (25)—Immoveable property— Definition, if exhaustive S 3 N 2
S. 3 (33) & (59) S 106 N 42
S. 3 (39) S 5 N 3*
S. 3 (52) S 59 N 7*
Sign—Meaning of S 3 N 12
S. 3 (58)—Writing S 9 N 14
S. 3 (59)—Year, defined S 107 N 5
S. 3, 4 S 3 N 1
S. 4 S 106 N 42; S 107 N 5
S. 6 S 2 N 5
S. 9 S 110 N 1
S. 13 S 44 N 9
S. 27 S 106 N 45

Guardians and Wards Act, 8 of 1890 S 38 N 11*; S 103 N 4
—Mortgage by guardian S 58 N 25
—Ss. 29 & 30 S 7 N 7*

Hindu Disposition of Property Act, 15 of 1916 S 2 N 10; S 13 N 5; S 14 N 13; S 15 N 2; S 19 N 3; S 28 N 3; S 30 N 2*; App. II

Hindu Disposition of property Act 15 of 1916 (*contd.*)
—S. 2 S 13 N 4

Hindu Transfers and Bequests (City of Madras) Act, 8 of 1921 S 2 N 10; S 13 N 5; S 15 N 2; S 19 N 3; S 27 N 2*; App. II

Hindu Wills Act, 21 of 1870 S 15 N 2

Insurance Act, 4 of 1938
—S. 38 S 130; S 130 N 1, 23
—S. 38 (6) S 130 N 23
—S. 121 S 130 N 1

Interest Act, 32 of 1839 S 8 N 18*; S 108 (1) N 4; O 34 R 11 N 2
—Post diem interest S 58 N 17

Land Acquisition Act
—10 of 1870 S 2 N 6*; S 51 N 18; S 73 N 1*, 2, 10, 14*; S 76 N 22
Acquisition, whether destruction of security S 68 N 3
—1 of 1894 S 3 N 7*; S 108 N 1; O 34 R 4 N 7; R 5 N 17
Compensation for acquisition, mortgagee's right to S 73 S. 3A S 3 N 10*

Land Improvement Loans Act. 19 of 1883
—S. 7
Charge under, enforcement of S 100 N 25
Charge under Subrogation in case of S 92 N 6
Transferee without notice S 100 N 21
—S. 7 (1) (c)—Charge under S 100 N 11

Legal Practitioners Act, 18 of 1879
—S. 3 S 136 N 4
—S. 28—Agreement to transfer, part performance, applicability of S 53A N 12

Limitation Act
—14 of 1859 S 3 N 2
—15 of 1877 S 2 N 5*; S 3 N 3*
Art. 99 S 82 N 15
—9 of 1908 S 61 N 6
S. 12 S 110 N 1
S. 22 S 52 N 28*
S. 23 S 55 N 9
S. 28 S 91 N 5; S 105 N 79, 80
Art. 44 S 6 N 20
Art. 57 S 68 N 13*
Art. 62 S 55 N 9; S 73 N 14; S 82 N 17*
Art. 66 S 68 N 13
Art. 83 S 55 N 9*, 14; S 111 N 9
Art. 97 S 55 N 9

Limitation Act, 9 of 1908 (*contd.*)
Art. 99—Contribution to mortgage debt—Suit for —Starting point S 82 N 15
Art. 105 S 76 N 22
Art. 105— Compensation for waste by mortgagee S 76 N 10
Art. 111 S 55 N 14
Art. 113 S 119 N 9
Art. 115 S 95 N 4
Damages for breach of covenant for title suit S 55 N 9
Art. 116 S 55 N 14; S 59 N 15*; S 68 N 5*, 14*; S 73 N 14; S 119 N 9
Covenant for title, breach of—Damages, suit for S 55 N 9
Art. 120 S 53 N 24*; S 73 N 14
Art. 131 S 105 N 65
Rent, right to, extinguishment of S 105 N 79
Art. 132 S 91 N 5; S 95 N 9*
Buyer's charge—Enforcement of S 55 N 20
Contribution to mortgage debt, suit for S 82 N 13
Mortgagor — Personal liability—Suit to enforce S 58 N 29
Redeeming co-mortgagor, suit by S 82 N 17
Seller's charge, enforcement of S 55 N 12
Art. 134 S 58 N 42; S 60 N 52
Art. 139 S 105 N 80; S 116 N 13
Art. 143 S 119 N 9
Arts. 144 & 148—Suit to recover accession to mortgaged property S 63 N 8
Art. 147 S 58 N 42; S 96 N 1
Art. 148 S 58 N 42; S 60 N 4, 52; S 63 N 8; S 82 N 17*; S 92 N 28*; O 34 R 9 N 1
Redemption suit for, limitation S 83 N 6
Suit by puisne mortgagee S 91 N 5
Suit to recover possession under S. 62, T. P. Act S 62 N 11
Art. 181—Application for final decree O 34 R 1 N 1
Lunacy Act, 4 of 1912 S 7 N 7; S 103 N 4
—Election, jurisdiction of Court S 35 N 25
Lunacy (District Courts) Act, 35 of 1858 S 7 N 7
—S. 14 S 7 N 7*
Majority Act, 9 of 1875 S 7 N 3
—S. 3 S 14 N 8
Married Women's Property Act, 3 of 1874, S. 8 S 10 N 19
Mesne Profits and Improvements Act, 11 of 1855 App. II
—Preamble S 51 N 1*
—S. 2 S 51 N 1*, 10*
Minors Act, 40 of 1858, S. 18 S 7 N 7*
Mussalman Wakf Validating Act —6 of 1913 S 18 N 5; App. II
S. 2 (1) S 18 N 5
S. 3 S 19 N 2
Ss. 3, 4 S 14 N 14; S 18 N 5
S. 4 S 19 N 2
—32 of 1930 S 18 N 5; App. II
Muslim Personal Law (Shariat) Application Act, 26 of 1937 S 129 N 5
Negotiable Instruments Act, 26 of 1881 S 137 N 2, 4
—S. 3 S 137 N 2
—S. 35 S 133 N 2*
—S. 58 S 41 N 1*
Official Trustees Act, 17 of 1864 S 5 N 5*
Oudh Estates Act, 1 of 1869 S 16 N 3
—S. 19 S 19 N 2
Oudh Land Revenue Act, 17 of 1876 S 7 N 3
Oudh Laws Act, 18 of 1876 S 54 N 12
—S. 3 S 129 N 5*
—S. 20 O 34 R 5 N 20
Oudh Rent Acts, 22 of 1886 S. 5 65, N 4*
Paper Currency Act, 20 of 1882 S 84 N 5*
Partition Act, 4 of 1893 S 5 N 1*
—S. 4 S 44 N 8, 9, 10
Partnership Act, 9 of 1932, S.18 S 3 N 42
Penal Code, 45 of 1860 S 51 N 8; S 126 N 6
Pensions Act, 23 of 1871 S 6 N 24
Policies of Insurance (Marine and Fire) Assignment Act, 5 of 1866, S. 15 S 135 N 1
Presidency Small Cause Courts Act, 15 of 1882, S. 53 S 112 N 3
Presidency Towns Insolvency Act, 3 of 1909 S 5 N 1*
—S. 56 S 53 N 20*
—S. 62 S 111 N 15
Provincial Insolvency Act, 5 of 1920
—S. 4
Application by Receiver to set aside fraudulent transfer S 53 N 29
Power to sell property in the hands of universal donee S 128 N 5
Provincial Insolvency Act 5 of 1990 (*contd.*)
—S. 9—Date of registration, time computed from S 59 N 13
—S. 47 O 34 R 6 N 16
—S. 53 S 53 N 5*
—Ss. 53 and 54, and S. 53, T.P. Act, distinction between S 53 N 30
—S. 54 S 53 N 20*
Date of registration, time runs from S 59 N 13
—S. 58 S 54 N 3
Provincial Small Cause Courts Act, 9 of 1887
—Seh 2, Art. 4 or 13 S 3 N 2*
—Art. 42—Contribution to mortgage debt, suit for S 82 N 27
Probate and Administration Act, 5 of 1881 S 52 N 17
—S. 90 S 39 N 4
Punjab Alienation of Land Act, 13 of 1900 S 100 N 15
—S. 16 S 58 N 3
Punjab Laws Act, 4 of 1872, S. 3 S 58 N 31
Punjab Tenancy Act, 16 of 1887, S. 4 (19) S 51 N 7*
Registration of Assurances Act. 16 of 1864 S 59 N 4; S 107 N 1*
Registration Act
—20 of 1866, S. 17 (2) S 58 N 6*
—8 of 1871, S. 50 S 48 N 9*
—3 of 1877 S 3 N 4, 20; S 59 N 5*
S. 23 S 59 N 6*
S. 26 S 59 N 6*
S. 50 S 48 N 9*
—16 of 1908 Pre N 4; S 1; S 3 Expl. I Proviso (1); S 3 N 3,* 34, 37, 38; S 4 N 2, 5, 6; S 8 N 17; S 9 N 5; S 48 N 9*; S 53 A N 3*; S 54 N 7; S 59 N 2, 6, 12; S 60 N 20; S 105 N 2, 4, 19; S 107 N 1, 2, 5, 6*, 7*, 9, 15
Optional registration— Provisions of T. P. Act prevail S 4 N 2
Sections of T. P. Act supplemental to S 4
S. 2 (7) S 105 N 4, 9
S. 3 S 3 N 3*
S. 17 S 4 N 5, 7, 8; S 5 N 7; S 8 N 17; S 53 A N 6, 16; S 54 N 21, 23; S 58 N 39; S 59 N 3; S 60 N 6, 20*; S 100 N 10; S 105 N 29*; S 107 N 13, 15; S 117 N 4; S 123 N 15; O 34 R 5 N 21; App. II

Registration Act (*contd.*)
Agreement of lease, registration of S 53A N 16
Agreement for sale S 54 N 23
Crown grants, not applicable to Pre N 4
Floating charge, registration of S 100 N 10
S. 17 (1) S 105 N 27
S. 17 (1), (a), (b), (c), (d) S 48 N 9
S. 17 (1) (a), (b) Pre N 4
S. 17 (1) (b) S 60 N 20, 21; S 60A N 2*; S 100 N 16; S 105 N 11
S. 17 (1) (b), (c) S 107 N 13*
S 17 (1) (c) S 60 N 21
S. 17 (1) (d) S 105 N 11; S 107 N 13, 15
Lease, registration of S 4 N 6
S. 17 (2) S 54 N 23
S. 17 (2) (vi) S 91 N 4* S 100 N 16; S 107 N 13*
Decree, charge created by, registration of S 100 N 16
S 18 App. II
S. 18 (a), (b) S 48 N 9
S. 23 S 78 N 5
S. 30 (2) S 3 Expl. I; S 3 N 37
S. 32—Presentation invalid S 59 N 6
S. 47 S 3 N 36; S 48 N 8; S 54 N 17*; S 59 N 13; S 123 N 6; App. II
S. 48 S 48 N 3*, 10; S 100 N 3; App. II
—S. 49 S 48 N 9*; S 53A N 16, 18*; S 54 N 17, 21, 23; S 59 N 5, 14; S 105 N 19; S 107 N 7, 9; S 123 N 5, 15; App. II
Admissibility of documents registrable under T. P. Act S 4 N 5
S. 49 (c) S 54 N 17*
S. 50 S 48 N 9; S 59 N 5
S. 50 (1) S 48 N 9
S. 51 S 3 Expl. I Proviso (2)
S. 55 S 3 Expl. I Proviso (3)
S. 64—Duty of registering officer S 3 N 37
S. 65—Duty of registering officer S 3 N 37
S. 75 S 3 N 20*
S. 90 Pre N 4; S 4 N 6
S. 90 (1) (d) S 107 N 12
Sale of Goods Act, 3 of 1930 S 118 N 9, 10; S 120 N 1; S 137 N 3
—S. 2 (4) S 137 N 5
—S. 2 (10) S 118 N 2*
—S. 4 S 118 N 2*
Sale of Goods Act. (*contd.*)
—S. 12 (3)—Warranty, defined S 133 N 4
—S. 14 S 119 N 2*; S 133 N 2*
—S. 27 S 41 N 1; S 121 N 1*
—S. 33 S 123 N 12
—S. 62 S 120 N 1
Specific Relief Act, 1 of 1877
—S. 3 S 71 N 2*
—S. 9 S 105 N 13, 37; S 108 (c) N 4
—S. 14 S 55 N 1*
—S. 18 S 6 N 3; S 43 N 2, 3
—S. 18 and S. 43, T. P. Act, distinguished S 43 N 3
—S. 22 S 55 N 13
—S. 23 S 3 N 24*
—S. 23 (b) S 3 N 24*; S 6 N 17
—S. 25 S 55 N 2*
Title free from reasonable doubt S 55 N 3
—S. 25 (b) S 55 N 3
—S. 27 S 3 N 39; S 108 (j) N 5
—S. 27 (b) S 3 N 50; S 40 N 13, 17, 18*, 20; S 48 N 3
—S. 27A S 53A N 5*; S 105 N 19; S 107 N 14; App. II
—S. 27A and S. 53A, T. P. Act, compared S 53A N 17
—S. 36 S 126 N 11
—S. 39 S 53 N 23
—S. 41 S 51 N 1
Stamp Act
—S. 42—Suit under S. 53, T. P. Act S 53 N 23
—Chap. II S 53A N 16; S 54 N 21; S 59 N 14
—1 of 1879 S 58 N 14
S. 46 S 105 N 67*
S. 49 S 58 N 14*
—2 of 1899 S 105 N 2, 9
Mortgage, definition of S 58 N 9
S. 2 (17) S 58 N 2
S. 30 S 84 N 5
S. 46 S 58 N 9*
Succession Act
—10 of 1865
S. 50 S 3 N 11, 12, 14*, 19*; S 59 N 7*
Signature and mark, distinction S 3 N 12
S. 100 S 13 N 2*; S 15 N 2
S. 101 S 15 N 2
S. 102 S 15 N 2
S. 107 S 21 N 13
S. 111 S 23 N 2*
S. 114 S 25 N 8*
S. 123 S 33 N 2*
Ss. 167 to 169, 171 to 177 S 35 N 1
—39 of 1925 S 8 N 11*, 19*; S 12 N 1; S 14 N 8; S
Succession Act (*contd.*)
38 N 5; S 127 N 1; S 129 N 5
Bequest to charities S 18 N 2
S. 63 S 3 N 11; S 3 N 12
S. 113—Unborn person, bequest in favour of S 13 N 1
Ss. 113, 114, 115, 116: S 2 N 10
S. 114 S 14 N1; S 16 N 1
S. 115 S 15 N 2
Bequest to a class S 15 N 1
Bequest to a class, failure with regard to same S 125 N 1
S. 116 S 16 N 1
S. 117—Accumulation of income S 17 N 1
S. 118 S 18 N 3
S. 119 S 19 N 1, 4
S. 120 S 2 N 1; S 21 N 13*; S 32 N 1
S. 120, Ill. (vii) S 12 N 3
Ss. 120 to 127, 129, 130 S 28 N 1
S. 121 S 22 N 1, 4
S. 122 S 127 N 1
S. 123 S 127 N 1
S. 124 S 23 N 1
S. 125 S 24 N 1, 2
S. 125, Ills. (iii) and (iv) S 24 N 1, 4
S. 126 S 25 N 1
S. 127 S 25 N 1, 8*
S. 128 S 26 N 1
S. 128, Ill. (iii) S 26 N 3
S. 128, Ill. (vii) S 26 N 7
Ss. 129 and 130—Acceleration of subsequent disposition S 27 N 1
S. 131 S 29 N 1
Bequest with condition subsequent S 28 N 1
Thing bequeathed S 28 N 5
S. 132 S 29 N 1
S. 133—Invalidity of ulterior bequest—Effect S 30 N 1
S. 134—Cessation of interest created S. 31 N 1
S. 135 S 32 N 2
S. 136 S 33 N 1, 2
S. 137 and S. 34, T. P. Act, distinguished S 34 N 1
S. 138 S 11 N 1, 12
Ss. 180 to 185 S 35 N 20
Ss. 180 to 182, 184 to 190 S 35 N1
Ss. 180 to 190 S 35 N 2
S. 182 S 35 N 10
S. 182, Ill. (1) S 35 N 11
S. 182, Ill. (iii) S 35 N 10
S. 182, Ill. (iv) S 35 N 10*
S. 183—Bequest for a person's benefit S 35 N 8

Succession Act, 39 of 1925 (*contd.*)
S. 184 S 35 N 18
S. 185 S 35 N 19
S. 186 S 35 N 20
S. 187 S 35 N 21
S. 188 (1) S 35 N 22
S. 188 (2) S 35 N 23
S. 189 S 35 N 24
S. 190 S 35 N 25
S. 191 S 129 N 4
Donatio mortis causa S 129 N 3
S. 210 S 103 N 4
S. 214 O 34 R 4 N 13
S. 307 S 39 N 4
Part VII S 103 N 4

Sucession Certificate Act, 7 of 1889 S 3 N 22*
S. 4 S 68 N 22; O 34 R 4 N 13

Transfer of Property (Amendment) Act, 27 of 1926—Whether retrospective S 3 N 11

Transfer of Property (Amendment) Act 20 of 1929,
S. 3 S 13 N 5

Transfer of Property (Validating) Act, 26 of 1917 S 3 N 11

Trustees' and Mortgagees' Powers Act, 28 of 1866 S 69; S 69 N 5; S 69A N 2, 3, 5, 11; App. II
—S. 12 S 69A N 1
—Ss. 12 and 15—Receiver of mortgaged property, appointment of S 69A N 1
—S. 14 S 69A N 8
Receiver, power to give effective receipts S 69A N 8
—S. 15 S 69A N 1

Trusts Aet, 2 of 1882
—S. 5 S 13 N 2
—S. 7—Competency to make trust S 7 N 1
—S. 9 S 13 N 2
—S. 15 S 76 N 6*

Trusts Act, 2 of 1882 (*contd.*)
—S. 19—Duty to keep accounts S 76 N 12
—S. 20 (e) S 66 N 9
—S. 32 S 100 N 20
—S. 34 S 69A N 1
—S. 48 S. 91 N 29
—S. 52 S 6 N 36
—S. 62 S 76 N 18
—S. 84 S 6 N 27; S 53 N 9
—S. 88 S 71 N 2*
—S. 90 S. 63 N 5
—S. 90, Ill. (a) S 71 N 2
—S. 91 S 40 N 11; S 108 (j) N 5

Usurious Loans Act, 10 of 1918 S 60 N 34; O 34 R 11 N 2

Usury Laws Repeal Act, 28 of 1855 S 76 N 12

FOREIGN ACTS AND STATUTES

Accumulation Act (Thelluson Act), 1800 (39 & 40 Geo III, C. 98) S 17 N 1, 2, 9, 10

Accumulation Act, 1892 (55 & 56 Vict., C. 58) S 17 N 2

Apportionment Act, 1870 (33 & 34 Vict., C. 35) S 36 N 1, 2, 8
—Preamble S 36 N 1*
—S. 2 S 36 N 1
—S. 3 S 36 N 1
—S. 5—Dividend defined S 36 N 6
—S. 7 S 36 N 1

Bankruptcy Act, 1914 (4 & 5 Geo. V, C. 59) S. 44 S 53 N 20*

Ceylon Ordinance, VII of 1840 S 53A N 3

Companies Act, 1929 (19 & 20 Geo. V, C. 23) Ss. 79, 88 S 100 N 10*

Companies (Consolidation) Act, 1908 (8 Edw. VII, C. 69) S. 93 S 100 N 10*

Conveyancing and Law of Property Act, 1881 (44 & 45 vict., C. 41). S 8 N 2; S 57 N 16; S 60B N 1; S 69 N 5, 6; S 69A N 2
—Inspection of title deeds, mortgagor's right S 60 B N 1
—S. 2 S 57 N 4
—S. 5 S 57 N 1, 2, 4, 6, 13
—S. 6 S 8 N 2, 6
—S. 7—Implied contracts by mortgagor S 65 N 1
—S. 7 (1) (A) S 55 N 9
—S. 14—Forfeiture, relief against S 114A N 1, 3

Conveyancing and Law of Property Act, 1881 (*contd.*)
—S. 16 S 60B N 1*
—S. 17 S 61 N 2, 5
—S. 19 S 69 N 1
—S. 19 (1) (ii) S 69A N 1, 12
—Ss. 19 to 21—Power of sale, mortgagee's S 69 N 1
—S. 20 S 69 N 1
—S. 21 S 69 N 1
—S. 21 (4) S 69 N 20*
—S. 23—Insurance, mortgagee by S 72 N 12
—S. 24— Receiver agent of mortgagor S 76 N 5

Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. VII, C. 47) S 28 N 11

Fires Prevention (Metropolis) Act, 1774, (14 Geo. III, C. 78) S 49 N 6*

Foreign Jurisdiction Act, 1890, (53 & 54 Vict., C. 37) S 1 N 3

Fraudulent Conveyances Act, 1571, (13 Elliz., C. 5) S 53 N 1, 2, 3, 5, 6, 9 11, 15, 16*, 17, 29, 30*
—S. 1 S 53 N 1*
—S. 5 S 53 N 1*

Government of India Act, 1915, (5 & 6 Geo. V, C. 61)—S. 107 O 34 R 1 N 22

Government of India Act, 1935, (25 & 26 Geo. V. C. 42)
—S. 46, sub-s. (2) S 1 N 1
—S. 288 S 1 N 1
—S. 466 S 1 N 1
—Part III S 1 N 1

Grantees of Reversions and Lessees Act, 1540 (32 Henry VIII, Ch. 34) S 6 N 8*

Indian Councils Act, (24 & 25 Vict., C. 104)—S. 22 S 104 N 1

Indian High Courts Act, (24 & 25 Vict., c. 104) S 104 N 1

Irish Registration Act, (6 Anne, c. II) S 48 N 9

Judgments Act, 1839 (2 & 3 Vict., c. 11) S 52 N 43

Judicature Act, 1873 (36 & 37 Vict., c. 66)—Rules under, O. 22 R. 3 S 84 N 8*

Land Charges Act, 1925 (15 Geo. V, C. 27 Ss. 1, 2, 3 S 52 N 43

Law of Property Act, 1925 (15 Geo. V, c. 20) S 6 N 8*; S 13 N 7; S 17 N 2; S 45 N 3; S 55 N 9; S 58 N 38; S 108 (a) N 2*; S 111 N 7; S 119 N 2
—Tacking, law as to S 79 N 1
—Ss. 34, 36 S 45 N 3*
—S. 44 S 55 N 3
—S. 47 S 49 N 1
—S. 50 S 57 N 1, 2, 13
—S. 59 S 119 N 2*
—S. 60 S 8 N 2
—S. 60, sub-s. (1)—Operation of transfer S 8 N 1
—S. 62 S 8 N 1, 2
—S. 76 S 55 N 9; S 119 N 2
—S. 76 (1) (c), (d)—Implied contracts by mortgagor S 65 N 1
—S. 76 (6) S 65 N 1
—S. 93 S 61 N 2

Law of Property Act, 1925 (*contd.*)
Consolidation of mortgage S 61 N 1
—S. 94 S 79 N 1
—S. 95 S 60A N 1
—S. 96 (1)—Inspection of title deeds by mortgagor S 60B N 1
—S. 101 (1) (i) S 69 N 1
—S. 101 (1) (ii) S 72 N 12*
—S. 101 (1) (iii) S 69A N 1
—Ss. 101, 103, 104 and 105—Mortgagee's power of sale S 69 N 1
—Ss. 101 and 109—Receiver of mortgaged property S 69A N 1
—S. 103 (i), (ii) S 69 N 1
—S. 104 (2) S 69 N 1
—S. 105 S 69 N 1
—S. 106 S 69 N 20
—S. 108 (1), (2) S 72 N 12*
—S. 109 S 69A N 1, 2
—S. 109 (1) S 69A N 5
—S. 136 S 130 N 2
—S. 140 S 37 N 4*; S 109 N 1
—S. 141 S 109 N 1, 2*
—S. 142 S 109 N 1, 2*
—S. 146—Forfeiture of lease, relief against S 114A N 1
—S. 151 S 109 N 1
—S. 164 S 17 N 1, 2
—S. 164 (2) S 17 N 7*
—S. 172 S 53 N 1
—S. 173 S 53 N 1
—S. 186—Merger rule as to S 111 N 7
—S. 205 S 57 N 4; S 58 N 12; S 130 N 3
—S. 205, (1) (xvi) S 59A N 1
—Sch. II, Part III S 65 N 1
—Sch. II, Part IV S 65 N 1

Lord Cranworth's Act, 1860 (23 & 24 Vict., c. 145) S 69A N 2

New York Code S 118 N 1

Parliamentary and Municipal Registration Act, 1878, (41 & 42 Vict., c. 26) S 105 N 15*

Prevention of Fraudulent and Covinous Conveyances, 1584-5 (27 Elliz., c. 4) S 42 N 1; S 53 N 1, 2, 17, 31
—S. 2 S 53 N 1*
—S. 6 S 53 N 1*

Real Property Act, 1845, (8 & 9 Vict., c. 106) S 119 N 2
—S. 3 S 119 N 2*

Sale of Goods Act, 1893, (56 & 57 Vict., c. 71) S 119 N 2*; S 133 N 4
—S. 62 S 133 N 4*

Statutes
—13 Eliz. Chap. 5, S 53 N 1, 2, 5, 15
—27 Eliz., c. 4 S 42 N 1; S 53 N 1, 2, 31
—43 Eliz, Ch. IV, 1601 S 18 N 3
—43 Geo. III, Ch. 126 S 84 N 5*

Statute of Frauds, 1677 (29 Car. II, c. 3) S 9 N 2; S 53A N 1, 2; S 58 N 39
—S. 4 S 53A N 1, 3

Supreme Court of Judicature Act, 1873 (26 & 37, Vict., c 66) S 130 N 12
—S. 25 S 131 N 1
—S. 25 (6) S 130 N 2, 11, 25

Vendor and Purchaser Act, 1874, (37 & 38 Vict. c. 78) S 55 N 3

Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21) S 53 N 1
—S. 2 S 53 N 1

PROVINCIAL ACTS.

Agra Acts.

—Agra Pre-emption Act, 11 of 1922, S. 19 S 52 N 16
—Agra Rent Act, 12 of 1881 S 72 N 2*
S. 9 S 63A N 3; S 64 N 3
—Agra Tenancy Act
2 of 1901 S 6 N 37*; S 43 N 9*; S 117 N 2, 3
—S. 10 S 68 N 13*
S. 20 S 5 N 1*; S 64 N 3; S 68 N 13*
3 of 1926
S. 3 (11) S 51 N 7*
Ss. 20, 21, 22 S 6 N 37*
S. 23 S 64 N 3*
S. 221 S 100 N 29*

Bengal Acts
—Bengal Excise Act, 5 of 1909, S. 11 S 6 N 30*
—Bengal Public Demands Recovery Act, 3 of 1913 S 67 N 24*
—Calcutta Municipal Act, 3 of 1899
Charg under, transferee without notice S 100 N 21
S. 25 S 67A N 3*
S. 228 S 100 N 11*
3 of 1923—Charge for consolidated rates S 100 N 11
—Calcutta Rent Act, 3 of 1920 S 106 N 9*
—Chota Nagpur Tenancy Act, 6 of 1908 S 106 N 49*
—Court of Wards Act, 9 of 1879, S. 60 S 7 N 3*
—Landlord and Tenant Procedure Act, 8 of 1869 S 117 N 2*
—Public Demands Recovery Act, 7 of 1880 S 67 N 24

Bihar Acts
—Bihar Tenancy (Amendment) Act, 8 of 1934, S. 3 (5) S 105 N 59*
—Bihar and Orissa Public Demands Recovery Act, 4 of 1914 S 76 N 8
S. 8—Charge under S 100 N 11

Bombay Acts
—Bhagdari and Narwadari Act, 5 of 1862 S 105 N 82*
S. 3 S 65 N 4*
—Bombay Agricultural Debtors Relief Act, 28 of 1939 S 58 N 33*; S 76 N 3*; S 76 N 13*; O 34 R 5 N 27
S. 85 (1) S 41 N 6*
—Bombay Court of Wards Act, 1 of 1905, S. 37 S 7 N 3*
—Bombay Land Revenue Code, 5 of 1879 S 60 N 22
Provisions of, not affected by T. P. Act S 2 N 3
S. 56 S 60 N 23*
S. 83 (2) S 105 N 41*; S 105 N 44
S. 84 S 105 N 32*
S. 86 O 34 R 14 N 2
—City of Bombay Municipal Act, 3 of 1888, S. 212—Arrears of property tax, charge for S 100 N 11
—Gujrat Taluqdars Act, 6 of 1888, Ss. 31, 32 S 2 N 5*

Central Provinces Acts
—Central Provinces Land Re-

venue Act, 2 of 1917, S. 80 S 91 N 8*
S. 122—Superior proprietor —Charge of S 91 N 14
Superior proprietor, redemption by S 91 N 14
—Central Provinces Tenancy Act, I of 1920 S 1 N 6; S 73 N 1*; S 105 N 57; S 105 N 68; S 105 N 84
S. 2 (5) S 51 N 7*
S. 2 (9) S 105 N 59*
S. 9
Charge for arrears of rent, subrogation in case of S 92 N 6
Charge for rent S 100 N 21
S. 40 S 100 N 12*
S. 49 S 70 N 2
S. 104 S 91 N 8*

Madras Acts

—Co-operative Societies Act, 6 of 1932—Registrar, proceeding before lis pendens S 52 N 9
—Hindu Transfers and Bequests Act, 1 of 1914: S 2 N 10; S 13 N 5; S 15 N 2; S 19 N 3; App. II
—Madras Abkari Act, 1 of 1886 S 52 N 32*; S 73 N 1*
S. 28 S 48 N 14*; S 73 N 3*
—Madras Agriculturists' Relief Act, 4 of 1938 S 69 N 8*
—Madras Court of Wards Act, 1 of 1902, S. 34 S 7 N 3*
—Madras District Municipalities Act, 4 of 1884, S. 63 (3) S 117 N 3*
—Madars Estates Land Act, 1 of 1908 S 117 N 3
Charge for rent under S 100 N 12
S. 3 (11) S 105 N 59*
Chap. IV S 41 N 23*
—Madras Forest Act, 5 of 1882, S. 6 S 3 N 2*
S. 39 S 3 N 2*
—Madras Hereditary Village Offices Act, 3 of 1895, S. 13: S 105 N 79*
—Madras Marumakkattayam Act, 22 of 1932, S. 43—Collector acting under, whether Court S 52 N 9
—Madras Rent Recovery Act, 8 of 1865—Sale for arrears of Rent—Lis pendens S 52 N 32
—Madras Revenue Recovery Act, 2 of 1864, S. 35 S 72 N 2*
—Madras Salt Act, 4 of 1889, S. 11 S 6 N 30*
—Malabar Compensation for Tenants' Improvements Act, 1 of 1900, Ss. 3, 4 S 51 N 7
—Malabar Tenancy Act, 14 of 1930—Kanom rights and liabilities under S 98 N 7

Punjab Acts

—Punjab Court of Wards Act, 2 of 1903, S. 15 S 7 N 3*
—Redemption of Mortgages (Punjab) Act, 2 of 1913, S. 12—Suit under, O. 34, R. 1 if applies O 34 R 1 N 1

U. P. Acts

—Bundelkhand Alienation of Land Act, 2 of 1903 S 67 N 32
S. 9 Mortgage suit against member of an agricultural tribe S 67 N 32
—Bundelkhand Encumbered Estates Act, 1 of 1903 S 60 N 42*
—Lucknow University Act, 5 of 1920 S 126 N 2
—United Provinces Agriculturists Relief Act, 27 of 1934 S 55 N 18
Applicability of O. 34 R. 7 to proceedings under O 34 R 7 N 3
Ss. 12 and 16 O 34 R 9 N 1
—United Provinces Court of Wards Act, 4 of 1912, S. 37 S 7 N 3*
—United Provinces Encumbered Estates Act, 25 of 1934 S 82 N 2
Proceedings under, O. 34 R, 1 whether applies O 34 R 1 N 3
—United Provinces General Clauses Act, 1 of 1904 S 3 N 3*
—United Provinces Land Revenue Act, 3 of 1901 S 7 N 3*; S 105 N 61
S. 141 S 48 N 14
S. 161 S 48 N 14
S. 162 S 48 N 14
—United Provinces Municipalities Act, 2 of 1916
Charge under, transferee without notice S 100 N 21
S. 177 S 100 N 21
S. 177—Charge for taxes due S 100 N 11
—United Provinces Tenancy Act, 17 of 1939
S. 3 (8) S 51 N 7*
S. 3 (18) S 105 N 59*
S. 33 S 64 N 3*

Bengal Alluvion and Diluvion Regulation, 11 of 1825 S 108 (d) N 2, 3*

REGULATIONS

Bengal Land (Conditional Sales) Regulation, I of 1798: S 58 N 33: S 6 N 5: S 83 N 2: App. II
Deposit of mortgage money S 83 N 2
Right of redemption under S 60 N 5
Bengal Land (Redemption and Foreclosure) Regulation, 17 of 1806 S 2 N 5: S 58 N 4:

S 60 N 1, 5, 17, 22*; S 67 N 14; S 69 N 4*; S 83 N 2, 8*; O 34 R 2 N 3; App. II

Compromise granting further time after period of grace—Effect of S 58 N 4

Deposit of mortgage money S 83 N 2

Redemption, right under S 60 N 5

S. 7 S 58 N 31

Ss. 7 and 8 S 58 N 31

S. 8 S 2 N 5; S 58 N 31; S 60 N 1; S 91 N 8*

Bengal Land-Revenue Sales Regulation, 5 of 1812, S. 3 S 105 N 63*

Bengal Patni Taluq Regulation, 8 of 1819 S 2 N 3; S 109 N 4

Provisions of, not affected by T. P. Act S 2 N 3

Bengal Revenue-free Lands (Badshahi Grants) Regulation, 37 of 1793, S. 15 S 8 N 4*

Bengal State-Prisoners Regulation, 3 of 1818 S 6 N 24*

Ceded Provinces Interest, Regulation, 34 of 1803 S 2 N 5*

Interest, Regulation, 15 of 1793, S. 10 S 76 N 12*

(Bombay) Acknowledgment of Debts; Interest. Mortgages, Regulation, 5 of 1827 S 2 N 5*; S 69 N 4*; App. II

S. 14 S 84 N 18

Partial tender or deposit, interest ceases on S 84 N 18

S. 15, cl. (3)—Rights of mortgagee in possession S 67 N 15

Madras Permanent Settlement Regulation, 25 of 1802, S. 8 S 105 N 42*

GLOSSARY.

The following abbreviations are used in this Glossary:

A.—Arabic. Ben.—Bengali. Fr.—French. Guz.—Guzerati. H. Hindi. Kan.—Kannada. L.— Latin. Mal.— Malayalam. Mar.— Marathi. P.—Persian. S.—Sanskrit. Tam.—Tamil. Tel.—Telugu.

Abadi (H.)

That part of the village land which is set apart for residences, shops, etc.

Ab initio (L.)

From the beginning.

Abkari (H.)

Revenue derived from taxes on the manufacture and sale of intoxicating liquors and drugs—See ('17) 4 AIR 1917 Mad 852 (852): 34 Ind Cas 927.

Absolute estate

A full and complete estate. The transfer of an absolute estate passes to the transferee an interest which is unlimited in estate and unfettered in respect of any condition or trust.

Absolute transfer.

Where a grant carries with it all the legal incidents thereof it is an absolute transfer. Thus a transfer is absolute where it is made without imposing any restrictions or conditions in respect of the legal incidents of the property transferred. This expression is to be distinguished from the expression 'transferred absolutely.' For an interest which is transferred absolutely is not the same thing as the transfer of an absolute estate in the property. Any interest e.g. a *life estate*, may be created absolutely by not imposing any conditions or restrictions qualifying its legal incidents.

Abwab (H.)

Tax imposed in addition to the regular assessment on the land.

Acceleration—Rule of

To accelerate means to quicken, to make haste or to shorten. Acceleration in its technical sense means the shortening of the time for the vesting in possession of a subsequent interest on the failure of a prior interest. The *rule of acceleration* may be stated thus: Where an interest created on a transfer of property is intended to take effect upon the failure of the prior interest created by the same transaction, such interest will take effect upon the failure of the prior interest in *any* manner. The effect of failure of a prior life interest is to accelerate the subsequent interests which are limited to take effect on the regular determination of that prior interest.

Accessio (L.)

Addition; an accessory thing—(See S. 63 Note 1.)

Accession credit principle (L.)

The increase follows the principal.

Accession

In its restricted sense, in which it is generally used in law, it means the mode of acquiring every accessory thing, whether corporeal or incorporeal, that has been added to a principal thing from without, and has been connected with the principal thing, whether by powers of nature or by the will of man, so that in virtue of this connection, it is regarded as part and parcel of the principal thing. It must be remembered that the expression 'accession' is not confined to *physical acquisitions* or additions to the property but also includes the acquisition of an *interest* in property. (See S. 63 Note 1, S. 70 Note 2 and S. 108 (d) Note 1.)

Accessorium non ducit sed sequitur suum principale (L.)

The accessary right does not lead, but follows its principals. (See S. 8 Notes 2, 12; S. 63 Note 1).

Accretion

The increase or extension of the boundaries, or the acquisition, of land by the gradual or imperceptible action of natural soil from the sea or a river, or by a gradual recession of the water from the usual watermark. In accretion the added land belongs to the owner of land to which land belongs to the owner of the land to which it is added.

For the distinction between the English and the Indian law on the accretion to land by alluvion, see S. 108 (d) Note 2.

Accruing debt

See S. 3 Notes 26 and 27.

Accumulation

The increase of a fund or property by the continuous addition to it of the interest or income of it. Section 17 of the T. P. Act lays down a provision as to the direction for accumulation of the income arising from the property transferred. It prescribes the limits beyond which a direction for accumulation of the income will be void. These limits are, (a) the life of the transferor, or (b) a period of eighteen years from the date of the transfer.

Acquiescence

See S. 51 Notes 22 and 23.

Actionable claim

See S. 3 for definition.

Actual or positive fraud
See S. 34 Note 3.

Adaghu (Tam.)
A simple mortgage.

Adaimana pattiram (Tam.)
A pledge-bond or security bond—See Per Brandt, J. in (1887) 10 Mad 509 (516).

Adamanam (Tam.)
Simple mortgage.

Adavu (Mal.; Kan.)
Simple mortgage.

Adha (H.)
Indicates the underground rights— See ('29) 16 AIR 1929 Pat 190 (191): 118 Ind Cas 603.

Adha and urdha (H.)
The use of these words in a grant indicates that there was every intention to convey all below the surface as well as all on it or above it—See ('25) 12 AIR 1925 P C 42 (44): 4 Pat 244: 52 Ind App 109.

Adimayavana (Tam.)
Adimayavana in its etymological sense may be translated 'beneficial enjoyment on account of services'; but that phrase *prima facie* imports a permanent tenure granted as a reward for past services or both for past and future services—See (1904) 27 Mad 202 (204).

Ad invitum (L.)
Against one's will.

Advancement
Property given, usually by a parent to a child or by a husband to a wife, in advance of a future distribution; an irrevocable gift by an intestate, during his life, of part or all of the donee's anticipated share in the donor's estate upon distribution. It is the donor's estate upon distribution. It differs from an absolute gift in that it is charged against the donee's future share in the estate, and from an advance in that the donee cannot be called upon to account for or repay it except by this charging of it—See also S. 39 Note 6 and S. 122 Note 11.

Aequitas est quasi equalitas (L.)
Equity is as it were equality. Equity favours true equality both of rights and liabilities dividing burdens and benefits in equal shares. For example of the application of this maxim, See S. 45 Note 1 and S. 46 Note 1.

Affirmative covenant
See S. 11 Note 11.

A fortiori (L.)
With stronger reason.

Agent
See S. 3 Note 42.

Agraharam (S.)
Land granted to Brahmans rent-free or at a reduced rate of assessment.

Agreement to grant lease
See S. 105 Note 4.

Agricultural purposes
See S. 117 Note 3.

Agriculture
The science and art of cultivating the soil, including the allied pursuits of gathering in the crops and rearing livestock; tillage; husbandry; farming in the widest sense. (See also S. 117 Note 3.)

Ahar (H.)
Reservoir for water—See ('12) 16 Ind Cas 705 (706).

Alienatio rei praefertur juri accrescendi (L.)
Alienation is favoured by the law rather than accumulation. (See S. 6 Note 1).

Alieni juris (L.)
Under another's right or authority.

Alimony
An allowance which a married woman sues for and is entitled to, upon separation from her husband.

Alio intuitu (L.)
With a collateral motive. For a different purpose.

Aliunde (L.)
From elsewhere.

Allegans contraria non est audiendus (L.)
He who alleges contrary things is not to be heard.—(See S. 35 Note 1; S. 112 Note 1.)

Alluvion
"Alluvion is described by Justinian as an 'imperceptible increase' and land is said to be acquired by alluvion when it is acquired 'so gradually that one cannot say how much is added at any particular moment of time. But if by the violence of a river a portion of land is added to the estate of an adjoining owner the land continues to be the property of the original owner.'"—(1906) 28 ALL 647 (649): 3 ALL L Jour 453.

Alternative conditions
See S. 26 Note 5.

A man shall not derogate from his own grant
For instances of the application of this maxim, See S. 66 Note 1; S. 115 Note 1.

Amaldastak (H.)
It is not a lease—('25) 12 AIR 1925 Pat 168 (173): 84 Ind Cas 386.

Anandravan (Mal.)
The term is applied generally to the junior member in a Malabar tarwad.

Angan (Mar.)
A courtyard.

Animus transferendi (L.)
Intention of making a transfer.

Aniyamit (Mar.)
Indefinite, unrestricted or unlimited—See ('31) 18 AIR 1931 Bom 466 (469): 133 Cas 839.

Annachatra (Mar.)
An institution for distribution of food to

Brahmans and mendicants—See (1904) 6 Bom L R 56 (57).

Annexed to the ownership of immovable property
See S. 40 Note 7.

Annuity
See S. 36 Note 5.

Anomalous mortgage
See S. 58 (g).

Appointment: See POWER OF APPOINTMENT.

Apportionment
See S. 36 Note 1.

A priori (L.)
From the former. From antecedent to the consequence.

Arasinage inam (Kan.)
Land granted in lieu of dower.

Aravar (Kan.)
A usufructuary mortgage.

Archaka (S.)
Priest, who alone is allowed personally to attend upon the idol—(1882) 4 Mad 391 (392).

Ardheli (Mar.)
A cultivator who undertakes the cultivation for a share of produce.

Arh (H.)
Literally denotes a "support" or "propping up." In 13 ALL 28 (43) it was held that the words "arh" and "mustaghraq" used in the bond implied a power of sale and denoted a mortgage without possession. See also 20 Ind Cas 870 (Oudh). But in 19 Ind Cas 658 (660) (ALL) it is held that the use of these words alone do not always and necessarily imply a power of sale.

Asmani sultani (H.; Mar.)
Evils from the skies or the King. Calamity akin to Act of God; e.g. destruction of property by accidental fire—See (1890) 14 Bom 28 (30).

Assign
(*Verb*) To transfer, or to make over to another, especially to transfer to, and vest in, certain persons, called assignees, for the benefit of creditors.

To assign means to part with absolutely—See *Russell* v. *Beecham* (1924) 1 K B 525 (533).

(*Noun*) Per Parke, B.—"The word 'assign' does not mean 'heir'; it means a person substituted for another by an act of some kind or other."—*Doe d Sophia Lewis* v. *William Lewis*, 152 E R 280 (281).

Attached to the earth
See the definition in S. 3.

Attest
See S. 3 Note 11.

Attestation
See S. 3 Note 11.

Attested
For definition see S. 3. See also S. 3 Note 11.

Attorn
To agree to become tenant to one as owner or landlord of an estate previously held of another; to recognise one as landlord.

Attornment
Agreement or acknowledgment by a tenant that he holds his tenement of a new person as landlord. An attornment acts as an estoppel to prevent the one attorning from denying title of the one to whom he attorns.

Aulad (H.)
Children, progeny. The use of this word in a lease-deed does not show that the lease can be inherited by collaterals—See ('26) 13 AIR 1926 Oudh 260 (261): 93 Ind Cas 927.

Avada (Mar.)
Cistern for animals to drink water from. —(1890) 14 Bom 1 (9).

Babuana grant
Grant of property generally to the junior male member of family of a Raja in lieu of maintenance.

Ba farzandan (P.)
A term inserted in a grant to indicate that it is made to the grantee and his posterity.

Bagh (H.)
A garden, a grove, a plantation.

Bahama wajah
These words used in a gift deed indicate an absolute estate—('23) 10 AIR 1923 ALL 234 (234): 65 Ind Cas 653.

Bai (A.)
Sale.

Bai-bil-wafa (A.)
(Also spelt as 'Bye-bil-wafa'). Sale with a contract of repurchase; mortgage by conditional sale.

Bainama (H.)
(Also spelt as—Bayanama.) Sale-deed.

Bakasht
The word 'baksht' literally means 'in the cultivation of' and when the word *malik* is added to it, the difference between *khudkast* and *bakasht-i-malik* becomes very slight—('26) 13 AIR 1926 P C 60 (62).
The term *bakasht* is the invention of the Survey Authorities and is used by them to denote the actual cultivating possession either of the proprietor or tenure holders as the case may be—('28) 15 AIR 1928 Pat 209 (211): 106 Ind Cas 272.

Bandhak (S.)
A pledge, a pawn, a mortgage.

Banjar (H.)
Fallow land.

Bastu
Site or foundation of a house. The word is derived from 'vastu.' (S.).

Bat (H.)
Partition.

Batai (H.)
Division of crop between the cultivator and the landlord.

Batta (H.)
(Correct spelling 'Bhatta.') An allowance.

Bayana (H.; Ben.)
Earnest-money.

Bemiad
Without any term.

Benamidar
The person whose name appears in a *benami* transaction but who is not the real person entering into the transaction. (See 'Benami transaction').

Benami transaction
A transaction entered into in the name of a person other than person really entering into the transaction. (See S. 53 Note 5.)

Beneficial interest
If A holds property in trust for B, A has legal estate and B has the beneficial interest. (See S. 3 Note 24.)

Bhadekhat (H.; Mar.)
It is an agreement between the lessee and the lessor whereby the lessee agrees to occupy and pay rent for the property on the conditions therein stated—(1869) 5 Bom H C R (A C) 92 (94).

Bhagbandak (S.; Tam.)
Usufructuary mortgage.

Bhandaki khat
(From 'Bandhak', a pledge, a mortgage). A simple mortgage-deed.

Bharatia (Ben.)
Suggests that the tenancy is not permanent—('32) 19 AIR 1932 Cal 398 (404): 137 Ind Cas 658.

Bharnanama (Ben.)
Deed of usufructuary mortgage—(1893) 20 Cal 609 (613).

Bhogyam (S.; Tam.)
Usufructuary mortgage.

Bikri (H.)
Sale.

Bila intiqal (P.)
Free of charge or incumbrance—('37) 24 AIR 1937 Oudh 295 (297): 167 Ind Cas 295.

Bila miad
Without any term.

Birt (H.)
(From 'Vritti' (S.), support, maintenance). A right, custom or privilege derived from performance of offices whether secular or religious. There are various kinds of *birt* such as *birt zamindari, sankalp birt, marwat birt,* etc.

Birt jajmani (H.)
Right of *purohits* to receive offerings that may be made to them by *jajmans.*

Biswi mortgage
'Biswi' (H.) is the name usually given in eastern Oudh to mortgages of land in subtenure—('22) 9 AIR 1922 Oudh 75 (77): 67 Ind Cas 808.

Bona fide (L.)
In good faith.

Bona fides (L.)
Honest intention, good faith.

Borokta (Ben.)
AIR 1921 Cal 424 (425): 62 Ind Cas 49.
Does not indicate fixity of rent—('21) 8

Brahmottara (S.)
(Brahma-uttara) Lands originally granted rent-free to Brahmans as a reward for their sanctity or learning or to enable them to devote themselves to religious duties and education.

Burgadar (Ben.)
A person cultivating land of another with a stipulation that he would keep half the produce in return for his service; not necessarily a tenant.

Butwara (H.)
(Also 'Butwada'). Division of property in two parts; partition.

Bye-bil-wafa: see BAI-BIL-WAFA.

Caveat emptor (L.)
Let the purchaser beware. (See S. 55 Note 9.)

Certum est quod certum reddi potest (L.)
That is certain which can be made certain.

Cess
A payment made by agricultural tenant over and above his rent which goes to meet some public charges.

Cessanate statute primitivo cessat derivativus (L.)
The derived estate ceases on the determination of the original estate. (See S. 115 Note 1.)

Cestui que trust (L.)
The person who possesses the equitable right to property, the legal estate being vested in a trustee; beneficiary.

Ceteris paribus (L.)
Other things being equal.

Chakran lands (Ben.)
Lands held by service tenure. (See S. 105 Note 69.)

Chali genis (Kan.)
Temporary tenants—See (1883) 7 Bom 256 (259).

Champerty
A bargain between a party to a litigation and a third person to share between themselves the property sued for in the event of the party being successful, whereupon the third person carries on the litigation at his expense. It is an aggravated form of maintenance.

Champerty (*contd.*)

Chance of succession: see SPES SUCCESSIONIS.

Char (Ben.)
A sand bank or island in the current of a river deposited by the water.

Charge-holder
The person in whose favour a charge is created.

Charity
See section 18 Note 3.

Chevisance
An agreement or composition between a creditor and debtor.

Chit (H.)
A rough note or account; a banker's acknowledgment of accountability for money deposited.

Chose in action
The expression chose in action in England was used to describe all personal rights of property which could only be claimed or enforced by action and not by taking physical possession, claims enforceable by taking physical possession being known as "chose in possession." (See S. 3 Note 21.)

Chose in possession: See CHOSE IN ACTION.

Choultry
A resting place for travellers—See (1933) 20 AIR 1933 Mad 782 (784): 146 Ind Cas 307.

Chowkidari chakran lands (Ben.)
Lands held on service tenure by chowkidars or village watchmen.

Chuck (H.)
(Also: chak) A circle or group for purposes of assessment; a portion of land divided off.

Chur: See CHAR.

Clog on redemption
Provision in a mortgage-deed which attempts to deprive the mortgagor of his right to redeem *absolutely* and *at any time* after the mortgage-money has become due. (See S. 60 Note 28.)

Coercion
See definition given in S. 15 of the Contract Act (See also S. 126 Note 6 of the T. P. Act.)

Common law lien
See S. 100 Note 2.

Competent to contract
See S. 7 Note 3.

Concurrent lease
See S. 108 clause (1) Note 10.

Condition
It signifies a quality annexed to an estate by virtue of which it may be defeated, enlarged or created upon an uncertain event. (See S. 10 Note 5.)

Condition precedent
Where a condition is to be performed before a person can take an interest in property it is called a condition precedent. (See S. 10 Note 5.)

Condition subsequent
Where the effect of a condition is either to enlarge or defeat an estate already created it is called a condition subsequent.

Conditional debts
See S. 3 Note 27.

Conditional or restricted transfer.
Where a grant does not carry with it all the legal incidents thereof but is modified by conditions and restrictions it is a conditional or restricted transfer. (See S. 10 Note 1.)

Consideration
See definition given in S. 2 (d) of the Contract Act.

Consolidation of mortgages
See S. 61 Note 2.

Constructive fraud
An act which although not originating in any actual design or contrivance to perpetrate a positive fraud or injury upon other persons is yet, by its tendency to deceive or mislead other persons or to violate private or public confidence or to impair or injure public interests, deemed equally reprehensible as positive fraud. (See S. 34 Note 3.)

Constructive notice
Constructive notice is knowledge which the Courts impute to a party upon a presumption so strong that it cannot be allowed to be rebutted, that the knowledge must have been communicated. (See S. 3 Note 28.)

Contingent charge.
A present charge as security for discharging a contingent liability. (See S. 100 Note 9.)

Contingent class
See S. 22 and Notes thereon.

Contingent debt
A debt the payment of which is dependent upon a contingency. (See S. 3 Note 27.)

Contingent interest
See S. 21 and Notes thereon.

Contract
An agreement enforceable by law.

Contract for sale
See S. 54.

Contractual subrogation
See S. 92 Notes 1 and 19.

Conventional subrogation See S. 92 Notes 1 and 19.

Conveyance
A transfer of property from one person to another. A deed or instrument by which such transfer is effected.

Conveys
See S. 5 Note 4.

Corpus
Body, material substance.

Corpus or transfer
See S. 8 Note 10.

Counterpart
That which completes another.

Covenant
An agreement between two or more parties by which either of them pledges himself to the other that something shall be done. For distinction between a condition and covenant, see S. 10 Note 5.

Covenant for perpetual renewal
See S. 105 Note 35.

Covenant for quiet enjoyment
See S. 55 Note 9 and S. 108 cl. (c) Note 1.

Covenant for title
See S. 55 Note 9; S. 65 Note 4.

Covenant running with the land
A covenant is said to run with the land when the benefit or burden of it passes to the successors in title of the covenantee or the covenantor as the case may be. (See S. 40 Note 1.)

Covinous
Fraudulent. (From '*covin*' which means an agreement between two or more persons to defraud another.)

Crown grants
See Preamble Note 4.

Cujus est solum, ejus est usque ad caclum et ad inferos (L.)
Whoever is the owner of the soil, it is his even to firmament and to the middle of the earth.

Curator
Protector of property, one appointed by law as guardian; one who has the charge of anything.

Cuttoogootaga (Tam.)
Denotes lease in perpetuity—See (1861) 8 Moo Ind App 327 (330): 4 Suth W R (PC) 73 (PC).

Cypres, doctrine of
See S. 26 Note 2.

Dahyak
Analogous to *nankar* and is a charge on the property. (See S. 100 Note 32.)

Daimi (H.)
Means relating to what is perpetual—('28) 15 AIR 1928 Cal 531 (532): 117 Ind Cas 675.

Daimi kaimi (H.)
The use of these words in a patta imports permanent tenancy—See ('34) 21 AIR 1934 Cal 861 (862): 153 Ind Cas 623.

Dakhli rehan (H.)
An anomalous mortgage—('37) 24 AIR 1937 Pat 261 (262): 169 Ind Cas 75.

Dakhildar (H.)
Commonly used in the upper part of India as meaning a tenant with occupancy rights —('31) 18 AIR 1931 Pat 361 (363): 135 Ind Cas 93.

Dakhil kharij (H.)
Entering the name of new proprietor and removal of the name of the old proprietor.

Damdupat (Mar.)
Rule of Hindu law by which the interest recoverable at any one time cannot exceed the principal—See (1863) 1 Bom H C 47 (49); (1868) 12 Moo Ind App 157 (187): 2 Beng L R P C 44.

Darpatni (Ben.): See PATNI.

Darpatnidar (H.)
Holder of a *darpatni* tenure.

Dartaluk (H.)
Subordinate taluka or estate.

Dasabandham (Tam.)
Right to receive one-tenth of the profits. A right to *dasabandham* does not in itself imply a right to hold the lands on which *dasabandham* is imposed—('16) 3 AIR 1916 Mad 102 (106)—31 Ind Cas 565.

Dastawez makfuli (P.)
'Dastawez' means a document. The use of the expression *makful* or *makfuli* indicates an intention to create a mortgage.

Daswant
Analogous to *nankar*. It is a charge on the property.

Dawami
The use of the expression 'dawami' in a lease does not necessarily import permanency or heritability.

De die in diem (L.)
From day to day.

De minimis non curat lex (L.)
The law cares not for small or trivial things.

Debentures of companies
For definition See S. 2 (4) of the Indian Companies Act, VII of 1913.

Debitum in præsenti solvendum in futuro (L.)
A debt due at present to be discharged at a future date.

Debt
A sum of money payable in present or in future by reason of a present obligation.

Debutter property
Property dedicated to a temple or idol.

Defeasance and repugnant clause
See S. 32 Note 9.

Defeasance clause
Clause in a transfer defeating the transfer on the happening or non-happening of the contingency.

Dehors (Fr.)
Foreign to; outside.

Demise
A grant; a transfer.

Deorha
Signifies that the rate of interest is fifty per cent.

Deposit
Where A advances money to B and the intention of parties is that B should keep the money until asked for by A, the transaction is a deposit.

De regueur (Fr.)
Strictly required.

Deshgat watan (Mar.)
A grant of rent-free land or cash allowance prevailing in the Bombay Presidency.

Dhara (H.; Mar.)
(1) Settled assessment. (2) Usage, practice or custom.

Dharam (H.)
Religious or charitable purpose. A bequest or gift to 'dharam' is void for vagueness and uncertainty.

Dharm (S.)
That which holds a man in the right path. Law, virtue, legal or moral duty.

Dhrista bandhaka (S.)
Simple mortgage.

Dies certus (L.)
Day certain.

Diluvion
Dimunition of land by reason of fluvial action—See ('31) 18 AIR 1931 Cal 537 (537) : 59 Cal 155 (F.B.)

Disqualified transferee
See S. 6 Note 25.

Dominant heritage
For definition, see the Easements Act (V of 1882), S. 4.

Dominant tenement: See DOMINANT HERITAGE.

Donatia mortis causa (L.)
A gift in contemplation of death.

Dry land
The term is defined in the Malabar Tenancy Act to mean a land which is neither a "wet land" nor a "garden land"—Madras Act XIV of 1930, S. 3 (*d*).

Dwelling house
See S. 44 Note 9.

Earnest-money
It is a sum of money paid by the buyer of property under a contract for sale in order to bind the seller to the terms of the agreement for sale.

Easement
See S. 6 Note 9.

Ejusdem generis (L.)
Of the same kind. It is one of the rules of construction by which general words used in deeds, statutes etc., have a less comprehensive meaning than they would otherwise have, by reason of particular words preceding them. The general words are to apply to objects of the kind or nature as those specified by the particular words.

Ekabogam (Tam.)
Possession of tenure of village land by one family without any cosharer—('22) 9 AIR 1922 P C 325 (330); 45 Mad 565: 49 Ind App 237 (P C).

Ekrar (H.)
An agreement.

Ekararnama (H.)
Deed of agreement.

Election
See S. 35.

Elegit (L.)
Literally the word means, he has chosen. A writ of execution, in English law by which the judgment creditor could elect either to have a writ of *fieri facias* or to seize all the chattels and half the land of the judgment-debtor until satisfaction. After the return of the writ the creditor became a tenant by elegit. (See S. 91 Note 25.)

Emblements
Growing crops which are annually produced by the labour of cultivator.

En ventre sa mere (L.)
In its mother's womb.

Enabling provision
Provision which makes it lawful to do something but does not compel a person to do it.

English mortgage
See definition given in S. 58 (e).

Eo nomine (L.)
By that name, on that claim.

Equitable charge
See S. 100 Note 2.

Equitable lien
See S. 100 Note 2.

Equitable mortgage
See S. 58 Note 39.

Escheat
Property falling to the State or Crown for want of an heir. (See S. 105 Note 6.)

Estoppel
A conclusive admission which cannot be denied by the party whom it affects. It is so called because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.

Ewajnama (H.)
Deed of exchange.

Ex abundanti cautela (L.)
From excessive caution.

Ex contractu (L.)
From contract.

Ex dolo malo non oritur actio (L.)
A right of action cannot arise out of fraud. (See S. 6 Note 27; S. 53 Note 9.)

Ex hypothesi (L.)
From the hypothesis.

Exchange
For definition See S. 118.

Executant
Person who executes a document.

Executor
A person appointed by a testator to carry out the directions in the will after his death.

Executory contract
It is a contract which is either wholly unperformed or in which something remains to be done on both sides.

Existing debt
See S. 3 Notes 22 and 27.

Expectation, doctrine of
Where a person knows that a land does not belong to him but expends money or does some act in the expectation that he would be given certain rights by the owner and the owner encourages him in that expectation, a Court of Equity will compel the owner to give effect to that expectation. (See S. 51 Note 22.)

Expressa nocent, non expressa non nocent (L.)
Things expressed hurt, things not expressed do not.

Expressum facit cessare tacitum (L.)
What is expressed makes what is silent to cease.

Ex-proprietary tenant
Person who has lost his proprietary rights and has become occupancy tenant of the *Sir*. (This is under some of the local Tenancy Acts.)

Family
See S. 44 Note 10.

Family arrangement
See S. 5 Note 4.

Farokht
Sale, selling. The word cannot be held to mean 'transfer' (*intiqal*) as it is inconsistent with the ordinary meaning of the word —('23) 10 AIR 1923 ALL 361 (362): 45 ALL 321.

Fee simple
In English law it means an absolute estate of inheritance.

Fee tail
In English law it means an estate restricted to a person and the heirs of his body.

Feed the estoppel
Where a person makes a grant by deed of property to which he has no title at the time of the grant and avers in it that he has title to it and subsequently acquires a title to it, the grant takes effect on the interest so acquired without any further act being necessary to be done by the grantor. The interest is said to "feed the estoppel" in such a case.

Feme sole (L.)
An independent woman, woman not subject to the control of her husband over her property.

Feoffment
In English law it means a transfer of the fee.

Feoffor
One who makes a feoffment.

Fiducia
In Roman Law *fiducia* involved transfer of ownership in a thing from a debtor to creditor on condition that the thing should be retransferred to the debtor on payment of the debt.

Fixture
A movable affixed to immovable property so as to become part of it. (See S. 3, Note 6.)

Floating charge
Charge which affects all the assets of a going concern expressed to be included in it but not specifically affecting any item until some event occurs which causes it to crystallize into a fixed security. (See S. 100, Note 10.)

Floating security: see FLOATING CHARGE.

Forbidden by law
An act is forbidden by law when it is either expressly prohibited or there is a penalty imposed by law for its commission. (See S. 6, Note 30.)

Foreclosure
Exclusion, prevention, or forfeiture of the mortgagor's right of redemption on failure to repay the money lent on the security. See S. 67.

Forehand rent
Advance rent. (See S. 105, Note 58.)

Forfeiture
Loss of a legal right by reason of some breach of obligation.

Fraud
See S. 6, Note 32.

Fraus et dolus nemini patrocinari debent (L.)
Fraud and deceit ought not to benefit any person.

From generation to generation
These words when used in a transfer import transfer of an absolute estate. (See S.
A mortgage-bond.

Gahan-khat (Mar.)
A mortgage. A pledge.

Gahan (Mar.)
A pledge or pawn.

Gage (Fr.)
8 Note 4.)

Gahan lahan (Mar.)
A mortgage by conditional sale— See (1877) 2 Bom. 231 (238).

Gahan-patra (Mar.)
Mortgage-deed.

Garden land
It is defined in the Malabar Tenancy Act to mean any land used principally for growing fruit-bearing trees—Madras Act XIV of 1930, S. 3 (g).

Genealia specialibus non derogant (L.)
General provisions do not derogate from special provisions.

Gharghanna (H.)
Rent payable in respect of the houses in the abadi of the village—See (1908) 30 ALL 235 (237): 5 ALL L Jour 361.

Ghat (H.; Ben.; Mar.)
A flight of steps for access to the water of a tank or river; the place on a river bank or on a tank where people ordinarily beth or where boats are moored for purposes of a ferry—See (1906) 33 Cal 1290 (1303): 4 Cal L Jour 343.

Ghatwal (H.)
Literally the guard of a hill-pass. The duties of person holding the office of ghatwal were police duties.

Ghatwali tenure is inalienable and indivisible—See ('24) 11 AIR 1924 (P C 5 (13): 3 Pat 183: 51 Ind App 37.

Gift
For definition see S. 122.

Girvi (H.)
Mortgaged. The word is not restricted to a usufructuary mortgage alone—(1926) 13 AIR 1926 ALL 506 (508): 48 ALL 292.

Good faith
See S. 41 Note 22.

Grant
Conveyance of property.

Gratuitous transfer.
Transfer without consideration.

Gratuitous transferee
Transferee without consideration.

Gross
A thing or right in gross exists independently and not as an appendage to another.

Gross negligence
See S. 3 Note 30.

Growing crops
See S. 3 Note 4.

Growing grass
See S. 3 Note 5.

Guzara
Meaintenance allowance or grant.

Hamesha (H.)
Always or for ever. The use of the expression in an instrument is not inconsistent with the restriction of the interest to the life of the grantee—(1901) 23 ALL 324 (330): 28 Ind App 65 (PC).

Haq (H.)
Right.

Haqiyat
Rights in immovable property—See ('11) 1911 Pun Re No. 24: 10 Ind Cas 850.

Haqq-i-chaharam
Zamindari dues payable under the custom that on private sales by contract the zamindar is entitled to receive one-fourth of the purchase-money—See (1879) 2 ALL 358 (360): (1884) 6 ALL 47: 1883 ALL W N 198.

Hat (H.; Ben.; Mar.)
A market. A *hat* is immovable property.

Hathchitti (H.)
A letter or note written by the hand.

Havala (H.)
Undertaking to pay debt of another. Transfer of a debt from the original debtor to a person who undertakes to become liable for it to the creditor.

He who seeks equity must do equity
See S. 53A Note 11; S. 61 Note 2; S. 92 Note 1.

Heir-apparent
He whose right of inheritance is indefeasible, provided he outlives the ancestor. Next of kin.

Hereditament
Anything which may be inherited, whether corporeal or incorporeal, real or personal property.

Heriot.
Right of the lord of the manor, on the death of a tenant to the best beast of the deceased tenant. (English law.)
ed tenant. (English law.)

Hiba (H.)
A gift.

Hiba-bil-ewaz (H.)
Gift for consideration.

Holding over
Whenever after the determination of a lease the lessee remains in possession, he is said to "hold over."

Horticulture
Cultivation of a garden: art of cultivating a garden.

Hundi (H.)
A bill of exchange.

Hypotheca (L.)
A pledge in which the pledgor retained possession of the thing pledged, as distinguished from *pignus*, where the possession was transferred to the pledge. (Roman law.)

Id certum est quod certum reddi potest (L.Y)
That is certain which can be made certain.

Ijara (H.; Mar.)
An "ijara" may mean a lease of lands, but it is more frequently used as a lease or form of land-revenue, rent or other proprietary rights as distinguished from a *patta* or a lease of land for cultivation—(1881) 3 Mad. 342 (344, 345) (F.B.).

Ikrarnama (H.)
Deed of agreement.

Iladarawara (Kan.)
A customary anomalous mortgage in vogue in South Canara. (See S. 98 Note 10.)

Immovable property
See S. 3 Notes 2 to 10.

Implied surrender
Surrender by operation of law. (See S. 111, Note 10.)

In esse (L.)
In existence; in being in fact.

In forma pauperis (L.)
In the character of a pauper., as a poor man.

In gremio (L.)
In the bosom.

In invitum (L.)
Against one's will.

In odium spoliatoris omnia præsumuntur (L.)
Everything is presumed against a wrong-doer.

In pari delicto (L.)
In equal fault.

In pari delicto potior est conditio defendantis (L.)
Where both parties are equally at fault, the condition of the defendant is more favourable.

In pari delicto potior est conditio possidentis (L.)
In equal fault, the condition of the possessor is more favourable.

In præsenti (L.)
At the present time.

In rem (L.)
(As opposed to *in personam* Against the thing or property.)

In solidum (L.)
Entirely; in entirety.

In terrorem (L.)
For the purpose of intimirating; by way of terrifying (See S. 114 Note 8.)

In toto (L.)
In the whole; totally.

Inam (H.)
A gift; a present. The term inam is one of mere generic significance, applicable to a Government grant as a whole—('12) 36 Bom 639 (659): 39 Ind App 202 (P C).

Incident
See S. 8 Note 11.

Incumbrance
See S. 57 Note 4.

Instrument
See S. 3.

Inter alia (L.)
Among other things.

Interesse termini (L.)
An executory interest.

Interest
(1) Right. (2) Money paid bythe debtor for the use of the sum advanced.

Inter vivos (L.)
Among living persons.

Intiqal (H.)
Transfer of rights in immovable property. It includes a transfer by way of perpetual lease—See ('27) 14 AIR 1927 ALL 788 (789): 100 Ind Cas 652.

Intra vires (L.)
Within power or authority.

Ipso facto (L.)
In the fact itself.

Ipso facto (L.)
By the law itself.

Irresistible force
See S. 108 cl. (m) Note 4.

Istemrari mokarrari (H.)
The words in a patta do not *per se* convey an estate of inheritance. (See S. 8 Note 4; S. 105 Note 47.)

Jaghirdar (H.)
The holder of a jaghir.

Jagir (H.)
(Also spelt as *jaghir*). The word *jagir* is not a term of art. It might consist of a grant of revenue-free property or of a mere grant of land revenue. It does not convey the same meaning in all parts of India—See ('36) 23 AIR 1936 Oudh 121 (123, 124): 11 Luck 588.
An assignment of Government revenue on a tract of land to a person or family. Originally such grants were for life only.
In the Punjab the term *jagir* is ordinarily restricted as meaning an assignment of land revenue only. Jagir is ordinarily not land—('12) 16 Ind Cas 855 (856) (DB) (Lah).

Jaidad (H.)
Usually means immovable property—(1909) 31 All. 523 (524): 3 Ind Cas 506 (507),

Jajman (H.; Ben.)
A person employing and feeding Brahmans for the performance of a religious ceremony.

Jajmani bahis (H.)
Books containing lists of pilgrims.

Jalkar (Ben.)
It is a right to take the profits of a river, lake or other water on a particular estate or tract of country— (1878) 3 Cal 276 (279).

Jamabandi (H.)
Rent roll.

Jamma (H.)
Rent or revenue payable.

Jenmi. (Mal.)
The owner of the *jenmi* or landlord's or mortgagor's interest under a Malabar *kanom*. It is defined in the Malabar Tenancy Act to mean a person entitled to the absolute proprietorship of land and includes a trustee in respect thereof—Madras Act XIV of 1930, S. 3 (*k*).

Jeroyiti
Jeroyiti land means cultivable or arable land, or assessable or assessed land as opposed to *inam* land. When prefixed to the word right or *hakkuq* it means right of occupancy—See ('28) 15 AIR 1928 Mad 786 (787): 111 Ind Cas 168.

Joshi (H.; Mar.)
An astronomer or astrologer. A priest.

Jote
'Jote' is a general term and it is not necessarily equivalent to "raiyati jote"—('22) 9 AIR 1922 P C 241 (242): 48 Ind App 49: 48 Cal. 460 (PC). It means tenancy of any kind—('41) 28 AIR 1941 Cal 506 (507): 197 Ind Cas 45.

The word 'jote' does not necessarily mean an occupancy holding; it may mean a raiyati, under-raiyati or any sort of holding for the purpose of cultivation—('32) 19 AIR 1932 Cal 568 (569): 139 Ind Cas 544.

Juristic person
See S. 5 Note 3.

Jus ad rem (L.)
An inchoate or imperfect right.

Jus disponendi (L.)
The right of disposing of property.

Jus in re aliena (L.)
A right in another's property.

Jus in rem (L.)
Right against the world at large. A right to or against a thing.

Kabala (H.)
A deed of conveyance; a contract; a sale-certificate.

Kabuliat (H.)
(Also spelt as Qabuliyat) An agreement in writing wherein the lessee expresses his consent to pay the stipulated rent.

Kabza (H.)
Possession.

Kaimi maurasi (H.)
Indicates permanent tenancy—See ('26) 13 AIR 1926 Cal 215 (216): 90 Ind Cas 104.

Kanom (Mal.)
Customary mortgage prevalent in Malabar. It is defined in the Malabar Tenancy Act to mean the transfer for consideration in money or in kind or in both by a landlord of an interest in specific immovable property to another (called the *kanamdar*) for the latter's enjoyment—Madras Act XIV of 1930, S. 3 (*l*).

Kanomdar (Mal.)
The mortgagee in a kanom mortgage.

Kar abadharita (Ben.)
Rent fixed in perpetuity—('40) 44 Cal W N 991 (992).

Karch-i-pandan (H.)
(Also spelt as Kharch-i-pandan.) Means literally 'betel-box expense.' It is a personal allowance to the wife customary among the Muhammadan families of rank, especially in Upper India, fixed either before or after the marriage.

Karnam (Tam.)
A hereditary village-office in Madras.

Karnavan (Mal.)
The manager of a tarwad.

Karta (S.)
Managing member of a Hindu family.

Kastkar (H.)
Tenant of the village—('27) 14 AIR 1927 Nag 23 (24): 22 Nag L R 173.

Kat-kobala (Ben.)
A mortgage by conditional sale.

Kattubadi (Kan.; Tam.; Tel.)
Quit rent assessed on lands granted to public servants.

Kattukuthagai (Tam.; Tel.)
Is in essence a lease or grant of land at a favourable rent—('28) 15 AIR 1928 Mad 375 (376): 106 Ind Cas 505.

Kayam (A.)
The word 'Kayam' is of Arabic origin denoting permanency and perpetuity—('85) 1885 Bom P J 205.

Kayam patta (H.)
Prima facie the words 'kayam patta' mean a 'perpetual lease.' But a long course of decisions have held that these words do not *prima facie* convey more than life-estate—('16) 3 AIR 1916 Mad 500 (500): 29 Ind Cas 188 (DB).

Kayam saswata patta
The use of these expressions in a lease does not *per se* convey an estate of inheritance—('92) 15 Mad 199 (202).

Kayemi (H.)
Means a permanent occupancy holding—('28) 15 AIR 1928 Cal 385 (386): 113 Ind Cas 855.

Kazi
Judge.

Kefalat (H.)
Incumbrance, pledge or security. The root meaning of the word is 'something to stand upon'—('34) 21 AIR 1934 Pat 217 (220).

Khandagutta cowle (Tel.)
Ordinarily denotes a lease and not a mortgage—See ('35) 22 AIR 1935 Mad 320 (320, 321): 156 Ind Cas 873.

Khandan (H.)
A group of descendants from one common ancestor.

Khandrika (Tel.)
A small hamlet—('32) 19 AIR 1932 P C 238 (238): 139 Ind Cas 546 (PC).

Kharidar (H.)
A purchaser.

Khasra (H.)
Field-book containing the names of persons cultivating or occupying the land, the right in which it is held and the rent payable—See C. P. Land Revenue Act, 1917, S. 45.

Khata (H.)
Ledger.

Khatkabala: see KAT-KOBALA

Khewat (H.)
(1) Record or register of shares of proprietors. (2) Statement of persons possess-

Khewat (*contd.*)
ing proprietary rights in the mahal—C. P. Land Revenue Act, 1917, S. 45.

Khorposh (H.)
A maintenance grant.

Khot (Mar.)
A farmer of land revenue or customs. In some of the Maratha districts an officer hereditarily exercising the office of collecting the Government revenue.

The khoti lands, which are cultivated by the khot himself, or by means of hired labourers, are called 'khoti khasgi,' and the rest are 'khoti nisbat' which may be sub-let to permanent tenants or to recent cultivators—('99) 23 Bom 518 (523).

Khudkast (H.)
Land cultivated by the proprietor. Home farm.

Kudivaram (Tam.)
The word literally signifies the cultivator's share of the produce in land held by him as distinguished from the landlord's share of the produce which is called *melvaram*—See ('18) 5 AIR 1918 P C 169 (171): 41 Mad 1012: 45 Ind App 209 (PC).

The word is also used to denote a permanent right of occupancy—('18) 5 AIR 1918 P C 169 (171): 41 Mad 1012: 45 Ind App 209 (PC); ('18) 5 AIR 1918 Mad 932 (938): 41 Ind Cas 788.

There is no substantial analogy between an English tenant and an Indian ryot. The reason is that the rights of ryots have come into existence independently of the zamindars. Hence the well known division of the interest in land into *melvaram* interest and *kudivaram* interest. The holder of the *kudivaram* interest i.e. the ryot, far from being a tenant of the holder of the *melvaram* right, is a co-owner with him— See ('97) 20 Mad 299 (302).

Kutkubala: See KAT-KOBALA.

Kuttubadi Tel.): See KATTUBADI

Kuzhikanam (Mal.)
The word is defined in the Malabar Tenancy Act to mean and include a transfer by a landlord to another (called the *kuzhikanamdar*) of garden lands or of other lands or of both, with the fruit-bearing trees, if any, standing thereon at the time of the transfer, for the enjoyment of those trees and for the purpose of planting such fruit-bearing trees thereon—Mad. Act XIV of 1930, S. 3 (*n*).

Lahan gahan (Mar.)
A mortgage by conditional sale.

Lakharaj (H.)
Revenue-free land.

Lambardar (H.)
A proprietor who is appointed to the post of lambardar mainly for the purpose of collection and payment of the revenue. He is the representative of the proprietary body.

Law Merchant
That part of the law which governs mercantile transactions.

Lease
For definition see S. 105.

Lease for a term certain
See S. 106 Note 3.

Lease for life
See S. 106 Note 4.

Lease from year to year
See S. 107 Note 4.

Lease-hold interest
Interest of a lessee.

Lease-hold rights
Rights of a lessee.

Legacy
A bequest.

Legal estate
See S. 5 Note 6.

Legal incident of property
See S. 8 Note 11.

Legal subrogation
See S. 92 Note 1.

Lekha mukhi (H.)
A usufructuary mortgage in the Punjab, in which the mortgagee takes over the land or property and binds himself to keep the *lekha* (account) of the produce or income and as soon as the principal and interest are paid off therefrom he has to surrender the property to the mortgagor. The mortgagor undertakes no personal liability. While the mortgagor is competent at any time to claim redemption on payment of amount due, the mortgagee is not entitled to sue for his debt—('40) 27 AIR 1940 Lah 401 (404): ILR (1941) Lah 71 (FB).

Lessee
For definition See S. 105.

Lessee holding over
See S. 116 Note 1.

Lessor
For definition See S. 105.

Licence
See S. 105 Notes 13, 14.

Lien
See S. 100 Note 2.

Life estate
An estate the duration of which is limited to the life time of the grantee.

Limitation
See S. 10 Note 5.

Lis pendens (L.)
A suit pending.

Living person
See S. 5 Note 3.

Local usage
Custom or practice confined to the locality.

Locus Pœnitentiæ (L.)
Place or chance of repentance.

Locus standi (L.)
Place for standing. Right to appear and be heard by the Court.

Lodger
See S. 105 Note 15.

Lost grant
See S. 105 Note 44.

Mahal (H.)
Any local area held under a separate engagement for payment of land revenue—(1893) 15 ALL 410 (411): 1893 ALL W N 173. See also C. P. Land Revenue Act, 1917, S. 2.

Mai hak hakuk (H.)
With all rights—(1907) 34 Cal 358 (361): 5 Cal L Jour 208.

Maintenance
(1) Per Lord Coleridge, C. J.— "There are many definitions of maintenance..... Blackstone calls it 'an officious intermeddling in a suit which in no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it.'.....There is, perhaps, the fullest and completest of all to be found in *Termes de la Ley*, 'Maintenance is when any man gives or delivers to another that is plaintiff or defendant in any action any sum of money or other thing to maintain his plea, or takes great pains for him when he hath nothing therewith to do; then the party grieved, shall have a writ against him called a writ of maintenance.'"—*Bradlaugh* v. Newdegate (1883) 11 Q B D 1 (5, 6):52 L J Q B 254: 31 W R (Eng) 792.
(2) Means of subsistence, supply of necessaries and conveniences.

Maintenance grant
Grant made for the purpose of providing subsistence, etc.

Makphul (H.)
Charged—('26) 13 AIR 1926 ALL 527 (530): 96 Ind Cas 39.

Mala fides (L.)
Bad faith.

Malabar tarwad: See TARDAD.

Malguzar (H.)
Primarily the word means rent-payer. In North Bihar it is generally applied to a tenure holder—See ('25) 12 AIR 1925 Pat 194 (197): 78 Ind Cas 492.

In the Central Provinces it means a proprietor of the village.

Malik (H.)
Literally the word means one who holds *milk* or land—('17) 4 AIR 1917 Pat 627 (630): 39 Ind Cas 755.

Ordinarily the word in relation to property means absolute owner—('23) 10 A I R 1923 Nag 56 (57): 69 Ind Cas 286.

The term 'malik' when used in a will or other document as descriptive of the position which a devisee or donee is intended to hold, has been held apt to describe an owner possessed of full proprietary rights, including a full right of alienation, unless there is something in the context or surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred—('22) 9 AIR 1922 P C 63 (68): 1 Pat 305: 49 Ind Cas 25 (PC).

Malik and kabiz (H.)
Signify absolute ownership—('24) 11 A I R 1924 Nag 195 (196): 75 Ind Cas 902.

Malikana (H.)
Malikana is not rent, nor has it the elements of rent. It is a right to receive a portion of the profits of an estate for which the Government have made a settlement with another person, the real proprietor having neglected to come in and make a settlement—(1870) 4 Beng L R A C 29 (31): 12 Suth W R 498.

Marfatdari receipt
Receipt granted in the name of payer on behalf of another—See ('26) 13 AIR 1926 Pat 465 (467): 5 Pat 415.

Market rights
See S. 105 Note 17.

Marriage brocage
Consideration paid for contriving a marriage.

Marumakkatayam (Mal.)
Law of inheritance through female line.

Marz-ul-maut (H.)
Gift in contemplation of death.

Maufi khairathi (H.)
Means that the land is held rent-free or at a low rent by the favour of or under an agreement with the proprietor—See ('25) 12 A I R 1925 Nag 452 (453): 89 Ind Cas 741.

Mehta (Guz.)
A clerk, an accountant.

Melcharth (Mal.)
The word is defined in the Malabar Tenancy Act to mean the transfer by the landlord of part of his interest in any land held by his tenant by which the transferee is entitled to evict such tenant—Madras Act XIV of 1930, S. 3 (*p*).

Melkanom (Tam.)
Mortgage upon mortgage.

Melvaram (Tam.)
The landlord's share of the produce: the share of crops claimed by Government. See also *Kudivaram*.

Miad.
Term.

Miras (A.)
The word denotes heritability or inheritance—('23) 10 AIR 1923 Cal. 705 (706).

Mirasdar (A.)
In the Bombay Presidency the mirasdar on inam estates is only a tenant at quit-rent or at a reasonable rent not subject to

Mirasdar (*contd.*)
ejectment so long as he pays—See ('94) 18 Bom 507 (511).

In Tanjore district mirasdar is a hereditary tenant under the Government— See ('69) 4 Mad H. R. 153 (161).

Mirasi (A.)
Denotes heritability and permanence of tenure.

Mireshorotto janmaiya (Ben.)
'Acquiring miras right.' The use of these words in a lease shows that it is heritable and permanent—('23) 10 AIR 1923 Cal 705 (706).

Modus et conventio vincunt legem (L.)
The form of agreement and the convention of parties overrule the law.

Moggu (Kan.)
Is an allowance received by a *wargadar* from *walawargdars* holding lands within the *warg* for which he holds the patta—('13) 10 Ind Cas 665 (665).

Mokarari (H.)
"The Arabic word 'mokarrar' is derived from the word 'karar' meaning agreement. The inflexions of 'karar' 'mokarar' or 'mukarrara' which has taken the Indian form of 'mokarrari' means agreed upon or fixed" —('31) 18 AIR 1931 Cal 265 (267): 131 Ind Cas 584.

The word usually employed in creating a fixed rent in perpetuity is the word 'mokarari'—('27) 14 AIR 1927 P C 20 (21): 54 Ind App 48: 54 Cal 166 (PC).

Mokhasa
(Also spelt as mokasa) Equivalent to Saranjam. It is defined as 'villages or lands or share in the rule over them or revenue arising from them, granted on condition of military service or in inam'—17 Bom 431 (443, 444): 20 Ind App 50 (PC).

Mokhasa is a well known tenure in Northern Cirkars. It implies a service tenure—('30) 1930 M W N 945 (952).

Mokurari: See MOKARARI

Mourasi
Implies permanent hereditary tenure.

Mouza (H.)
A village.

Mowrasi
Denotes a heritable estate.

Muafi (H.)
Revenue-free or rent-free holding.

Muakhiza
The root meaning of the word is 'taking' and the word is generally used in the sense of taking satisfaction or calling to account. The word 'muakhiza' does not necessarily imply a power of sale—('12) 34 ALL 446 (449): 15 Ind Cas 435.

Muchalika (H.)
Written agreement by the tenant.

Muddatakrayam (Tam.; Tel.)
Land mortgaged with option to the lender to consider it as his property if the mortgage is not redeemed within a stipulated period—('06) 29 Mad 531 (533).

Muhatarifa (H.)
It is rent paid by persons who are not agricultural tenants residing in the *abadi*—('04) 1 ALL L J 537 (540).

Mukhtar (H.)
(Also spelt as Mukhtyar) An agent; a representative.

Mulgeni (Kan.)
Is a permanent lease. For nature and history of *mulgeni* tenure, see ('83) 7 Bom 256 (258 to 260): 7 Ind Jur 482.

Mustagraq (H.)
It literally means submerged. It is used to denote a simple mortgage. See also *Arh*.

Mutarfa (H.)
Ground rent—('39) 26 AIR 1939 Pat 252 (253): 18 Pat 190.

Mutatis mutandis (L.)
With necessary changes.

Nankar (H.)
See S. 100 Note 32.

Naslan bad naslan (H.)
In regular descent or succession. These words denote an absolute estate—See ('21) 8 AIR 1921 Oudh 240 (241): 65 Ind Cas 707; ('29) 16 AIR 1929 Oudh 415 (416): 121 Ind Cas 95.

Nazar gahan (Mar.)
It literally means sight-mortgage. A mortgage.

Nazarana (H.)
A present to a superior.

Neerozhikka otti kanom (Mal.)
A mortgage in Malabar. It is not irredeemable—('22) 9 AIR 1922 Mad 185 (185): 70 Ind Cas 20.

Nehami (Mar.)
Always.

Nemo allegans suam turpetudinem audiendus est (L.)
No one alleging his own baseness ought to be heard.

Nemo plus juris ad alium transferree potest quam ipse haberet (L.)
No man can transfer to another a right or title greater than what he himself possesses.

Nibandha (S.)
In Hindu law, a kind of property having something to do with land. (Gharpure's *Hindu law.*)

A corrody or fixed allowance granted by the king or person in authority to be received from the proceeds of a manufactory, mine or estate. (Wilson's *Glossary.*)

Nidhi (S.)
Fund.

Nikasi (H.)
Gross income—See ('24) 11 AIR 1924 Oudh 92 (93): 74 Ind Cas 95.

Nirantar (Mar.)
Perpetually, for ever. (See (1876) Bom P J 227)—Permanent. (See ('31) 18 AIR 1931 Bom 426 (469): 133 Ind Cas 639.)

Non dat qui non habet (L.)
He gives not who hath not.

Non est factum (L.)
It is not his deed.

Nova constitutio, futuris formam imponere debet, non præteritis (L.)
A new law ought to impose form on what is to follow, not on the past.

Novation
Substitution of a new contract.

Nullus commodum capere potest de injuria sua propria (L.)
No one can take advantage of his own wrong.

Occupancy tenant
Under the local tenancy laws the tenants are divided into different classes. Occupapancy tenant is one of them. For definition of ocupancy tenant, See S. 28 of U. P. Tenancy Act, 1939; S. 5 of the Punjab Tenancy Act, 1887; S. 10 of the C. P. Tenancy Act, 1920.

Occupation rent
See S. 76, Note 18.

Omne majus continet in se minus (L.)
The greater contains the less.

Omnia rite acta præsumuntur (L.)
All things are presumed to have been rightly done.

Onerous gift
See S. 127.

Optimus interpres rerum usus (L.)
Usage is the best interpreter of things.

Ostensible owner
See S. 41, Note 8.

Otti (Tam.; Mal.)
See S. 98, Note 8.

Ottidar
Holder of an *otti* mortgage.

Owelty
Amount payable by one cosharer to another for equalising the partition.

Pala
A turn of worship—('29) 16 AIR 1929 Nag 81 (81): 115 Ind Cas 170.

Panyam (Mal.)
A mortgage.

Pan-mala (Mar.)
A plantation; a garden of the betel-vine.

Paracudi (Tam.)
A migratoryor non-resident cultivator.

Parapad (Tam.)
The nett rent—(1862-63) 1 Mad H C R 112 (112).

Pardanashin (H.)
(Literally, seated behind a curtain.) One who observes the practice of seclusion.

Particular estate
Under the English law the fee simple is the largest possible estate. Hence an estate tail or any other estate less than the fee simple was called a "particular estate" (Latin, *particula*—small part).

Parsaipan
A right similar to right to the pala or turn of worship.

Particeps criminis (L.)
One who assists another in carrying out a fraudulent purpose.

Patni (Ben.)
A tenure by which the occupant holds of a zamindar a portion of the zamindari in perpetuity, with the right of hereditary succession, and of letting or selling the whole or part as long as a stipulated amount of rent is paid to the zamindar, who retains the power of sale for arrears, and is entitled to a regulated fee or fine upon any transfer. The tenure created by an under-letting in the second degree is termed *dar-patni* (or lease within lease); and a third under-letting is denominated *seh-patni* (from the Persian *seh*, three). This description of subtenures originated in Burdwan, being created by the Raja or Zamindar. It has been extended and sanctioned by the Bengal Regulation VIII of 1819.—(Wilson's *Glossary*).

Patnidar (Ben.)
Holder of a patni.

Patta (H.; Mar.; Tel.)
(Also spelt as Putta, Pottah) A deed of lease.

Patti (H.) A part of a village: a division of land into separate strips.
Mar.) A share of a village. But the term is more often employed to denote a general collection or contribution.

Pattidar (H.)
Owner of a patti in a village.

Pendente lite nihil innovetur (L.)
Pending a litigation nothing new should be introduced.

Pension
See S.. 6 Note 24.

Per my et per tout (L.)
By half and the whole; in part and entirely.

Per se (L.)
By itself.

Permissive waste
Neglect of necessary repairs. A waste which consists in permitting the demised property to become ruinous is called *permissive* waste as distinguished from *voluntary* waste which consists in doing unauthorised acts that alter the character of the demised property.

Perpetuity
For rule against perpetuity, See S. 14 Note 2.

Person
See S. 5 Note 3.

Persona designata (L.)
A person described; one described as an individual.

Peruarthum (Mal.)
A customary anomalous mortgage.

Pignus (L.)
A pledge or security for a debt or demand. A pledge is called *pignus* when the possession of a thing was transferred to the pledgee, and *hypotheca*, when the pledgor retained it in his possession.

Portion
Property settled or provided for in favour of children or their issue.

Post diem (L.)
After the day.

Pottah: See PATTA.

Power of appointment
Under the English law an executory interest was any interest in land which was not a reversion or a remainder. Executory interests were frequently created by means of *powers of appointment*: that is, by giving to some person the right to take the land away from one set of persons and give it to others. A *power* is a capacity given to a person to dispose of a greater estate in the land than he himself possesses. Powers are either (1) *general powers*, or (2) *special powers*.

GENERAL POWERS are those where the donee of the power can *appoint* the land to any one without restriction. For example: A grants land to such persons as B shall appoint by deed or by his will. B is called the 'appointor,' or 'donee of the power,' and he can 'appoint' or give the land to any one he likes, including himself. Until B makes the appointment he has no estate or interest in the land; but he can, at any moment, by executing a deed, vest the fee simple in himself.

SPECIAL POWERS are those where the donee of the power can only appoint the land to one or more of the members of a certain class of persons. Thus, land may be given by a marriage settlement to the husband for life, with remainder to such of the children of the marriage as the husband shall by will appoint. The husband can then give the land by his will to any of his children; but he cannot give it to any person who is not his child. The children are said to be the 'object of the power.' (Topham, *New Law of Property*. See also *In re Fane*, (1913) 1 Ch. 404 (413).)

Pre-emption
Rightof pre-emption is the right to acquire the property in preference to others; the right of purchasing first.

Premia (L.)
Payments made for insurance.

Premium (L.)
A payment made for insurance. A reward.

Premium in lease
See S. 105 Note 58.

Presumptive reversioner
One who, if the female should die immediately, would be the heir.

Price
See S. 54 Note 12.

Prima facie (L.)
On the first view.

Privity
Participation of interest.

Privy
Partaker; person having an interest in an action.

Pro tanto (L.)
To that extent; for so much.

Profit a prendre
Right to take some profit out of the tenement of another.

Property
See S. 5 Note 5.

Proprio motu (L.)
Of his or her own accord.

Proprio vigore (L.)
By its own force.

Public office
A position which has a public duty attached to it.

Public policy
See S. 6 Note 35.

Pujari (H.; Mar.)
A priest in a temple who conducts the worship and receives offerings.

Purakudi (Tam.)
Does not imply a permanent occupancy right.

Purohit (S.)
Family priest.

Putra (S.)
Son.

Putra pautradi krame
Signifies an estate of inheritance.

Putra putradik
These words denote descent in the direct male line—('23) 10 AIR 1923 P C 217 (218): 82 Ind Cas 879 (P C).

Qua (L.)
In the character of.

Quantum (L.)
How much; proportion.

Quicquid plantatur solo solo cedit (L.)
Whatever is affixed to the soil belongs to the soil.

Qui facit per alium facit per se (L.)
He who acts through another acts through himself.

Qui in jus dominiumve alterius succedit jure ejus uti debet (L.)
He who suceeds to the right or property of another ought to be clothed with his right.

Qui prior est tempore potior est jure (L.)
He who is first in time has the strongest claim in law.

Qui sentit commodum sentire debet et onus (L.)

He who enjoys the benefit ought also to bear the burden.

Quod nullius est, est domini regis (L.)

That which is the property of nobody, belongs to our lord the King.

Raiyat (H.)

A cultivator. The word does not necessarily mean an agricultural tenant. It is often used in a wider sense as meaning a tenant in general—See ('26) 13 AIR 1926 Cal 215 (216): 90 Ind Cas 104.

Raiyati (H.)

Belonging to the tenant.

Razinama (H.)

A deed of relinquishment of rights.

Real property

The word *real* in English law is used, not in its common sense, in which it is opposed to sham, or imaginary, or ideal, but principally to convey the notion of the capability of specific restitution. The terms *real* and *personal* were first applied to actions; and were afterwards extended to things and property with the meanings which they had acquired in connection with actions. If the estate was a fee simple or fee tail or an estate which might last for an *uncertain* length of time, e.g., an estate for the life of a tenant, and if the services rendered by the tenant were considered free, then his holding was a *freehold*, and his rights were protected in the King's Court. A tenant of a freehold who was ejected by his landlord or any other person could bring an action to recover the land itself, i.e., the 'res' or 'thing' of which he had been deprived; the action was called a *real* action, and the property which could be recovered was *real property*.

While describing the growth in England of the Civil Law in the thirteenth and fourteenth centuries, Radcliffe and Cross remark, "A very frequent classification—and one which has left a deep mark on our law—was that into real actions, personal actions and mixed actions. In the first the plaintiff claimed—and if he was successful would recover—a specific object of property (a 'res'). In a personal action, on the other hand, the plaintiff sought to enforce a general claim to compensation in damages from the defendant, while in a mixed action he could claim alternatively either specific restitution or damages. Broadly speaking, the only objects of property which were recoverable in specie in the developed common law system were estates of freehold in land. The actions by which title to such estates could be asserted were the 'real actions' *par excellence*, and the estates themselves came in consequence to be called 'real property.'" (*The English Legal System*; 1937 Edn.)

Redeem, right to

See S. 60 Note 4.

Redeem up and foreclose down

See S. 94 Note 2.

Redemption

See S. 60 Note 4.

Re-entry, right of

See S. 6 Note 8.

Regalia

The royal rights of a sovereign.

Registered

See S. 3 Note 20.

Rehan (H.)

"It is an expression which most people would understand when used by villagers as meaning a usufructuary mortgage."—('15) 2 A I R 1915 ALL 142 (142): 29 Ind Cas 554.

The use of the word '*rehen*' in a mortgage has been held of itself sufficient to convey a power of sale—('13) 20 Ind Cas 870 (871) (Oudh).

Release or relinquishment

Giving up or abandoning of some right or claim.

Remainder

It is that expectant portion, remnant or residue of interest which on the creation of a particular estate, is at the same time limited over to another, who is to enjoy it after the determination of such particular estate. Thus a remainder is an estate *given* to a person after some other estate given by the same instrument shall have come to an end. It is a future estate which waits for and depends upon the termination of some particular estate.

Remainderman

A person entitled to a remainder.

Rent

See S. 105 Note 59.

Rent note

An agreement to pay rent executed by the lessee.

Repugnant clause

See S. 32 Note 9.

Res accessoria sequitur rem principalem (L.)

The accessory follows the principal.

Res communes (L.)

Things common to all.

Res extra commercium (L.)

Things which cannot be the subject of commerce or traffic.

Res gestæ (L.)

Things done.

Res nullius (L.)

The property of no one.

Restitutio ad integrum (L.)

Entire restitution.

Restraint on anticipation

See S. 10 Note 19.

Restraint on marriage

See S. 32 Note 6.

Restricted transfer

See S. 11 Note 2.

Restrictive covenant

Covenant restrictive of the user of land.

Revenue

Income, annual profit received from land or other funds. Sum payable annually to Government.

Revenue sale

See S. 8 Note 3.

Reversion

During the continuance of any particular estate, the interest of the tenant in fee simple, which still remains undisposed of—that is his present estate, in virtue of which he is to have again the possession at some future time—is called his reversion. (See also S. 54 Note 18.)

Right in gross

A right exercisable by an individual on another's land, but irrespective of the ownership or occupation by that individual of any dominant heritage.

Right in personam: See RIGHT IN REM.

Right in rem

Right *in rem* means a right in respect of a thing. Right *in personam* means a right against or in respect of a person. In right *in rem*, it is the relation to the object which is most conspicuous; while in right *in personam* it is the relation to the person under liability which is conspicuous.

Right of re-entry: See *RE-ENTRY, RIGHT OF.*

Royalty

Payment to the owner of minerals for the right of working the mines.

Ryot: See RAIYAT.

Sadavarat (H.)

Distribution of provisions daily to passers by, mendicants and paupers.

Salami (H.)

A gratuity or offering on receiving a lease, or settling for revenue or on receiving any favour real or implied.

Sale

See S. 54.

Salvage

Compensation allowed to persons by whose exertions ships or goods have been saved from dangers of sea, fire, pirates or enemies.

San (Guz.)

A mortgage without possession prevailing in Gujrat—(1882) 6 Bom 193 (201): 6 Ind Jur 363 (FB).

Sanad (H.)

Document or charter from the ruling authority to an individual conveying to him, emoluments, titles, privileges or rights to revenues from lands.

Sanadi grant

Grant made by a *sanad*.

Sanba sani kaimi asat jotedari (Ben.)

These words indicate a permanent right —('31) 18 A I R 1931 Cal 87 (89): 129 Ind Cas 855.

Sankalp (S.)

A solemn mental determination to perform some pious act or to make a charitable donation.

Sankhat (Guz.): See SAN.

Santati (H.; Mar.)

Progeny. The word is wide enough to include natural as well as adopted children—See ('28) 15 A I R 1928 Mad 126 (127): 107 Ind Cas 289.

Saranjam (H.; Mar.)

Marathi equivalent for the term Jaghir—('12) 36 Bom 639 (658): 39 Ind App 202 (PC). It is a grant ordinarily of Government revenue and not of the soil—('82) 6 Bom 598 (603). Prima facie the grant is a personal one—('12) 36 Bom 639 (658): 39 Ind App 202 (PC).

Sarasari bemiadi kabuliyat (H.)

A permanent lease but variable as to rent—('28) 15 AIR 1928 Cal 392 (395): 55 Cal 435.

Sarasari jimbadari (H.)

Refers to an ordinary tenancy with no particular incident such as fixity of rent attached to the tenancy—('25) 12 AIR 1925 Cal 1209 (1210): 88 Ind Cas 377.

Sarbarahkar (H.)

Manager of land.

Saswatham (S.; Tam.)

The word occurring in a lease-deed ordinarily imports permanent tenancy—('19) 6 AIR 1919 Mad 886 (886): 48 Ind Cas 301.

Savaram jeroyiti

Home farm cultivation—('28) 15 AIR 1928 Mad 786 (787): 111 Ind Cas 168.

Sayer

The duties which the owners of *gunges, bazaars, hats, etc.*, used to levy on commodities sold in these places were designated as *sayer* collections—('92) 19 Cal 8 (10).

Sayer means all sorts of imports in addition to land revenue—('27) 14 AIR 1927 Cal 956 (958): 55 Cal 35 (50).

Scribe

Writer.

Seisin

Possession.

Sepatni: See PATNI.

Service grants

See S. 105 Note 69.

Service tenures

See S. 6 Note 26a.

Sham transaction

See S. 53 Note 5.

Shamilat-patti (H.)

Patti held in common by the whole proprietary body of a village.

Shikmi (H.)

The word 'shikmi' is derived from the word 'shikam' which means the belly and its primary meaning is 'inclusion'—('01) 23 ALL 260 (260).

The word 'shikmi' is a common expression meaning an under-tenant—('31) 18 AIR 1931 Pat 361 (362): 135 Ind Cas 93.

Sic utere tuo ut alienum non laedas (L.)

So use your own property as not to injure the rights of another.

Sign

See S. 3 Note 12.

Simple mortgage

For definition See S. 58.

Simple mortgage usufructuary

See S. 58 Note 41; S. 98 Note 5.

Sine qua non (L.)

An indispensable condition.

Sir

For definition see the United Provinces Tenancy Act, XVII of 1939, S. 6 and the Central Provinces Land Revenue Act, II of 1917, S. 2 (17).

Solatium (L.)

Compensation.

Specialty

A contract by deed.

Specific immovable property

See S. 58 Note 9.

Spes successionis (L.)

Expectancy of succession. (See S. 6 Notes 3 and 4.)

Standing timber

See S. 3 Note 3.

Status quo (L.)

The state in which the thing is already.

Stocks and shares

See S. 137 Note 3.

Subrogation

See S. 92 Note 1.

Sudbharna bond

A usufructuary mortgage bond.

Suggestio falsi et suppressio veri (L.)

Suggestion of falsehood and suppression of truth.

Sui juris (L.)

Of his own right. A person who is not a minor, insane or subject to any other disability.

Suo motu (L.)

Of his or its own motion.

Surrender

It is the yielding up of an estate for life or years to him who has the immediate estate in reversion or remainder. (See S. 5 Note 4 and S. 111 Note 8.)

Swadina adamanam (Tam.)

Usufructuary mortgage.

Swamibhogam (Tam.)

The proprietor's or landlord's right.

The term 'swamibhogam' usually implies that the ownership in the soil vests in the person who is entitled to 'swamibhogam'—

('21) 8 AIR 1921 Mad 233 (233): 62 Ind Cas 750.

Swamibhogam is the revenue derived from the tenants or occupiers over and above what is necessary to pay the tax—('29) 16 AIR 1929 P C 156 (157): 52 Mad 549: 56 Ind App 248 (PC).

Tacking

See S. 79 Note 1.

Tahsildar (H.)

A Revenue Officer in charge of the collection of the revenue of a tahsil.

Takavi (H.)

Loans advanced to agriculturists by the Government at the time of sowing.

Talook (H.)

(Also spelt as Taluk) Estate; division of a district.

Talukdar (H.)

The holder of a talook.

Tamassuk (H.)

A bond.

Tanaka (Tel.)

A mortgage. The word 'tanaka' occurring in a document evidencing a loan denotes a mortgage—('19) 6 AIR 1919 Mad 1117 (1121).

Tangible property

See S. 54 Note 19.

Taraga (Mal.)

A lease or rather a counterpart of a lease known in Malabar as 'taraga'—See ('21) 8 AIR 1921 Mad 80 (30): 44 Mad 509.

Taran gahan (Mar.)

Mortgage without transfer of possession—(1890) 14 Bom 408 (416) (FB).

Tarwad (Mal.)

An institution peculiar to Malabar. A group of persons, all of them tracing their descent in the female line from a common female ancestor owning joint property under the absolute control and management of the *karnavan* (senior male member)—(1905) 28 Mad 182 (189): 14 Mad L Jour 415 (FB).

Tenancy at will

See S. 105 Note 32.

Tenancy by acquiescence

See S. 105 Note 12.

Tenancy by holding over

See S. 105 Note 38.

Tenancy by payment and acceptance of rent

See S. 105 Note 8.

Tenancy by sufferance

See S. 116 Note 1.

Tenancy-in-common

This estate is created when several persons have several distinct estates, either of the same or of a different quantity, in any subject of property, in equal or unequal shares and either by the same acts or by several acts and by several titles and not a joint title.

Tenant at will

See S. 105 Note 32.

Tenant by elegit.

See S. 62 Note 2.

Tenant by sufferance

See S. 116 Note 1.

Tender

See S. 84 Note 5.

Tenement

Though in its popular acceptation the term is only applied to houses and other buildings, yet in its original proper and legal sense, it signifies everything that may be held provided it be of a permanent nature, whether it be of a substantial and sensible, or of an unsubstantial, ideal kind.

Term limited conditionally

See S. 111 Note 4.

Terminus a quo (L.)

The term from which. The starting point (as of the period of limitation).

Thalwa

Person who is not a tenant of the village—('27) 14 AIR 1927 Nag 23 (24): 22 Nag L R 173.

Thanaka

Security.

Thing

See S. 118 Note 7.

Timber

See S. 3 Note 3.

Toda giras haq.

These annual payments though originally exacted by the Grasias from village communities in certain territories in the west of India, by violence and wrong and in the nature of blackmail, had, when these territories fell under the British rule, acquired by long usage a quasi-legal character as customary annual payments; and as such they were recognized by the British Government—('73) 10 Bom H C R 281 (283).

Transfer in invitum

Transfer of property by operation of law, independently of the will of the party.

Ubhayapattam (Mal.)

It is equivalent to a *kanom* mortgage—('07) 30 Mad 61 (65): 16 Mad L Jour 462.

Ulavadi (Tam.)

Does not import a permanent tenancy—('99) 22 Mad 264 (267).

Ulavadai mirasdar (Tam.)

Imports a permanent tenancy—('96) 19 Mad 485 (494) : 6 Mad L Jour 247.

Ultimus haeres (L.)

The last heir.

Ultra vires (L.)

Beyond its powers.

Under-proprietor

Under-proprietor means in Oudh a person possessing a heritable and transferable right in land who is, or but for a judicial decision or contract would be, liable to pay rent therefor—U. P. Land Revenue Act, III of 1901, S. 4 (15).

Universal donee

See S. 128.

Universal succession.

See S. 128, Note 2.

Universitates juris (L.)

Universal or entire rights or duties.

Uralar (Mal.)

Trustee—('81) 3 Mad 270 (270): 4 Ind Jour 622.

Use and occupation, compensation for

See S. 105, Note 70.

Usufructuary mortgage

For definition See S. 58 (d).

Utbandi (Ben.)

Land held for a year or rather for a season only. The general custom is for the husbandman to get verbal permission to cultivate a certain amount of land in a particular place at a rate agreed upon when the crop is on the ground. The land is measured and the rent is assessed on it—('90) 17 Cal 393 (397).

Utbandi (*contd.*)

The outstanding general conception of all *utabandi holdings* seems to be that the land which is specified remains the *khas khamar* land of the landlord, and the raiyat is allowed to occupy it for a season or for a year and pays rent at a given rent for so much of it as he cultivates during that term —('33) 20 AIR 1933 Cal 609 (609).

Ut resmagis valeat, quam pereat (L.)

That an act may avail rather than perish.

Valatdan (Guz.)

It is a kind of mortgage under which the produce of land goes towards the payment of the principle and interest, the land being redeemed as soon as the debt is cleared—See ('08) 32 Bom 569 (571): 10 Bom L R 742.

Varashasan (Mar.)

An annual allowance.

Vargadar (Kan.)

The proprietor of a hereditary estate collecting and paying the assessment of the whole, although others may have portions of the village lands as separate property.

Verumpattam (Mal.)

Rent of land or gardens without any advance or loan.

Verumpattamdar (Mal.)

It means a tenant other than a *kanomdar* or *kuzhikanomdar* of a holding, for agricultural purposes, which includes wet lands, and may or may not include other lands—Malabar Tenancy Act (Madras Act XIV of 1930), S. 3 (*w*).

Vested interest

See S. 19.

Vested remainder

A vested remainder is one which is ready from its commencement to its end, to take effect so soon as the particular estate shall determine.

Vivum vadium (L.)

A living pledge.

Voluntary waste

See S. 108, clause (m), Note 1.

Vritti (S.)

A customary allowance.

Waiver

The passing by an occasion to enforce a legal right whereby the right to enforce the same is lost.

Wajib-ul-arz (A.)

Village administration paper recording the village customs.

Wakf (A.)

Wakf means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable—See S. 2 of the Mussalman Wakf Validating Act, 1913.

Wakf-alal-aulad

See S. 18 Note 5.

Wargdar: See VARGADAR.

Warranty

See S. 133 Note 4.

Waranty of solvency

See S. 133 Note 4.

Watan property

The expression has been defined in the Bombay Hereditary Offices Act to mean the moveable and immovable property held, acquired or assigned for providing remuneration for the performance of the duty appertaining to an hereditary office. It includes a right to levy customary fees or perquisites, in money or in kind, whether at fixed time or otherwise. It includes cash payments in addition to the original watan property made voluntarily by the Provincial Government and subject periodically to modification or withdrawal—Bombay Act III of 1874, Section 4.

Welsh mortgage

A conveyance of an estate redeemable at any time by the mortgagor on payment of the loan, the rents and profits to be received by the mortgagee in satisfaction of interest.

Wet land

The expression is defined in the Malabar Tenancy Act to mean land which is adapted for the cultivation of paddy—Madras Act XIV of 1930, S. 3 (*x*).

Will

It means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death—S. 2 (4) of the Succession Act, XXXIX of 1925.

Yajman (S.)

A person who employs a priest or priests to perform for him either fixed or occasional religious ceremonies.

Yajman vahi (Mar.)

Book containing list of pilgrims.

Yajman vritti

The office of hereditary priest—('12) 36 Bom 94 (99): 12 Ind Cas 928.

A "yajman vritti" primarily denotes an obligation imposed upon the *purohit*, or family priest to perform certain religious rites the performance of which no doubt carries with it certain emoluments—('32) 19 AIR 1932 Sind 60 (61): 25 Sind L R 451.

Year

For definition, see S. 3 (59) of the General Clauses Act, 1897.

Yearly rent

See S. 107 Note 6.

Zamindari (H.)

The office and rights of a zamindar. The tract of land constituting the possessions of a zamindar.

Zamindari and ryotwari lands

See S. 105 Note 75.

Zariat (H.)

Proprietor's private land—('25) 12 AIR 1925 Pat 241 (242): 4 Pat 89.

Zarichaharam (H.)

One-fourth of the sale proceeds received on sale of one's interest to another. (See S. 40 Note 12.)

Zuripeshgi lease

(Also spelt as "zarpeshgi.") See S. 58 Note 36.

TOPICAL INDEX.

N.B.— Reference are to Sections or Order and Rules and Notes. For references to Acts, Codes and Regulations, See Appendix V.

N—Note. O—Order. Pre—Preamble. R—Rule. S—Section.

Abatement
—Mortgage debt, of S 60 N 44; S 82 N 18; S 101 N 5
—Rent of: *See* Rent.
Absolute transfer S 11 N 2
—Forfeiture of
Attempt to transfer, on S 12 N 2
Insolvency, on S 12 N 2
—Meaning of S 10 N 1; S 11 N 7
—Restrictions on enjoyment void S 11 N 2
Acceleration—Rule of S 27 N 2
—English law S 27 N 2
—Object of rule S 27 N 2
—Same interest S 27 N 3
—Void, prior disposition S 27 N 4
Accession
—Accretion to land S 63 N 2; S 108 (d) N 2
See also Accretion to land
—Buildings, erected S 63 N 3
—Lease, in case of S 108 (d); S 108 (d) N 1 to 4; S 108 (q) N 1
—Machinery S 63 N 3
—Meaning of S 63 N 1; S 108 (d) N 1
—Mortgaged property, to S 63
Acquisition by mortgagee S 63 N 5
After date of mortgage S 70 N 4
Consent, mortgagor's, with S 63 N 10
Continuance of mortgage during, must be S 63 N 6
Costs of acquisition to be paid, when S 63; S 63 N 9
Distinction between S. 63 and S. 70 S 70 N 1
Extinguishment of mortgage, after S 70 N 4
Illustrations of S 70 N 2
Mortgage decree, after S 70 N 4
Mortgagee's right to S 70; S 70 N 5
Security, for purpose of S 70 N 3a
Option, mortgagor's S 63 N 6
Profits of S 63

Accession (*contd.*)
Redemption, mortgagor's right to, on S 63
Principles underlying S 63 N 1
Representative mortgagor's by S 70 N 3
Separate possession and enjoyment, capable of S 63 N 9
Suit to recover
Limitation S 63 N 8
Nature of S 63 N 8
—Physical, need not be S 63 N 1
—Test to determine S 108 (d) N 1
—Trees fallen S 63 N 4
Account
—Mortgage in possession, from: *See* Mortgagee in possession.
—Right to sue for, mere right to sue S 6 N 21
Accretion to land S 63 N 2; S 108 (d) N 2
—Artificial S 108 (d) N 2
—Imperceptible S 108 (d) N 2
—Sudden S 108(d) N 2
Accumulation of income S 17
—Direction as to
Charities, transfer in favour of S 18
Express or implied S 17 N 3
Repugnant direction void as S 17 N 3
Validity of S 17
Vested interest, direction if shows contrary intention S 19; S 19 N 10
Will, direction in S 17 N 1
—English law S 17 N 1
—Hindu law S 17 N 4
—Mahomedan law S 17 N 5
—Payment of debts for S 17; S 17 N 7
Bona fide, provision S 17 N 7
Capital fund, provision to recoup S 17 N 7
Debts of any person taking interest under transfer S 17 N 7
Debts to arise in future S 17 N 7
Past debt S 17 N 7
Transferor's need not be S 17 N 7

Reference to Official Reports are invariably given in all cases found in the Official Reports.

Accumulation of income (*contd.*)
—Period of—Limits S 17
Alternative S 17 N 3
Computation of S 17 N 3
Computation of—Eighteen years from date of transfer S 17 N 3, 6
—Preservation or maintenance of property, for S 17; S 17 N 10
—Preservation or maintenance of property, for S 17; S 17 N 10
—Provision of portions for children S 17; S 17 N 8
Interest in property to parents S 17 N 9
Substantial, if must be S 17 N 9
What amounts to S 17 N 8
—Transfer supject to restrictions, must be S 17 N 3

Acknowledgment
—Signature of executant, acknowledgment of S 3 N 13

Acquiescence
—Doctrine of S 51 N 22
—Duty to speak S 51 N 22
—Effects of S 51 N 23
—Estoppel, acquiescence a phase of S 51 N 22
—Expectation, doctrine of S 51 N 22
—Improvements—S. 51, if based on doctrine of S 51 N 23
—Requisites of S 51 N 22
—Restrictive covenant, breach of S 40 N 23
—Subsequent conduct to violation of right S 51 N 24
—Tenancy by S 105 N 12

Actionable claim
—Cause of action accruing, in future S 3 N 21; S 130 N 2
—Chose in action S 3 N 21; S 130 N 2
Assignment of S 6 N 16; S 130 N 2
Equitable assignment S 130 N 2, 11
Right of transferee to sue in his own name S 130 N 2
—Claim under S. 68, for failure to deliver possession S 68 N 15
—Compensation for improvements, right of a tenant in Malabar, to, whether S 130 N 21
—Contract, benefit of S 3 N 21, 24
—Contractual nature S 4 N 3
—Debt S 3 N 21, 22
See also Debt.
—Decree debt S 3 N 23
—Definition of S 3
—Future rent S 3 N 26
—Immovable property, right in S 3 N 21
—Interest: *See* interest
—Legal incidents of S 8
—Legal practioner, purchase by, at court sale S 2 N 6
—Meaning of S N 21
—Mere right to sue S 3 N 21
—Mortgage-debt, whether S 3 N 21; S 8 N 17; S 58 N 4
—Movable property, beneficial interest in S 3 N 24
—Policy, life, money due under S 3 N 27
—Provident fund, amount S 6 N 23
—Revenue Court, claim exclusively triable by S 3 N 25

Actionable claim (*contd.*)
—Secured debt, claim to S 134 N 3
—Security for
Passes on transfer, when S 8 N 17
Transferee of actionable claim, when entitled to S 8
—Seller's right to recover purchase money; S 130 N 4
—Share S 137 N 3
—Transfer of: *See* Actionable claim, transfer of

Actionable claim, transfer of S 130
—Admission by S 130 N 13
—Agreement for payment of debts from a fund with third person, whether S 130 N 15
—Assignment of rights by one partner to another S 5 N 4
—Beneficial interest in movable property, assignment of S 130 N 7
—'Caveat emptor,' principle, applicability of S 130 N 24
—Charge, creation of S 130 N 12
—Charge, creation of
—Complete
Execution of instrument on S 130 N 17
Transfer when S 130 N 17
—Conditional S 130 N 3
—Consideration S 130 N 11
—Consideration with or without, may be: S 130 N 11
—Disputed transfers S 130 N 17
—Execution of decree, transfer in S 130 N 10; S 132 N 7
—Existing, actionable claim must be S 130 N 4
—Fire and marine policies, assignment of: S 130 N 23
—Form of assignment S 130 N 12
No particular words necessary S 130 N 13
Security, transfer by way of S 130 N 12
—Gift of S 122 N 6; S 123 N 14; S 130 N 11
Mahomedan, gift by S 130 N 2
—Hindu joint family, debt due to S 130 N 9
—Idol, dedication to S 130 N 11
—Instances of S 130 N 13
—Instrument of transfer S 130
Authority of agent to sign S 130 N 16
Execution, transfer complete on S 130 N 17
—Judge, incompetency to buy or traffic in S 136; S 136 N 3
—Legal practioner, incompetency to buy or traffic in S 136; S 136 N 3
—Legal practioner, incompetency to buy or traffic in S 136; S 136 N 3, 4
Purchase in execution S 136 N 5
—Liability of debtor not affected S 130 N 5
—Liability of transferor, after S 130 N 20
—Life policy, assignment of S 130 N 23
—Mercantile document of title, transfer of S 137; S 137 N 5
—Mortgage-debt, transfer of S 130 N 18
—Negotiable instrument, transfer of—Chapter VIII not applicable S 137; S 137 N 2, 4
—Notice of transfer S 131; S 131 N 2
Completion of transfer, whether necessary for S 130 N 17

Actionable Claim, transfer of (*contd.*)
Conditional or qualified S 130 N 17; S 131 N 5
Defects in, waiver of S 131 N 6
Express S 130 N 17
Invalid S 130 N 17
Liability of debtor after S 130 N 17
Name and address of transferee S 131 N 4
Omission to give effect S 130 N 17
To whom to be given S 130 N 17
Transferee or his agent by S 131 N 3
Refusal of transferor to sign, mentioning of S 131 N 3
—Officer of Court, incompetency to buy or traffic in S 131 N 3
—Officer of Court, incompetency to buy or traffic in S 136 N 2
—Operation of law—Transfer by S 130 N 10
—Part of debt, assignment of S 130 N 8
—Persons prohibited, to buy or traffic in S 136; S 136 N 2
Principle underlying Prohibition S 136 N 2
—Present, transfer must be S 130 N 4
—Principles S 130 N 2
—Punjab, law in S 130 N 25
—Registration, not necessary S 130 N 14
—Relinquishment, by S 130 N 13
—Rents and profits, assignment of S 130 N 6
Distinguished from transfer of reversion S 130 N 6
—Security by way of S 130 N 3
—Security when passes S 8 N 17
—Successive transferees
Notice, subsequent transferee without S 130 N 17
Priority between S 130 N 17
—Transfer, meaning of S 130 N 3
—Transferee
Equities subject to S 132 N 3
Knowledge of liability or equities S 132 N 4
Liabilities, subject to S 132 N 2
Estoppel of debtor S 132 N 5
Rights and remedies of S 130 N 19
Suit or proceeding
Consent of transferor, unnecessary S 130 N 22
Right to institute S 130 N 22
Title, when becomes complete S 130 N 17
—Valid, transfer must be S 130 N 17
—Warranty of solvency of debtor S 133; S 133 N 2
Contract to the contrary S 133 N 5
—Writing necessary S 9 N 5; S 130 N 12, 13

Actual notice
See Notice—Actual.

Administration
—Lis pendens, administration suit, operates as S 32 N 17

Administrator
—Mortgage by S 58 N 25
—Transfer by—Subject to maintenance S 39 N 4

Advancement
—Doctrine of, no application in India S 122 N 11
—Meaning of S 39 N 6

Advancement (*contd.*)
—Transfer where third person is entitled to, provision for S 39; S 39 N 6

Adverse possession
—Acquisition of title, after redemption S 91 N 32
—Equity of redemption, of S 60 N 53
—Invalid gift, possession under S 123 N 10
—Lessee's possession S 105 N 79, 80, 82, 84; S 108 (d) N 3; S 111 N 17; S 116 N 13

Agent
See Principal and Agent.

Agreement
—Agreement to end money—Specific performance of S 6 N 17; S 58 N 6
—Alienation against: *See* Covenant not to assign or alienate
—Assignment against: *See* Covenant not to assign or alienate
—Lease, to grant: *See* Lease
—Mortgage, agreement to S 58 N 6
See also Mortgage
—Public policy, opposed to S 6 N 35
—Transfer agreement to, whether transfer of property S 109 N 3

Agricultural lease
—Agriculture, defined S 117 N 3
—Agricultural purpose
Defined S 117 N 3
Instances S 117 N 3
Test—Primary object of lease S 105 N 1
—Apportionment, principle of S 36 2; S 37 N 9
—Commencement of—When no day mentioned S 110 N 1
—Determination of S 111 N 1
Forfeiture by S 117 N 2
Mortgage, lease by S 111 N 5
Notice to quit, by S 117 N 2
—Exemption from provisions of T. P. Act S 117; S 117 N 2
—Fair and equitable rent, power of Court to decree S 105 N 64
—Forfeiture of S 117 N 2
Notice of, unnecessary S 117 N 2
Relief against—Non-payment of rent in case of S 114 N 1; S 117 N 2
—Growing crops, lessee's right to S 108(i)N 1
—Holding over, in case of S 116 N 1; S 117 N 2
—Lessee, rights and liabilities—S. 108, applicapibility of S 108 N 1; S 117 N 2
—Lessor—Rights and liabilities S 108 N 1
—Oral S 117 N 4
—Payments made on behalf of lessor, deduction of S 108 (g) N 1
—Permanent structures, erection of S 108 (p) N 1
—Principles of T. P. Act, applicability of S 105 N 1; S 117 N 2
—Transfer—Lessee's right to S 198 (j) N 9
—Transferee from lessor, rights and liabilities of S 109 N 2
—Under-lease
Forfeiture of head lease, effect on S 115 N 4

Agricultural lease (*contd.*)
Surrender of head lease, effect on S 115 N 4
—Yearly tenancy, presumption of S 106 N 13
Alien
—Capacity to hold property in India Pre N 3
—Competent to transfer S 122 N 3
Alienation
—Covenant against: *See* Covenant not to assign or alienate.
—Guardian, alienation by—Right to set aside, if a mere right to sue S 6 N 20
—Restraint on S 10
See also Restraint on alienation.
—Right to impeach—If a mere right to sue S 6 N 20
Alternative conditions
See Condition precedent—Alternative conditions.
Alternative limitations
—Failure of one under S. 13 or S. 14, T. P. Act—Effect of S 16 N 3
Annuity
—Apportionment of S 36; S 36 N 5
—Arrears of, as debt S 3 N 22
—Meaning of S 36 N 5
Anomalous mortgage
—Applicability of S. 68 S 68 N 12
—Clog on redemption S 60 N 29; S 98 N 2
—Contract silent, applicability of provisions of T. P. Act S 98 N 3
—Defined S 58
—Iladarawara mortgage S 98 N 10
—Illustrations of S 58 N 40
—Kanom S 98 N 7
See also Kanom
—Mode of effecting S 59 N 2
—Otti mortgage S 98 N 8
—Personal liability, mortgagor's S 68 N 12
—Peruarthum mortgage S 98 N 9
—Remedy of mortgagee S 67 N 18
—Rights and liabilities of parties S 58 N 40; S 98
Contract, governed by S 98; S 98 N 1
How determined S 98 N 1
Local usage, determined by S 98; S 98 N 1
—Mortgage, lease by S 111 N 5
—Usufructuary mortgage and mortgage by conditional sale, combination of S 98 N 6
Appointment
—Deed of—Fraudulent transfer S 53 N 5
—Power of: *See* Power of appointment.
—Transfer of property, power to make if S 5 N 1
Apportionment
—Agricultural leases, applicability of principle of S 36 N 2; S 37 N 9
—Annuities, of S 36; S 36 N 5
—Benefit of obligation of S 37; S 37 N 1
Burden increased, permissibility of S 37 N 7
Conditions for S 37 N 1
Duty, capable of severance must be S 37 N 6
Obligation, nature of S 37 N 4
Apportionment (*contd.*)
Proportion of S 37 N 5
—Cases not covered by S. 36, applicability of principle of S 36 N 2
—Common law rule S 36 N 1
—Consideration of, on joint transfer S 46; S 46 N 3
—Contract to the contrary S 36 N 3
—Covenants running with land, of S 37 N 4
—Defined S 36 N 1
—Dividends, of S 36 N 6
—Easement of S 36 N 4
—Estate as to S 36 N 1; S 37 N 1
Conditions for S 37 N 1
S. 37 and S. 109 compared S 109 N 2
—Execution of decree, transfer in, S 36 N 2; S 37 N 2
—Mortgage-debt, equitable rule of S 81 N 3
Contribution, distinguished from S 81 N 3
Marshalling, distinguished from S 81 N 3
—Notice of severance of interest S 37 N 8
—Payable on days appointed, rents etc. S 36 N 8
—Pensions, of S 36
—Periodical payments of S 36; S 36 N 7
—Principle of applicability of—Cases not covered by S. 36 S 36 N 2
Execution of decree, transfer in S 36 N 2
Lessee, assignment of interest by S 36 N 2
Transfer by operation of law S 36 N 2
—Rent, of S 36; S 36 N 4; S 37 N 3, 4; S 108 (1) N 1; S 109
—Severance of estate S 37 N 3
—Succession, devolution of interest by, applicability of, principle of S 36 N 2
—Transfer by operation of law, applicability of rule of S 36 N 2; S 37 N 2
—Time as to S 36 N 1
—Usage local, to the contrary S36 N 3
Assignment
—Actionable claim of: *See* Actionable claim, transfer of.
—Assignability—T. P. Act it exhaustive S 3 N 24
—Charge of S 100 N 19
See also Charge.
—Covenant against: *See* Covenant not to assign or alienate.
—Lease of: *See* Lease, transfer of.
—Mortgage, of: *See* Mortgage.
Attached to the earth
—Defined S 3
—Fixtures, principles governing S 3 N 6
See also Fixtures.
—Grass S 8 N 15
—Growing crops S 8 N 15
—Imbedded S 3 N 9
Attached to S 3 N 10
—Permanently fastened S 3 N 7
—Rooted S 3 N 8
—Standing timber S 8 N 15
—Things attached—Legal incidents of property S 8 N 15
—Well S 108 (h) N 5

Attachment
—Agreement for sale, prior to S 40 N 21
—Attaching creditor—Redemption by S 91 N 25
—Charge, if created by S 91 N 25; S 100 N 11
—Contingent interest of S 21 N 4
—Effect of S 100 N 11
—Interest in property, does not create S 91 N 25
—Mortgage pending S 60 N 55
—Pendency of, circumstance in favour of keeping alive charge S 101 N 2
—Seller's charge, of S 55 N 12
—Transfer of attached property S 6 N 30
—Vested interest, of S 19 N 8

Attempt or endeavour to transfer
—Forfeiture on S 12
See also Forfeiture.
—Illustrative cases of S 12 N 7
—Meaning of S 12 N 7

Attestation
—Acknowledgment of signature S 3 N 13
—Attest—Meaning of S 3 N 11
—Attested, definition of S 3
—Attesting witness: *See* Attesting witness.
—Charge, necessity of S 100 N 16
—Consent, attestation if implies S 41 N 13; S 59 N 9
—Contents notice of S 3 N 31
Existing interest in property—Attestor having S 3 N 31
Presumption as to S 3 N 31
—Estoppel, attestation if operates as S 59 N 9
—Form of S 3 N 16
—Gift of immovable property, for S 123 N 8
—Identifying witnesses at registration—Signature of S 3 N 19
—Mortgage, of S 59; S 59 N 8, 9
See also Mortgage—Attestation.
—Pardanashin lady, execution by S 3 N 11a
—Presence of executant—Executant if must actually see S 3 N 14
Insensible executant. S 3 N 14
Meaning of S 3 N 14
Necessity of S 3 N14
Pardanashin lady S 3 N 14
—Presumption as to S 3 N 15
—Proof of S 59 N 8
Execution admitted S 59 N 8
Onus S 3 N 15
—Sub-Registrar, signature of S 3 N 19
—Validity of—Attestation on admission of execution S 3 N 11
Essentials S 3 N 11

Attesting witness
—Competency
Identifying witnesses at registration S 3 N 19
Party S 3 N 17
Person signing on behalf of executant S 3 N 17
Real owner—Benami transaction S 3 N 17
Scribe S 3 N 17, 18
Sub-Registrar S 3 N 19
—Person not seeing executant signing nor receiving admission of execution S 3 N 11

Attesting witness (*contd.*)
—Person signing before execution of deed S 3 N 16
—Person signing in approval of transaction S 3 N 11
—Signature—Affixing of mark, sufficiency of S 3 N 12
Different ink or pen used S 3 N 14
Full signature S 3 N 12
Signature affixed by another with consent S 3 N 12
—Signing in another capacity S 3 N 11

Attornment
—Necessity of S 109 N 7

Auction-purchaser
See Execution sale

Award
—Charge cretaed by S 100 N 1
—Condition restraining alienation in S 10 N 15
—Mortgage if can be created by S 59 N 2
—Restraint on enjoyment, direction as to S 11 N 10a
—Transfer under S 5 N 2
—Writing **S 9 N 13**

Benami transaction
—Benamidar
Mortgage suit by or against S 67 N 22; O 34 R 1 N 8
Redemption by S 91 N 30
Whether ostensible owner S 41 N 8
—Fraudulent transfer, within S. 53, whether S 53 N 5, 7
—Nature of S 53 N 5
—Real owner—Competency of as attesting witness S 3 N 17

Beneficial interest
—Movable property in: *See* Movable property

British India
—Aden S 1 N 1
—Berar S 1 N 3a
—Burma S 1 N 1
—Burma S 1 N 1
—Civil stations and cantonments S 1 N 1
—Defined S 1 N 1
—Native states S 1 N 1
—Property outside—T. P. Act, provisions, applicability S 5 N 1
—Singapore S 1 N 1

Buddhist law
—Chapter II, T. P. Act, abrolates rules of S 2 N 11
—Donatio mortis causa, invalid under S 129 N 4
—Gift—Delivery of possession S 123 N 3

Buyer, liabilities of
—Completion of sale, before S 55 N 1
—Conveyance—Tender of S 55
—Destruction, injury or decrease in value, loss from, to bear S 55; S 55 N 16
—Disclosure, facts increasing value of property of S 55; S 55 N 13
Non-disclosure—Effect of S 55; S 55 N 21
—Incumbrances to pay S 55; S 55 N 17

Buyer, liabilities of (*contd.*)
—Interest on incumbrances to pay S 55; S 55 N 17
—Non-fulfilment of S 55 N 1
—Non-payment of purchase-money, for S 55 N 14
Remedy of seller S 55 N 14
—Public charges, to pay S 55; S 55 N 17
—Purchase-money, to pay or tender: S 55; S 55 N 14
Contract to the contrary S 55 N 14
Non-payment of—Remedies of seller S 55 N 14
Personal liability S 55 N 14
Retention to pay incumbrances S 55 N 14
Third party, if can enforce contract as to S 55 N 15
Third person, direction to pay S 55 N 14
Time and place of S 55 N 14
—Rent, to pay S 55; 55 N 17
—Statutory obligations S 55 N 1

Buyer, rights of S 55
—Charge for purchase-money paid S 55
See also Buyer's charge
—Completion of sale, after S 55 N 1
—Improvement in property, to S 55
—Increase in value, to S 55
—Rents and profits, to S 55; S 55 N 19

Buyer's charge S 55; S 55 N 20; S 100 N 11
—Acceptance of delivery
Declining improperly S 55 N 20
Effect of S 55 N 20
What amounts to S 55 N 20
—Anticipation of delivery, payment in S 55 N 20
—Completion of sale, arises before S 55 N 20
—Costs, for S 55; S 55 N 20
—Default of seller, if necessary S 55 N 20
—Earnest-money, for S 55 N 20
—Exchange, in case of S 120 N 3
—Extent of S 55 N 20
—Interest in immovable property, is S 55 N 20
—Interest on purchase-money, for S 55
—Lien, purchaser's S 55 N 20
—Limitation for S 55 N 20
—Modification of S 55 N 20
—Nature of S 55 N 20
—Non-existence of property S 55 N 20
—Non-possessory S 55 N 20
—Principle underlying S 55 N 20
—Purchase-money paid, for S 55; S 55 N 20
—Transferee, enforceable against S 55 N 20
Notice, transferee without S 55 N 20
—Waiver of S 55 N 20
—When arises S 55 N 20

Cessation of interest created
—Attempt or endeavour to transfer on S 12
—Condition subsequent as to S 31; N 2
—Gift over and cessation of interest S 31 N 2
—Insolvency, on S 12

Chance of succession
See also Spes successionis
—Accrual of right, at date of transfer S 6 N 4

Chance of Succession (*contd.*)
—Property, chance whether S 6 N 3, 4
—S. 43, applicability, to transfer of S 6 N 7
—Transfer of S 6
—Whether contingent interest S 21 N 5

Charge
—Act of parties, by S 100; S 100 N 1, 7
—Agreement to mortgage S 100 N 5
—Applicability of O 34 R 14 C. P. C. O 34 R 14 N 3
—Arrears of rent, for S 92 N 6; S 109 N 19
—Assignment of S 100 N 19
Registration, necessary if S 8 N 17; S 100 N 19
—Attachment, if creates S 91 N 25; S 100 N 11
—Attestation, necessary S 100 N 16
—Auction-purchaser without notice, if bound by S 100 N 24
—Award, created by S 100 N 1
—Bengal Tenancy Act (VIII of 1885) manager, created by, priority of S 48 N 15
—*Buyer's*: *See* Buyer's charge
—Charge-holder
Possession, right to retain S 100 N 17
Rights and liabilities of S 100 N 17
Right to redeem S 91 N 4
See also Redemption—Right to redeem
Sale, right of S 100 N 17
—Continent charge S 100 N 9
Contingency, enforcement on happening of S 100 N 9
Defined S 100 N 9
Instances of S 100 N 9
Valid S 100 N 9
—Contract for sale, if creates S 54; S 54 N 23; S 100 N 5
—Contribution to mortgage-debt claim for S 82 N 13; S 100 N 11
—Covenant not to alienate, by S 100 N 5
—Creation of
Interest of owner after, if mere possibility S 6 N 6
Actionable claim, on S 130 N 12
Agreement to lease whether creates S 107 N 15
Deed, construction S 100 N 5
Formalities necessary S 100 N 16
Intention of parties S 100 N 5
Particular form of words not necessary S 100 N 5
Restraint on alienation, if affects S 10 N 12
Transfer of property, whether S 5 N 4; S 8 N 17; S 10 N 12; S 14 N 3; S 100 N 1
—Dahyak rights S 100 N 32
—Debt secured by, transfer of: *See* Debt
—Debts of deceased Muhammadan S 100 N 31
—Decree, created by S 100 N 28
Charge within S. 100, whether S 100 N 28
Enforcement of S 100 N 28: O 34 R 15 N 10a
Registration of S 100 N 16
Transferee for consideration without notice, enforcement against S 100 N 28
Transferee pending suit, if bound by S 52 N 6a

Charge (*contd.*)
—Decree on
Effect of S 100 N 25
Sale in execution—Effect of 100 N 27
Sale in execution—Recurring charge, in case of S 100 N 27
—Deed creating
Construction of S 100 N 5
Intention to be ascertained S 100 N 5
—Defined S 100; S 100 N 1
—Deposit of money due, in Court S 83 N 4
—Enforcement of S 40 N 3; S 67 N 3; S 100; S 100 N 1, 25
Auction-purchaser without notice, against S 100 N 24
Charge kept alive, of S 101 N 10
Company in liquidation against S 100 N 25
Decree, charge created by, of S 100 N 28
Personal decree, charge-holder's right to S 100 N 25, 26; O 34 R 15 N 2
Possession, charge-holder when entitled to sue for S 100 N 25
Procedure for S 100 N 25; O 34 R 15 and N 2, 12
Sale of charged property by S 100 N 25
Transferee for consideration without notice, against S 100 N 22
Transferee from a transferee, against: S 100 N 23
—English law S 100 N 2
—Equitable S 100 N 2
Distinguished from equitable lien S 100 N 2
—Equity, created on grounds of S 100 N 1
—Existing, property must be S 100 N 4
—Expressly provided for by any other law, charge S 100 N 21
—Extinguished—Sale in execution of charge-decree S 100 N 27
Recurring charge S 100 N 27
—Extinguishment—Merger by: *See* Merger
—Floating charge S 100 N 10
Changing property S 100 N 10
Characteristics of S 100 N 10
Defined S 100 N 10
Distinguished from contingent charge S 100 N 10
Fixed, when becomes S 100 N 13
Instances S 100 N 10
Priority S 100 N 10
Registration of S 100 N 10
—Future property on S 100 N 4
Registration of S 100 N 10
—Future property on S 100 N 4
Operates as agreement to charge S 100 N 4
—Instances of S 100 N 5
—Incumbrance, if S 57 N 4
—Intention of parties
Document, construction of S 100 N 5
Rule of construction S 100 N 5
—Interest in property, charge is S 100 N 19
—Invalid mortgage, if creates S 59 N 8, 15; S 100 N 14
—Kinds of S 100 N 1
Exhaustive, S. 100 whether of all charges S 100 N 1

Charge (*contd.*)
—Lien, distinguished from S 100 N 2
—Maintenance, when S 39 N 2; S 100 N 30
—Marshalling, subsequent purchaser by S 56 N 6
—Merger of: *See* Merger
—Money secured—Suit for—S. 68, applicability of S 68 N 20
—Mortgage—Distinguished from S 58 N 4; S 100 N 13
—Mortgage—Invalid, whether operates as S 39 N 8, 15; S 100 N 14
—Mortgage—Transaction must not amount to S 100 N 13
—Mortgage and charge—Priority S 48 N 3
—Mortgage or charge, transaction whether S 100 N 15
—Mortgaged property on—Person having, redemption by S 91 N 4
—Movable property on S 100 N 3
—Movable property on—Specifically indicated property S 100 N 3
—Nankar rights S 100 N 32
—Non-possessory
Buyer's S 55 N 20
Seller's S 55 N 12
—Notice
Auction-purchaser without S 100 N 24
Transferee for consideration without S 100; S 100 N 22
—Operation of law, by S 100; S 100 N 1, 11
Directly created S 100 N 11
Indirectly created S 100 N 11
Instances S 100 N 11
Land Improvement Loans Act S. 7 under, subrogation, in case of S 92 N 6
Registration of S 4 N 8
Single suit in respect of several charges S 67A N 3
—Perpetuity rule against, application to S 14 N 3
—Personal liability under S 60 N 20; S 100 N 26
—Possession—Charge-holder when entitled to sue for S 100 N 25
—Possession, right of charge-holder to S 100 N 17
—Priority
Floating charge of S 100 N 10
Future advances, charge to secure S 79 N 9
Several charges among S 100 N 18
—Procedure for enforcement S 100 N 25
—Provisions applicable to S 100; S 100 N 1
—Receiver, appointment of, if creates S 100 N 11
—Recurring—Sale for arrears S 100 N 27
—Redemption of—Applicability of S. 91 S 91 N 43
—Registration of S 4 N 8; S 100 N 16
Charge by operation of law S 4 N 8
Decree created by S 100 N 16
Floating charge of S 100 N 10
Necessary S 100 N 16
—Rent Acts under S 100 N 12
—Rent is not S 108 (1) N 3

Charge (*contd.*)
—Sale, right of charge-holder to bring property to S 100 N 17
—Salvage, payments in the nature of S 100 N 29
—Security bond—Creating
See also Security bond
—Security for payment S 100 N 5
Intention to make property as S 100 N 5
—Seller's, for unpaid purchase-money S 55; S 100 N 11
See also Seller's charge
—Specified property S 100 N 6
Description when sufficient S 100 N 6
Necessity of S 100 N 6
—Statutory: *See* Charge—Operation of law by
—Subrogation right of S 92 N 6
—Suit to enforce—Parties to O 34 R 1 N 1, 3
—Superior proprietor under C. P. Land Revenue Act, of S 91 N 14
—Transfer of property, charge whether a S 5N 4: S 8 N 17; S 10 N 12; S 14 N 3; S 100 N 1
—Transferable S 100 N 19
—Transferee for consideration without notice S 100 N 22
Amendment, effect of S 100 N 22
Decree, charge created by, enforceability against S 100 N 28
Enforcement against S 100 N 22
Onus to prove S 100 N 22
Plea of S 100 N 22
Simple mortgagee S 100 N 22
—Transferee from a transferee, if protected S 100 N 23
—Trustee charge of, for expenses S 100; S 100 N 20
Section 100 not applicable to S 100; S 100 N 20
—Will, created by S 100 N 7
—Writing
Moveables, charge on S 100 N 3
Necessary S 100 N 16

Charities
—Bequest to—Perpetuity rule against, applicability of S 18 N 2
—Charitable purposes S 18 N 3
Instances of S 18 N 3
Intention to benefit community S 18 N 3
Public purpose, must be S 18 N 3
Religious purpose S 18 N 3
Specific individuals, benefit of S 18 N 3
—Defined S 18 N 3
—Hindu law, rules of, regarding transfer to S 18 N 4
—Mahomedan law, rules regarding transfer to S 18 N 5
—Meaning, legal and popular S 18 N 3
—Perpetuity rule against, application of S 18
—Transfer in favour of—Commencement of S 18 N 2
English law S 18 N 2
Exception to rules against tying up of property S 18 N 2
Illustrative cases S 18 N 3
Restrictions in Ss. 14, 16 and 17, applicability of S 18

Charities (*contd.*)
—Transfer to charity and other objects
Distribution of funds S 18 N 6
Failure of transfer with regard to other objects—Effect of S 18 N 6

Civil Court
—Meaning of S 3 N 25
—Revenue Courts, if S 3 N 25

Class, transfer to
—Ascertained, transferees, number of S 15 N 3
—Ascertainment of members of S 15 N 4
Time of ascertainment S 15 N 4
—Bequest to, failure with regard to some S 15 N 1
—Contingent class: *See* Contingent class, transfer to
—Defined S 15 N 3
—Failure of interest with regard to some—Effect S 15
Leake 1. Robinson, rule in S 15 N 2
—Hindu law, rule of S 2 N 10; S 15 N 5
—Members taking under transfer S 15 N 4
—Specifically named transferees S 15 N 3
—Transfer on failure of prior interest S 16
—Uncertain, number S 15 N 3

Clog on redemption
—Anomalous mortgage, applicability of principles S 60 N 29; S 98 N 2
—Collateral advantage, stipulation for S 60 N 33
—Conditions necessary, to operate as S 60 N 28
—Consolidation of mortgages, provision for S 60 N 35; S 61 N 5
—Effect of S 60 N 28
—Examples of S 60 N 37
—General principles S 60 N 28
—Hard terms S 60 N 36
—Long period for redemption S 60 N 32
—Mortgagee as such, stipulation to be by: S 60 N 28
—Option to purchase S 60 N 30
—Part of mortgage transaction, stipulation to be S 60 N 28
—Penalty on default S 60 N 34
—Persons other than mortgagor, stipulation against redemption by S 60 N 31
—Prohibition of redemption after due date S 60 N 28
—Purchaser, if bound by S 60 N 38
—Right to redeem absolutely, condition restricting S 60 N 28
—Purchaser if bound by S 60 N 38
—Right to redeem absolutely, condition restricting S 60 N 28
—Subsequent and independent contract S 60 N 28
—Time limit for impeachment S 60 N 39

Co-mortgagee
—Deposit of mortgage-money to the account of S 83 N 15
—Discharge valid, if one can give S 60 N 14
—Payment or tender to S 60 N 14
—Redemption by paying one alone S 60 N 47
—Suit on mortgage, by S 67 N 27

Co-mortgagor
—Consolidation of mortgages, contract by S 61 N 3
—Meaning of S 95 N 7
—Mortgagee from—Marshalling right of S 81 N 6
—Mortgagee right, acquisition of—Redemption by others S 60 N 46
—Redeeming co-mortgagor
Charge for contribution, right of S 92 N 15
Contribution, right to claim S 82 N 17
Expenses of redemption
Addition to mortgage-money S 95; S 95 N 1
Properly incurred S 95 N 3
Right to S 95
Interest, right to claim S 95 N 4
Option to claim rights under S. 95 or S. 82 S 82 N 17
Personal decree, right to claim S 95 N 8
Proportionate recovery from other co-mortgagor S 95 N 6
Redemption—Meaning of S 95 N 2
Rights of S 82 N 17
S. 95 whether retrospective in operation S 95 N 10
Subrogation, right of S 92; S 92 N 1, 15
—Several persons deriving title from one mortgagor S 95 N 7
—Usufructuary mortgagee
Right to recover individual share from S 62 N 3
Whole property, right to recover S 62 N 3

Company
—Debentures—Floating charge S 100 N 10
—Juristic person S 5 N 3
—Living person S 5
—Mortgage by S 59 N 12
—Share
Actionable claim, whether S 137 N 3
Includes stock S 137 N 3
Transfer of S 137 N 3
—Shares—Restraint on alienation of S 10 N 11
—Stocks—Transfer of S 137 N 3

Compensation
—Election
Disappointed donee to S 35 N 12
Doctrine of, whether one of S 35 N 11
—Exchange, deprivation of thing exchanged S 119; S 119 N 5
—Fixtures for, lessee's right to S 198(h) N 4
—Improvements, for S 51 N 1, 17, 18
Auction-purchaser, to S 51 N 6
Cosharer, to S 51 N 5
Malabar tenant in, right of, nature of S 130 N 21
Wrong-doer, if can claim S 51 N 25
—Land Acquisition Act, under
Lessee's right to S 108 N 1; S 108 (h) N 7
Mortgagee's right to S 73; S 73 N 10
—Use and occupation, for S 105 N 70

Competency to transfer
—Co-owner S 44 N 3
—Coparcener S 7 N 7; S 44 N 3

Competency to transfer (*contd.*)
—Disqualified proprietor S 7 N 3
—Father, in joint Hindu family S 7 N 7
—Guardian S 7 N 7
Appointed by Court S 7 N 7
De facto S 7 N 7
De jure S 7 N 7
—Hindu widow S 7 N 7
—Judgment-debtor, during Collector's management S 7 N 7
—Manager of joint Hindu family S 7 N 7
—Manager of lunatic's estate S 7 N 7
—Manager or trustee of a religious endowment S 7 N 7
—Minor S 7 N 7
—Partner S 7 N 7
—Persons competent to transfer S 7; S 7 N 2
—Person not entitled to transferable property S 7 N 4
—Person of unsound mind S 7 N 3
—Property not one's own S 7 N 5
Instances of persons entitled to transfer S 7 N 3
—Ward of Court of Wards S 7 N 3

Condition
—Annexed to property, restraining alienation S 10 N 3
—Breach of, forfeiture of lease on S 111; S 111 N 13
See also Forfeiture of lease.
—Construction of S 28 N 6
Precedent or subsequent, determination of S 28 N 6
—Covenant and condition, distinction S 10 N 5
—Defined S 10 N 5
—Forfeiture of interest on attempt to transfer, as to S 12
—Forfeiture of interest on insolvency, as to S 12
—Gift—Subject to: *See* Gift
—Ignorance of S 29 N 6; S 34 N 3
—Lease—Restraint on alienation, condition in S 10
See Restraint on alienation.
—Limitation and condition distinguished S 10 N 5
—Performance of an act as
Breach of, when no time specified S 33; S 33 N 2
Prevented by fraud—Effect S 34; S 34 N 2
—Precedent: and subsequent, distinguished S 10 N 5
—Precedent: *See* Condition precedent.
—Relief against
Fraud as ground for S 34 N 3
Power of Court to grant S 31 N 6
—Residence as to S 32 N 4
—Restraint on alienation, absolute S 10
—Restraint on enjoyment, as to—Validity S 11 N 8
—Subsequent: *See* Condition subsequent.
—Time of performance—Computation of time S 34 N 4

Condition (*contd.*)
—Transfer subject to—Intention of parties S 10 N 5

Condition precedent
See also (1) Condition
(2) Condition subsequent
—Alternative conditions—Substantial compliance with S 26 N 5
—Breach of—Effect S 34 N 2
—Construction of, condition subsequent as S 28 N 6
—Defeating the law S 25
—Forbidden by law S 25; S 25 N 4
—Fulfilment of S 26; S 26 N 2
Illegal S 32 N 11
—Immoral S 25; S 25 N 8
—Impossible, fulfilment of S 25
Becoming impossible after date of transfer S 25 N 3
Consent or assistance of another necessary S 25 N 3
Partly impossible S 25 N 3
—Instances S 10 N 5
—Interest dependent on
English law S 25 N 2
Failure of S 25 N 2
—Involving injury to person or property S 25
—Meaning of S 10 N 5
—Name and arms clause—Substantial compliance with S 26 N 6
—Public policy, opposed to, S 25; S 25 N 9
Restraint on marriage, in S 25 N 9
Restraint on trade, in S 25 N 9
—Relief against—Fraud as ground for S 34 N 3
—Relief against—Power of Court to grant S 26 N 7
—Residence, condition as to—Substantial compliance with S 26 N 4
—Restraint on trade, condition in S 25 N 9
—Subsequent condition, distinguished S 10 N 5
—Substantial compliance with S 26; S 26 N 2
Alternative conditions S 26 N 5
Instances of S 26 N 3
Name and arms clause S 26 N 6
Performance within reasonable time—
When time limit is fixed S 26 N 7
Principle underlying S 26 N 2
Residence, condition as to S 26 N 4
Test, to determine S 26 N 3
—Time limit for performance of—Fixed by transferor—Effect of S 36 N 7
—Time limit for performance—Reasonable time, performance within S 26 N 7
—Validity of S 32 N 2

Condition subsequent
—Attempt to transfer, condition in restraint of S 28 N 11
—Bequest with S 28 N 1
—Breach of—Effect S 34 N 2
—Breach of—Performance of an act as condition S 33; S 33 N 2
—Cessation of interest and gift over S 31 N 2
—Cessation of interest created as to S 28 N 2; S 31; S 31 N 2

Condition Subsequent (*contd.*)
Bequest rule, as to S 31 N 1
Covenant in gift, distinguished S 31 N 3
Insolvency, cessation on S 31 N 4
—Clear and certain, must be S 32 N 3
—Contract, condition in S 31 N 7
—Defeasance and repugnant clause, distinguished S 32 N 9
—Defeasance clause S 28 N 2
—Defeasance clause with gift over S 28 N 2
Absolute, prior interest, if must be S 38 N 5
Class, gift over, in favour of S 28 N 11
Construction of S 29 N 3
Illustrative cases S 29 N 3
Strict construction S 29 N 3
Definite person or persons, in favour of S 28 N 8
Illustrative cases S 28 N 2
—Defined S 28 N 2
—Forfeiture of interest on attempt to transfer, condition of S 12 N 1
—Forfeiture of interest on insolvency, condition of S 12 N 1
—Fulfilment of
Impossible, fulfilment, becoming S 29 N 5; S 30 N 3; S 32 N 10
Strict fulfilment of S 29; S 29 N 2, 4
Two or more conditions S 29 N 8
—Gift over to another person S 28; S 28 N 2, 5, 8, 11; S 29 N 3
—Hindu law, rules as to S 28 N 3
—Illegal S 32 N 11
—Immoral S 32 N 7
—Imposition, subsequent to transfer S 28 N 6
—Insolvency, gift over, on S 28 N 11
—Instances S 10 N 5
—Knowledge of, necessity of S 29 N 6; S 34 N 3
—Mahomedan law, rules as to S 28 N 4
—Meaning of S 10 N 5
—Onus as to breach of S 29 N 4a
—Opposed to public policy S 32 N 5
—Part of transfer, must be S 28 N 6
—Precedent condition, distinguished S 10 N 5
—Precedent construed as subsequent S 28 N 6
—Performance of an act, condition as to—Breach of, no time specified for performance S 33; S 33 N 2
—Performance of an act, as—Impossible by reason of fraud S 34; S 34 N 2
—Relief against—Fraud as ground for S 34 N 3
—Relief against—Power of Court to grant S 26 N 7; S 31 N 6
—Repugnancy, void for S 32 N 8
—Restraint on alienation, condition in S 28 N 11
—Restraint on marriage, condition in S 28 N 11
General restraint S 32 N 6
Prima facie void S 32 N 6
Remarriage, restraint on S 32 N 6
—Specified uncertain event
Clear, definite and unambiguous, must be S 28 N 7
Time of happening of S 28 N 11
Uncertainty as to happening of S 28 N 7

Condition subsequent (*contd.*)
—Survival, condition as to S 28 N 11
—Two or more conditions S 29 N 8
—Transfer with S 28
—Uncertainty, void for S 32 N 3
Residence, condition as to S 32 N 4
Test S 32 N 3
—Validity of S 28 N 11; S 32
Hindu law S 32 N 12
Mahomedan law S 32 N 12
Test S 32 N 2
—Vested interest—Interest to be defeated is S 19 N 10a
—Void, when S 32 Notes 3 to 8

Conditional transfer S 25
See also (1) Condition precedent
(2) Condition subsequent
—Acceleration of ulterior disposition: *See* Ulterior disposition
—Breach of condition—Effect S 34 N 2
—Cessation of interest created—Condition as to S 31: S 31 N 2
See also Condition subsequent—Cessation of interest created as to
—Defined S 32 N 2
—Dependent upon condition S 25 N 2
Interest when fails S 25 N 2
—Knowledge of condition, if necessary S 29 N 6; S 34 N 3
—Performance of an act, condition as to—
Breach, when no time specified for performance S 33: S 33 N 2
Impossibility of, by fraud S 34: S 34 N 2
—Relief against condition; *See* (1) Condition precedent (2) Condition subsequent
—Transfer with condition subsequent S 28

Consent
—Attestation, if implies S 59 N 9
—Ostensible ownership, to: *See* Ostensible owner, transfer by
—Silence, amounting to S 41 N 10

Consideration
—Apportionment of S 46: S 46 N 3
—Lease, consideration for S 105 N 57
—Maintenance grant, for S 105 N 68
—Meaning to be attached to S 4 N 4
—Object, distinguished from S 6 N 28
—Partly legal and partly unlawful—Effect S 6 N 29
—Partly void—Effect S 6 N 29
—Transfer for S 53 N 17
—Transfer without S 122 N 2
—Unlawful—Transfer for: *See* Unlawful consideration.

Consolidation of mortgages
—Amendment of S. 61, retrospective, if S 61 N 10
—Contract providing S 61 N 5
Clog on redemption, not S 61 N 5
Co-mortgagor by S 61 N 3
Construction of S 61 N 5
Instances of S 61 N 5
Onus to prove S 61 N 5
Valid S 61 N 5
—Defence of S 61 N 6
—Doctrine of S 61 N 2

Consolidation of mortgages (*contd.*)
—English law S 61 N 2
—Further charge and mortgage, of S 61 N 5
—Mortgage and simple debt, of S 61 N 5
—Mortgagor, against S 61
Persons deriving title from S 61 N 3, 8
Same mortgagor S 61 N 3
—One suit on several mortgages S 67A
See also Mortgage suit
—Redeem any one, mortgagor's right to S 61 N 7
—Redemption separately or simultaneously S 61
—Same mortgagee S 61 N 4
Person deriving title from S 61 N 4
—Same property, mortgages over S 61 N 2
—Time-barred mortgage, of S 61 N 6
—Usufructuary mortgage, of S 62 N 12
Waiver of right S 61 N 11
Construction of T. P. Act Pre. N 1, 6

Constructive notice
See Notice—Constructive
—Sub-lessee, of covenants in head lease to S 108 (j) N 5

Contingency
—Specified uncertain event
Clear, definite and unambiguous, must be S 28 N 7
Time of happening of S 28 N 11
Uncertainty as to happening of S 28 N 7

Contingent charge
See Charge

Contingent class, transfer to
See also Class, transfer to
—Ascertainment of members S 22 N 5
—Attaining a particular age, interest on S 22; S 22 N 2
Contingent, interest whether S 21 N 8
Gift over, in favour of class S 28 N 11
Gift over, provision for—Effect of S 12 N 3
Provision for applying income for benefit of class S 21 N 13; S 22 N 4
—Bequest to contingent class S 22 N 1
—Transfer on contingency, distinguished from S 22 N 2

Contingent interest
—Alternative contingencies S 21 N 12
—Attachment of S 21 N 4
—Attaining a particular age, interest on S 19 N 5; S 21; S 21 N 8
Class, transfer to S 21 N 8
Direction to apply income for benefit of transferee S 21 N 13; S 22 N 4
Contingent, when S 21 N 8
Income, given to transferee S 21 N 13
Discretion to spend as much as necessary—Effect S 21 N 13
During minority only S 21 N 14
Partly given S 21 N 13
Property of which, must be given S 21 N 13
Whole, if must be given S 21 N 13
Income, direction to apply for benefit of transferee S 21 N 15
Class, transfer to S 22 N 4
Intention of transferor S 21 N 1

Contingent interest (*contd.*)
—Bequest, contingent S 21 N 1
—Chance of succession, if S 21 N 5
—Defined S 21
—Direction to do what law enjoins, interest if contingent S 21 N 10
—Existing right, whether S 21 N 4
—Gift over, contingent interest with S 28 N 5
—Gift over, provision for—Intention to make interest contingent S 19 N 11
Prior interest when contingent S 19 N 11
—Illustration of S 21 N 3
—Immediate right, interest not S 21 N 3
—Mahomedan law, as to S 13 N 6; S 21 N 2
—Person 'then' living after prior interest, transfer to S 21 N 9
—Possibility mere, if S 21 N 4, 5
—Right to accrue on uncertain event S 21 N 3
—Specified uncertain event
Clear, definite and unambiguous, must be S 28 N 6
Time of happening of S 28 N 11
Uncertainty as to happening of S 28 N 7
—Survival, interest to take effect on S 19 N 6
—Test to determine S 21 N 3
—Transferable S 21 N 4
—Transfer on happening of specified uncertain event S 23 N 3
—Two or more contingencies S 21 N 12
—Ulterior interest dependent on condition: S 28 N 11
—Uncertain event—Death S 21 N 7
Survival S 21 N 7
—Vested interest
Contingent interest when becomes S 21; S 21 N 11
Distinguished from S 19 N 4

Contingent transfer
—Bequest, contingent S 23 N 1
—Contingent interest till happening of event S 23 N 3
—Happening of contingency, same time as determination of prior interest S 23 N 5
—No time fixed for happening of contingency S 23 N 2
Failure of interest—Principle S 23 N 2
Illustration S 23 N 4
Interest when fails S 23; S 23 N 2
—Transfer to persons surviving at some period
Bequest to S 24 N 1
Contrary intention S 24 N 4
Exact period not specified S 24; S 24 N 2
Time of death—No presumption as to S 24 N 3
—Time specified for happening of contingency S 23 N 2

Contract
—Benefit of—Assignment of S 3 N 24; S 6 N 17
Assignment after breach S 6 N 17
English law S 6 N 17
T. P. Act if exhaustive S 6 N 17

Contract (*contd.*)
—Benefit of—Whether actionable claim S 3 N 21
—Competent to contract S 7 N 3; S 103 N 3
Disqualified proprietor S 7 N 3
Equitable incapacity S 7 N 3
Law of place, determines S 7 N 3
Minor S 7 N 3
Pardanashin lady S 7 N 3
Person of unsound mind S 7 N 3
Transferee, need not be S 6 N 36; S 7 N 8
Ward of Court of Wards S 7 N 3
—Condition subsequent, in S 31 N 7
—Enforceable against whom S 40 N 1
Enjoyment of immovable property, contract affecting S 40 N 1
Third persons S 40 N 1
—Executed contract, transfer as S 4 N 2
—Future property, contract to transfer S 43 N 2
—Lease, based on S 105 N 7
—Lease, contract to give: *See* Lease.
—Maintenance, contract to pay: *See* Maintenance
—Novation S 130 N 5
Effect of S 130 N 5
Transfer of debt distinguished from S 130 N 5
—Perpetuity, rule against, applicability to: S 14 N 10
Contract for sale of land S 14 N 10
—Pre-emption—Contract for: *See* Pre-emption.
—Public policy, opposed to S 6 N 35
See also Public policy, opposed to.
Rescission of S 126 N 5
Mistake on ground of S 126 N 11
—Restricting enjoyment
For ever or indefinite period S 11 N 13
Validity of S 11 N 13
—Sale of immovable property, contract for
See Contract for sale.
—Specific performance
Agreement to lend money S 6 N 17; S 58 N 6
Lis pendens, suit for S 52 N 24
Right to sue, assignment of S 6 N 17
Assignee of contract, right of S 6 N 17
Official receiver, against S 40 N 20
—Subsisting contract S 43 N 11
—Third person, if can enforce S 55 N 15
—Transfer, contract of
Decree on—Effect of S 43 N 11
Subsistence of S 43 N 11
—Transfer, initially S 4 N 2
—Unlawful object—Effect of S 6 N 27
—Void on ground of mistake S 126 N 11
—Voidable S 126 N 5 to 9
—Zaricharam, contract to pay: *See* Zaricharam.

Contract for sale
—Assignment of benefit of S 6 N 17
—Attachment, contract prior to, sale after attachment S 40 N 21
—Auction, sale by, is S 54 N 23

Contract for Sale (*contd.*)
—Charge, if created by S 54; S 54 N 23; S 100 N 5
—Completed, not, remedy of parties S 54 N 23
—Condition subsequent—Relief against S 31 N 7
—Contract of sale, distinguished S 54 N 23
—Covenant running with land S 40 N 8
—Defined S 54
—Equitable interest, if creates S 14 N 10; S 40 N 8; S 54 N 23
—Interest in property, if creates S 54; S 54 N 23
—Merger of S 54 N 23
—Obligation annexed to the ownership S 40 N 8
—Owner in equity, buyer S 55 N 6
—Perpetuity, rule against, if applies S 14 N 10
—Precedes sale S 54 N 23
—Pre-emption, contract for S 54 N 23
—Registration of S 54 N 23
—Re-sale, contract for S 54 N 23
—Specific performance of S 6 N 17
—Time, if essence of S 55 N 5
—Transfer, contract for sale is not S 38 N 6
—Transferee of property, enforcement against S 40 N 8
—Transferee with notice, mesne profits, liability for S 40 N 17
—Trustee, seller if becomes S 55 N 6
—Void or voidable—Effect of S 55 N 1; S 82

Contribution to mortgage-debt
—Abatement of mortgage-debt S 60 N 44; S 82 N 18
—Acquisition of portion of equity of redemption by mortgagee
Abatement of proportionate debt S 60 N 44; S 82 N 18
Effect of S 60 N 44; S 82 N 18
—Apportionment, equitable rule of, distinguished from S 81 N 3
—Charge, claim for, is S 82 N 13; S 92 N 15; S 100 N 11
—Common and equal liability S 82 N 4
—Co-mortgagor redeeming, rights of S 82 N 17; S 92 N 15
—Conditions essential for S 82 N 2
—Contract to the contrary
Assignees of property—Benefit, if passes to S 82 N 8
Assignees of property—Liability of S 82 N 8
Different owners, between S 82 N 7
Enforcement of S 82 N 8
Implied S 82 N 7
Liability excluded by S 82 N 7
Mortgagee party to, if necessary S 82 N 7
Obligation annexed to the ownership, whether S 82 N 8
—Court directing sale in particular order S 82 N 9
—Discharged fully, mortgage-debt not claim for S 82 N 15
—Doctrine of contribution S 82 N 2

Contribution to mortgage debt (*contd.*)
—Interest, awarding of S 82 N 26
—Involuntary payment S 82 N 16
—Laches of mortgagee, effect on S 82 N 20
—Liability to contribute
Different mortgages if must be by same person S 82 N 8a
Different owners, properties of S 82
Different properties of same owner S 82
Personal, liability whether S 82 N 14
Properties liable to contribute S 82 N 23
Property, several owners having distinct shares in S 82 N 3
—Life tenant and reversioner, between S 82 N 21
—Marshalling, exception to rule of S 56 N 2; S 82; S 82 N 10
—Mortgagee acquiring part of equity of redemption
Abatement of proportionate S 60 N 44; S 82 N 18
—Mortgagee acquiring portion of equity of redemption—Effect S 60 N 44; S 82 N 18
—Mortgagors inter se, right restricted to S 82 N 12
—Mortgagee's laches, effect on S 82 N 20
—Mortgagee's negligence, effect on S 82 N 20
—Mortgagee, not affected by rule of S 82 N 12
—Mortgagee, release of portion of equity of redemption, by S 82 N 19
—Mortgagee, right not available against S 82 N 12
—Negligence of mortgagee, effect on S 82 N 20
—Personal decree, right to claim: S 82 N 14; S 95 N 8
—Properties liable to S 82 N 23
—Puisne mortgagee's right to S 82 N 4a
—Punjab, principles applied to S 82 N 2
—Rate, determination of S 88 N 6
Mode of S 82 N 6
Principles S 82 N 6
—Redeeming co-mortgagor—Rights of S 82 N 17; S 92 N 15
—Redemption suit, failure to claim in S 82 N 24
—Release of portion of equity of redemption S 82 N 19
—Suit for
Defence, plaintiff having no interest left, of S 82 N 25
Limitation S 82 N 13
Lis pendens S 82 N 18
Parties to S 82 N 22
Small Cause Court, not cognizable by S 82 N 27
—Valuation for purpose of S 82 N 5
Date of mortgage, value on S 82 N 5
—Voluntary payment, right not restricted to S 82 N 16

Conveyance
—Act of conveying S 5 N 4

Conveyance (*contd.*)
—Future, conveyance in S 5 N 7
—Present, conveyance in S 5 N 7

Co-owner
—Acceptance of, rent by S 113 N 3
—Election by one S 35 N 14
—Improvements by S 51 N 5
—Joint possession, right to S 44 N 4
—Mortgage by S 58 N 21
—Notice to quit by S 106 N 34
—Ouster of S 44 N 4
—Partition—Agreement not to divide S 11 N 13
—Partition, right to S 44 N 5
—Redemption, tenant-in-common, by S 91 N 24
—Revenue payment to save estate, rights on S 100 N 29
—Share in common property, transfer of, by co-owner S 47; S 47 N 1
—Share in common property, transfer of, by co-owners—Operation of transfer on shares of transferors S 47; S 47 N 1
—Transfer by one: *See* Transfer by one co-owner

Crops of transfer
—Ascertainment of S 8 N 10
—Instances of S 8 N 10
—Interest in, passes to transferee S 8 N 10
—Land, lease of—Minerals if included S 8 N 10
—Land, lease of—Standing timber, if included S 8 N 10
—Land, things below and above S 8 N 10
—Legal incidents of, pass to transferee S 8 N 10
—Rents and profits, transfer of S 8 N 14

Court
—Civil Court: *See* Civil Court
—Court within S. 69A S 69A; S 69A N 13
—Deposit of mortgage-money in S 83
See also Deposit of mortgage-money
—Discharge of incumbrance, provision by S 57
—Foreign Court S 52 N 9
—Juristic person, Court if S 5 N 3
—Living person—Court whether S 5 N 3
—Meaning of S 52 N 9
—Transfer of prohibited by order of S 6 N 30

Court of Wards
—Authorised to dispose of property of ward S 7 N 5
—Lessee of, right to assign interest S 6
—Ward—Competency to contract S 7 N 3
—Ward—Competency to transfer S 7 N 3

Covenant
—Affirmative S 11 N 11
—Affirmative—Running with land, if S 40 N 1
—Affirmative—Transferee, enforcement against S 40 N 1
—Affirmative—Transferee without notice enforceable against S 11 N 11
—Affirmative and negative S 11 N 11; S 40 N 1

Covenant (*contd.*)
—Alienation, against: *See* Covenant not to assign or alienate
—Assignment, against: *See* Covenant not to assign or alienate
—Condition distinguished from S 10 N 5
—Covenant for title: *See* Covenant for title
—Covenant running with land: *See* Covenant running with land
—Direction, distinguished from S 11 N 11
—Meaning of S 10 N 5
—Negative: *See* Restrictive covenant
—Renewal of lease, covenant for: *See* Renewal of lease
—Restraining enjoyment—Validity of S 11 N 11
—Restrictive covenant: *See* Restrictive covenant

Covenant for indemnity
—Covenant for title, distinguished from S 55 N 9
—Runs with the land, whether S 40 N 24
—Seller's S 55 N 9
—Suit on—Cause of action when arises S 55 N 9

Covenant for quiet enjoyment
—Crown grant, in S 108 (c) N 7
—Lessor's S 108(c); S 108(c) N 1
Breach of S 108(c) N 2
Breach—Damages for S 108(c) N 8
Breach—Remedies of lessee S 108(c) N 8
Condition precedent to S 108(c) N 1
Contract of lease, part of S 108(c) N 5
Duration of S 108(c) N 1
English law S 108(c) N 1
Interruption—Meaning of S 108(c) N 2
Paramount title-holder, interruption by S 108(c) N 3
Tortious or unlawful eviction against S 108(c) N 1
Trespasser, interruption by S 108(c) N 4
—Seller's S 55 N 9

Covenant for renewal of lease
See Renewal of lease

Covenant for title
—Mortgagor's S 65; S 65 N 4
—Seller's S 55; S 55 N 9
Absolute S 55 N 9
Benefit of S 55
Benefit of—Waiver of S 55 N 9
Breach of S 55 N 9
Damages—Limitation, suit for S 55 N 9
Damages, measure of S 55 N 9
Remedies of buyer S 55 N 9
Voidable sale S 55 N 9
Caveat emptor, rule of S 55 N 9
Completed sale, necessary S 55 N 9
Contract to the contrary S 55 N 9
Fiduciary character, person in sale by S 55 N 9
Liability for breach S 55 N 9
Nature of covenant S 55 N 9
Indemnity contract of, distinct from S 55 N 9
Invalid sale, in S 55 N 9

Covenant for title (*contd.*)
Quiet enjoyment, covenant for, if included S 55 N 9
Runs with the land S 40 N 24; S 55 N 9
Sale in invitum, in S 55 N 9

Covenant not to assign or alienate
—Binding, on whom S 10 N 16
—Breach of
Effect S 10 N 17
Remedies S 10 N 16
Validity of transfer S 10 N 16
—Creditor of transferee, right to proceed against property S 10 N 16
—Indefinite period for S 10 N 16
—Lease, covenant in S 10 N 17; S 108 (j) N 1
Breach of—Determination of lease S 10 N 17; S 108 (j) N 1
Breach of—Validity of assignment S 10 N 5; S 10 N 17; S 108(j) N 1
Breach of—What constitutes S 111 N 13
Re-entry, absence of right of S 10 N 17; S 108 (j) N 1
Runs with land S 10 N 17
—Limited period for S 10 N 16
—Mortgagor, by S 10 N 18
Assignee—Rights of S 10 N 18
Assignment—Validity of S 10 N 18
Clog on redemption S 60 N 37
Effect of S 10 N 18
Liability personal S 10 N 18
—Perpetuity in S 10 N 16
—Pre-emption, agreement for S 10 N 16
—Quality annexed to property if S 10 N 16
—Vendee by—Validity of S 11 N 13
—Whether amounts to a mortgage S 58 N 4

Covenant running with the land
—Annexed to land S 14 N 11
—Apportionment of S 37 N 4
—Benefit of, running with land S 40 N 1; S 108 (j) N 3; S 109 N 5
—Building schemes, covenants in S 40 N 26
—Burden of, running with land—Equity rule in S 40 N 1
—Burden of, running with land S 40 N 1
—Burden of, running with land—Landlord and tenant, rule as to S 40 N 1; S 108 (j) N 3; S 109 N 5
—Common law, rule in S 40 N 1
—Contract for repurchase of easement S 40 N 8a
—Contract for sale of immovable property S 40 N 8
—Covenant for indemnity, seller's S 40 N 24
—Covenant for title, seller's S 40 N 24
—Covenant to pay, mortgagor's S 58 N 29; S 68 N 8
—Covenant to repair S 109 N 5
—English law S 40 N 1
—Equity, rule in S 40 N 1
—Implied contracts by mortgagor, if S 65 N 3
—Lease, contract to give S 40 N 12
—Lease—Covenant against alienation in S 10 N 17
—Lessor and lessee, covenant between S 40 N 25; S 108 (j) N 3; S 109 N 5

Covenant running with the land (*contd.*)
—Perpetuity rule against, if affects S 14 N 11; S 40 N 16
—Pre-emption, contract for S 40 N 10
—Renewal of lease, covenant for S 40 N 25; S 105 N 36; S 111 N 3;
—Rent, covenant to pay S 105 N 59; S 109 N 5
—Transferee for value without notice— Enforcement against S 40; S 40 N 1
—Zaricharam, contract to pay S 40 N 12

Creditor
—Defeat or delay creditors, transfer to' *See* Fraudulent transfer
—Defined S 53 N 10
—Redemption right of S 91 N 38

Crown
—Escheat, right of S 105 N 6
—Forfeiture of mortgagor's interest to S 91 N 19
—Lease by Pre N 4
—Redemption right of S 91 N 19
—Revenue sale, interest of Crown if passes S 8 N 3

Crown debt
—Secured S 48 N 14
—Unsecured S 48 N 14

Crown Grants
—Applicability of S. 54 to S 54 N 2
—Construction of Pre N 4
—Covenant for quiet enjoyment in S 108 (c) N 7
—Election doctrine of, applicability to S 35 N 5
—Enjoyment, restraint on S 11 N 5
—Lease by Government Pre N 4; S 105 N 1; S 106 N 47; S 107 N 12
—Lis pendens, applicability of S 52 N 5
—Meaning of S 52 N 5
—Registration Act, S 17 not applicable to Pre N 4
—Registraint on alienation, validity of S 10 N 2
—Several persons to—Transferees, interest of S 45 N 6
—T. P. Act not applicable to Pre N 4
—Under-lease, relief against forfeiture, effect on S 115 N 1

Damages
—Actionable claim—Claim for damages, on breach of contract S 3 N 21
—Right to claim, transferee of actionable claim, passes to S 103 N 19
—Right to sue for S 6 N 16

Debt
—Accruing debt S 3 N 26
—Accumulation of income for payment of S 17
—Annuity, arrears of S 3 N 22
—Arrears of rent or other monies S 3 N 22
—Assignment of part of S 130 N 8
—Bill unpaid, money due under S 3 N 22
—Book-debt S 3 N 22
—Charge, debt secured by—Transfer of
Charge when passes S 8 N 17
Oral S 8 N 17

In the footnotes to the Commentary indicates either of leading case or a case giving fuller reasons.*

Debt (*contd.*)
Unregistered S 8 N 17
—Contingent or conditional S 3 N 22, 27
Meaning of S 3 N 27
Life policy, money due under S 3 N 27
—Contract to pay, of another S 40 N 14
—Crown debt: *See* Crown debt.
—*Debitum in proesenti solvendum in future* S 3 N 26
—Decree-debt as actionable claim S 3 N 23
—Deposit, due performance of duty, for S 3 N 22
—Earnest-money, claim for S 3 N 24
—Existing or future, mortgage for S 58 N 13
—Future rent S 3 N 26
—Interest: *See* interest
—Kinds of S 3 N 26, 27
—Legal incidents of S 8; S 8 N 17
—Liquidated or certain sum, must be S 3 N 22
—Meaning of S 3 N 22; S 133 N 3
—Mortgage-debt: *See* Mortgage-debt
—Mortgage debt S 134
—Provident fund money S 3 N 22
—Present obligation necessary S 3 N 22
—Purchase at Court sale S 2 N 6
—Rent in kind S 108 (1) N 4
—Secured debt—Transfer of S 134 N 3
—Security, debt separated from S 3 N 22
—Security for
Legal incident of debt S 8 N 17
Passes on transfer S 8; S 8 N 17
Separate from debt S 8 N 17
When passes on transfer S 8 N 17
—Transfer by way of security
Application of payments received S 134 N 2
Residue, person entitled to S 134 N 6
Rights and duties of transferee S 114 N 5
—Transfer of, distinguished from novation S 130 N 5
—Transfer of, security when passes S 8 N 17
Endorsement of promissory note—Debt if passes S 8 N 17
—Unpaid consideration of usufructuary mortgage S 3 N 22
—Vendee, consideration in the hands of S 3 N 22
—Wages, servant's S 3 N 22
—Warranty of solvency of debtor S 133
Contract to contrary S 133 N 5
Date of transfer on S 133 N 2
—Limit to S 133 N 2

Decree
—Charge created by S 100 N 1
Applicability of S. 100 to S 100 N 28
Registration of S 100 N 16
Transferee for consideration without notice, whether bound S 100 N 28
—Condition against alienation in S 10 N 15
—Decree-debt if actionable claim S 3 N 23
—Execution, transfer in
Apportionment, rule of, applicability S 36 N 2; S 37 N 2
Lis pendens, if applies S 52 N 31
—Fraudulent transfer of S 53 N 3

Decree (*contd.*)
—Lease embodied in S 107 N 13
See also Lease
—Mesne profits, decree for, transfer of S 6 N 19
—Money-decree, transfer by person with limited authority S 38 N 4
—Mortgage-debt, decree for sale— Whether immovable property S 3 N 2
—Notice, decree as S 3 N 48
—Occupancy right, transfer prohibited by S 6 N 37
—Pre-emption decree, transfer of S 6 N 12
—Restraint on alienation—Direction as to S 11 N 10a
—Reversal or variation of
Assignment of decree, effect on S 52 N 42
Sale in execution—Effect on S 52 N 42
—Right under—If mere right to sue S 6 N 19
—Transfer by—Lis pendens, applicability of S 52 N 31
—Transfer by or in execution of S 2 N 6; S 54 N 3
Actionable claim of S 130 N 10
Applicability of T. P. Act S 2; S 2 N 6
Registered instrument, if necessary S 54 N 3

Deed
—Construction of—Principles S 8 N 20
—Contents—Notice of deed, if notice of S 3 N 32
—Deeds referred in notice of deed, if notice of S 3 N 32
—Title deeds: *See* Title deeds.
—Words with technical meaning S 8 N 4

Definitions
—British India S 1 N 1
—Dividend S 36 N 6
—Fraud S 34 N 3; S 78 N 2
—Good faith S 41 N 22; S 50 N 2; S 51 N 8
—Mesne profits S 51 N 20
—Misrepresentation S 78 N 3
—Mortgagee S 59A N 1
—Mortgagor S 59A N 1
—Registration Act, definitions, applicability of S 4 N 5
—Warranty S 133 N 4
—Writing S 9 N 14

Deposit of mortgage-money S 83
—Acceptance of
Full discharge, must be in S 83 N 20
Partial discharge, in, not allowed S 83 N 20
Refusal, effect of S 83 N 20
—Account of mortgagee, deposit to S 83 N 15
Co-mortgagee, to S 83 N 15
Estate of the original mortgagee, to S 83 N 15
Minor mortgagee, procedure S 83 N 16
Third person and mortgagee S 83 N 15
—Actual, necessary S 83 N 8
—Amount to be deposited S 83 N 17
Bona fide mistake in calculation S 83 N 17

Deposit of mortgage-money (*contd.*)
Costs of mortgagee S 83 N 17
Deficiency made good, effect S 83 N 17
Interest, calculation of S 83 N 17
Date of deposit, up to S 83 N 17
Date of service of notice up to S 83 N 17
Penal clause according to S 83 N 17
Larger sum, of S 83 N 17
Money spent by mortgagee to save property, inclusion of S 83 N 17
Mortgagee in possession, in case of S 83 N 17
Remaining due on mortgage S 87 N 17; S 84 N 7
Value of improvements, inclusion of S 63A N 6; S 83 N 17
—Application for, mere S 83 N 8
—Cessation of interest on: *See* Interest, cessation on
—Charge, money due under, deposit of S 83 N 4
—Court in which to be made S 83 N 14
—Due, principal money has become, after S 83 N 5
—Duty after S 84 N 10
Adult mortgagee in case of S 84 N 10
Incompetent to contract, mortgagee, in case of S 84 N 10
—Rival claimants to mortgagee's estate; in case of S 84 N 10
—Extinguished, mortgage if S 83 N 20
—Full discharge, acceptance must be in S 83 N 20
—Incompetent to contract, mortgagee
Guardian ad litem, appointment of S 103 N 2 and 5 to 7
Procedure S 103; S 103 N 2
—Interest, cessation on S 84
Condition for S 84 N 2
Date of S 84 N 2
Date of service of notice, ceases from S 84 N 11
Previous tender, effect of S 84 N 9
Withdrawn, deposit by mortgagor S 84; S 84 N 13
—Insufficiency
Plea of S 84 N 17
Question of fact S 84 N 17
—Interest up to date of notice, subsequent deposit of S 84 N 11
—Invalid
Before principal money has become due: S 83 N 5
Guardian ad litem, appointment of, without S 103 N 7
Mortgagee's rights on S 67 N 9
—Ministerial and not judicial Court's function S 83 N 3
—Minor mortgagee
Guardian ad litem, appointment of S 83 N 16; S 103; S 103 N 2, 5 to 7
Legal curator of, notice to S 103; S 103 N 4
—Minor mortgagor, by S 83 N 7
—Money deposited, title to S 83 N 13
—Mortgagor's right to S 83
—Notice to mortgagee S 83; S 83 N 18

Deposit of mortgage-money (*contd.*)
Agent, notice to S 102; S 102 N 2
Duty of Court S 83 N 18
Guardian ad litem, appointment of S 103; S 103 N 2, 5 to 7
Interest between date of deposit and service S 84 N 11
Legal curator to S 103; S 103 N 4
Mortgagee's suit before service S 67 N 9; S 83 N 12
Service of S 84 N 11; S 102; S 102 N 2
Agent, on S 102; S 102 N 2
Date of, interest ceases from S 84 N 11
Direction as to, Court to make, when S 102
—Object of provision S 83 N 2
—Persons entitled to make S 83; S 83 N 7; S 84 N 3
—Petition for withdrawal, verification on S 83 N 19
—Possessory mortgage, in case of S 84 N 19; S 103 N 7
Effect S 76 N 21; S 84 N 19; S 103 N 7
Expenses incurred after deposit, credit for S 76 N 21
—Premature S 83 N 5
—Proceedings for—Ministerial, Court's function is only S 83 N 17
—Procedure for S 83
Ministerial, Court's function only S 83 N 3
Minor mortgagee, in case of S 103; S 103 N 2
Summary S 83 N 3
—Redemption suit, in S 83 N 3
—Redemption suit, in S 83 N 10
—Redemption suit, without S 83 N 11
—Refusal to accept—Effect of S 83 N 20
—Security bond, power of Court to take S 83 N 23
—Special privilege to mortgagor S 83 N 2
—Suit on mortgage, after S 83 N 9
Interest, suit for recovery of only—Deposit after S 83 N 9
—Sufficiency of
Power of Court to decide S 83 N 17
Principal amount only, deposit of S 84 N 7
—Tender, deposit a special kind of S 84 N 12
—Unconditional, must be S 83 N 8
—Validity of, essentials S 83 N 2
—When can be made S 83; S 83 N 5, 6
—Withdrawal of
Application by mortgagee S 83
Delivery of possession before S 83
Deposit of mortgage deed and documents before C 83; S 83 N 21
Direction in decree, in pursuance of S 83 N 13
Extinguished, mortgage, by S 83 N 13
Procedure for S 83
Re-transfer of property before S 83; S 83 N 22
Right to redeem, mortgagee cannot subsequently dispute S 83 N 7
—Withdrawn by mortgagor—Effect S 84 N 13

Reference to Official Reports are invariably given in all cases found in the Official Reports.

Determination of lease
—Agricultural lease S 117 N 2
—Burden of proof S 105 N 71
—Cesser of lessor's interest on S 76 N 6; S 111; S 111 N 5
—Death of lessee, by S 105 N 72; S 106 N 6, 16; S 111 N 6, 24
—Death of lessor, by S 106 N 6; S 111 N 5, 6
Hindu widow lease by S 111 N 5
—Effect of S 111 N 1
—Efflux of time, by S 106 N 3; S 111; S 111 N 2
Permanent lease S 111 N 2
Year to year lease S 111 N 2
—Forfeiture by S 111; S 111 N 11 to 22
See also Forfeiture of lease
—Happening of contingency, on S 111; S 111 N 4
—Joint lessees, death of one S 111 N 26
—Joint lessor's, in case of S 111 N 26
English law S 111 N 26
—Lease not governed by T. P. Act, of S 111 N 25
—Lessee—Giving up possession before S 106 N 31
—Lessee to deliver possession on S 108 (q); S 108 (q) N 1
—Merger, by S 111; S 111 N 7
Co-extensive, interests united to be S 111 N 7
Intention, rule of
Abrogated S 111 N 7
English law S 111 N 7
Subordinate interests, effect on S 111 N 7
Whole property, interest in, must be merged S 111 N 7
—Modes of S 106 N 26; S 111
—Mortgagee, lease by S 76 N 6
—Municipality, lease by S 106 N 48
—Non-payment of rent S 105 N 71
—Notice to quit, by S 106; S 111; S 111 N 23
See also Notice to quit
—Option to determine S 110; S 110 N 4
Exercise of S 110 N 4
—Periodic lease of S 105 N 31; S 106
See also Notice to quit—Periodic leases
—Piece-meal S 106 N 19
—Possession of lessee, after S 111 N 27
Adverse, whether S 116 N 13
Nature of S 105 N 80; S 111 N 27
Wrongful, when S 116 N 13
—Principles—Leases not governed by T. P. Act applied to S 111 N 25
—Sub-lease, determination of: *See* Sub-lease
—Surrender, by S 111; S 111 N 8 to 10
See Surrender of lease
—Tenancy at will S 105 N 32; S 106 N 6; S 111 N 24
See also Tenancy at will

Disqualified transferee
—Actionable claim, persons prohibited to buy or traffic in S 136; S 136 N 2, 4
—Bequest onerous, to S 127 N 1
—Incompetent to contract, person S 7 N 8
—Onerous gift to S 127; S 127 N 4
—Transfer to S 6; S 6 N 25

Dividend
—Apportionment of S 36 N 6
—Defined S 36 N 6
—Share of profits S 36 N 6

Donatio Mortis Causa: *See* Gift.

Duration of lease
—Certain time S 105 N 25
Capable of being made certain S 105 N 25, 26
Date of lease on, need not be S 105 N 25
Instances S 105 N 25
Provision for continuation after period fixed S 105 N 29
Terminable before end of term fixed S 105 N 30
—Computation of time S 110; S 110 N 1, 3
—Determination of—Principles S 105 N 26; S 107 N 3
—Holding over—Renewed lease, of S 116
—Lessee to hold as long as he pays rent or as long as he may wish, in case of S 105 N 27
—Minimum period S 105 N 25
—Periodic leases of S 105 N 31; S 106
See also Periodic leases
—Tenancy at will S 105 N 25
—Term of lease, how determined S 107 N 3
—Uncertain S 105 N 25, 26
—Yearly rent reservation of S 106 N 15

Dwelling house
—Actual occupation, if necessary S 44 N 9
—Defined S 44 N 9
—Joint possession, transferee if entitled to S 44 N 8
—Several, dwelling houses— Transferee of share in one S 44 N 9
—Transferee of a share of rights and liabilities of S 44
—Undivided family, owned by S 44 N 10

Earnest-money
—Charge for S 55 N 20
See also Buyer's charge
—Claim for
Beneficial interest in moveable property whether S 3 N 24
Whether debt S 3 N 24
—Defined S 55 N 20
—Forfeiture of S 55 N 20
—Test, to determine whether amount paid as S 55 N 20

Easement
—Annexed to property S 8 N 13
Easement of necessity S 8 N 13
Quasi easement S 8 N 13
—Apportionment of S 37 N 4
—Creation of S 6 N 9
Sale, creation of easement whether S 54 N 7
Transfer of property, creation of easement whether S 5 N 1; S 54 N 7
Writing, necessity of S 9 N 8
T. P. Act not applicable to Pre. N 5
—Defined S 6 N 9
English law S 6 N 9
—Dominant heritage, transfer along with S 6 N 9
—Enforcement of right of S 40 N 4
—Legal incident of property S 8

Easement (*contd.*)
—Necessity, easement of
Incident of property if S 8 N 13
Passes to transferee if S 8 N 13
—Passes on transfer S 8 N 13
—Quasi
Incident of property, if S 8 N 13
Passes to transferee, if S 8 N 13
—Right in gross S 6 N 9
—Right of, whether immovable property S 3 N 2
—Transfer of S 6; S 6 N 9
—Waste, grant of easement if amounts to S 66 N 6

Ejectment, suit for
—Acceptance of rent after S 112; S 112 N 7; S 113 N 3
—Agreement to grant lease, defence of S 105 N 4
—Appeal, payment or tender or rent in S 114 N 5
—Assignee of lessor, by—Forfeiture on ground of S 114 N 3
—Continuance of lease during S 105 N 3; S 111 N 1
—Cosharers, by one of S 106 N 34
—Defence
Agreement to grant lease S 105 N 4
Covenant for renewal of lease S 105 N 39
Licence grant of, as S 105 N 13
—Delay in filing, whether operates as waiver of notice S 113 N 3
—Forfeiture, on ground of
Assignee of lessor by S 114 N 3
Claim for rent, if operates as waiver of forfeiture S 112 N 4
Decree for arrears of rent only, power of Court to pass S 114 N 10
Denial of title prior to suit necessary S 111 N 14
Notice to remedy breach of condition, before S 114A; S 114A N 1 to 3
Waiver of forfeiture after S 112 N 7
—Hearing of—Payment or tender of rent at S 114 N 5
—Notice to lessee before S 114A; S 114A N 2
Two notices, when necessary S 114A N 2
—Notice to quit before S 106 N 24; S 111 N 23
—Part of holding, right of lessor to eject from S 109 N 5
—Relief against foreiture S 114
Assignee of lessor, suit brought by S 114 N 3
Power of Court to order S 114
—Right of, on determination of lease S 108 (q) N 1
—Transferee from lessor if can sue S 109 N 5; S 114 N 3
—Void lease, possession under S 105 N 19

Election S 35
—Acceptance of benefit
Conscious, choice, must be S 35 N 21
Duty to elect, knowledge of S 35 N 21

Election (*contd.*)
Knowledge of circumstances influencing judgment in making election S 35 N 21
Status quo, impossibility of restoring S 35 N 23
Waiver of inquiry—Effect of S 35 N 21
When operates as election S 35 N 21
—Applicability of doctrine S 35 N 2
Essentials S 35 N 2
Interest in property S 35 N 2
Personal estate S 35 N 2
Persons, claiming property in any character S 35 N 2
Property of all kinds S 35 N 2
Property of all kinds S 35 N 2
Real estate S 35 N 2
Transfer of property, to S 35 N 2
Will, to S 35 N 2
—Belief of transferor as to ownership S 35 N 17
—Benefit on owner S 35 N 8
Condition coupled with S 35 N 8
Conferring benefit—Illustrative cases S 35 N 8
Forfeiture of, on dissent from transfer S 35 N 11
English law S 35 N 11
Particular benefit in lieu of transfer—Effect S 35 N 20
Part of benefit, failing S 35 N 8
Restraint on anticipation, coupled with S 35 N 25
—Cancellation of document on dissent by owner S 35 N 16
—Compensation to disappointed donee S 35 N 12
Date, material for ascertainment of S 35 N 12
Extent of S 35 N 12
Remedy against transferor or his representatives S 35 N 12
—Co-owners, election by one S 35 N 14
—Crown grants, applicability of doctrine to S 35 N 5
—Disability transferor's S 35 N 26
—Disappointed donee
Remedy of, not against owner S 35 N 12
Right of, to compensation S 35 N 12
—Dissent by donee of benefit—Effect of S 35 N 11
—Distinct capacities, person taking under, by S 35 N 19
—Doctrine of S 35 N 19
—Doctrine of S 35 N 2
English law—Doctrine of compensation S 35 N 19
— S 35 N 11
Principles S 35 N 2; S 127 N 2
Rule of conscience S 35 N 2
—Duty to elect, knowledge of, if necessary S 35 N 21
—Enjoyment of benefit for two years— Presumption from S 35 N 22
—Forfeiture of benefit conferred S 35 N 11
English law S 35 N 11
—Hindu law, doctrine if inconsistent with rule of S 35 N 3

Election—Benefit on owner (*contd.*)
—Illegality, rule cannot be applied to cure S 35 N 15
—Impossibility of restoring status quo—Effect S 35 N 23
—Independent transaction, transfer and conferring of benefit S 35 N 9
—Indirectly, benefit received, election if necessary S 35 N 18
—Intention of transferor S 35 N 7
Clear and manifest, must be S 35 N 7
Contrary intention, expression of, rule subject to S 35 N 13
Nature of S 35 N 7
Proof of S 35 N 7
—Invalid, professed transfer—Effect S 35 N 15
—Lunatic, by S 35 N 25
—Married woman, by S 35 N 25
—Minor, by S 35 N 25
—Muhammadan law, doctrine if inconsistent with rule of S 35 N 4
—Owner of property transferred
Acquisition of interest after time of election S 35 N 10
Creditors of, applicability of rule to S 35 N 10
Disappointed donee, remedy of, against S 35 N 12
Immediate interest, if necessary S 35 N 10
Meaning of S 35 N 10
Time of election, person must be, at S 35 N 10
—Particular benefit in lieu of transfer—Effect S 35 N 20
—Persons bound by S 35 N 25
—Power of appointment under S 35 N 27
—Presumption of S 35 N 22
Rebuttable S 35 N 22
Two years' enjoyment of benefit, from S 35 N 22
—Property must be belonging to another S 35 N 6
—Ratification, is not S 35 N 28
—Representatives, bound by S 35 N 14
—Same transaction
Benefit conferring of and transfer must be part of S 35 N 9
Separate instruments S 35 N 9
—Surrender, by Hindu widow, applicability of doctrine S 35 N 7
—Time limit for S 35 N 24
English law, different S 35 N 24
—Transfer, transferor must profess to S 35 N 7
—Transferor having right to transfer—Effect S 35 N 6
—When necessary S 35
—Will—Applicability of doctrine S 35 N 2

Endowment
—Religious and charitable—Gift to, writing S 9 N 9
—English mortgage S 9 N 9
—Absolute transfer S 58 N 38
Nature of S 58 N 38
—Defined S 58
—English law and practice S 58 N 38

Endowment (*contd.*)
—Essentials of S 58 N 38
—Mofussil in S 58 N 38
—Parties to S 58 N 38
—Personal liability, mortgagor's S 58 N 38
Certain date, of payment must be S 58 N 38
—Possession of property S 58 N 38
Mortgagor retaining S 58 N 38
—Power to sell without intervention of Court S 69
—Reconveyance, proviso for S 58 N 38
—Remedy of mortgage S 67 N 16

Enjoyment, postponement of
—Limits to S 19 N 9
—Provision for
Unborn person, transfer for the benefit of S 20; S 20 N 4
Validity of S 19 N 9
—Vesting of interest S 19; S 19 N 9
See also Vested interest
—Vesting of interest—Unborn person transfer for benefit of S 20; S 20 N 4

Equitable mortgage
See Mortgage by deposit of title deeds

Equity of redemption
—Acquisition of by mortgagee S 60 N 22 to 25; S 73 N 6; S 101 N 4, 5
Court sale at S 60 N 23
Intention to keep alive charge S 101 N 1, 2
Merger, none against subsequent incumbrances S 101
Portion of S 60 N 23; S 82 N 18; S 101 N 5
Purchase by mortgagee S 60 N 22 to 25; S 82 N 18; S 101 N 4, 5
Sale for arrears of revenue, at S 60 N 23; S 73 N 6
—Adverse possession of S 60 N 53
Title perfected by date of hearing, right to redeem S 91 N 34
—Court sale—Mortgagee purchaser S 60 N 23
Voidable, sale when S 60 N 23
—Immovable property, equity of redemption whether S 3 N 2
—Intangible thing, whether S 54 N 19
—Meaning of S 60 N 1
—Mortgage of S 58 N 9
—Mortgagee acquiring part of S 60 N 23; S 82 N 18; S 101 N 5
Abatement proportionate of debt S 82 N 18
Contribution to mortgage-debt, effect on S 82 N 18
—Mortgagor parting with, redemption by S 91 N 3
—Origin and development of S 60 N 1
—Prior mortgagee, purchase by: *See* Prior mortgagee
—Purchase by mortgagee
Invalid—Effect of S 101 N 4
Portion, purchase of S 101 N 5
Revenue arrears, sale for S 60 N 23; S 73 N 6
Right to redeem, when extinguished S 60 N 22 to 25

Equity of redemption (*contd.*)
—Purchaser of
Pending suit on mortgage S 52 N 18
Redemption right of S 91 N 8
Subrogation right of S 92 N 10, 13
—Sale of S 54 N 19
Advance by mortgagee, after S 79 N 10
—Transfer of—Wrongful act, if S 68 N 4
—Unknown to ancient law in India S 60 N 1
Escheat
—Crown right of S 105 N 6
—Lease, in case of S 105 N 6
—Transfer by operation of law in S 2 N 7
—When takes place S 105 N 6
Estoppel
—Acquiescence, phase of S 51 N 22
—Attestation, estoppel by S 59 N 9
—Deed, estoppel by S 43 N 2
—Distinction between Evidence Act, S. 115 and S. 41, T. P. Act S 41 N 2
—Expectation, doctrine of S 21 N 22
—Feeding by estoppel: *See* Feeding by estoppel
—Lessee's S 105 N 79, 85; S 111 N 17
—Lessor not to deny grant S 105 N 20
—Mortgagor, not to deny title S 65 N 4
—Permanent tenancy, lessor's estoppel against denying S 105 N 55
—Priority forfeited by S 48 N 16; S 78 N 1, 10
—Real owner, of S 41 N 2
—Statute, against S 6 N 3, 7
—Title whether passes by S 54 N 1
Exchange
—Buyer's charge in S 120 N 3
—Compensation for deprivation of thing exchanged S 119; S 119 N 5
Amount of S 119 N 5
Suit for—Limitation S 119 N 9
—Condition as to title implied, in S 119 N 2
Contrary intention S 119 N 8
—Defect in title
Deprivation of thing exchanged, for S 119
Inoperative, exchange if rendered ipso facto S 119 N 4
—Defined S 118
—Deprivation of thing exchanged
Complete and permanent, if to be S 119 N 3
Party deprived, rights of S 119; S 119 N 5
Title paramount by S 119 N 3
—Family arrangement whether S 118 N 4
—Intangible things of S 118 N 7
—Mode of effecting S 118; S 118 N 9
Goods, of S 118 N 9
Immovable property, of S 118 N 9
Single instrument, by S 118 N 9
—Money, of S 121; S 121 N 1, 2
Warranty as to genuineness S 121; S 121 N 1
—Moveable property, of S 118 N 1
—Mutual sale deeds, by S 118 N 6
—Mutual transfer of ownership
Instances of S 118 N 4
Necessary S 118 N 4
—Partition whether S 118 N 5
Exchange (*contd.*)
—Possession, failure to get—Remedy for S 119 N 6
—Pre-emption, right of, on S 118 N 3; S 120 N 2
—Punjab, principles applied to S 119 N 2
—Remedy of parties to S 117 N 10
Completion on S 118 N 10
Specific performance of contract of S 118 N 10; S 119 N 6
—Return of thing exchanged
Against whom can be claimed S 119; S 119 N 1, 5, 10
Option to claim S 119; S 119 N 5
Partial deprivation on S 119 N 5
Suit for—Limitation S 119 N 9
Void exchange, in case of S 119 N 7
—Retrospective operation of S. 119 S 119 N 10
—Rights and liabilities of parties to S 120; S 120 N 1
—Sale, distinguished from S 118 N 2
—Seller's charge in S 120 N 3
—Thing, of S 118 N 7
—Transfer partly for money, whether S 118 N 3
—Void, return of property in case of S 119 N 7
—Warranty as to title implied in S 119 N 2
Contrary intention S 119 N 8
—Writing, necessity of S 9 N 5, 6
Execution sale
—Auction-purchaser
Charge whether binds S 100 N 24
Creditor of judgment-debtor if S 53 N 10
Improvements by S 51 N 6; S 63A N 2
Marshalling right of S 56 N 7
whether S 53 N 32
Transferee, whether, within meaning of S 40; S 40 N 20
Transferee within meaning of S. 43, whether S 43 N 12, 13
—Equity of redemption of
Mortgagee purchaser—Effect of: S 60 N 23 to 25
Voidable, sale when S 60 N 23
—Legal incidents of property if pass at S 8 N 3
—Marshalling, doctrine of, applicability S 56 N 7
—Mortgage-debt, of—What passes at S 8 N 17
—Reversal or variation of decree—Effect on S 52 N 42
—Sale certificate, instrument of transfer if S 8 N 8
—Sale subject to a change O 34 R 12 N 5
—Section 41, T. P. Act, principle, applicability of S 41 N 3
—Transfer, execution sale whether S 5 N 3
—What passes at S 8 N 3
Money decree in S 58 N 43
Mortgage decree in S 48 N 43
Executor
—Mortgage, by S 58 N 25
—Transfer by—Subject to maintenance S 39 N 4

Expectation, doctrine of S 51 N 22
—Estoppel, based on S 51 N 22
Family arrangement
—Assumption of antecedent title S 5 N 4
—Basis of S 9 N 11
—Dispute, existence of, if necessary S 5 N 4
—Exchange, not S 118 N 4
—Meaning of S 5 N 4; S 9 N 11
—Part performance, applicability of S 53 A N 6
—Restraint on alienation in S 10 N 3
—Restraint on enjoyment in S 11 N 6
—Reversioner's interest, as to S 6 N 4
—Substance of transaction, to be looked to S 5 N 4
—Transfer of property, family arrangement if S 5 N 4; S 9 N 11
—Writing, if necesary S 9 N 11
Feeding the estoppel S 43 N 2
—Doctrine of—S. 43 if based on S 6 N 7
—Spes successionis, transfer of, applicability of, doctrine to S 6 N 3
Fire insurance
—Fire policy, assignment of S 130 N 23; S 135 N 2, 3
—Gift of insured property S 49 N 3
—Transfer of property for consideration—Insurable interest, transfer of S 49 N 2
Insurance money, transferee if can claim S 49 N 4, 6
Reinstating the property, transferee's right S 49 N 4, 6
Right of transferee S 49; S 49 N 2, 5
English law S 49 N 1
—Transfer of property for consideration—Subsequent insurance S 49 N 2
Fixtures
—Attached to the earth
Meaning of S 3; S 3 N 6
Thing if part of land S 3 N 6
—English law S 3 N 6; S 8 N 16
—Imbedded in the earth
Things attached to, when immovable property S 3 N 10
Things if immovable property S 3 N 9
—Lessee's right to remove S 108 cl (h); S 108 cl (h) N 2 to 8
—Machinery brought for business, transfer of house, whether passes on S 8 N 16
—Mortgagee of land, pass to S 8 N 8
—Pass on transfer of house S 8 N 16
—Permanently fastened to anything attached to the earth—Thing, if immovable property S 3 N 7

Floating charge: *See* Charge.
Floating security: *See* Charge—Floating charge.
Foreclosure or Sale for Foreclosure
—Anomalous mortgagee, right of S 98 N 1, 5, 6
—Benamidar, suit by S 67 N 22
—Decree for money in a suit for sale O 34 R 4 N 4
—Deposit of mortgage money after
Invalid—Effect of S 67 N 9
Mortgagee's right to sue or: S 67 N 9; S 83 N 12
Foreclosure or Sale for Foreclosure (*contd.*)
—Due, after mortgage-money has become S 67 N 5
See also Mortgage-money
—Final decree—Redemption right extinguished S 60 N 26
—Final decree for foreclosure O 34 R 3 & N 6, 7
Appeal O 34 R 3 N 13
Appeal from preliminary decree, effect of O 34 R 3 N 5
Application by puisne mortgage O 34 R 2 N 15
Effect of O 34 R 3 N 9
Ex parte decree O 34 R 3 N 7
Execution of O 34 R 3 N 12
Right to redeem before passing of O 34 R 3 N 3
—Final decree for sale O 34 R 5
Appeal O 34 R 5 N 24
Application for, necessity of O 34 R 5 N 10
Award, decree on O 34 R 5 N 5
Confirmation of sale, mortgagor's rights before O 34 R 5 N 13
Consent decree O 34 D 5 N 5
Costs O 34 R 5 N 26
Court to which application to be made O 34 R 5 N 9
Direction for sale of mortgaged property O 34 R 5 N 17
Dismissal of application O 34 R 5 N 16
Execution of O 34 R 5 N 20
Form of O 34 R 5 N 7
Injunction restraining mortgagor from receiving income O 34 R 5 N 22
Joint decree-holders O 34 R 5 N 30
Limitation for application O 34 R 5 N 12
More than one O 34 R 5 N 6
Nature of proceedings O 34 R 5 N 29
Notice to judgment-debtor O 34 R 5 N 11
Power to go behind preliminary decree O 34 R 5 N 8
Power to take note of subsequent events O 34 R 5 N 8
Transfer of, registration O 34 R 5 N 21
When can be passed O 34 R 5 N 3, 4
—Final decree in a suit for sale, when the defendant makes payment O 34 R 5 and N 14, 15
Payment into Court O 34 R 5 N 14
Return of documents O 34 R 5 N 15
—Final decree in foreclosure suit, when amount is paid O 34 R 3 and N 10
—Foreclosure
-Effect of S 67 N 10
Meaning of S 67
Persons entitled to O 34 R 2 N 4
Restricted to anomalous mortgage and mortgage by conditional sale S 67 N 12
Trustee or legal representative, mortgagor being of mortgagee, effect S 67
—Instalments, on failure of S 67 N 7
—Interest, failure to pay on S 67 N 6
—Kanom mortgagee, right of S 98 N 7
—Limited interest in property, mortgagee of, by S 67 N 22a

Foreclosure or Sale—Final decree for sale (*contd.*)
—Money decree on mortgage, mortgagee obtaining—Effect of S 67 N 31
—Mortgage-money paid—Effect S 67 N 9
—Mortgagee claiming under S. 68, if can sue for sale S 68 N 17
—Mortgagee's right to S 67
Contract to the contrary S 67 N 4
—Moveables, foreclosure of S 58 N 11
—Partial S 67; S 67 N 27; O 34 R 3 N 8
Multiplicity of suits, rule against S 67 N 27
Severance of interests with mortgagor's consent S 67 N 27
Sole mortgagee, right of S 67 N 28
Suit by one co-mortgagee—Defendants, others joined as S 67 N 27
Whole amount, if must be for S 67 N 27
—Parties to suit for: *See* Mortgage suit
—Portion of property, sole mortgagee's right to S 67 N 28
—Preliminary decree for foreclosure: O 34 R 2 and N 3
Accounts, how to be taken O 34 R 2 N 6 to 14
Mortgagee in possession O 34 R 2 N 13
Sub-mortgagee, suit by or against: O 34 R 2 N 14
Amount to be paid by mortgagor O 34 R 2 N 7 to 12; R 3 N 6
Costs of suit O 34 R 2 N 11
Extension of time for payment O 34 R 2 N 18
Form of O 34 R 2 N 5
Instalment decree O 34 R 2 O 5
Interest subsequent to date fixed for payment O 34 R 2 N 9
Foreclosure or sale—Preliminary decree
Other costs, charges and expenses O 34 R 2 N 12
Payment into Court O 34 R 2 N 16
Puisne mortgagee impleaded, form of decree O 34 R 2 N 15
Time for payment O 34 R 2 N 17
—Preliminary decree for sale O 34 R 4
Appeal O 34 R 4 N 16
Award, decree on O 34 R 4 N 14
Consent decree O 34 R 4 N 15
Costs O 34 R 4 N 12
Deposit by mortgagor, limitation for O 34 R 5 N 12
Extension of time for payment O 34 R 4 N 8; R 5 N 18
Foreclosure suit, decree in O 34 R 4 and N 9
Form of O 34 R 4 N 5, 6
Order in which properties to be sold O 34 R 4 N 10
Persons entitled to O 34 R 4 N 3
Power to adjust equities O 34 R 4 N 7, 10
Suit by prior mortgagee O 34 R 4 N 6
—Prior and puisne mortgagees, remedies against each other S 67 N 19
—Right to redeem and right to foreclosure, co-extensive S 60 N 5

Foreclosure or Sale—Preliminary decree for Foreclosure (*contd.*)
—Simple mortgage usufructuary, right of mortgagee S 98 N 5
—Sub-mortgagee, right of S 67 N 21
See also Sub-mortgagee
—Succession certificate, necessity of, in a suit for sale O 34 R 4 N 13
—Takkavi loan, suit to recover S 67 N 24
—Trustee or legal representative mortgagor, of mortgagee's interest S 67 N 25
—Usufructuary mortgagee claiming under S. 68—Right of S 68 N 17
Forfeiture
—Attempt or endeavour to transfer, on S 12; S 12 N 2
Condition or limitation as to
Inoperative when no transfer of property S 12 N 4
Transfer by operation of law if affected by S 12 N 8
English law S 12 N 2
Absolute interests, forfeiture of S 12 N 2
—Clause of—Construction of S 12 N 11
—Crown to, mortgagor's interest of S 91 N 19
—Earnest-money, of S 55 N 20
See also Earnest-money
—Fraudulently incurred—Mortgagee's rights S 67 N 29
—Insolvency, forfeiture on S 12; S 12 N 1
Annulment of insolvency, effect of S 12 N 12
Bequest of, on insolvency of legatee S 12 N 3
Condition or limitation as to
Inoperative when no transfer of property S 12 N 4
Partnership deed, in S 12 N 6
Transfer by operation of law, if affected by S 12 N 8
English law S 12 N 2
Life-estate, forfeiture of S 12 N 2
—Law abhors S 111 N 11
—Lease of: *See* Forfeiture of lease
Forfeiture of lease
—Acceptance of subsequent rent, effect of S 112; S 112 N 2
—Agricultural lease S 114 N 1; S 117 N 2
—Alienation, breach of condition against, for S 10 N 13; S 12 N 9; S 111 N 13
Relief against S 114 N 11; S 114A; S 114A N 1
English law S 114A N 1
—Attempt or endeavour to transfer on
Benefit of lessor, condition must be for S 12 N 9
Condition or limitation as to S 12
Validity of S 12 N 9
Transfer by operation of law S 12 N 8
Insolvency on petition of lessee S 12 N 8
Voluntary procuring of—Effect S 12 N 8
—Breach of an express condition on S 10 N 13; S 111; S 111 N 13
Alienation, condition against S 10 N 13; S 111 N 13
Breach—What constitutes S 111 N 13

Forfeiture of lease (*contd.*)
Condition
Express, to be S 111 N 13
Valid, must be S 111 N 13
English law S 111 N 13; S 114A N 1
Lessor, breach-by S 111 N 13
Non-payment of rent S 111 N 13
Notice to remedy breach S 114A; S 114A N 1
Contents of S 114A; S 114A N 3
Determination of lease, notice to be given after S 114A N 2
Ejectment suit, before S 114A; S 114A N 2
Object of S 114A N 3
Reasonable time to remedy breach S 114A N 3
Re-entry provision for, necessary S 10 N 13; S 12 N 9; S 111 N 13
Relief against S 114 N 11; S 114A; S 114A N 1, 2
English law S 114A N 1
—Construction of covenants entailing S 111 N 11
—Courts, lean against S 112 N 1
—Covenant against alienation, breach of, on S 10 N 17
—Denial of title, by S 111; S 111 N 14
Alienation of lease, interest S 111 N 14
Assignment of lease, denial after S 111 N 14
Disclaimer, what constitutes S 111 N 14
Disputing terms of tenancy S 111 N 14
Effect of denial S 111 N 14
Ejectment suit prior to S 111 N 14
English law S 111 N 14
Execution of kabuliat, denial of S 111 N 14
Extent of interest of landlord, denial of S 111 N 14
Joint lessees, by one S 111 N 14
Non-payment of rent S 111 N 14
Notice before ejectment suit S 114A N 1
Notice to quit, whether dispensed with S 106 N 25
Putting landlord to proof of his title S 111 N 14
Renunciation of tenancy S 111 N 14
Requiring information, lessee S 111 N 14
Setting up title of cosharer S 111 N 14
Suit to which lessor is not a party, denial in S 111 N 14
—Determination of lease by S 111; S 111 N 11 to 22
Conditions for S 111 N 11
Re-entry, provision for, necessary S 10 N 13; S 111 N 11
—Distress for subsequent rent—Effect of S 112; S 112 N 3
—Ejectment suit on
Denial of title prior to, necessary S 111 N 14
See also Ejectment suit on
—Fraud, procured by, under-lease, effect on S 115; S 115 N 3

Forfeiture of lease (*contd.*)
—Insolvency on S 12; S 12 N 8, 11; S 111; S 111 N 15
Notice before ejectment suit S 114A N 1
—Kanom, waste by kanomdar S 111 N 11
—Knowledge to lessor of forfeiture: S 112; S 112 N 5
—Non-payment of rent, by
Denial of title, non-payment whether amounts to S 111 N 14
Relief against S 114
—Notice of intention to determine lease S 106 N 21; S 111 N 11, 16
Agricultural lease, in case of S 117 N 2
—Conditional notice S 111 N 16
—Period for S 111 N 16
—Service of notice S 111 N 16
—Notice to lessee—Remedy the breach, notice to S 114A; S 114A N 1, 2, 3
—Option to detarmine on S 111 N 16
—Partial S 111 N 11
—Permanent lease S 111 N 12
—Re-entry, right of S 10 N 13; S 111 N 18
—Relief against
Agricultural lease in case of S 114 N 1
Alienation, breach of condition against in case of S 114 N 11; S 114A
Breach of an express condition in case of S 114 N 11
Agricultural lease S 114 N 1; S 117 N 2
Appeal, payment or tender of rent in S 114 N 5
Assignee of lessor, ejectment suit by S 114 N 3
Conditions for S 114
Court, power to grant S 114
Decree creating relationship of lessor and lessee, in case of S 114 N 9
Decree granting relief, construction of S 114 N 12
Discretionary S 114 N 7
Exercise of discretion, interference with S 114 N 7
Effect of S 114
Granted generally S 114 N 7
Hearing of suit, payment or tender at S 114 N 5
Order of ejectment, after S 114 N 5
—Payment or tender S 114 N 4a
Period of grace provided for, in case of S 114 N 8
Principle S 114 N 1
Applied before T. P. Act S 114 N 2
Refused, when may be S 114 N 7
Rent, to be paid
Amount to be paid S 114 N 4, 6
Appeal, payment in S 114 N 5
Hearing of suit, at S 114 N 5
Time barred, rent, if must be paid S 114 N 6
Transferees of lessee, if can claim S 114 N 4
Under-lease, effect on S 115; S 115 N 1, 3
—Service tenures, forfeiture of S 111 N 22

Forfeiture of lease— (*contd.*)
—Transfer by operation of law, forfeiture clause if operates on S 12 N 8
—Under-lease, effect on S 115; S 115 S 3
Fraud, forfeiture procured by S 115; S 115 N 3
Relief against forfeiture, effect of S 115; S 115 N 3
—Waiver of S 112; S 112 N 1
Acceptance of subsequent rent by S 112; S 112 N 2
Forfeiture of Lease Waive of
Protest, acceptance under S 112 N 2
Sub-lessee, rent paid by S 112 N 2
Act showing intention to treat lease as subsisting by S 112; S 112 N 4
Instances of S 112 N 4
Positive, must be S 112 N 4
Demand for subsequent rent by S 112 N 4
Effect of S 112 N 1, 6
Ejectment suit, after S 112 N 7
Express S 112 N 4
Irrevocable S 112 N 6
Knowledge of forfeiture to lessor, necessary S 112; S 112 N 5
Prior rent
Acceptance of S 112 N 2
Distress for S 112 N 3
Suit for subsequent rent, by S 112 N 4
—Who can enforce S 111 N 19
Transferee from lessor S 109 N 4; S 111 N 19

Fraud
—Actual
Defined S 34 N 3
Varities of S 34 N 3
—Actual and constructive S 34 N 3
—Agent, fraud of, notice to principal S 3 N 47
—Constructive
Defined S 34 N 3
Misrepresentation amounting to S 78 N 3
—Defined S 6 N 32
—Fraudulent transfer: *See* Fraudulent Transfer
—Ground, for relief against condition S 34 N 3
—Mortgagee, of S 73 N 6
—Mortgagee prior, of S 78 N 2
—Particulars of S 78 N 2
—Parties to, position of
Fraud carried out S 53 N 9
Fraud not carried out S 53 N 9
—Priority lost by S 78; S 78 N 1, 2
—Proof of S 34 N 3
Onus S 34 N 3
Strict proof, necessary S 34 N 3
Fraudulent transfer S 6 N 32; S 53
—All properties of transferor, transfer of S 53 N 6
—Avoidance of
Contract Act, S. 65, application of, on S 53 N 8
Defence, by way of S 53 N 14
Judgment of lien, creditor if must have obtained S 53 N 12
Mode of S 53 N 13, 14
Partial S 53 N 15

Fraudulent transfer (*contd.*)
Parties to transfer, by S 53 N 8, 9
Persons entitled to S 53 N 9
Creditor of transferor S 53 N 10a
Receiver in insolvency, by S 53 N 29
Subsequent creditor, by S 53 N 11
Suit for S 53 N 23
Avoidance, if must be, by S 53 N 13
Representative, must be S 53
—Barred debt, transfer for S 53 N 6, 17
—Benami transactions, if S 53 N 5, 7
—Consideration, transfer for S 53 N 17
Dower, transfer for, whether S 53 N 18
—Creditor
Judgment or lien on debt, if must have obtained S 53 N 12
Meaning of S 53 N 10
Transferor of, only entitled to impeach S 53 N 10a
—Decree, transfer of S 53 N 3
—Defeat or delay creditors, transfer to: S 53; S 53 N 2
—Defence of, representative capacity, if must be in S 53 N 26
—Dower, transfer for S 53 N 18
—English law as to S 53 N 1
—General principles S 53 N 1
—Good faith, transferee in S 53 N 19
Fact, question of, good faith S 53 N 22
—Gratuitous or voluntary transfer
Bona fide, valid S 53 N 6
Defined S 53 N 6
Fraudulent, presumption as to S 53 N 6
—Hindu law, as to S 53 N 4
—Immovable property—S. 53 restricted to S 53 N 3
—Inadequate consideration, transfer for S 53 N 6
Mortgage, for S 53 N 6
—Indebtedness of transferor S 53 N 6
—Insolvency, avoidance in S 53 N 30
—Insolvency, avoidance in S 53 N 30
—Intent to defeat or delay creditors S 53 N 6
Fact, question of S 53 N 22
Indications of S 53 N 6
Possession with transferor S 53 N 6
Value of property transferred S 53 N 6
Presumption as to S 53 N 6
Test, to determine S 53 N 6
—Mahomedan law, rule of, as to S 53 N 4
—Motive, immaterial S 53 N 6
—Moveable property, transfer of S 53 N 3
—Onus of proof, as to S 53 N 34
—Parties to, avoidance by S 53 N 8
—Partition, when S 53 N 5
—Plea of S 53 N 33
—Possession with transferor S 53 N 6
—Presumption as to S 53 N 6
—Relations, transfer to S 53 N 6
—Relinquishment of rights, when S 53 N 5
—Reserving benefit to transferor, or transfer whether fraudulent S 53 N 6
—S 53, T. P. Act and S 23 of Contract Act. S 53 N 2a
—S. 53 and S. 128, distinction between S 128 N 2
—Sham transaction, if S 53 N 5

Fraudulent transfer— (*contd.*)
—Subsequent creditor, avoidance by S 53 N 11
—Subsequent transferee, transfer in fraud of S 53; S 53 N 2, 31
Auction-purchaser, whether subsequent transferee S 53 N 32
—Suit to avoid
Cancellation of document, suit for S 53 N 23
Declaration, bare, suit for S 53 N 23
Frame of S 53 N 23
Insolvency Court, leave of S 53 N 28
Judgment-creditor, by S 53 N 24
Land, suit for, if S 53 N 27
Leave of Court S 53 N 25
Limitation S 53 N 35
Representative, must be S 53 N 24
—Surrender, when a S 53 N 5
—Transfer by operation of law, if S 53 N 5
—Transfer for consideration without reservation of benefit, if S 53 N 6
—Transferee from transferee S 53 N 21
—Transferee in good faith and for consideration, protected S 53 N 16
—Transfer, what amounts to S 53 N 5
Benami transaction S 53 N 5
Deed of appointment S 53 N 5
Mutation, acquiescence in S 53 N 5
Partition S 53 N 5
Relinquishment of rights S 53 N 5
Sham transaction S 53 N 5
Fraudulent transfer— Transfer, what amounts to
Surrender S 53 N 5
Wakf S 53 N 5
—Valid, parties to, between S 53 N 8
—Void, ipso facto, whether S 53 N 8
—Voidable S 53 N 8
—Wakf, when S 53 N 5
Future advances, mortgage to secure S 79 N 3
—Maximum, expressed S 79 N 5
Essential S 79 N 5
—Priority over subsequent mortgage: S 79; S 79 N 2
Advances before subsequent mortgage: S 79 N 6
Exceeding maximum, advance, of S 79 N 7
Notice, subsequent mortgagee must have S 79 N 8
Subsequent advances—Meaning of S 79 N 6
—Sale of equity of redemption, advance after S 79 N 10
Future property
—Charge on S 100 N 4
Operates as an agreement to charge S 100 N 4
Contract to transfer S 43 N 2
—Crops future, mortgage of S 3 N 4; S 5 N 7
—Gift of S 124; S 124 N 1, 2
—Mortgage of S 3 N 4; S 5 N 7; S 58 N 10
—Pledge of S 58 N 10
—Property, future no property at all S 5 N 5
—Transfer of

Future Property (*contd.*)
Contract to transfer, treated as, S 5 N 7; S 43 N 2; S 124 N 2
Equitable interest, if creates S 43 N 2
Equity treats that as done which ought to be done, application of the maximum S 43 N 2
Subsequent transferee for value without notice S 43 N 2
Gift
—Acceptance of S 122 N 7, 8
Death of donee before S 122
Death of donor before S 122 N 8
Donee by S 122 N 7
Express S 122 N 7
Hindu law S 122 N 20
Idol, gift to S 5 N 3
On behalf of donee S 122 N 7
Onerous gift of: S 122 N 7; S 127; S 127 N 1 to 5
See also Onerous gift
Presumption of S 122 N 7
When to be made S 122
—Actionable claim of S 122 N 6; S 123 N 14
—Agreement to give S 122 N 2a
—Attestation S 123; S 123 N 8
—Cantonment area, gift made in S 123 N 11
—Chapter relating to—If part of Contract Act S 4 N 3
—Charitable purpose, gift for S 18 N 3
—Competency to give S 122 N 3
Alien S 122 N 3
Corporation S 122 N 3
—Competency to receive S 122 N 4
—Complete
Irrevocable S 126 N 16
When S 123 N 6
—Conditional S 122 N 1; S 126 N 2
Condition and covenant as to cessation of interest, distinguished S 31 N 3
Onerous gift, distinguished from S 127 N 3
Restraining alienation, condition subject to S 10 N 14
Subsequent imposition of condition S 122 N 1
Transferee without notice, if bound by condition S 31 N 3
—Contract, gift not S 4 N 3
—Consideration, transfer for, is not S 122 N 2
—Consideration without S 122 N 2
Consideration—Meaning of S 122 N 2
Motive of transfer S 122 N 2
—Dedication for religious or charitable object S 122 N 5a
—Defined S 122
—Definite purpose S 122 N 5a
—*Donatio mortis causa* S 129; S 129 N 3
Buddhist law, invalid under S 129 N 4
Chapter relating to gifts inapplicable S 129; S 129 N 3
Hindu law—Void under S 129 N 4
Nature of S 129 N 3
Proof of S 129 N 3

Gift (*contd.*)
Suicide, gift in contemplation of S 129 N 3
—Donee
Competency S 122 N 4
Death before acceptance S 122; S 122 N 10
Right to redeem S 91 N 11
Several, non-acceptance by one S 125; S 125 N 1
Universal donee: *See* Universal donee
—Existing and future property of S 124; S 124 N 1
—Existing property must be S 122 N 6; S 124 N 1
—Gift or sale, transaction whether S 122 N 16
—Gift or trust S 122 N 15
—Gift or will, document whether S 122 N 17
—Hiba-bil-ewaz, whether S 54 N 4; S 128 N 6
—Hindu law as to S 122 N 20
—How made S 123
Territories to which Act not extended S 123 N 15
—Idol, to S 122 N 5a
—Immovable property of S 123 N 5
How made S 123; S 123 N 1
Registered instrument by: S 123; S 123 N 1, 5, 6
—Income of S 122 N 1
—Insolvency of donor after S 128 N 5
—Insured property, of S 49 N 3
—Invalid—Possession under S 123 N 10
—Irrevocable, when S 126 N 16
—Joint donees S 122 N 5
—Joint, several persons to
Joint tenants, transferees, when S 45 N 6
Quantum of interest of transferees S 45 N 1
Tenants-in-common, transferees when; S 45 N 6
—Muhammadan law S 123 N 4
—Muhammadan law, rules of
Delivery of possession S 9 N 3
Future property, gift of S 124 N 3
Not affected S 129; S 129 N 2, 5
Writing, necessity of S 9 N 3
—Mode of effecting S 123
—Mortgage, gift of S 122 N 6
—Moveable property, of S 122 N 6
Delivery of property S 123 N 12
How made S 123; S 123 N 1
—Onerous gift: *See* Onerous gift
—Pardanashin lady, by S 122 N 3
—Part performance, applicability of S 53A N 7; S 123 N 9
—Person, meaning of S 122 N 5
—*Persona designata*, to S 122 N 12
—Person with limited authority to transfer, by S 38 N 6
—Possession, delivery of
Buddhist law S 123 N 3
Hindu law S 123 N 2
Mahomedan law S 123 N 4
—Public, to S 122 N 5
—Registered after death of donor S 122 N 8

Gift (*contd.*)
—Registration of S 4 N 7; S 123: S 123 N 1, 5, 6
Moveables S 4 N 7
Operation of gift not suspended till S 123 N 6
—Release by mortgagee whether S 122 N 1
—Relinquishment by a coparcener, whether S 122 N 1
—Revocation of S 42 N 1; S 126; S 126 N 1
After acceptance S 123 N 6
Agreement of revocation S 126 N 2
Before registration S 123 N 6
Coercion—On ground of S 126 N 6
Express, must be S 126 N 15
Fraud, on ground of S 126 N 7
Grounds S 126; S 126 N 1, 5
Hindu law S 126 N 1
Life insurance policy, conditional assignment of S 126 N 2a
Loss of right of S 126 N 13
Misrepresentation, on ground of S 126 N 8
Mistake, on ground of S 126 N 11
Pardanashin woman, gift by S 126 N 10
Restraint on alienation, breach of S 10 N 14
Suit for—Limitation S 126 N 12
Subsequent transfer for consideration: S 42 N 1
Transferee for value without notice—
Rights of S 126; S 126 N 17
Undue influence, on ground of S 126 N 9
Who may revoke S 126 N 14
—Services rendered, transfer for S 122 N 2
—Signature S 123 N 7
On behalf of donor S 123 N 7
—Surrender by Hindu widow whether S 128 N 3
—Suspension of S 126
Registration, operation whether suspended till S 123 N 6
Transferee for value without notice—
Rights of S 126
—Trust, distinguished from S 128 N 3
—Unauthorised person, by S 43 N 5
—Unborn person, to—Void under Hindu law: S 2 N 10
—Universal donee: *See* Universal donee
—Unlawful object, for S 122 N 13
—Unregistered instrument, admissibility of S 123 N 5
—Universal gift S 128 N 2
Surrender by Hindu widow, whether S 128 N 3
—Void—Future property S 124; S 124 N 1, 2
Revocable on mere will of donor S 126; S 126 N 3
Unlawful object, for S 122 N 13
Vague and uncertain object S 122 N 5a
—Voluntary S 122 N 1
—Will of donor, revocable at S 126; S 126 N 3
—Writing
Endowment religious and charitable to S 9 N 9
Necessity of S 9 N 5, 6
Muhammadan law S 9 N 3

Good faith
—Defined S 41 N 22; S 50 N 2; S 51 N 8
—Meaning of S 51 N 8
—Ostensible owner, transferee from, in S 41 N 21, 22
—Rent or profits, payment or delivery in S 50; S 50 N 1, 2
—Transferee in S 41 N 21, 22; S 43 N 13; S 51 N 8; S 53 N 19
Person with limited authority, transfer by S 38 N 9

Government
—Agent, notice to S 3 N 46
—Lease by
Registration S 4 N 6
Relief against forfeiture, underlessee, rights of S 115 N 1

Grant
—Indefinite period, grant for S 8 N 7
Period capable of ascertainment—Effect: S 8 N 7
—Maintenance grant: *See* Maintenance grant

Gratuitous transfer
—Bona fide S 53 N 6
—Defined S 53 N 6
—Fraudulent, presumption as to S 53 N 6
—Gift S 122 N 1

Gratuitous transferee
—Covenant running with land—Enforcement against S 40; S 40 N 1
—Maintenance, right of enforcement against S 39; S 39 N 9

Gross negligence
—Meaning of S 3 N 30; S 78 N 4
—Mortgagee prior, of S 78 N 4
All title deeds, failure to obtain S 78 N 6
Evidence of fraud amounting to S 78 N 4
Failure to obtain title deeds S 78 N 5
Laches in instituting suit S 78 N 7
Parting with title deeds S 78 N 5
—Priority lost by S 78; S 78 N 1, 4
—Question of—If one of law or fact S 3 N 33
—Title deeds, omission to call for and inspect S 3 N 32

Growing crops
—Attached to the earth S 8 N 15
—Bona fide holder under defective title, right of, to S 51
—Crops future, mortgage of S 3 N 4; S 5 N 7
Applicability of Contract Act to S 3 N 4
Applicability of T. P. Act to S 3 N 4
—Crops, future, right to, whether right to growing crops S 3 N 4
—Immovable property, whether S 3 N 4; S 108 (i) N 1
—Legal incident of property: S 8 N 15; S 108 (i) N 1
—Lessee's right to S 108 (i); S 108 (i) N 1 to 3
—Meaning of S 3 N 4
—Right to—Person evicted, of S 51 N 21
—Sale in invitum, pass in S 8 N 3

Growing grass
—Attached to the earth S 8 N 15
—Future grass to be raised right to, whether interest in immovable property S 3 N 5
—Immovable property, growing grass, whether S 3 N 5
—Legal incident of property S 8 N 15
—Sale of—Whether sale of interest in land: S 3 N 5

Guardian
—Acceptance of gift by S 122 N 7
—Authority to transfer S 7 N 7; S 38 N 5
Appointed by Court, guardian S 7 N 7
De facto guardian S 7 N 7
De jure guardian S 7 N 7
—Guardian ad litem
Appointment of, on deposit of mortgage-money S 83 N 16; S 84 N 10; S 103; S 103 N 2, 5 to 7
Tender of mortgage-money, for purposes of S 103; S 103 N 2, 5 to 7
—Mortgage by S 58 N 25
Personal liability of S 68 N 11
—Payment or tender to S 60 N 12
—Person interested in property, guardian if S 41 N 9
—Redemption by S 91 N 31

High Court
—Rules—Power to make S 104; S 104 N 1, 2

Hindu female
—Alienation by
Persons entitled to dispute S 91 N 18
Transferee, redemption by S 91 N 18
—Competency to transfer S 7 N 7
—Transfer to
Absolute estate, passing S 8 N 6
Presumption of conferring limited estate S 8 N 6
—Transferee from—Interest acquired by S 8 N 9
—Widow
Authority to transfer property S 7 N 7; S 91 N 18
Lease by S 105 N 20
Covenant for renewal S 111 N 3
Death of widow if determines S 111 N 5
Maintenance right of
Charge, whether S 39 N 5; S 100 N 30
Nature of S 100 N 30
Mortgage by S 58 N 25
Surrender by S 91 N 17
Gift, surrender whether S 128 N 3
Writing S 9 N 12

Hindu joint family
—Coparcener
Authority to transfer undivided share S 6 N 2a; S 7 N 7; S 44 N 3
Interest of, mere possibility whether S 6 N 6
Mortgage by S 58 N 21
Relinquishment by S 122 N 1
Transferee from
Joint possession, right to S 44 N 6
Liabilities, subject to S 44 N 7

Hindu Joint family (*contd.*)
Rights of S 44 N 6
—Debts due to
Assignment of S 130 N 9
Partition—Effect of S 130 N 9
—Father
Authority to transfer S 7 N 7; S 38 N 5
Mortgage, by S 58 N 25
Redemption, son's right of S 91 N 21
—Juristic person, if S 5 N 3
—Living person, if S 5 N 3
—Manager
Authority to transfer property S 7 N 7; S 38 N 5
Mortgage by S 58 N 25
Redemption, right of member to S 91 N 22
Mortgage suit by or against, parties O 34 R 1 N 12
Notice to quit by S 106 N 34
Payment or tender to S 60 N 12
—Son
Interest by birth S 91 N 21
Redemption, right of S 91 N 21

Hindu law
—Accumulation of income, rule as to S 17 N 4
—Chapter II of T.P. Act prevails over rule of S 2 N 10
—Charitable purpose, illustrative cases S 18 N 4
—Charities, transfer to S 18 N 4
—Class, transfer to S 2 N 10; S 15 N 5
—Condition subsequent validity of, rule as to S 28 N 3; S 32 N 12
—Coparcener: *See* Hindu joint family— Coparcener
—Defeating the provisions of transfer S 6 N 31
—*Donatio mortis causa*, void under S 129 N 4
—Election doctrine of, if inconsistent with S 35 N 3
—Fraudulent transfer, rule of, as to S 53 N 4
—Gift
Delivery of possession S 123 N 2

Hindu law—Gift
Revocation of gift under S 126 N 1
Rules as to S 122 N 20
—Immovable property
Definition of—Applicability of S 3 N 2
Instances S 3 N 2
—Improvements, land of another on, rule as to S 51 N 1, 2
—Maintenance—Persons entitled to S 39 N 5
—Operation of transfer, rules as to S 8 N 6
—Partition, transferee from coparcener, right of S 44 N 6
—Perpetuity—Rule against S 14 N 13
—Prohibited transfers
Property dedicated to charity S 6 N 2a
Religious office S 6 N 2a
—Residence, right of, under S 39 N 5
—Restraint on alienation, rule as to S 10 N 1
—Restraint on enjoyment, rule as to S 11 N 4
—Transfer by person with limited authority—Validity of S 38 N 2
—Transfers prohibited by S 6 N 2a

Hindu law—Gift (*contd.*)
—Unborn person—Transfer for benefit of S 2 N 10; S 13 N 5; S 15 N 5; S 28 N 3
—Vested interest, if recognized S 19 N 3
—Writing, necessity of, for transfer S 9 N 1

Holding over
—Acceptance of rent S 116; S 116 N 6
Assent, acceptance when amounts to S 116 N 7
Legal representative of lessor by S 116; S 116 N 5
Several lessors, acceptance by one S 116 N 7
Voluntary, must be S 116 N 6
—Agreement to the contrary S 116 N 11
—Agricultural lease, in case of S 116 N 1; S 117 N 2
—Assent of lessee, not necessary S 116 N 1
—Assent of lessor, with S 116; S 116 N 6
Acts indicating S 116 N 6
Clause for enhancement of rent in quit notice, indicating S 116 N 8
Effect of S 116 N 1
Suit for rent for period after determination, if amounts to S 116 N 9
—Clause for renewal S 105 N 39; S 116 N 10
Lessee's rights S 105 N 36, 39
Specific performance of S 105 N 39
—Continuity of possession S 116 N 2
—Duration of renewed lease S 105 N 38; S 116; S 116 N 1, 12
—Effect of S 116; S 116 N 1
—English law S 116 N 1
—Legal representatives of lessee by S 116 N 4
Determination of lease by death of lessee, in case of S 116 N 4
—Meaning of S 116 N 1
—Notice to quit in case of S 106 N 3
—Possession after determination of lease S 116 N 2
Continuity of S 116 N 2
Several lessees, by some only S 116 N 3
—Possession of tenant holding over without consent
Adverse, whether S 116 N 13
Wrongful S 116 N 13
—Possession under a lease valid for a part of term only, effect of S 116 N 14
—Punjab, principle applies to S 116 N 1
—Renewed lease S 105 N 38; S 116
Duration of S 116; S 116 N 1
Effect of S 116 N 12
Several lessees, holding over by some only S 116 N 3
Terms same on S 116 N 12
—Repudiation of lease on destruction, acceptance of rent after S 108 (e) N 6
—Several lessees, by some only S 116 N 3
—Tenant at will, lessee if becomes S 116 N 1

House
—Dwelling house: *See* Dwelling house
—Legal incidents of S 8; S 8 N 16
—Meaning of S 44 N 9
—Transfer of—Fixtures, if pass S 8 N 16

Idol
—Dedication to, actionable claim of S 130 N 11
—Dedication to, if transfer S 5 N 3
—Gift to S 9 N 9; S 122 N 5A
—Juristic person, idol if S 5 N 3; S 122 N 5A
—Living person, idol if S 5 N 3; S 122 N 5A
—Property, capacity to hold S 5 N 3
—Trust for maintenance of S 18 N 3

Iladarawara mortgage
—Incidents of S 98 N 10

Immovable property
—Contract for sale of: *See* Contract for sale
—Covenant running with land: *See* Covenant running with land
—Definition of S 3
Exhaustice, definition if S 3 N 2
General Clauses Act, definition in, applicability of S 3 N 1
—Enjoyment of—Contract affecting—Enforceability of S 40 N 1
Right to restrain: *See* Right to restrain enjoyment
—Growing crops—Whether immovable property S 3 N 4; S 108 (i) N 1
See also Growing crops
—Growing grass—Whether S 3 N 5
See also Growing grass
—Hindu law
Applicability of definition, given in S 3 N 2
Immovable property—What constitutes S 3 N 2
—Imbedded in earth—Things attached to—When S 3 N 9, 10
—Instances S 3 N 2
—Interest in
Buyer's charge, whether S 55 N 20
Grass future, right to, whether S 3 N 5
Growing grass, sale of—Whether sale of an interest in land S 3 N 5
Lease is S 105 N 2, 3
Seller's charge S 55 N 12
Whether immovable property S 3 N 2
—Jalkar S 106 N 11
—Machinery—When immovable property S 3 N 7, 10
—Obligation imposing restriction of use of
See (1) Restrictive covenants
(2) Right to restrain enjoyment
—Ostensible owner, transfer by: *See* Ostensible owner, transfer by
—Part performance, application restricted to S 53A N 8
—Perpetuity rule against, applies to S 14 N 4
—Real property—Immovable property if identical with S 3 N 2
—Standing timber—If immovable property S 3 N 3
See also Standing timber
—Trees, rooted in earth, whether S 3 N 8

Implied contracts by mortgagor
See Mortgagor

Improvements
—Absolutely entitled, transferee's belief as to S 15 N 9

Improvements (*contd.*)
—Acquiescence, S 51 if based on S 51 N 23
—Bona fide holder under defective title, by S 51
Good faith, transferee in S 51 N 8
Remedies of transferee with regard to S 51
—Compensation for
Cosharer, right of S 51 N 5
Modes of compensating S 51 N 18
Principles S 51 N 1
Representative of transferee, claim by; S 51 N 17
Wrongdoer, if can claim S 51 N 25
—Cosharer, by S 51 N 5
—Court sale—Purchaser by S 2 N 6; S 51 N 6
—Crops—Transferee, right to S 51 N 21
—Eviction from property
Better title, person having, by S 51 N 15
Transferor by S 51 N 16
—Hindu law, rule as to S 51 N 1, 2
—Land of another on—Principles, governing S 51 N 1
—Lessee, by S 51 N 9
—Limited owner, transferee from, by S 51 N 11
—Mahomedan law, rule as to S 51 N 1, 3
—Meaning of S 51 N 7
—Mortgaged property to S 63A; S 63A N 1
Auction-purchaser, in mortgage decree, by S 63A N 2
Costs of
Contract as to S 63A N 4
Interest on S 63A N 7
Mortgagee when entitled to S 63A N 3
Mortgagor to pay, when S 63A; S 63A N 1, 3
Persons liable to pay
Representatives, mortgagor's S 63A N 5
Reversioner S 63A N 5
Principal money, addition to S 63A N 6
Punjab, mortgage in S 63A N 1
Purchaser from mortgagee by S 63A N 2
Redemption, mortgagor entitled on S 63A
Revaluation, at the time of execution of decree for redemption S 63A N 8
During continuance of mortgage, must be S 63A N 1a
—Mortgagee, by S 63A
—Option of evictor S 51; S 51 N 13
—*Pendente lite* S 52 N 3
—Permanent tenure, holder, by S 51 N 9
—Pre-emption, land subject to, transferee of, by S 51 N 12
—Profits on—Right of transferee to claim as set-off S 51 N 20
—Remedies of transferee, on eviction S 51 N 18
—Repairs if S 51 N 7
—Transferee of property S 51 N 4
—Colourable transaction, person under S 51 N 4

Improvements (*contd.*)
Defective title conveyed, person if S 51 N 4
Legatee if S 51 N 4
Meaning of S 51 N 4
Representative of, benefit of S. 51, if can claim S 51 N 17
Trespasser if S 51 N 10
Unregistered transfer, person if S 51 N 4
—Trespasser, by S 51 N 10
Transferee from S 51 N 10
—Value of
Estimated how S 15 N 19
Market-value—Principles for determination S 51 N 18, 19

Income
—Accumulation of: *See* Accumulation of income
—Apportionment of S 36
—Gift of S 122 N 1
—Legal incident of property S 8

Incumbrances
—Buyer's duty to pay S 55 N 17
—Charge, whether S 57 N 4
—Defined S 57 N 4
—Discharge—Mortgagor's covenant to discharge previous incumbrances S 65
—Discharge of
Buyer's duty S 55
Court, power to make provision for S 57; S 57 N 2
Amount to be deposited: S 57; S 57 N 7, 11, 12
Appeal against order S 57 N 15
Application to Court S 57 N 8, 9
Courts empowered S 57 N 16
Discretion, Court has S 57 N 6
In futuro, incumbrance payable S 57 N 5
Notice to incumbrancer S 57 N 13
Service of S 57 N 14
Procedure S 57; S 57 N 10
S. 57 and O. 34 R. 12, C. P. C., compared S 57 N 3
S. 57 and S. 83 compared S 57 N 3
Suo motu, Court if can act S 57 N 8
—Discharge, to seller's duty S 55; S 55 N 8
—Interest on
Buyer to pay when S 55; S 55 N 17
Seller's duty to pay S 55
—Recurring liability, if S 55 N 8
—Sale, free of
Buyer's rights S 55
Test to determine S 55 N 14
—Sale, subject to
Buyer's duty S 55; S 55 N 17
Invalidity of incumbrances, benefit, who gets S 55 N 18

Injunction
—Purchaser with notice of S 40 N 22
—Restraining alienation—Grant of S 52 N 41
—Runs with the land, whether S 40 N 22
—Transfer by lessee, to restrain S 108 (j) N 1
—Waste by mortgagor, to restrain S 66 N 8

Insolvency
—Annulment of, effect on forfeiture clause S 12 N 12
—Cessation of interest created on S 12; S 28 N 11; S 31 N 4
—Donor of—Universal donee, property in hands of, if can be sole S 128 N 5
—Forfeiture of interest on, condition or limitation as to S 12
—Fraudulent transfer, leave of Court, for suit to set aside S 53 N 28
—Insolvent, transfer by S 6 N 31; S 43 N 4
—Legatee, of—Forfeiture of bequest on S 12 N 3
—Lease, forfeiture on S 111; S 111 N 15
—Official Assignee or Receiver: *See* Official Assignee or Receiver
—Partner's—Clause as to forfeiture of interest S 12 N 6
—Person expecting, transfer by S 6 N 31
—Preference of one creditor S 53 N 20

Instrument
—Definition of S 3
—Registered and unregistered, priority between S 48 N 8, 9

Insurance
See also (1) Fire insurance
(2) Marine policy
—Insurance money—Application of—Mortgagee in possession, by S 76 N 11
—Life policy, assignment S 130 N 23
Conditional, validity of S 126 N 2a
—Mortgagee's right to insure S 72; S 72 N 12
—Policy, life, money due under
As actionable claim S 3 N 27
As beneficial interest in moveable property S 3 N 27
If debt S 3 N 27
—Policy, pledge of, if transfer S 5 N 2

Insured property
—Fire insurance—Transferee's right under policy S 49; S 49 N 2

Interest
—Accessory to principal S 8 N 18; S 68 N 14
—Arrears of—Transferee if entitled to S 8
—Arrears of rent, on S 105 N 66; S 108 (1) N 2
—Cessation on tender
Mortgage-debt, in case of S 84 N 8
See also Mortgage-money
Non-mortgage debt in case of S 84 N 8
—Incumbrances, on
Buyer's duty to pay S 55; S 55 N 17
Seller's duty to pay S 55
—Immovable property, in: *See* immovable property
—Legal incident of property S 8; S 8 N 18
—Property, interest in
Charge is S 100 N 19
Transfer of S 8 N 8
—Property mortgaged, in S 91 N 4
See also Mortgaged property
—Restricted in enjoyment to owner
Heritable right if S 6 N 10
Instances S 6 N 10

In the footnotes to the Commentary indicates either a leading case or a case giving fuller reasons.*

Interest (*contd.*)
Intention, test of restriction S 6 N 10
Maintenance, grant in lieu of S 6 N 10
See also Maintenance grant
Residence, right of S 6 N 10
Right based on ownership S 6 N 10
Transferability S 6; S 6 N 10, 15
—Right to redeem, in S 91 N 4
See also Redemption—Right to redeem

Involuntary transfer
—Joint, quantum of interest of transferees S 45 N 8
—Rules in S. 55, if apply to S 55 N 1

Joint tenancy
—Bequest to several persons S 45 N 6
—English law S 45 N 3
—Gift to several persons S 45 N 6; S 122 N 5
—Joint tenants gift to, non-acceptance by one S 125 N 1

Joint transfer
—Bequest, quantum of interest of each S 45 N 1
—Common fund, consideration paid out of S 45 N 2
—Crown grant, several persons to S 45 N 6
—Equality of interest of transferees—Presumption of S 45 N 7
Rule of evidence S 45 N 7
—Gift, several persons to
Joint tenants, transferees, when S 45 N 6
Quantum of interest of transferees S 45 N 1
Tenants-in-common transferees, when S 45 N 6
—Involuntary transfer—Quantum of interest of transferees S 45 N 8
—Joint tenants, transferees, if S 45 N 3, 6
—Mortgagees, joint S 45 N 5
—Persons having distinct interests, by S 46
See also Transfer by persons having distinct interests
—Quantum of interest, transferees, of: S 45; S 45 N 1
Common fund, when consideration is paid out of S 45 N 2
Separate funds, when consideration is paid out of S 45 N 3
Specified by contract S 45 N 4
—Separate funds, consideration paid out of
English law S 45 N 3
Quantum of interest of transferees S 45 N 3
Tenants-in-common, transferees, if S 45 N 3
—Tenants-in-common, transferees, when S 45 N 3, 6

Judgment-creditor
—Redemption, right of S 91 N 25, 27

Kanom
—Forefeiture, in case of S 111 N 11
—Jenmi—Mortgagor S 98 N 7
—Kanomdar
Mortgagee S 98 N 7
Rights of S 58 N 37
Waste by S 111 N 11
—Mortgage, Kanom when S 58 N 37

Kanom (*contd.*)
—Nature and incidents of S 58 N 37; S 98 N 7
—Redemption—Right when arises S 60 N 5
—Rights and liabilities of parties S 98 N 7
—Sale, right of mortgagee S 98 N 7
—Ubhayapattam, equivalent to S 98 N 7

Land revenue
See Revenue.

Lease
—Accession to S 108 (d); S 108 (d) N 1 to 4
See also Accession.
Accretion to land S 108 (d) N 2
Determination of lease, delivery of possession S 108 (q) N 1
Encroachment by tenant S 108 (d) N 3
Part of leased property becomes S 108 (d) N 4
—Acquiescence, tenancy by S 105 N 12
—Actual entry, necessity of S 105 N 5
—Admission, if created by S 105 N 7
—Agreement to grant S 105 N 4; S 107 N 15
Construction of S 105 N 4
Covenant running with land, whether S 40 N 13
Defence to ejectment suit as S 105 N 4
Interest in property, if creates S 105 N 4; S 107 N 15
Liability under S 105 N 4
Obligation annexed to ownership S 40 N 13; S 105 N 4
Person entering under, use and occupation compensation liability for S 105 N 70
Possession under S 106 N 8
Promise, rights of S 105 N 4
Registration Act, definition of lease S 105 N 4
Registration of S 53A N 16; S 107 N 15
Specific performance of S 105 N 4
Specific Relief Act, S. 27A S 53A N 17
—Agreement to share produce of land, whether S 105 N 16, 18
—Agreement varying rent, whether S 105 N 11
—Agreement varying terms of lease, whether S 105 N 11
—Agricultural leases:
See agricultural leases S 105 N 11
—Agricultural purpose for
Duration of S 106; S 106 N 13
See also Periodic leases.
Presumption as to S 106 N 12, 13
—Alienation of—Absolute restraint S 10
See also Restraint on alienation.
—Assignment of S 108 (j)
See also Lease—Transfer of
—Attornment: *See* Attornment.
—Avoidance of
Defect in property failure to disclose, on S 108 (a) N 3
Lessor having no title, on ground of S 108 (a) N 2
—Avoidance on destruction of property S 108 (e); S 108 (e) N 1
Default of lessee, destruction by S 108 (e) N 5

In the foot-notes to the Commentary† indicates a case which is most appropriate for the proposition

Lease (*contd.*)
Effect of repudiation S 108 (e) N 6
Exercise of option S 108 (e) N 4
Notice of S 106 N 21
Option of lessee S 108 (e) N 4
Reasonable time within S 108 (e) N 4
—Commencement of S 105 N 24; S 110; S 110 N 1
English law S 105 N 24
Future date from S 105 N 24
No day mentioned, in case of S 110; S 110 N 1
Oral lease S 110 N 1a
Particular day from S 110 N 1, 2
—Competency to grant S 105 N 20 to 22
De facto proprietor S 105 N 21
—Computation of time S 110; S 110 N 1, 2
Presumption as to expiration of lease S 110 N 1
—Concurrent lease S 108 (1) N 10
—Condition in, breach of forfeiture on S 111; S 111 N 13
See also Forfeiture of lease.
—Consideration for S 105; S 105 N 57
Forms of S 105 N 57
Premium S 105 N 51
Rent S 105 N 57
Service S 105 N 16
—Contract necessary for S 105 N 7
Implied, may be S 105 N 7
—Contract to lease, distinguished from S 110 N 2
—Conveyance of interest in fee simple, distinguished from S 105 N 6
—Corpus of S 8 N 10
Land, lease of
Minerals, if included S 8 N 10
Standing timber, if included S 8 N 10
—Covenants in, run with the land, if S 40 N 1, 25
—Creation of
Acquiescence by S 105 N 12
Application to grant with endorsement of sanction S 105 N 9, 10
Contract necessary S 105 N 7
Document emanating from transferee S 105 N 9
Kabuliat, by S 105 N 9
Payment and acceptance of rent by S 105 N 8
Rent note by S 105 N 9
—Crown by Pre N 4
—De facto proprietor, by S 105 N 21
Bona fide S 105 N 21
—Decree or order of Court embodied in S 107 N 13
Exemption from S. 107, T. P. Act S 107 N 13
Registration S 107 N 13
—Deed
Document emanating from transferee S 105 N 9
Kabuliat S 105 N 9
Registration Act, under S 105 N 9
Rent-note S 105 N 9
Several documents S 105 N 7
Stamp Act, under S 105 N 9

Lease (*contd.*)
—Defined S 105
—Delivery of possession and oral agreement, by S 107 N 1, 8, 9
Constructive possession, delivery of S 107 N 9
—Destruction of leased property S 108 (e); S 108 (e) N 1
Avoidance of lease, on S 108 (e); S 108 (e) N 1, 4, 5
English law S 108 (e) N 1
Extent of damage, necessary S 108 (e) N 3
Flood, by S 108 (e) N 2
Option, lessee's to avoid lease S 108 (e) N 4
Wrongful act or default of lessee, by S 108 (e) N 5
—Determination of: *See* Determination of lease.
—Devise, lease by S 111 N 1
—Duration of: *See* Duration of lease.
—Encroachment by lessee S 105 N 81; S 108 (d) N 3
Absolute title by prescription S 108 (d) N 3
Additional rent for S 108 (d) N 3
Landlord's land, on S 108 (d) N 3
Lessee to deliver possession on determination of lease S 108 (q) N 1
Lessor's right to S 108 (d) N 3
Presumption as to S 108 (d) N 3
Third person's land on S 108 (d) N 3
—Escheat, in case of S 105 N 6
—Essentials of S 105 N 2
Fixed period, lease for S 106 N 3
Determination of S 106 N 3
—Fixtures, removal, lessee's right S 108 (h)
—Forfeiture of: *See* Forfeiture of lease.
—Government, by S 105 N 1; S 106 N 47
Applicability of S. 107, T. P. Act S 107 N 12
Registration of S 4 N 6
—Heritable S 105 N 72; S 106 N 16, 17; S 108 (e) N 6
Construction, rule of S 105 N 72
Life-lease for, not S 105 N 72; S 108 (j) N 1
Tenancy at will, whether S 105 N 32, 72; S 111 N 24
—Hindu widow, by S 105 N 20
—How made S 107
—Indefinite period, for S 105 N 25, 26
—Interest in immovable property, lease is: S 105 N 3
—Invalid—Possession under S 106 N 18
—Kabuliat, whether S 105 N 9
—Lease before T. P. Act S 105 N 1
—Lease not governed by T. P. Act S 105 N 2
—Licence
Compared with S 105 N 13
Test to determine, lease or licence S 105 N 14
—Life, lease for S 105 N 34; S 111 N 6
Certain time S 105 N 25
Determination of S 111 N 6
Heritable, not S 105 N 62

Reference to Official Reports are invariably given in all cases found in the Official Reports.

Lease (*contd.*)
Lease entitling lessee to hold as long as he pays rent or as long as he may wish S 105 N 27
Notice to quit in case of S 106 N 4
Possession of legal representatives, nature of S 105 N 80a
Registration S 105 N 34
Tenancy at will S 105 N 32
Term exceeding one year, for S 107 N 5
—Maintenance grant whether S 105 N 57; 58, 68
—Manufacturing purpose, for
See also Periodic leases.
Duration of S 106; S 106 N 13
Presumption as to S 106 N 12, 13
—Merger of—Lessee dying without any heirs S 105 N 6
—Minerals, if included in lease of land S 8 N 10
—Minor
Lease by S 105 N 20, 22
Lease in favour of S 105 N 22
—Mode of effecting S 107
Decree or order of Court lease embodied in S 107 N 13
Lessor and lessee to execute S 107; S 107 N 10
Oral agreement accompanied by delivery of possession, by S 107; S 107 N 1, 9
Punjab, law in S 107 N 2
Registered instrument by S 107; S 107 N 1
Term exceeding one year, lease for S 107; S 107 N 1, 5
Year to year, lease from S 105 N 8; S 107; S 107 N 1, 4
Yearly rent, lease reserving: S 107; S 107 N 1, 6
—Mortgage, distinguished from S 105 N 6
—Mortgage of
Privity, mortgagee and lessor, between: S 76 N 8
Renewal of: *See* Renewal of lease mortgaged.
Surrender by lessee effect of: S 71 N 5; S 111 N 8
—Mortgagee in possession, by—Power to lease S 52 N 39; S 76 N 6
—Mortgagor, by S 52 N 39; S 65A
See also Mortgagor—Lease by.
—Municipality by S 105 N 1; S 106 N 48
—Non-transferable property, of S 105 N 23
Lease of transferable and non-transferable property S 105 N 23
—Non-transferable when S 6 N 37; S 108 (j) N 8, 10
—Occupation as lodger S 105 N 15
—Occupation as servant S 105 N 16
—Operation of transfer on S 8 N 8
—Oral, commencement of S 110 N 1a
—Ownership, transferred, transaction whether S 105 N 6
—Part performance, applicability of S 53A N 6; S 105 N 4, 39; S 107 N 14

Lease (*contd.*)
—Payment and acceptance of rent, by
Evidence of lease S 105 N 8
Invalid lease, possession under S 106 N 18
Tenancy by S 105 N 8
Void lease under S 105 N 8, 19, 20
—Pendente lite S 52 N 39
—Periodic leases S 105 N 31
See also Periodic leases.
—Permanent S 105 N 41 to 56
See also Permanent lease.
—Personal right of enjoyment, whether: S 105 N 2, 3
—Personal right to possession S 105 N 3
—Possession of lessee—Adverse, whether S 105 N 79, 80, 82; 84
—Possession, right to S 105 N 5
Exclusive S 105 N 5
—Premium S 105 N 57, 58
Consideration for lease S 105 N 57
Defined S 105 N 58
Lessee to pay or tender S 108 (1)
Money due as S 105 N 58
Money only as S 105 N 58
Refund, lessee whether entitled to S 105 N 58; S 108 (a) N 2
Rent, distinguished from S 105 N 58
Unpaid, no lien for S 105 N 58
—Prescription, acquisition of tenancy by: S 105 N 84
—Principles governing applicability of S 105 N 1
—Provincial Government power to exempt from formalities S 107; S 107 N 11
—Rescission of S 108 (b) N 3
—Re-entry—Provision for
Absence of S 10 N 5
Assignment in breach of covenant against alienation S 10 N 17
Benefit of lessor S 10 N 13
Necessary S 108 (j) N 1
—Re-entry, right of: *See* Re-entry, right of
—Registration of S 4 N 6; S 107
Agreement to lease of S 107 N 15
Decree or order of Court, lease embodied in S 107 N 13
Life-lease for S 105 N 34
Non-registration—Effect of S 107 N 7
Period of lease, dependent on S 107 N 1
Permanent lease S 106 N 5
Tenancy at will S 105 N 32
The Punjab, law in S 107 N 2
Unregistered instrument, admissibility of S 107 N 9
Validity of lease created by oral agreement when registration is necessary S 107 N 8
—Renewal of: *See* Renewal of lease.
—Rent-note, whether S 105 N 9
—Repairs
Expenses, lessee when to deduct or recover S 108 (f) N 1 to 3
Lessee's liability S 108 (m) N 1
Lessor when bound to do S 108 (f) N 1
See also Repairs.

Lease— (*contd.*)
—Right to enjoy S 105 N 5
Enjoyment
Meaning of S 105 N 5
Nature of S 105 N 5
Possession, right to, included S 105 N 5
—Sale, distinguished from S 105 N 6
—Sale, transaction whether S 54 N 11
—Service grant S 105 N 69
See also Service grants.
—Standing timber, lease of land if includes: S 8 N 10
—Surrender of: *See* Surrender of lease.
—Tenant by sufferance. S 105 N 37
See also Tenant by sufference.
—Tenancy at will, whether S 105 N 32; S 111 N 24
See also Tenancy at will.
—Tenancy by acquiescence S 105 N 12
—Tenancy by payment and acceptance of rent S 105 N 8
—Term exceeding one year
Defined S 107 N 5
Life, lease for S 107 N 5
—Term of, determination of S 107 N 3
—Term of one year or less, for—Mode of effecting S 107; S 107 N 1, 9
—Term of years for—Determination of S 111 N 2
—Term of—Agreement varying, whether lease S 105 N 11
—Transfer by operation of law, forfeiture on S 12 N 8
—Transfer, lessee's right to S 108 (j)
See also Lease, transfer of.
—Transferable S 108 (c) N 6; S 108 (j); S 108 (j) N 1
Agricultural lease S 108 (j) N 9
—Trespasser by S 105 N 20
—Unauthorised person, by S 105 N 20
—Uncertain
Duration of S 108 (i) N 2
Void for being S 105 N 25, 26
—Unregistered
Admissibility of S 105 N 19; S 107 N 9
When registration necessary S 3 N 20
—Use and occupation, compensation for S 105 N 70
See also Use and occupation, compensation for.
—Usufruct of property, transfer of, whether S 105 N 5
—Usufructuary mortgage
Lease for a premium distinguished from S 105 N 67
Lease or mortgage, transaction whether S 105 N 67
—Void S 105 N 19 to 22
Ejectment suit, defences open to lessee S 105 N 19
Fixtures, removal of S 108 (h) N 6
Lessee, rights of S 105 N 19
Liability for rent under S 105 N 19
Payment and acceptance of rent—Effect of S 105 N 8, 19, 20
Payment and acceptance of rent, tenency by S 105 N 8

Lease (*contd.*)
Possession under
Effect S 105 N 19
If adverse S 105 N 82
Rent liability, in S 108 (1) N 12
Rights and liabilities of lessee under S 105 N 19
Tenancy creation of S 105 N 19
Uncertainty for S 105 N 25, 26
Use and occupation, liability for S 105 N 70
—Who can grant S 105 N 20 to 22
—Will, lease by S 105 N 7
—Writing, necessity of S 9 N 5, 6
—Year to year, from S 105 N 31
See also Periodic leases.
—Yearly rent reserving S 106 N 15
Meaning of S 107 N 6
Registered instrument necessary S 107; S 107 N 1
—Zamindary lands, tenants of S 105 N 75

Lease, transfer of
—Absolute transfer S 108 (j); S 108 (j) N 1, 2
—Apportionment, principle of, applicability S 36 N 2
—Assignee
Lessee's rights against S 108 (j) N 7
Liabilities of S 108 (j) N 4
Extent of S 108 (j) N 4
Invalid assignment S 108 (j) N 4
Several assignees S 108 (j) N 4
Rights of S 108 (j) N 3
—Condition restraining, breach of S 10 N 13
Determination of lease S 10 N 13
What constitutes S 111 N 13
—Consent of lessor, condition of S 108 (j) N 1
—Covenant against alienation S 108 (j) N 1
See also Covenant not to assign or alienate.
Re-entry, condition for S 108 (j) N 1
Runs with the land, if S 40 N 25
Transfer in breach of S 10 N 17; S 108 (j) N 1
—Denial of title by lessee, after S 111 N 14
—Determination of lease—Effect on S 108 (j) N 1
—Injunction to restrain S 108 (j) N 1
—Lessee's right to transfer S 108 (j); S 108 (j) N 1
—Liability of lessee after S 108 (j) N 6
—Non-transferable leases S 108 (j) N 8, 10
—Partial interest, transfer of S 10 N 12; S 108 (j) N 5
—Privity of contract, assignee and lessor, between S 108 (j) N 4
—Privity of estate, assignee and lessor, between S 108 (j) N 2, 4, 5
—Retrospective, S. 108 (j) whether S 108 (j) N 10
—Several assignees, liability of each S 108 (j) N 4
—Sub-lease S 108 (j); S 108 (j) N 1, 5
See also Sub-lease.

Legacy
—Acceleration of subsequent interest on failure of prior S 27 N 1

Legacy (*contd.*)
—Bequest to persons as shall be surviving at some period not exactly specified S 24 N 1
—Cessation of interest created, condition as to S 31 N 1
—Chance of obtaining property, S 6 N 3
S. 43, applicability, to transfer of S 6 N 7
Transfer of S 6; S 6 N 5
—Charities to, rule against perpetuity, applicability of S 18 N 2
—Class, to S 125 N 1
—Ascertainment of members S 15 N 4
—Failure with regard to some S 15 N 1;
—Condition subsequent—Strict fulfilment of S 29 N 1
—Conditional
Condition subsequent, bequest with S 28 N 1
Immoral condition S 25 N 1
Impossible condition S 25 N 1
On performance of an act S 33 N 1
Opposed to public policy, condition S 25 N 1
Substantial compliance with condition precedent S 26 N 1
—Contingent
Class, to S 22 N 1
Interest in S 21 N 1
No time fixed for happening of contingency S 23 N 1
—Endeavour to transfer—Illustrative cases of S 12 N 7
—Forfeiture of, on insolvency of legatee S 12 N 3
—Joint
Joint tenancy, when arises S 45 N 6
Quantum of interest of each S 45 N 1
Tenants-in-common, transferee when S 45 N 6
—Legatee
Residuary—Doctrine of election, applicability to S 35 N 2
Specific doctrine of election, applicability to S 35 N 2
Transferee, legatee whether within S. 51 S 51 N 4
—Onerous bequest S 127 N 1
—Performance of an act, condition as to—
Prevented by fraud S 34 N 1
—Perpetuity, rule against S 14 N 1
See also Perpetuity—Rule against.
—Prior and subsequent—Prior failing under S. 113 or S. 114, Succession Act—Effect: S 16 N 1
—Ulterior invalid, effect on prior S 30 N 1
—Unborn person, in favour of S 13 N 1
—Vested interest in S 19 N 1

Legal and equitable estates S 5 N 6
—Indian law S 5 N 6

Legal incidents of property S 8
—Arrears of interest S 8
—Attached to the earth, things S 8 N 15
—Buildings S 8 N 15
—Burden attached to property S 8 N 11
—Defined S 8 N 11

Legal incidents of property (*contd.*)
—Easements annexed S 8
See also Easement.
—English law S 8 N 1
—Essentials of S 8 N 11
—Grass S 8 N 15
—Growing crops S 8 N 15; S 108 (i) N 1
—House, incidents of S 8 N 16
—Income from property S 8
—Instances S 8 N 19
—Interest S 8; S 8 N 18
Prior to date of transfer S 8 N 18
—Land—Buildings on S 8 N 15
—Machinery, incidents of S 8
—Mortgagee power of, to sell S 69 N 6
—Pass to transferee S 8 N 2
English law S 8 N 2
Execution sale, on S 8 N 3
Principle underlying S 8 N 2
—Proprietary rights distinct from S 8 N 11
—Rent and profits S 8
—Securities for debt or actionable claim S 8
—Standing timber S 8 N 15
—Transfer of—Effect S 8 N 12
—Trees S 8 N 15

Lekha mukhi mortgage S 58 N 37a

Lessee
—Adverse possession by S 105 N 79, 80, 82, 84; S 108 (d) N 3; S 111 N 17
During tenancy S 105 N 79
—Assignee from
Covenant for renewal, enforcement of S 105 N 36
Lessee's rights against S 108 (j) N 7
Liabilities of S 108 (j) N 4
Mortgagee, whether S 105 N 36
—Notice to quit S 108 (j) N 3
Relief against forfeiture, if can claim S 114 N 4
Rights of S 108 (j) N 3
Under-lessee S 40 N 1
—Attornment by, whether necessary S 109 N 7
—*Bona fide* payment of rent to lessor, after transfer S 50 N 1 to 3; S 109; S 109 N 7
—Co-lessee—Notice to quit to S 106 N 37
—Co-owner from, partition, right of S 44 N 5
—Court of wards, of, right to assign interest S 6
—Death of
Heritability of lease S. 105 N 72
When determined S 111 N 6, 24
—Defined S 105
—Denial of title by
Estoppel S 105 N 79; S 111 N 17
Forfeiture on S 111; S 111 N 14
See also Forfeiture of lease.
—Dispossession of—Third person by, adverse possession against lessor S 105 N 83
—Ejectment from part of holding S 109 N 5
—Encroachment by S 108 (d) N 3
Absolute title by prescription S 108 (d) N 3
Additional rent for S 108 (d) N 3

Lessee (*contd.*)
Delivery of possession on determination of lease S 108 (q) N 1
Landlord's land, on S 108 (d) N 3
Nature of possession S 105 N 81
Presumption as to S 108 (d) N 3
Restoration of possession on expiry of lease S 108 (d) N 3
Third person's land on S 108 (d) N 3
—Estoppel, denying title of landlord S 105 N 79, 85; S 111 N 17
—Execution sale—Right to apply to set aside S 105 N 3
—Heirs of—Notice to quit to S 106 N 37
—Holding over S 116
See also Holding over.
—Improvements by S 51 N 9
—Insolvency, forfeiture on S 111; S 111 N 5
—Joint lessees
Denial of title by one S 111 N 14
Holding over by some only S 116 N 3
Surrender by one S 111 N 8
—Legal representatives of
Holding over by S 116 N 4
Possession of, after determination of lease S 116 N 4
—Marshalling, right of S 81 N 6
—Mortgage by—Landlord's right to redeem S 91 N 13
—Mortgaged property, of: *See* Mortgaged property.
—Notice to make good defect caused by S 108 (m); S 108 (m) N 6
—Notice to quit by S 106 N 22
See also Notice to quit.
—Notice to, transfer by lessor of S 109 N 7
Payment of rent to lessor after S 109 N 7
—Option to avoid lease on destruction of property S 108 (e); S 108 (e) N 1, 4, 5
—Option to determine lease S 110; S 110 N 4
—Option to hold lessor or his transferee liable S 109; S 109 N 6
—Possession of
Adverse, whether S 105 N 80; S 111 N 17; S 116 N 13
Determination of lease after S 111 N 27
Wrongful, when S 116 N 13
Invalid lease under S 106 N 18
Wrongful, when S 111 N 27
—Rescission of lease on non-delivery S 108 (b) N 3
—Redemption, right of S 91 N 12
—Rights of
Void lease, lessee under S 105 N 19
Whether immovable property S 3 N 2
—Sub-lease, right to grant S 115 N 1
—Waste by S 108 (o) N 7
Permissive S 108 (m) N 1
Voluntary S 108 (m) N 1
S 108;

Lessee, rights and liabilities of S 108 N 1
—Accession, right to S 108 (d) N 1
—Agricultural lease S 117 N 2
Delivery of possession on determination S 108 (q) N 1

Lessee, rights and liabilities of (*contd.*)
—Assignment of lease, liability after S 108 (j) N 6
—Avoidance of lease on destruction of property S 108 (e); S 108 (e) N 1, 4, 5
Effect of repudiation S 108 (e) N 6
—Compensation for fixtures, right to S 108 (h) N 4
—Compensation under Land Acquisition Act, right to S 108 N 1
—Default of lessee, destruction of property by S 108 (e) N 5
—Delivery of possession on determination of lease S 108 (q); S 108 (q) N 1
Contract to the contrary S 108 (q) N 1
Failure to, liability for S 108 (q) N 1
Several lessees S 108 (q) N 1
—Special legislation S 108 (q) N 2
Vacant possession, on destruction of property S 108 (e) N 6
—Destruction of leased property, on S 108 (e); S 108 (e) N 1 to 6
—Disclosure of facts increasing value of interest S 108 (k); S 108 (k) N 1
—Diversion to different purpose, liability for S 108 (o) N 8
—Encroachment
Lessee to deliver possession on determination of lease S 108 (d) N 3; S 108 (q) N 1
Rights in respect of S 108 (d) N 3
—Encroachment on lessor's rights, to give notice of S 108 (n); S 108 (n) N 1
—Fire, injury to property by S 108 (m) N 4
—Fixtures—Removal of S 108 (h); S 108 (h) N 2; S 108 (o) N 4
Contract to contrary S 108 (h) N 8
English law S 108 (h) N 2
Time for S 108 (h); S 108 (h) N 3
Trees planted S 108 (h) N 2
Usage to the contrary S 108 (h) N 8
Void lease S 108 (h) N 6
—Growing crops, right to S 108 (i); S 108 (i) N 1
Default lessee's, lease determined by S 108 (i) N 3
English law S 108 (i) N 1
Uncertain duration, lease must be of S 108 (i) N 2
—Interference with lessor's rights, to give notice of S 108 (n); S 108 (n) N 1
—Irresistible force, change in property by S 108 (m); S 108 (m) N 4
—Land Acquisition Act, compensation under, right to S 108 (h) N 7
—Mines and quarries, not to work S 108 (o) N 6
—Option to avoid lease on destruction of property S 108 (e) N 4
—Payments made on behalf of lessor, deduction of S 108 (g); S 108 (g) N 1 to 4
Conditions for S 108 (g) N 1
Damages and reimbursement, lessee's right S 108 (g) N 3

Lessee, rights and Liabilities of (*contd.*)
English law S 108 (g) N 1
Lessor must be bound to make payment S 108 (g) N 2
Revenue payment of S 108 (g) N 2
Undertaking to pay by lessee S 108 (g) N 4
—Permanent injury or destruction, act causing, not to commit S 108 (o) N 7
—Permanent structures, not to erect S 108 (p); S 108 (p) N 1
Agricultural purpose, lease for S 108 (p); S 108 (p) N 1
Building purposes, lease for S 108 (p) N 1
—Preserve property in good condition S 108 (m); S 108 (m) N 2
Contract to contrary S 108 (m) N 7
—Proceedings to recover property, to give notice of S 108 (n); S 108 (n) N 1
—Rent to pay or tender S 108 (l)
—Repairs
Expenses of, to deduct or recover S 108 (f); S 108 (f) N 1, 2
Contract against S 108 (f) N 3
Liability for S 108 (f) N 1; S 108 (m) N 1
Third person's liability to, for non-repairs S 108 (m) N 8
—Restore property in good condition S 108 (m)
—Sub-lessee, rights against S 108 (j) N 7
—Timber, not to fell and sell S 108 (o)
—Transfer, right to S 108 (j)
See also Lease, transfer of.
—Trees, cutting of S 108 (h) N 2; S 108 (o) N 4
Belonging to lessor S 108 (o) N 4, 5
—Use of property S 108 (o)
Different from purpose of lease
Illustrative cases S 108 (o) N 3
Lessee not to make S 108 (o); S 108 (o) N 1, 3
Reasonable use S 108 (o) N 2
—Waste, not to commit S 108 (o); S 108 (o) N 1, 7
Permissive S 108 (m) N 1
Voluntary S 108 (m) N 1
—Wear and tear, not liable for S 108 (m); S 108 (m) N 3

Lessor
—Adverse possession against S 105 N 79 to 84
—Agent of—Payment or tender to S 108 (l) N 6
—Cesser of interest of—Effect S 111; S 111 N 5
—Consent for transfer, condition of S 108 (j) N 1
—Death of—Determination of lease, by S 111 N 5, 6, 24
—Defined S 105
—Ejectment from part of holding by S 109 N 5
—Estoppel of S 105 N 20
Denying permanent tenancy from S 105 N 55
—Joint lessors
Acceptance of rent by one, from tenant holding over S 116 N 7

Lessor—(*contd.*)
Apportionment of rent S 108 (l) N 6
Determination of lease by one S 111 N 26
Ejectment suit by one S 106 N 34
Notice to quit by one S 106 N 34
Payment of rent to one S 108 (l) N 6
Share of rent, right of one to sue for S 106 N 34
Suit for entire rent by one S 108 (l) N 6
Surrender to one S 108 (q) N 1; S 111 N 8
—Legal representative of—Meaning of S 116 N 5
—Liabilities of
Continue notwithstanding transfer S 109; S 109 N 2
Election by lessee to hold transferee liable S 109 N 6
—Notice to quit after transfer of interest S 106 N 35; S 109 N 4
—Payment or tender of rent to S 108 (l) N 6
—Transfer of property leased S 109
Apportionment of rent on S 109; S 109 N 10
Bona fide payment of rent by lessee in ignorance of S 109; S 109 N 7
Entire property of, whether necessary for application of S 109; S 109 N 4
Lease of reversion, whether S 109 N 4
Mortgage, whether S 109 N 4
Notice to lessee, of S 109 N 7
Notice to quit by lessor after S 109 N 4
Part of property of S 109 N 4
S. 37 and S. 109 compared S 109 N 2
Surrender acceptance by lessor after S 109 N 4
Transferee, rights of S 109; S 109 N 4, 5
—Transferee from
Advance by tenant, binding on, when S 50 N 3
Advance rent payable in—Bond by agreement S 109 N 8
Agricultural lease, in case of S 109 N 2
Arrears of rent, not entitled to S 109; S 109 N 9
Attornment, whether necessary S 109 N 7
Covenant for renewal enforceable against S 105 N 36
Covenant running with the land, rights under pass, to S 109 N 5
See also Covenants running with the land.
Ejectment, right of S 109 N 5
Forfeiture, enforcement by S 109 N 4; S 111 N 19; S 114 N 3
Relief against forfeiture in S 114 N 3
Lessor includes S 114 N 3
Liabilities of English law S 109 N 2
Liabilities under lease, subject to if lessee elects S 109; S 109 N 2, 6
Notice to quit by S 106 N 35; S 109 N 4
Operation of law, transfer by S 109 N 2
Part of property of S 109 N 4
Rights and liabilities: S 6 N 8; S 109; S 109 N 4, 5
Agricultural lease in case of S 109 N 2
Principle underlying S 109 N 2

Lessor—Transferee from
Re-entry right of, if passes to S 6 N 8
Surrender, acceptance by S 109 N 4
Valid, transfer must be S 109 N 3
Lessor, rights and liabilities of S 108; S 108 N 1
—Agricultural lease S 117 N 2
—Defect in property, to disclose S 108 (a); S 108 (a) N 1
Breach of obligation
Effect of S 108 (a) N 3
Fraudulent, whether S 108 (a) N 4
Intended use, defect with reference to S 108 (a) N 1
Latent defects S 108 (a) N 1
Nature and condition of property as to S 108 (a) N 2
Warranty of fitness S 108 (a) N 1
—Defect in title, disclosure of S 108 (a) N 2
—Delivery of possession S 108 (b)
Contract to the contrary S 108 (b) N 4
Failure to give—Effect S 108 (b) N 3
Lessee's right to sue for S 108 (b) N 3
Lessor not in possession S 108 (b) N 1
Nature of S 108 (b) N 1
Onus to prove S 108 (b) N 1
Rescission of contract on non-delivery S 108 (b) N 3
Request, lessee's, at S 108 (b) N 2
Statutory obligation S 108 (b) N 1
—Encroachment, benefit of, right to S 108 (d) N 3
—Entry on property for inspection, right of S 108 (m); S 108 (m) N 5
—Payments by lessee—Liability in respect of S 108 (g); S 108 (g) N 1 to 4
—Quiet enjoyment, covenant for S 108 (c); S 108 (c) N 1
Benefit of, runs with land S 108 (c); S 108 (c) N 6
Breach of S 108 (c) N 2
Remedies of lessee S 108 (c) N 8
Condition precedent to S 108 (c) N 1
Covenant for title, not included S 108 (c) N 2
Duration of S 108 (c) N 1
English law S 108 (c) N 1
Interruption
Meaning of S 108 (c) N 2
Paramount title, holder by S 108 (c) N 3
Trespasser, by S 108 (c) N 4
Part of contract of lease S 108 (c) N 5
—Repairs, liability for S 108 (f) N 1
—Tortious or unlawful eviction against S 108 (c) N 1
Trespass, no duty to protect against S 108 (n) N 1
—Trespasser, lessor's right to sue S 108 (c) N 4

Licence
—Ejectment suit, defence of S 105 N 13
—Lease
Compared with S 105 N 13
Test to determine, lease or licence S 105 N 14
—Licensee, rights of S 105 N 13
—Maintenance grant whether S 105 N 68

Licence (*contd.*)
—Market rights S 105 N 17
—Occupation as lodger S 105 N 15
—Occupation as servant S 105 N 16
—Re-entry by force S 105 N 71
—Revocation of S 105 N 13
—Service as consideration of S 105 N 63

Lien
—Charge, distinguished from S 100 N 2
—Equitable S 100 N 2
—Judicial S 100 N 2
—Meaning of S 100 N 2
—Rights in case of S 100 N 2

Life estate
—Alienation of, restraint on S 10 N 1; S 11 N 12
—Death of holder, lease determined by S 111 N 5, 6
—Forfeiture of
Attempt to transfer on—English law S 12 N 2
Insolvency on—English law S 12 N 2
—Gift over, condition of S 28 N 5
—Grant for indefinite period S 8 N 7
—Mahomedan law under S 19 N 2; S 21 N 2
—Maintenance grant S 8 N 5
—Mortgage by holder of S 58 N 25
—Redemption by holder of S 91 N 15
—Restraint on alienation—Validity of S 10 N 1; S 11 N 12
—Transferee—Redemption after death of holder of life estate S 91 N 15

Limitation of estate
—Annexed to property, restraining alienation S 10 N 4
—Condition and limitation distinguished S 10 N 5
—Forfeiture of interest
Attempt to transfer on S 12
Insolvency on S 12
—Married woman, restraint on anticipation S 10
See also Restraint on anticipation.
—Meaning of S 10 N 5
—Restraining alienation absolute S 10

Limited interest
—Mortgagee, foreclosure or sale by S 67 N 22A

Limited owner
—Improvements by transferee from S 51 N 11

Limited power of transfer
See Transfer by person with limited authority.

Lis pendens
—Assent, transfer with, or other party S 52 N 35
—Assets of deceased, recovery of money from, suit for S 52 N 14
—Charge created by decree—Transferee, applicability of doctrine of S 100 N 28
—Charge created by decree—Transfer during pendency of suit before decree S 52 N 6 a
—Co-defendants, applicability to S 52 N 37
—Collector, acting under S. 43, Madras Marumakkathayam Act (XXII of 1933)—Proceedings before S 52 N 9

Lis pendens (*contd.*)
—Collusive suit S 52 N 13
—Commencement of lis S 52 N 10, 12
—Compromise decree or order, transferee if bound by S 52 N 38
—Contentious suit S 52 N 13
—Court, pending before S 52 N 9
Foreign Court S 52 N 9
Jurisdiction, Court without S 52 N 9
Registrar of Co-operative Societies, proceedings before S 52 N 9
Revenue Court S 52 N 9
—Crown grants S 52 N 5
—Decree or order
Passed in suit or proceedings S 52 N 38
Transfer by or in execution of S 52 N 31
—Doctrine of S 52 N 1
—Duration of S 52 N 11, 12
Mortgage suit in S 52 N 18
—English law S 52 N 1
—Foreign Court, proceedings before S 52 N 9
—Government dues, sale for recovery of, if affected by S 52 N 32
—Immovable property, right, directly and specifically in question S 52 N 14
—Improvements, *pendente lite* S 52 N 3
—Lease, *pendente lite* S 52 N 39
—Mis-description of property S 52 N 14
—Misdescription of property— Amendment, substituting property transferred S 52 N 14
—Mortgage decree—Sale in execution S 52 N 31
—Mortgagee, sale by, under power of sale, if affected by S 69 N 25
—Moveable property, doctrine, applicability to S 52 N 15
—Notice
Lis pendens as S 3 N 48
Lis pendens, if based on S 52 N 1
—Ostensible owner, transfer by, after institution of suit by real owner S 41 N 16
—Otherwise dealt with, property S 52 N 27
—Party to the suit S 52 N 36
—Pendency of suit or proceeding S 52
Active prosecution S 52 N 8
Commencement of S 52; S 52 N 10, 12
Duration of lis S 52; S 52 N 11
Proceeding, duration of S 52 N 12
—Permission of Court, transfer by S 52 N 3, 4
—Personal relief, suit for S 52 N 14
—Pre-existing rights, if affected S 52 N 7
—Principle, applicability of S 52 N 2
—Proceeding
Commencement of S 52 N 12
Duration of lis S 52 N 12
—Proceedings operating as
Administration suit S 52 N 17
Contribution under S. 82, T. P. Act, suit for S 52 N 18
Declaration of title, suit for S 52 N 26
Maintenance suit for S 52 N 20
Charge not claimed S 52 N 20
Mortgage suit S 52 N 18; S 60 N 54
Partition, suit for S 52 N 19
Pre-emption suit S 52 N 21
Rent, suit for S 52 N 14

Lis pendens— (*contd.*)
Specific performance of contract, suit for S 52 N 24
Trust deed, cancellation of, suit for S 52 N 23
Will, suit for establishing S 52 N 22
Winding up proceedings S 52 N 25
—Registration of S 52 N 43
—*Res judicata*
Lis pendens, extension of S 52 N 1
Lis pendens if prevails against S 52 N 4
—Revenue Court, proceedings before S 52 N 9
—Right directly and specifically in question: S 52 N 14
Beginning of suit, if must be from S 52 N 14
—Sale under S. 88, Cr. P. C., if affected by: S 52 N 33
—Same property, transfer of S 52 N 14
—Suit
Commencement of S 52 N 10
Lis, duration of S 52 N 11
—Transfer
By operation of law S 52 N 30
During pendency of suit S 52
Executed before suit but registered after S 52 N 29
Made before suit S 52 N 28
Not affected by—Illustrative cases S 52 N 35
—Transferee *pendente lite*
Bound by decree or order S 52 N 40
Redemption right of S 91 N 10
Limit to S 91 N 10
Representative of party within S. 47, C. P. C. S 52 N 40
Rights and liabilities of S 52 N 16
—Transfer of property not under *lis* S 52 N 16
—Transferor, if can challenge transfer, on ground of S 52 N 37
—Void, transfer during, if S 52 N 35
—Voidable, transfer during, is S 52 N 35

Living person
—Almighty S 5 N 3
—Association or body of individuals S 5
—Company S 5
—Court S 5 N 3
—Idol S 5 N 3
—Joint Hindu family S 5 N 3
—Juristic persons S 5 N 3
—Muth, Hindu S 5 N 3

Lodger
—Licensee or lessee S 105 N 15
—Occupation as S 105 N 15

Lunatic
—Competency to contract S 7 N 3
—Curator, redemption by S 91 N 31
—Defined S 7 N 3
—Election, by S 35 N 25
—Manager of estate—Authority to transfer property S 7 N 7
—Transfer in favour of S 7 N 8

Machinery
—Accession, machinery when S 63 N 3
—Fixture, whether S 8 N 16

Machinery (*contd.*)
—House transfer of, whether passes on S 8 N 16
—Immovable property
Machinery if S 3 N 7
Machinery, when becomes S 3 N 10
—Legal incidents of S 8

Mahomedan law
—Accumulation of income, validity of, direction as to S 17 N 5
—Chapter II not to affect, rule of S 2; S 2 N 9
—Condition subsequent, validity of, rule as to S 28 N 4; S 32 N 12
—Contingent interest, creation of S 13 N 6; S 19 N 2; S 21 N 2
—Debts of a deceased Muhammadan—Rights of unsecured creditor S 100 N 31
—Defeating the provisions of, transfer S 6 N 31
—Dower
Possession in lieu of, if mortgage S 58 N 8
Widow's right to possession, transfer of S 6 N 38; S 58 N 8
—Election, doctrine of, if inconsistent with any rule of S 35 N 4
—Expectancy, transfer of S 6 N 38
—Fraudulent transfer rule of, as to S 53 N 4
—Future property, gift of S 124 N 3
—Gift
Conditions derogating—Void S 11 N 3
Delivery of possession S 9 N 3
Provisions of T. P. Act relating to, not affecting S 129; S 129 N 2, 5
Writing, necessity of S 9 N 3
—Hiba-bil-ewaz
Not a gift S 128 N 6
Whether sale S 54 N 4
—Improvements, land of another, on rule as to S 51 N 1, 3
—Life estate, creation of—Validity S 19 N 2
—Office, emoluments attached to, transfer of S 6 N 38
—Perpetuity—Rule against S 2 N 9; S 14 N 14
—Pre-emption, sale for purposes of S 54 N 4
—Prohibited transfers
Property dedicated to charity S 6 N 2a
Religious office S 6 N 2a
—Restraint on alienation S 10 N 1
—Restraint on enjoyment S 11 N 3
—Sale, rule as to, abrogated S 54 N 4
—Section 6, provisions of, if inconsistent with any rule of S 6 N 38
—Stipulation as to payment by a vendee S 11 N 9
—Transfer prohibited by S 6 N 2a
—Unborn person—Transfer for the benefit of S 13 N 6
—Universal donee, rule as to S 128 N 6
—Vested remainder after-life-estate, if recognised S 19 N 2; S 21 N 2
—Waqf: *See* Waqf.
—Writing, necessity of, for transfer S 9 N 1, 3

Maintenance
—Arrears, transfer of S 6 N 13
—Charge—Right to receive from profits S 39 N 2
—Enforcement of, right of
Administrator, transfer by S 39 N 4
Executor, transfer by S 39 N 4
Gratuitous transferee, against S 39; S 39 N 9
Transfer binding on person entitled—Effect S 39 N 2
Transferee for consideration, without notice S 39; S 39 N 1, 8
—Future, right to
Agreement of parties arising under S 6 N 13
Babuana grant S 6 N 13
Heritable allowance S 6 N 13
Meaning of S 6 N 13
Personal law, right arising under S 6 N 13
Right to recover, whether immovable property S 3 N 2
Transfer of S 6; S 6 N 13
Opposed to public policy S 6 N 15
S. 6 (dd), if retrospective S 6 N 14
—Hindu widow's right of S 39 N 5; S 100 N 30
—Hindu wife, having right of, creditor, within S. 53, if S 53 N 10
—*Lis pendens*, suit for, operates as S 52 N 20
—Obligation to pay—Annexed to the ownership S 40 N 9
—Person entitled to—Redemption right of S 91 N 35
—Right to
Meaning of S 6 N 13
Nature of S 39 N 5
Persons entitled to S 39 N 5
Resting on ownership, right S 6 N 19
—Transfer where third person is entitled to S 39; S 39 N 1

Maintenance grant S 105 N 68
—Absolute interest created S 105 N 68
—Consideration for S 105 N 68
—Heritable, when S 8 N 5
—Interest in property, creates S 105 N 68
—Interest restricted in enjoyment to owner, whether S 6 N 11
Test—Intention S 6 N 11
—Lease, whether a S 105 N 57, 58, 68
—Licence, grant is not S 105 N 68
—Life-estate S 8 N 5
—Transfer of S 6 N 11

Marine policy
—Assignment of S 6 N 17; S 130 N 23; S 130A N 2; S 135A
Endorsement by S 130A and N 2

Marriage
—Restraint on: *See* Restraint on marriage.
—Transfer where third person is entitled to provision for S 39; S 39 N 7

Married woman
—Election by S 35 N 25
—Restraint on anticipation S 10

Reference to Official Reports are invariably given in all cases found in the Official Reports.

Marshalling
—Apportionment, of mortgage-debt, distinguished from S 81 N 3
—Attaching creditor, by S 81 N 6
—Contribution, marshalling prevails over: S 56 N 2; S 82; S 82 N 10
—Discretion of Court, order in which properties sold, as to S 56 N 7
—Distinction between S. 56 and S. 81 S 56 N 1
—Doctrine of S 56 N 1
—Executing Court, power of S 56 N 12
—Lessee, by S 81 N 6
—Moveable property, application of doctrine to S 81 N 5
—Purchaser in execution of decree on second mortgage, by S 81 N 8
—Subsequent mortgagee, by S 81; S 81 N 7
Available against whom S 81 N 2
Transferee for valuable consideration
Co-mortgagor, from S 81 N 2 S 81 N 6
Conditions for S 81
Extent of right S 81 N 10
Notice of prior mortgage, not affecting S 81 N 13
Prejudice, prior mortgagee's right to: S 81 N 11
Purchase of equity of redemption not affecting S 81 N 7
Same, mortgagor S 81 N 6
Second mortgagee, right not restricted to: S 81 N 7
—Subsequent purchaser, by S 56
Charge, prior, right of, against S 56 N 6
Conditions for S 56 N 4
Contract to the contrary S 56 N 8
Execution sale, applicability of principle of S 56 N 7
Mortgage to one person S 56 N 6
Moveable property, hypothecation of, against S 56 N 6
Notice, purchaser with—Effect of S 56 N 13
Order in which properties to be sold
Discretion of Court S 56 N 7
Executing Court, jurisdiction of S 56 N 12
Mortgagee's right S 56 N 10
Properties, two or more S 56 N 5
Purchaser of another item, against S 56 N 14
Right available against whom S 56 N 14
—Transferees, different items of, between S 81 N 2

Maxims
—*Accessio cedit principle* (The increase follows the principal) S 63 N 1
—*Accessorium non ducit, sed sequitur suum principale* (That which is necessary or incident does not lead, but follows the principal) S 8 N 2, 12; S 63 N 1
—*Aequitas est quasi equalitas* (Equity is, as it were equality) S 45 N 1; S 46 N 1
—*Alienatio rei proefertur juri accrescendi* (Alienation is favoured by the law other than accumulation) S 6 N 1

Maxims (contd.)
—*Allegans contraria non est audiendus* (He is not to be heard who alleges things contradictory to each other) S 35 N 2; S 112 N 1
—"A man shall not derogate from his own grant" S 66 N 1; S 115 N 1
—*Caveat emptor* (Let the purchaser beware) S 55 N 9; S 130 N 24
—*Certum est quod certum reddi potest* (That is certain which can be made certain) S 100 N 6
—*Cessante statue primitivo cessat derivativus* (The derived estate ceases on the determination of the original estate) S 91 N 13; S 115 N 1
—*Cujus est solum ejus est usque ad caelum et ad inferos* (Whoever is the owner of the soil, it is his even-to firmament and to the middle of the earth) S 8 N 10
—*De minimis non curat lex* (The law cares not for small or trivial things) S 84 N 7
—*Debitum in proesenti solvendum in futuro* (A debt due at present to the discharged at a future time) S 36 N 7
—Equality is equity S 18 N 6
—Equity looks on that as done, which ought to have been done S 6 N 7; S 43 N 2; S 53A N 2
Ex dolo malo non oritur actio (A right of action cannot arise out of fraud) S 6 N 27; S 53 N 9
—*Expressa nocent, non expressa non nocent* (Things expressed hurt, things not expressed do not) S 8 N 4
—*Expressum facit cessare facitum* S 58 N 29
—*Fraus et dolus nemini patrocinari debent* (Fraud and deceit ought not to benefit any person) S 34 N 2
—*Generalia specialibus non derogant* (General provisions do not derogate from special provisions) S 2 N 3, 6; S 8 N 17
—He who seeks equity must do equity S 53A N 11; S 61 N 2; S 92 N 1
—*Id certum est quod certum reddi potest* (That is certain which can be made certain) S 79 N 5; S 106 N 19
—*In pari delicto potior est conditio defendentis* (In equal fault, the condition of the defendant is more favourable) S 6 N 27; S 53 N 9; S 119 N 7
—*Modus et conventio vincunt legem* (The form of agreement and the convention of parties overrule the law) S 10 N 1
Nemo allegans suam turpetudinem audiendus est (No one alleging his own baseness ought to be heard) S 53 N 9
—*Nemo plus juris ad alium transferre potest quam ipse haberet* (No man can transfer to another a right or title greater than what he himself possesses) S 41 N 1; S 111 N 5; S 132 N 2
—*Non dat qui non habet* (He gives not who hath not) S 41 N 1
—*Nova constitutio, futuris forman imponere debet non proeteritis* S 2 N 5

Maxims (*contd.*)
—*Nullus commodum capere potest de injuria sua propria* (No one can take advantage of his own wrong) S 34 N 2
—*Omne majus continet in se minus* (The greater includes the less) S 83 N 17
—*Omnia rite acta proesumuntur* (All things are presumed to have been rightly done) S 59 N 8
—"Once a mortgage, always a mortgage" S 60 N 28
—*Pendente lite nihil innovetur* (Pending a litigation nothing new should be introduced) S 52 N 1
Qui facit per alium facit per se (He who acts through another acts through himself) S 76 N 12
—*Qui in jus dominiumve alterius succedit jure ejus uti debet* (He who succeeds to the right of property of another is clothed with the same rights as those attached to the assignor) S 109 N 2
Qui prior est tempore potier est jure (He has a better title who was first in point of time) S 48 N 1; S 79 N 2; S 93 N 3
—*Qui sentit commodum sentire debet et onus* (He who derives the advantage ought to sustain the burden) S 35 N 2; S 127 N 2; S 128 N 2
—*Quicquid plantatur solo solo cedit* (Whatever is affixed to the soil becomes part of the soil) S 3 N 6; S 8 N 3; S 51 N 1; S 108 (h) N 2
Quod nullius est, est domini regis (That which belongs to no one belongs to the King) S 105 N 6
—"Redeem up and foreclose down" S 91 N 7; S 94 N 2
—*Res accessoria sequitur rem principalem* (An accessory follows the principal thing) S 8 N 2
—*Ut res magis value, quam pereat* (That an act may avail rather than perish) S 106 N 19

Mercantile document of title to goods
—Meaning of S 137; S 137 N 5
—Transfer of S 137; S 137 N 5

Merger
—Charge kept alive
Enforcement of S 101 N 10
Defence by way of S 101 N 10
Suit, by S 101 N 10
Possession right to retain under S 101 N 10
Sale subject to, subsequent mortgagee right of S 101 N 10
—Doctrine of S 101 N 1; S 111 N 7
—Estates of, larger and smaller S 101 N 1
—Intention rule of S 101 N 1; S 111 N 7
Applicability after 1929 S 101 N 1
Applied in India S 101 N 1
Benefit, when charge paid of, to be considered S 101 N 2
Circumstances in favour of keeping alive S 101 N 2
Presumption to keep alive S 101 N 1, 2

Merger (*contd.*)
—Lease determined by S 105 N 6; S 111; S 111 N 7
See also Determination of lease.
—Mortgagee acquiring equity of redemption S 101
Invalid purchase—Effect of S 101 N 4
Portion of mortgaged property, acquisition of S 101 N 5
Owner acquiring charge S 101 N 1
—Persons deriving title from mortgagee—Benefit of S. 101 if can claim S 101 N 8
—Renewal of mortgage, in case of
Intention to keep alive prior security S 101 N 3
Undertaking to pay subsequent mortgage in case of S 101 N 3
Invalid, renewed mortgage, effect of S 101 N 4
Prior security whether extinguished S 101 N 3
—Rent decree under the Bengal Tenancy Act —Purchase under S 101 N 6
—Retrospective—S. 101, whether S 101 N 11
—Subsequent incumbrance absence of, effect S 101 N 9
—Subsequent incumbrance—None in case of S 101; S 101 N 9

Mesne mortgagee
See also: (1) Prior mortgagee
(2) Puisne mortgagee.
—Person deriving title from—Rights of S 94 N 4
—"Redeem up and foreclose down" S 94 N 2
—Rights of S 94
Personal decree, against posterior mortgagee S 94 N 3
Same rights as against mortgagor S 94 N 3

Mesne profits
—Claim for—As debt S 3 N 22
—Decree for, transfer of S 6 N 19
—Defined S 51 N 20; S 105 N 66
—Interest on S 105 N 66
—Liability for—Contract for sale, transferee with notice of S 40 N 17
Mortgagee of S 76 N 21; S 84 N 19
—Right to recover
Assignment of S 8 N 14
Mere right to sue S 6 N 18
Property transferred—Effect S 6 N 18
Whether immovable property S 3 N 2
—Trespasser, liability of S 105 N 70
—Void lease, lessee under, liability of S 105 N 19

Minerals
—Lease of land, if includes S 8 N 10

Mines
—Lessee not to open or work S 108 (o) N 6

Minor
See also Guardian.
—Acceptance of gift on behalf of S 122 N 7
—Age of majority S 7 N 3; S 14 N 8
—Competency to contract S 7 N 3
—Consent, by ostensible ownership to S 41 N 8
—Defined S 7 N 3

Minor (*contd.*)
—Election by S 35 N 25
—Guardian
Alienation by—Right to set aside if a mere right to sue S 6 N 20
Authority to transfer property S 7 N 7
—Lease by S 105 N 20, 22
—Mortgage by S 58 N 24
—Mortgage, in favour of S 7 N 8; S 58 N 26
—Mortgagor, redemption by guardian S 91 N 31
—Personal liability of S 68 N 10
—Transfer in favour of: S 7 N 8; S 58 N 26; S 105 N 22

Misrepresentation
—Constructive fraud, amounting to S 78 N 3
—Defined S 78 N 3
—Mortgagee, prior, of S 78 N 3
—Priority lost by S 78; S 78 N 1, 3

Money
—Exchange of S 121
—Meaning of S 121 N 2
—Warranty as to genuineness S 121; S 121 N 1

Mortgage
—Acquittance for payment, transfer for S 58 N 12
—Administrator, by S 58 N 25
—Agreement to
Charge, if creates S 100 N 5
Priority of—Effect S 40 N 11
Rights, created by S 58 N 6
Specific performance, of S 6 N 17; S 58 N 6
—Anomalous: *See* Anomalous mortgage.
—Assignee of — Account between mortgagor and mortgagee, subject to S 58 N 4
—Assignment— Registered instrument S 60A N 2
—Attachment, mortgage pending S 60 N 55
—Attestation S 59
See also Attestation.
Consent, attestation if implies S 59 N 8
Estoppel, attestation if operates as S 59 N 9
Invalid—Effect of S 59 N 8
Moveables, mortgage of S 59 N 2
One witness, by S 59 N 8
Proof of S 59 N 8
Execution admitted S 59 N 8
Two witnesses, by S 59 N 8
—Award, creation of mortgage by: Pre N 2; S 59 N 2
—Balance of a running account, mortgage to secure S 58 N 13; S 79 N 4a
—Beneficiary, by S 58 N 23
—Characteristics of S 58 N 2
—Charge
Distinguished from S 58 N 4; S 100 N 13
Invalid mortgage, whether operates as S 59 N 8, 15; S 100 N 14
—Charge and mortgage—Priority S 48 N 3
—Charge or mortgage, transaction whether S 100 N 15

Mortgage (*contd.*)
—Company, by S 59 N 12
—Conditional sale, by: *See* Mortgage by conditional sale.
—Consideration
Non-payment
Effect of S 58 N 18
Remedy of mortgagor S 58 N 18
Partial, extent to which mortgage valid S 4 N 4; S 58 N 18
Void, without consideration S 58 N 18
—Consolidation, several mortgages of: *See* Consolidation of mortgages.
—Construction of S 58 N 44
—Co-owner, by S 58 N 21
—Coparcener, by S 58 N 21
—Defined S 58
—Definition under Stamp Act, compared S 58 N 2
—Delivery of property, by S 59 N 5
—Deposit of title deeds, by: *See* Mortgage by deposit of title deeds.
—Dower, Muhammadan widow's possession, in lieu of S 58 N 8
—Enforcement of S 67 N 2
Procedure S 67 N 2
Trespasser against S 67 N 30
—English: *See* English mortgage
—Equitable Mortgage: *See* Mortgage by deposit of title deeds.
—Execution of S 59 N 7
Admission of, attestation, proof of S 59 N 8
Mere signature, if S 59 N 7
—Executor, by S 58 N 25
—Existing or future debt securing S 58 N 13
—Extinguishment of S 83 N 20
Deposit mere, of mortgage-money, by: S 83 N 20
Merger by: *See* Merger
Redemption by S 83 N 20
—Future advances; to secure S 79 N 3
See also Future advances, mortgage to secure.
—Future crops, of S 3 N 4; S 5 N 7
—Future debt, securing S 48 N 7; S 58 N 13
—Future property, of S 5 N 7; S 58 N 10
—Gift of S 122 N 6
—Guardian, by S 58 N 25
—Heritable S 58 N 4
—Hindu father, by S 58 N 25
Redemption, son's right S 91 N 21
—Hindu widow, by S 58 N 25
—Incompetent to contract, by person S 58 N 24
—Indivisible S 60 N 41; S 67 N 27; S 82 N 12
—Integrity, broken when S 60 N 41
—Invalid, whether operates as charge S 59 N 8, 15; S 100 N 14
—Lease distinguished from S 100 N 6
—Leasehold property, of S 108 (j); S 108 (j) N 1, 5
—Lessee's right to S 108 (j); S 108 (j) N 1
—Life-estate holder, by S 58 N 25; S 91 N 15

Mortgage (contd.)
—*Lis pendens*, affected by S 60 N 54
—Manager—Joint Hindu family, by S 58 N 25
Redemption by member S 91 N 22
—Marshalling securities: *See* Marshalling.
—Material alteration of effect of S 59 N 11
What amounts to S 59 N 11
—Merger of: *See* Merger.
—Minor, by S 58 N 24
—Minor, in favour of S 58 N 26
—Mode of effecting S 59; S 59 N 2
Anomalous mortgage S 59 N 2
Award, if can be created by S 59 N 2
Delivery of property by S 59; S 59 N 2, 5
Contemporaneous S 59 N 5
Impossible delivery—Effect S 59 N 5
Unregistered instrument, existence of S 59 N 5
Mortgage by deposit of title deeds S 58 N 39; S 59 N 2
Moveable property, mortgage of S 59 N 2
Punjab, in S 59 N 2
Registered instrument S 59; S 59 N 2
Simple mortgage S 59; S 59 N 2
Sum secured one hundred rupees or more S 59 N 4
Territories excluded from operation of Registration Act, in S 59 N 2
—Mortgage-debt: *See* Mortgage-debt.
—Mortgage-deed, defined S 58
—Mortgage-money: *See* Mortgage-money.
—Mortgagee: *See* Mortgagee.
—Mortgagor: *See* Mortgagor.
—Moveables, of S 58 N 11
See also Moveable property.
—Mode of effecting S 59 N 2
Pledge, distinguished from S 58 N 11
—Operation of transfer on S 8 N 8
—Origin and history of S 58 N 2
—Partner, by S 58 N 25
—Performance of an engagement, securing S 58 N 14; S 79 N 4
Pecuniary liability under S 58 N 14
—Priority: *See* Priority—Mortgages of.
Estoppel, by S 48 N 16
Receiver, mortgage by S 48 N 12
—Property mortgaged S 60 N 18
See also Mortgaged property.
—Purdanashin woman by S 58 N 22
Independent advice S 58 N 22
—Purpose of S 58 N 12, 13, 14
—Receiver by, priority of S 48 N 12
—Registration of S 59; S 59 N 2
Company, mortgage by S 59 N 12
Effect, document when takes S 59 N 13
Invalid
Effect of S 59 N 6, 15
When S 59 N 6
Mortgage by deposit of title deeds—Memorandum of S 58 N 39
Moveable property, mortgage of S 59 N 2
Presented invalidly S 59 N 6
Principal money secured, meaning of S 59 N 3
Registered instrument—Meaning of S 59 N 6

Mortgage (contd.)
Necessary S 59 N 4, 5
Sum secured one hundred rupees or more S 59 N 4
Registered, meaning of S 59 N 6
Unregistered document, use of S 59 N 4
Valid, must be S 59 N 6
—Renewal of S 101 N 3
Intention to keep alive prior security S 101 N 3
Invalid
Effect of S 101 N 4
Right of mortgagee S 59 N 15
Prior security if extinguished S 101 N 3
Undertaking to pay another mortgage—
Effect of S 101 N 3
—Renewal of mortgaged lease: *See* Renewal of mortgaged lease.
—Revival of—Invalidity of new security S 58 N 7
See also Merger.
—Sale, distinguished from S 58 N 4
—Sale or mortgage, transaction, whether S 54 N 9
—Securing payment of money S 58 N 12
—Security
Deprivation of S 68 N 4, 16
Right to sue for mortgage-money S 68 N 4
Destruction of S 68 N 3
Mortgage-money right to sue for S 68; S 68 N 3
Insufficient S 66; S 66 N 9; S 68 N 3
Insufficient, security rendered S 66; S 68 N 3
—Security bond—Decree-holder, if mortgagee S 58 N 16
See also Security bond.
—Signature on S 59 N 7
Agent by S 59 N 7
Illiterate person by S 59 N 7
Joint mortgagors S 59 N 7
Mark affix S 59 N 7
—Simple: *See* Simple mortgage.
—Simple mortgage usufructuary S 58 N 41
See also Simple mortgage usufructuary.
—Specific immovable property S 58 N 9
Equity of redemption S 58 N 9
Instances of S 58 N 9
Specific, description when S 58 N 9
—Sub-mortgage: *See* Sub-mortgage.
—Substituted security for: *See* Substituted security.
—Tacking of: *See* Tacking.
—Title, person without, by S 58 N 19
Subsequent acquisition of title S 58 N 19
—Transfer of an interest S 58 N 4
What amounts to—Instances S 58 N 4
—Transferable S 58 N 4
—Trespasser—Enforcement against S 67 N 30
—Unregistered, admissibility of S 59 N 14
Consideration, payment of, to prove S 59 N 14
Personal covenant to pay, to prove S 59 N 14

Mortgage (*contd.*)
Possession, delivery of, to prove S 59 N 14
Possession, nature of, to prove S 59 N 14
—Unregistered—When registration necessary S 3 N 20
—Usufructuary: *See* Usufructuary mortgage
—Validity—Consideration partial S 4 N 4
—Voidable title, person having by S 58 N 20

Mortgage by conditional sale S 58 N 31
—Certain date, default of payment on S 58 N 31
—Conditional sale, distinguished from S 58 N 32
—Defined S 58
—Nature and incidents of S 58 N 31
—Ostensible sale S 58 N 31
—Personal covenant to pay in S 58 N 31
—Personal liability, mortgagor's absence of S 58 N 31
—Possession, delivery of S 58 N 31
—Redemption after due date—Law prior to S. 58 S 58 N 31
—Remedy of mortgagee S 67 N 14
—Sale or mortgage, transaction whether S 58 N 33
Evidence admissible S 58 N 33
Conduct of parties, of S 58 N 33
Oral S 58 N 33
Surrounding circumstances, of S 58 N 33
Illustrative cases S 58 N 33
Intention, test S 58 N 33
Onus S 58 N 33
Proviso to S. 58 (c)—Effect of S 58 N 33
Single transaction, sale and agreement to reconvey S 58 N 33
—Test—Description given by parties, whether S 58 N 34

Mortgage by deposit of title deeds
—Creditor or his agent—Delivery to, necessary S 58 N 39.
—Defined S 58
—Delivery, documents of title of S 58 N 39
Creditor or his agent, must be to S 58 N 39
—Documents of title
All-deposited if must be S 58 N 39
Documents to be deposited S 58 N 39
Illustrations of S 58 N 39
Meaning of S 58 N 39
—Equitable mortgage S 58 N 39
—Essentials of S 58 N 39
—Further advances, for S 58 N 39
—Interest, mortgagee's right to S 58 N 39
—Interest to create security, necessary S 58 N 39
—Memorandum accompanied by S 58 N 39
Registration of S 58 N 39
—Merger, formal mortgage in S 58 N 39
—Mode of effecting S 58 N 39; S 59 N 2

Mortgage by Deposit of title deeds (*contd.*)
—Mortgagee—Remedies of S 58 N 39; S 67 N 17
—Mortgagor—Remedy of S 58 N 39
—Oral S 48 N 10
Priority over subsequent registered S 48 N 10
—Property secured
Extent of S 58 N 39
Presumption as to S 58 N 39
—Provisions applying to simple mortgage, applying to S 96; S 96 N 1, 2; O 34 R 15 and N 11
—Territories, in which can be effected S 58 N 39
Property outside, occupied territories of S 58 N 39
Punjab in S 58 N 39

Mortgage-debt
—Abetment of, mortgagee acquiring part of property S 60 N 44; S 82 N 18; S 101 N 5
—Actionable claim, if S 3 N 21; S 8 N 17; S 58 N 4; S 130 N 18
—Apportionment equitable rule of S 81 N 3
—Apportionment of—Compelling mortgagee to S 82 N 12
—Assignment of—Third party to, mortgagee's obligation S 60A; S 60A N 1
—Chose-in-action, England, in S 58 N 4
—Contribution to S 82
See also Contribution to mortgage-debt.
—Sale of, in execution—Security, if passes S 8 N 17
—Security for
Passes on transfer of debt, whether S 8 N 17
Separation from debt S 8 N 17
—Surety for: *See* Surety.
—Third party, assignment to S 60A; S 60A N 1
Costs of S 60A N 3
Mortgagor's right to require S 60A; S 60A N 1
Subsequent incumbrancer's right S 60A; S 60A N 1
—Transfer of
Security when passes S 8 N 17
Unregistered
Effect S 8 N 17
Remedy of transferee S 8 N 17
Security, if passes S 8 N 17

Mortgage-deed
—Defined S 58
—Delivery, redemption on S 60; S 60 N 16
—Deposit in Court S 83 N 21
—Material alteration of S 59 N 11

Mortgage-money
—Addition to
Accession, costs of acquisition, when S 63
Defending title, expenses of S 72
Improvements, costs of S 63A; S 63A N 6, 7
Premiums of insurance paid S 72; S 72 N 12

Mortgage-money— (*contd.*)
Preservation of property, expenses of S 72
Redeeming co-mortgagor, expenses of redemption S 95; S 95 N 1
Renewal of mortgaged lease, expenses of S 72
Support mortgagor's title, expense of S 72
—Amount remaining due S 83 N 17; S 84 N 7
—Costs incurred under S. 72, whether S 60 N 10
—Defined S 58; S 58 N 17
—Deposit in Court: *See* Deposit of mortgage-money.
—Due, when becomes S 60 N 5; S 67 N 5, 8; S 83 N 5
Demand on, payable S 67 N 5
Instalments, payable by S 67 N 5
Period for payment fixed S 67 N 5
—Instalments payable by
Due, when becomes S 67 N 5
Failure to pay, foreclosure or sale on S 67 N 7
—Interest S 58 N 17
See also Mortgage suit.
Accessory to principal S 68 N 14
Cessation on deposit S 84
Adult mortgagee, in case of S 84 N 10
Date, from which ceases S 84 N 2
Date of service of notice, from S 84 N 11
Incompetent to contract, mortgagee, in case of S 84 N 10
Invalid deposit S 84 N 6
Previous tender, deposit without S 84 N 9
Principal deposit of, only S 84 N 7
Reasonable notice of payment or tender, contract, stipulating S 84
Rival claimants to mortgagee's estate, in case of S 84 N 10
Withdrawal of deposit by mortgagor S 84
Cessation on tender S 84
Accompanied by deposit, if must be S 84 N 8
Amount remaining due, tender must be of S 84 N 7
Benefit of tender, who can take S 84 N 3
Date of S 84 N 2
Insufficient amount S 84 N 7
Partial tender S 84 N 7
Person entitled to make, tender must be by S 84 N 3
Reasonable notice of payment or tender, contract stipulating S 84
Charge on estate S 60 N 10
When not S 60 N 10
Damages, by way of S 68 N 14
Failure to pay, foreclosure or sale on S 67 N 6
Independent contract to pay S 68 N 14
Part of mortgage-money S 58 N 17; S 60 N 10
Personal liability for S 68 N 14
Post diem S 58 N 17; O 34 R 11 N 2

Mortgage-money—Interest (*contd.*)
Damages, as S 58 N 17
Implied, agreement to pay S 58 N 17
Redeeming co-mortgagor's right to claim S 95 N 4
Redemption without payment of S 60 N 10
Right to sue for S 68 N 14
Subrogee's right to claim S 92 N 24
Suit for recovery—Deposit of mortgage-money after S 83 N 9
Usufructuary mortgagee's right S 60 N 10
—Notice before payment or tender S 60; S 60 N 40; S 84 N 14
Contract stipulating for S 84 N 14
Demand by mortgagee, effect of S 84 N 15
English law S 84 N 14
—Payment of
Agent of mortgagee, to S 60 N 12
Assignee of mortgagee— Amount to be paid S 60 N 11
Co-heirs, one of several, to S 60 N 15
Co-mortgagee, to one S 60 N 14
Current coin in S 60 N 7
Guardian of minor, to S 60 N 12
Instalments, in S 60 N 7
Karta, to S 60 N 12
Meaning of S 60 N 7
Memorandum—Registration of S 60 N 7
Notice before S 60; S 60 N 40; S 84 N 14
Reasonable notice S 60 N 40
Ostensible owner, to S 41 N 19
Part-owner, by S 60 N 10
Presumption S 60 N 7
—Principal money S 58 N 17
Registration, for purpose of S 59 N 3
—Redemption on payment or tender of S 60 N 7 to 11
—Reduction in S 69 N 8
—Right to sue for S 68
Actionable claim, is S 68 N 15
Deprivation of security on S 68; S 68 N 4
After decree, deprivation S 68 N 16
Extent of deprivation S 68 N 4
Person deriving title from mortgagor—Liability of S 68 N 4
Wrongful act, mortgagor's by S 68 N 4
Destruction of security on S 68; S 68 N 3
Acquisition under Land Acquisition Act S 68 N 3
Instances S 68 N 3
Opportunity to provide further security S 68 N 3
Failure to deliver possession, on S 68; S 68 N 5
Initial, not restricted to S 68 N 5
Intentional S 68 N 5
Portion, of property, of S 68 N 5
Remedies of mortgagee S 68 N 5
Insufficient, security rendered S 68; S 68 N 3
Illustrations **S 68 N 3**
Insufficiency—**Meaning of** S 68 N 3

In the footnotes to the Commentary indicates either a leading case or a case giving fuller reasons.*

Mortgage-money (*contd.*)
Opportunity to provide further security S 68 N 3
Personal covenant to repay: *See* Personal liability, mortgagor's.
Punjab and N.W.F.P., applicability of S. 68 S 68 N 19
Secure possession, failure to, on S 68; S 68 N 5
Acquiescence of mortgagee S 68 N 5
Default of mortgagee, dispossession owing to S 68 N 7
Disturbance by mortgagor S 68 N 5
Intentional S 68 N 5
Trespasser, disturbance by S 68 N 5
Succession certificate if necessary S 68 N 22
Void mortgage— Relief under S. 68 if can be given S 68 N 1, 13
—Suit for—Stay of, power of Court to S 68; S 68 N 18
—Tender of: *See* Tender of mortgage-money.

Mortgage suit
—Addition of parties O 34 R 1 N 21
Order refusing—Revision O 34 R 1 N 22
—Appeal, parties to O 34 R 1 N 18
—Benamidar, by S 67 N 22
—Construction of mortgage decree O 34 R 5 N 21
—Costs
Mortgagee's right to S 72 N 5
Refusal of tender effect of S 84 N 16
Subsequent mortgagee, against S 72 N 5
—Costs, charges and expenses incurred after preliminary decree O 34 R 10 N 4, 6
—Costs of mortgagee O 34 R 10 N 3
Appeal as to costs O 34 R 10 N 9
Costs of appeal O 34 R 10 N 5
Mode of realisation O 34 R 10 N 8
Power of executing Court to add O 34 R 10 N 7
—Decree, construction of O 34 R 5 N 23
—Deposit of mortgage-money, after S 83 N 9
—Interest, payment of O 34 R 11 N 2
Date fixed for payment, to date of realisation O 34 R 11 N 2
Date of suit to date fixed for payment O 34 R 11 N 2
Post diem interest O 34 R 11 N 2
Prior to suit, interest O 34 R 11 N 2
—*Lis pendens*—Suit operates as S 52 N 18
—One suit on several mortgages
Contract against S 67 A N 7
Money must have been due on all mortgages S 67A N 8
Mortgaged property, different may be S 67A N 6
Mortgagee, when bound to bring S 67A; S 67A N 1
Retrospective, S. 67A, if S 67A N 2
Same kind of decree, right to S 67A N 5
Same mortgagor, by S 67A N 4
Separate suits, maintainability of S 67A N 1
Subsequent mortgagee subrogated to rights of prior mortgagee S 92 N 27

Mortgage suit (*contd.*)
—Paramount title, person claiming O 34 R 1 N 5
—Parties to O 34 R 1 and N 3, 4, 20, 21
Administrator, suit by or against O 34 R 1 N 7
Assignee of mortgagee, suit by O 34 R 1 N 13
Benamidar, suit by or against O 34 R 1 N 8
Executor, suit by or against O 34 R 1 N 7
Interest in the mortgage-security, person having O 34 R 1 N 5, 6
Interest in the right of redemption, person having O 34 R 1 N 5, 6
Joint Hindu family, manager, suit by or against O 34 R 1 N 12
Kanomdar O 34 R 1 N 17
Landlord O 34 R 1 N 16
Lessee O 34 R 1 N 15
Mahomedan co-heirs, suit by or against O 34 R 1 N 11
Mis-joinder of parties O 34 R 1 N 21
Necessary parties S 67 N 19; S 91 N 7; O 34 R 7 N 6
Non-joinder of a necessary party, effect of O 34 R 1 N 19
Order discharging a party—Revision O 34 R 1 N 22
Paramount title, person claiming O 34 R 1 N 5
Prior mortgagee S 91 N 7; S 92 N 30; O 34 R 1 N 10
Receiver in insolvency O 34 R 1 N 14
Trustees, suit by or against O 34 R 1 N 7
—Person not impleaded, rights of S 67 N 19; S 91 N 45; O 34 R 1 N 19
—Personal decree O 34 R 6 and N 3, 23
Amount due O 34 R 6 N 11
Appeal O 34 R 6 N 21
Application for, necessity of O 34 R 6 N 3
Attachment of property before O 34 R 6 N 9
Award, decree on O 34 R 6 N 8a
Compromise decree, personal remedy under O 34 R 6 N 8
Execution of O 34 R 6 N 20
Heirs of mortgagor, against O 34 R 6 N 7
Insolvency of mortgagor O 34 R 6 N 16
Invalid mortgage O 34 R 6 N 3
Legally recoverable O 34 R 6 N 12, 13
Limitation O 34 R 6 17
Nature of proceedings O 34 R 6 N 22
Net proceeds of sale found insuffcient O 34 R 6 N 10
Notice to judgment-debtor O 34 R 6 N 19
Person not the mortgagor, against O 34 R 6 N 6
Puisne mortgagee, against O 34 R 6 N 14, 15
Purchaser from mortgagor, against O 34 R 6 N 4
Redemption suit, personal decree in O 34 R 8 A and N 1
Separate decree O 34 R 6 N 3

Mortgage Suit (*contd.*)
Succession certificate O 34 R 6 N 18
—Prior mortgagee joined as party O 34 R 1 N 10
—Puisne mortgagee, suit by O 34 R 1
—Rents and profits in Receiver's hands S 8 N 14
—Sale in execution
Confirmation of sale, mortgagor's right to redeem before O 34 R 5 and N 13
Confirmation of sale, right to redeem extinguished S 92 N 7
Effect of S 67 N 11; O 34 R 5 N 19
Lis pendens, applicability of S 52 N 31
Order in which to be sold—Discretion of Court S 56 N 7, 10
Person holding decree for, redemption by S 91 N 28
—Sale of property free from prior mortgage O 34 R 12 and N 1a, 3
Application of proceeds O 34 R 13 and N 2 to 4
Prior usufructuary mortgage O 34 R 12 N 4
—Sale of property subject to prior mortgage O 34 R 12 N 2

Mortgaged property
—Accession to: *See* Accession—Mortgaged property, to
—Attachment of O 34 R 14 N 2, 9
—Charge on, person having S 91 N 4
—Contract to purchase, person contracting, right to redeem of S 91 N 9
—Improvements, to: *See* Improvements.
—Insurable S 72 N 12
—Insurance—Mortgagee to insure S 72; S 72 N 12
—Interest in
Nature of S 91 N 4
Person having, redemption by S 91 N 4
Bond by mortgage, person must be S 91 N 4
Present, must be S 91 N 4
Validly created, must be S 91 N 4
—Lessee of—Redemption by S 91 N 12
—Lessee of—Whether necessary party to suit on mortgage O 34 R 1 N 15
—Meaning of S 60 N 19
—Mortgagee-right, as S 60 N 19
—Receiver of S 69A
See also Receiver of mortgaged property.
—Rents and profits of
Mortgagee when entitled to S 8 N 14
Pass as security S 8 N 8
—Retransfer of, on redemption S 60; S 60 N 18
Third party—Mortgagee's obligation to S 60A; S 60A N 1
—Sale in particular order directed—Right of contribution if affected S 82 N 9
—Sale of, for money claim arising under mortgage O 34 R 14
Claim arising under the mortgage O 34 R 14 N 6, 12
Consent decree O 34 R 14 N 14
Decree for payment of money O 34 R 14 N 15

Mortgaged property (*contd.*)
Extent of prohibition O 34 R 14 N 2, 12
Mortgagee bound to institute suit for sale O 34 R 14 N 11, 13
Object of prohibition O 34 R 14 N 2
Sale in contravention of O. 34 R. 14 O 34 R 14 N 7
Sale prohibited O 34 R 14 and N 2
Transferee of decree from mortgagee O 34 R 14 N 10

Mortgagee
—Acquisition of part of equity of redemption by Abatement, proportionate, of debt S 82 N 18
Effect of—Contribution to mortgage-debt on S 82 N 18
Intention to keep charge alive S 101 N 1, 2
Merger, none against subsequent incumbrances S 101
—Agent of
Notice of deposit to S 102 N 2, 3
Payment or tender to S 60 N 12; S 102 N 2, 3
—Assignee of
Amount to be paid or tender to S 60 N 11
Equities against mortgagee, available against S 130 N 18
Payment to mortgagee, bound by S 60 N 13
—Benamidar, suit by S 67 N 22
—Co-heirs—Payment or tender to one S 60 N 15
—Co-mortgagee: *See* Co-mortgagee.
—Concurrent remedies under Ss. 67 and 68 S 68 N 18
—Co-owner, from—Partition, right of S 44 N 5, 7
—Costs of S 72 N 2
Recovery of S 72 N 5
Refusal of tender, effect of S 84 N 16
Right to S 72 N 5
Creditor, mortgagee if S 53 N 10
Decree-holder is not, when security bond is given to Court S 58 N 16
Defined S 58
Delivery of possession by S 60 N 17
Documents of title, delivery on redemption S 60 N 16
Mortgagee—Estoppel against mortgagor S 11 S 67 N 1a
—Expenses incurred by
Capacity, as mortgagee S 72 N 10
Charge for S 72 N 2
Enforcement independent of mortgage S 72 N 9
Contract against S 72 N 7
Defending title for S 72; S 72 N 5
Independent suit, agreement to recover by S 72 N 8
Interest on S 72; S 72 N 11
Rate of S 72 N 11
Right to S 72 N 11
Litigation with third person in S 72 N 5
Premiums, insurance, paid S 72; S 72 N 12

Mortgagee—Expenses incurred by (*contd*)
Preservation of property for S 72; S 72 N 3
Destruction, from S 72 N 3
Forfeiture or sale, from S 72 N 3
Necessary, when S 72 N 3
Sale of equity of redemption, from S 72 N 3
Principal money, addition to S 72: S 72 N 8
Additional remedy S 72 N 8
Recovery of S 72 N 8
Enforcement of charge independently S 72 N 9
Reimbursement of necessary S 72 N 2
Remedies for S 72 N 8
Adoption of one, effect of S 72 N 8
Renewal of mortgaged lease for S 72; S 72 N 6
Right of mortgagee to spend S 72
Contract to the contrary S 72 N 7
Mortgagee in possession—S. 72 not restricted to S 72 N 2
Supporting title of mortgagor, for S 72; S 72 N 4
Necessary and reasonable S 72 N 4
—Gross negligence—Title deeds omission to call for and inspect S 3 N 32
—Improvements by: *See* Improvements.
—Insurance by
Contract against S 72 N 12
Extent of S 72 N 12
Premiums paid, addition to mortgage-money S 72 N 12
Right to insure S 72; S 72 N 12
—Joint mortgagees S 45 N 5
—Joint mortgagees, rights of S 45 N 5
—Laches—Contribution, effect on S 82 N 20
—Lease by—Determined on redemption S 111 N 5
—Mesne mortgagee: *See* Mesne mortgagee.
—Minor
Deposit of mortgage-money—Procedure S 83 N 16
Legal curator of
Notice of deposit to S 103; S 103 N 4
Tender to S 103; S 103 N 4
Notice of deposit in case of S 103; S 103 N 2
Tender—Procedure in case of S 83 N 16; S 103; S 103 N 2
—Mortgagee rights
Sale of S 54 N 6, 19
Whether immovable property S 3 N 2
—Negligence—Contribution—Effect on S 82 N 20
—Ostensible owner, mortgagee if S 41 N 17
—Payment or tender to S 60 N 6
Agent of S 60 N 12
Co-heirs, one of several, to S 60 N 15
Co-mortgagee, to one S 60 N 14
Guardian of minor S 60 N 12
Karta of joint Hindu family S 60 N 12
—Persons deriving title from, included S 59A; S 59A N 2, 3; S 84 N 4
Sub-mortgagee S 59A N 3
—Person incompetent to contract—Notice of deposit—Procedure S 103; S 103 N 2
—Power of sale, without intervention of Court S 69; S 69 N 3
Conferring of S 69 N 3
Expressly conferred must be S 69 N 10
Crown, as mortgagee of S 69
Default in payment
Interest only, of S 69 N 9
Where no time is fixed S 69 N 7
Demand for payment S 69 N 7
English law S 69 N 1
Applied, before T. P. Act S 69 N 4
English mortgagee S 69
Exercise of—Conditions for S 69
Professed exercise, sale must be in S 69 N 19
Improper or irregular exercise of: S 69; S 69 N 23
Damages, mortgagor's right to claim S 69 N 24
Manager of joint Hindu family, mortgage by S 69 N 4a
Mortgagee in specified towns S 69
Notice to pay S 69 N 12
Agent to S 102; S 102 N 2
Electing to give, effect of S 69 N 17
Interest, sale for arrears of S 69 N 16
Necessity of S 69 N 12
Sale without S 69 N 12
Service of S 69 N 14
Three months after service, mortgagee to wait S 69 N 15
Waiver of S 69 N 13
Reduction, mortgage-money of S 69 N 8
Second mortgagee S 69 N 3
Suit for redemption, if affects S 52 N 7
Validity of S 69; S 69 N 3
Who can exercise S 69 N 20
—Prior mortgagee: *See* Prior mortgagee.
—Puisne mortgagee: *See* Puisne mortgagee.
—Purchase of equity of redemption
Court sale, at S 60 N 23
Effect of S 60 N 22
Invalid, effect of S 101 N 4
Portion, purchase of S 101 N 5
Revenue arrears, sale for, at S 60 N 23
Right to redeem when extinguished S 60 N 22, 23, 24, 25
—Receiver, to appoint, power of S 69A
—Release of portion of equity of redemption
Contribution, effect on S 82 N 19
Gift, whether S 122 N 1
Power to S 60 N 43; S 82 N 19
—Remedies of
Anomalous mortgagee S 67 N 18
English mortgagee S 67 N 16
Mortgagee by conditional sale S 67 N 14
Mortgagee by deposit of title deeds S 67 N 17
Simple mortgagee S 67 N 13
Usufructuary mortgagee S 67 N 15
—Rents and profits of property, entitled to, if S 8 N 14

Mortgagee—Power of Sale, etc. (*contd.*)
—Sale without intervention of Court
Contract for sale, effect of S 69 N 22
Co-mortgagor to S 69 N 27
Conduct of S 69 N 21
Effect of S 69 N 22
Fresh notice of S 69 N 15
Himself, to S 60 N 25; S 69 N 27
Effect of S 69 N 28
Legal incident, sale of S 69 N 6
Lis pendens, sale affected by S 69 N 25
Notice—Arrears of interest for S 69 N 16
Notice to pay, without S 69 N 12
Part of property, of S 69 N 6
Postponement of S 69 N 25a
Purchaser
Notice or irregularities, with S 69 N 18
Persons competent to be S 69 N 27
Position of S 69 N 29
Protected, when S 69 N 18
Title of S 69
Title unimpeachable, when S 69 N 19
Sale proceeds, application of S 69 N 30
Stopping of S 69 N 26
Subsequent mortgagee to S 60 N 24; S 69 N 27
Three months after, notice S 69 N 15
—Sub-mortgagee: *See* Sub-mortgagee.
—Subsequent—Redemption by
Assignment of mortgage-debt S 60A; S 60A N 1
Third party re-transferee of property to: S 60A; S 60A N 1
—Substituted security, right to S 73
See also Substituted security.
—Successive mortgagees: *See* (1) Prior mortgagee; (2) Mesne mortgagee; (3) Puisne mortgagee.
—Waste, injunction to restrain, right of, to: S 66 N 8

Mortgagee in possession
—Accounts—Compound interest, charging of S 76 N 16
Contract against keeping S 76 N 12
Duty to keep S 76
Duty to keep and render S 76 N 12
Expenses, deduction of S 76 N 19
Failure to keep—Effect of S 76 N 15
Fair occupation rent S 76 N 18
Calculation of S 76 N 18
Full and accurate S 76 N 12
Liability—Receipts in lieu of interest S 77 N 1
Loss from waste, debit of S 76 N 10
Mode of taking S 76 N 16
Mortgagor's liability under contract S 77 N 3
Proof of S 76 N 14
Receipts S 76 N 17
Receipts in lieu of interest—Effect of S 77
Rents and profits in lieu of interest S 76 N 12
Rests yearly S 76 N 16
Surplus S 76 N 20
Interest on S 76 N 20
Taken, when to be S 76 N 13

Mortgagee in possession (*contd.*)
—Assignment of mortgage-debt, third party to on redemption S 60A; S 60A N 1
—Deposit or tender by mortgagor—Effect of S 76
—Duties of S 76 N 1; S 78
Failure to perform S 76
Principles, application to the Punjab S 76 N 2
—Fair occupation rent
Calculation of S 76 N 18
Occupation rent—Meaning of S 76 N 18
—Improvements by S 51 N 9
See also Improvements.
—Instances of S 76 N 5
—Insurance money, application of S 76; S 76 N 11
Reinstating property, for S 76 N 11
—Just allowances to S 76 N 19
—Land revenue—Liability to pay S 72 N 3
Increased revenue S 72 N 3
Rents and profits, out of S 72 N 3
—Liabilities of S 76
Absolute S 77 N 1
Contract excluding S 77 N 1
—Loss caused by, remedies for S 76 N 22
—Management of property
As his own, to manage S 76 N 6
Duty as to S 76; S 76 N 6
Expenses of, deducted S 76 N 19
—Mesne profits, liability for S 76 N 21; S 84 N 19
—Occupation rent, fair calculation S 76 N 18
—Permanent lease, by S 76 N 6
—Personal services, allowance for S 76 N 19
—Possession
Independent tenements, possession of one S 76 N 5
Mortgagee, when in S 76 N 5
Qua mortgagee S 76 N 5
Taking of
Continuance of mortgage during S 76 N 4
Extinct, after mortgage, is S 76 N 4
Wrongful S 76 N 5
—Public charges to pay S 76; S 76 N 8
Income from S 76 N 8
Tagavi advance S 76 N 8
—Receipts, defined portion of principal, appropriation to S 77 N 2
—Receipts in lieu of interest
Contract for
Effect of S 77
Illustrative cases S 77 N 1
Liabilities under S. 76—Effect of S 77
—Receipts in lieu of interest and part of principal—Contract for—Effect of S 77
—Redemption, mortgagee's right to crops S 60 N 17
—Rent of mortgaged property
Duty to pay
Arrears S 76 N 8
Income from S 76 N 8
Failure to pay S 76 N 8
Liability to pay S 76; S 76 N 8
—Rents and profits, collection of S 76; S 76 N 7

Mortgagee in possession (*contd.*)
Diligence in S 76 N 7
Expenses of—Deducted S 76 N 19
Percentage allowed S 76 N 19
Illegal collection S 76 N 7
Liability—Receipts in lieu of interest—
Effect on S 77
Non-recovery—Liability as to S 76 N 7
Wilful default in S 76 N 7
—Repairs necessary
Contract as to S 76 N 9
Duty to make S 76 N 9
Funds for S 76 N 9
Liability—Receipts in lieu of interest—
Contract for S 77
Liability to make S 76
Water-pipes laying of, if S 76 N 9
—Revenue
Liability to pay S 76; S 76 N 8
Contract to the contrary S 76 N 8
Contract under S. 77—Effect S 76 N 8
Enhanced revenue S 76 N 8
Failure to pay S 76 N 8
Income from S 76 N 8
Newly assessed S 76 N 8
—Surplus with
Interest on S 76 N 20
Liability as to S 76
Mortgagor, to be paid to S 76 N 20
—Tender or deposit of mortgage-money
effect of S 76 N 21
Expenses incurred after—Credit, for S 76 N 21
—Third party—Re-transfer to, on redemption compulsory S 60A; S 60A N 1
—Waste by S 76 N 10
Duty not to commit S 76; S 76 N 10
What amounts to S 76 N 10
Loss occasioned, debit of S 76 N 10
Prevention, third person waste by, of S 76 N 10
—Who is—Illustrative cases S 76 N 5

Mortgagor
—Agent of
Notice to S 102; S 102 N 2
Subrogation, right to S 92 N 9
—Co-mortgagor: *See* Co-mortgagor
—Copies of title-deeds, right to make S 60B; S 60B N 1
—Covenant against alienation by S 10 N 18
See also Covenant not to assign or alienate—Mortgagor by.
—Defined S 58
—Deposit mortgage-money, right to S 83
—Estoppel, to deny title S 65 N 4
—Heir of, redemption by S 91 N 20
—Implied contracts by S 65
Benefit of S 65; S 65 N 3
Goes with mortgagee's interest S 65 N 11
Breach—Remedies for S 65 N 10
Conditions in lease, perform S 65; S 65 N 7
Remedy for breach of S 65 N 10
Contract to the contrary S 65 N 9
Covenant for title S 65; S 65 N 4
Breach of S 65 N 4

Mortgagor (*contd.*)
Incumbrances, prior, failure to disclose S 65 N 4
Remedies for breach S 65 N 4, 10
Covenant running with land whether S 65 N 3
Defend title, to S 65; S 65 N 5
Breach of S 65 N 5
Remedy for breach S 65 N 10
Enforced against whom can be S 65 N 11
Incombrances previous to pay S 65
Remedy for breach of S 65 N 10
Mortgage prior to T. P. Act, in S 65 N 3
Public charges to pay S 65; S 65 N 6
Remedy for breach S 65 N 10
Rent of leasehold to pay S 65; S 65 N 7
Remedy for breach of S 65 N 10
—Inspection of title deeds S 60B; S 60B N 1
—Lease by
Best rent S 65A; S 65A N 5
Binding on mortgagee S 65A
Commencement of S 65A
Contract providing for S 65A
Duration of S 65A
Lawful possession, mortgagor must be in S 65A N 3
Mortgage prior to S 65A; S 65A N 2
Ordinary course of management, in S 65A N 4
Permanent S 65A N 4
Power to lease S 52 N 39; S 65A; S 65A N 1
Renewal covenant for S 65A
Security rendered insufficient S 55A N 1
—Lunatic, curator of, redemption by S 91 N 31
—Minor, guardian of, redemption by S 91 N 31
—Person having no interest in property S 58 N 15
—Personal decree against: *See* Mortgage suit
—Personal liability to pay S 58 N 29
—Persons deriving title from, includes S 59A; S 59A N 2, 3, 4; S 84 N 4
—Purchaser from, not for purpose of S 92; S 92 N 13
—Redemption by: *See* Redemption.
—Redemption, right of: *See* Redemption.
—Remedies of S 84 N 2
—Subrogation, right to S 92 N 9
—Successor-in-interest, of
Subrogation right of S 92 N 9
—Waste by: *See* Waste—Mortgagor, by

Moveable property
—Beneficial interest in S 3 N 24
Accounts, right to ask, of partner S 3 N 24
Assignment of S 130 N 7
Benefit of contract S 3 N 24
Earnest-money, claim for S 3 N 24
Liability under contract S 3 N 24
Life policy, money due under S 3 N 27
—Charge on S 100 N 3
Agreement to charge S 100 N 3
Writing not necessary S 100 N 3

Moveable property (*contd.*)
—Delivery of property in gift S 123 N 12
—Exchange of S 118 N 1
Mode of S 118 N 9
—Foreclosure of S 58 N 11
—Gift of S 4 N 7; S 122 N 6
—Hypothecation of, writing necessary S 9 N 7
—*Lis pendens*, doctrine of, if applies to S 52 N 15
—Marshalling, doctrine of, applicability of: S 56 N 6; S 81 N 5
—Mortgage of S 58 N 11
Attested, if must be S 59 N 2
Bona fide transferee without notice S 58 N 11
Delivery of possession S 58 N 11
Formalities S 58 N 11
Future crops S 3 N 4
Mortgagee's rights S 58 N 11
Pledge, distinguished from S 58 N 11
Redemption after default S 60 N 2
Registration if necessary S 59 N 2
Suit to enforce, parties O 34 R 1 N 1
—Ostensible owner, transfer by S 41 N 4
—Part performance, application of S 53A N 8
—Perpetuity, rule against, application to S 14 N 4
—Pledge: *See* Pledge.
—Sale of
Condition as to title in S 119 N 2
Warranty as to title in S 119 N 2

Nankar
—Charge on property, whether S 100 N 32
—Defined S 100 N 32

Negligence
—Defined S 3 N 30
—Duty to inquire S 3 N 30
—Gross negligence: *See* negligence
—Wilful abstention from inquiry distinguished from S 3 N 30

Negotiable instruments
—Custom or Law Merchant, negotiable under S 137 N 4
—Endorsee, right to debt S 8 N 17
—Meaning of S 137 N 4
—Promissory note—Endorsement of, debt if passes S 8 N 17
—Statute—Negotiable under S 137 N 4
—Transfer of—Chapter VIII, T. P. Act S 137; S 137 N 2
—Transfer of, mode of S 137 N 5
—Actionable claim—Notice of transfer, of: *See* Actionable claim—Transfer of.
—Actual S 3 N 28
Definite, information must be S 3 N 28
Time, notice before purchase S 3 N 28
—Agent, notice to S 3 N 41
Authority to receive S 3 N 42
Secret limitation of S 3 N 42
Cessation of agency after S 3 N 44
Common agent S 3 N 42, 43
Communication by agent, presumption: S 3 N 41
Conditions, essential S 3 N 43
knowledge during agency S 3 N 43

Negotiable instruments (*contd.*)
Knowledge, material to transaction S 3 N 43
Exception S 3 N 47
Fraud of agent S 3 N 41, 47
Party, person seeking benefit to S 3 N 47
Possibility of discovery by honest agent S 3 N 47
Government as principal S 3 N 46
Infant, principal S 3 N 45
Principle, imputed to S 3 N 41
Sub-agent, notice to S 3 N 42
—Attestation, if notice of contents S 3 N 31
Existing interest in property, attestor having S 3 N 31
Presumption as to S 3 N 31
—Classes of S 3 N 28
—Constructive S 3 N 28
Classes of S 3 N 28
Doctrine of, basis of S 3 N 28
Doctrine of, principle underlying S 3 N 28
English decision, application of S 3 N 28
Fraudulent party, if can plead S 3 N 49
Meaning of S 3 N 28
—Date of, registration of instrument S 3 N 36
Date of filing memorandum S 3 N 37
—Decree as S 3 N 48
—Deed, notice of, contents of, when S 3 N 32
Deeds referred to, notice of S 3 N 32
—Definition of S 3
—Deposit of mortgage-money of: *See* Deposit of mortgage-money.
—Forfeiture, notice to determine lease on S 111; S 111 N 16
See also Forfeiture of lease
—Gross negligence S 3 N 30
See also Gross negligence
—Husband of pardanashin woman, notice to S 3 N 42
—Lessee, to, of transfer by lessor S 109 N 7
—Lessee, to, to make good defect in property S 108 (m); S 108 (m) N 6
—*Lis pendens*, as S 3 N 48
—Mortgage-money to pay S 69 N 12
See also Mortgagee—Power of sale without intervention of Court
—Notice to quit: *See* Notice to quit
—Notification in newspaper S 3 N 28
—Obligation annexed to the ownership of: S 40 N 17
See also Obligation annexed to the ownership.
—Partner, to S 3 N 42
—Possession as S 3; S 3 N 39
Actual, must be S 3 N 39
Collateral agreements of person in possession, notice of S 3 N 39
Completion of contract, possession, if notice before S 3 N 40
Restricted to title of person in possession only S 3 N 39
—Proof of, onus S 3 N 50
—Redemption, of S 60

Notice—Agent, notice to (*contd.*)
—Registered instrument, notice of S 3
—Registered letter, refusal of S 3 N 29
—Registration of instrument S 3 N 34
Date of execution, notice if relates back to S 3 N 36
Invalid registration S 3 N 38
Registration not under Act of 1908 S 3 N 38
Subsequent S 3 N 35
—Repairs, notice to lessor S 108 (f)
—Restrictive covenant of S 40 N 17
See also Restrictive covenant.
—Severance of interests, of S 37 N 8
—Taxes, omission to inquire S 3 N 29
—Transferee for consideration without: *See* Transferee for value without notice
—Wilful abstention from inquiry S 3 N 29
Bona fides, want of, must be S 3 N 29
Designed or intentional abstention S 3 N 29

Notice
Duty to inquire S 3 N 29
Negligence, distinguished from S 3 N 30
Question of, if one of fact or law S 3 N 33
Record of Rights, omission to examine S 3 N 32
Title deeds, failure to call for and inspect by transferee S 3 N 32

Notice to quit S 106
—Acceptance of subsequent rent S 113 N 3
Cosharer, by S 113 N 3
Ejectment suit during pendency of S 113 N 3
Protest under S 113 N 3
Unauthorised person, by S 113 N 3
—Agent, notice by or to S 106 N 38
—Assignee of lessee, to S 106 N 37, S. 108 (j) N 3
—Assignee of lessor, by S 106 N 35; S 109 N 4
—Cases not governed by S. 106, in case of: S 106 N 49
S 109 N 4
—Clear and unambiguous S 106 N 19
—Co-lessee to S 106 N 37
—Compensation for improvements, lessor undertaking to pay in S 106 N 28
—Competency to give S 106 N 33 to 36
—Construction of S 106 N 19
—Contract to the contrary S 106; S 106 N 2
Possession under agreement to grant lease for term certain S 106 N 8
Valid, must be S 106 N 2
—Co-owner, by S 106 N 34
—Co-trustee, by S 106 N 34
—Denial of title by lessee—Effect of S 106 N 25
—Determination of lease by S 111; S 111 N 23
—Dispensed with, when S 106 N 25, 30, 31
—Ejectment suit, without S 106 N 24
—Enhancement of rent, clause for, in, effect of S 116 N 8
—Expiring with end of year or a month of tenancy S 106 N 40

Notice to quit (*contd.*) S 106
—Form of S 106; S 106 N 19, 43
—Given, when unnecessary S 106 N 27
—Government lease by, in case of 106 N 47
—Heirs of lessee, to S 106 N 37
—Indefinite period, lease for S 106 N 7
—Invalid, effect of S 106 N 19, 32; S 111 N 23
—Invalidity, plea of S 106 N 24
—Joint lessors, by due S 106 N 34
—Joint receivers, by one S 106 N 34
—Lease for life, in case of S 106 N 4
—Lease for term certain, in case of S 106 N 2, 3
Determination before expiry of period, by S 106 N 3
—Lessee, by S 106 N 22, 33
Duty to give up possession S 106 N 22
—Lessor by S 106 N 33
After assignment S 106 N 35; S 109 N 4
—Local law to the contrary S 106; S 106 N 9
—Manager of joint family by S 106 N 34
—Municipality, lease by S 106 N 18
—Onus as to S 106 N 2, 24
—Option to continue on different terms, with S 106 N 20
Enhanced rent, to pay S 106 N 20
—Part of holding, as to S 106 N 19
—Period of S 106; S 106 N 39
Calculation of S 106 N 42
Year or month tenancy S 106 N 40, 41
—Plea of want of S 106 N 24; S 111 N 23
—Possession of lessee, after expiry of
Damages, liability for S 106 N 32
Invalid notice S 106 N 32
Rent, liability for S 106 N 32
—Principles S 106 N 19
Cases not governed by S. 106, applied to S 106 N 49
—Reasonable notice, when sufficient S 106 N 49
—Receiver, by S 106 N 36
—Second notice to quit—Effect of S 113 N 3
—Service S 106
Co-lessee on S 106 N 37
Mode of S 106 N 44
Pleader or solicitor on S 106 N 46
Post by S 106 N 45
—Service tenures, in case of S 111 N 22
—Sub-lease, effect on S 106 N 29
—Sub-lessee to S 106 N 37
—Sufficiency of S 106 N 19
—Tenancy at will, in case of S 106 N 6
—Tenancy created by decision of Court S 106 N 19
—Term of years, lease for, in case of S 111 N 2
—To whom to be given S 106 N 37, 38
—Trustee by S 106 N 36
—Unauthorised person, by S 106 N 38
—Unnecessary, when S 111 N 23
—Usage to the contrary S 106; S 106 N 10
—Validity of S 106 N 19, 39
—Verbal S 106 N 49
—Waiver of S 106 N 23; S 113; S 113 N 1
Acceptance of subsequent rent by S 113 III (a); S 113 N 3

Notice to quit (*contd.*)
Ejectment suit, acceptance after S 113 N 3
Protest, acceptance under S 113 N 3
Acts not amounting to S 113 N 3
Consent of person to whom given, necessary S 113; S 113 N 2
Demand, mere, for subsequent rent S 113 N 3
Distress for rent, by S 113 N 3
Effect of S 113 N 4
English law S 113 N 1
Guarrantor for rent, effect on S 113 N 4
Intention to treat lease as subsisting S 113 N 3
Permanent tenancy, assertion of S 113 N 1
Rent prior to, acceptance of S 113 N 3
Second notice to quit, by S 113 N 3
—Who can give S 106 N 33 to 36
—Writing in S 106
—Year or month of tenancy S 106 N 40, 41
Calculation of S 106 N 42

Obligation annexed to ownership
—Contract for sale of immovable property S 40 N 8
—Contribution to mortgage-debt, contract excluding S 82 N 8
—Debt, contract to pay, of another S 40 N 14
—Enforcement of S 40
—Illustrative cases S 40 N 15
—Land revenue, contract to pay, on land of another S 40 N 14
—Lease
Contract for renewal of S 105 N 36
Contract to give S 40 N 13; S 105 N 4
—Maintenance, contract to pay S 40 N 9
—Meaning of S 40 N 7
—Mortgage contract to give S 40 N 11
—Notice of S 40 N 17
Onus to prove S 40 N 17
Transferee with S 40 N 17
—Pre-emption, contract for S 40 N 10
—Second transferee from *bona fide* purchaser, enforcement against S 40 N 19
—Test S 40 N 7
—Transfer by operation of law, enforcement in case of S 40 N 20
—Transferee of property S 40 N 18
Court sale, purchaser at S 40 N 20
—Zaricharam contract to pay S 40 N 12

Occupancy rights
—Transfer of S 6 N 31, 37
One transfer of transferable and not transferable, effect S 6 N 29
Prohibited by agreement—Effect S 6 N 37
Prohibited by decree of Court S 6 N 37

Occupancy tenant
—Mortgage by—Redemption by person recognised subsequently as tenant S 91 N 36

Official Assignee or Receiver
—Authorized to transfer insolvent's property S 7 N 5
—Fraudulent transfer, avoidance by S 53 N 29
—Sale by S 54 N 3

Official Assignee or Receiver (*contd.*)
Section 43, applicability of S 43 N 12
Whether transfer by operation of law S 2 N 6
—Specific performance against S 40 N 20
—Whether a necessary party to a mortgage suit O 34 R 1 N 14

Onerous gift S 127
—Acceptance of S 122 N 7; S 127
Effect of S 127; S 127 N 5
Principle S 127 N 2
—Conditional gift, distinguished from S 127 N 3
—Disqualified transferee, to S 127
Acceptance by S 127; S 127 N 4
Death before attaining competency S 127 N 4
—Option to select, separate transfers S 127; S 127 N 2
—Single transfer, acceptance in case of S 127; S 127 N 2

Operation of law, charge by
See Charge.

Operation of transfer S 8
—Corpus of transfer S 8 N 10
See also Corpus of transfer
—English law S 8 N 1, 2
—Execution sale—What passes at S 8 N 3
—Heritable estate, when conferred S 8 N 4
—Hindu female, transfer to S 8 N 6
Absolute estate, passing of S 8 N 6
—Hindu law S 8 N 6
—Intention
Different intention expressed or implied; S 8 N 4
How gathered S 8 N 4
—Interest in property—Transfer of S 8 N 8
—Lease, on S 8 N 8; S 108 (o) N 6
—Legal incidents of property: *See* Legal incidents of property
—Maintenance grant S 8 N 5
Heritable, when S 8 N 5
—Mortgage, on S 8 N 8
—Passes all interest of transferor S 8 N 2
—Principles S 8 N 2; S 10 N 1
—Rent and profits, transfer of S 8 N 14
—Revenue sale—What passes at S 8 N 3
Building on land S 8 N 3
—Sales *in invitum*—What passes at S 8 N 3
—Transferee—What passes to
Better title than transferor S 8 N 9
Hindu widow—Transfer by S 8 N 9
Transferor with absolute interest S 8 N 9
Transferor with dual capacity S 8 N 9
Transferor's interest passes—Principle underlying S 8 N 2
—Unauthorised person, transfer by: *See* Transfer by unauthorised person.

Opposed to the nature of interest, transfer S 6 N 26
—Emoluments attached to office, transfer of S 6 N 26
—Service tenures, transfer of S 6 N 26a
See also Service tenures.
—Temple, transfer of S 6 N 26

Oral transfer S 9
—Agricultural lease S 117 N 4

Oral Transfer (*contd.*)
—Hindu law S 9 N 1
—Mahomedan law S 9 N 1
—Mortgage by deposit of title deeds S 48 N 10
—Prior to passing of T. P. Act—Validity of S 9 N 1
—Priority over one by registered instrument S 48 N 10
—Writing, when not necessary S 9 N 2

Order
—Lease embodied in S 107 N 13
See also Lease
—Transfer by or, in execution of S 2 N 6
T. P. Act not applicable S 2; S 2 N 6

Ostensible owner
—Benamidar S 41 N 8
—Defined S 41 N 8
—Mortgagee, if included S 41 N 17
—Transfer by: *See* Ostensible owner, transfer by

Ostensible owner, transfer by
S 41
—Applicability of S. 38 to S 37 N 3
—Burden of proof, as to S 41 N 25
—Consent to ostensible ownership S 41 N 8
Attestation, if amounts to S 41 N 13
Capacity to give S 41 N 8
Death of real owner, effect S 41 N 15
Express S 41 N 10
Implied S 41 N 10
Minor, by S 41 N 8
Mistake under S 41 N 12
Mortgagee, by S 41 N 8
Motive immaterial S 41 N 14
Nature of S 41 N 12
Necessity of S 41 N 8
Ownership, consent must be to S 41 N 8
Reversioner, Hindu, by S 41 N 8
Silence amounting to S 41 N 10
Transfer, consent to, necessary if S 41 N 11
What amounts to S 41 N 8
Withdrawn before transfer S 41 N 15
—Dekkhan Agriculturists' Relief Act (XVII of 1879)—S. 10A, suit under S 41 N 6
—Estoppel, real owner S 41 N 2
Distinction between S. 115, Evidence Act and S. 41, T. P. Act S 41 N 2
—Execution sale, principle of S. 41, applicability S 41 N 3
—Good faith, transferee in S 41 N 22
Burden of proof as to S 41 N 25
Plea of S 41 N 24
—Interest in property, ostensible owner having some S 41 N 18
—*Lis pendens*, suit by real owner—Effect of, on S 41 N 16
—Moveable property, of S 41 N 4
—Person interested in property S 41 N 9
Guardian S 41 N 9
Reversioner, Hindu S 41 N 9
Trustee S 41 N 9
—Principle underlying S 41; S 41 N 1
Provinces where T. P. Act does not apply applicability to S 41 N 5

Ostensible owner, transfer by (*contd.*)
—Reasonable care by transferee S 41 N 23
Burden of proof as to S 41 N 25
Degree of care S 41 N 23
Plea of S 41 N 24
Possession, inquiry as to S 41 N 23
Title, inquiry into S 41 N 23
What amounts to S 41 N 23
—Subsequent transferee from first transferee, protected, if S 41 N 20
—Title of transferee to be considered from date of transfer S 41 N 24a
—Transfer, mortgage-money, payment of, if S 41 N 19
—Transferee, protected, when S 41 N 21
Conditions for S 41 N 7

Otti mortgage
—Incidents of S 98 N 8
—Rights and liabilities of parties S 98 N 8

Owelty
—Meaning of S 48 N 13
—Priority of S 48 N 13

Pardanishin lady
—Attestation of deed executed by S 3 N 11a, 14
—Competency to contract S 7 N 3
—Husband—If agent S 3 N 42
—Gift by S 122 N 3
Revocation of S 126 N 10
—Mortgage by S 58 N 22
—Transfer by—Independent advice S 58 N 22; S 126 N 10

Part performance S 53A
Part performance—Acquiescence and expectation, how far are.
—Acts of S 53A N 10
Act in furtherance of contract S 53A N 10
—Bars enforcement of right, by transferor S 53A N 13
—Consideration, transfer for, necessary S 53A N 7
—Contract to transfer S 53A N 6
Invalidity, nature of S 53A N 12
Proof of S 53A N 16
Writing, must be in S 53A N 9
—Defence
Available only in S 53A N 13
Third parties, against S 53A N 13
—Equitable doctrine of S 53A N 1; S 105 N 19
Applicability in India S 53A N 3, 18
History of S 53A N 1
Importation, partial, into India S 53A N 3
Limitations of S 53A N 1
S. 53A and, distinction between S 53A N 4
—Family arrangement, applicability to S 53A N 6
—Gift, application to S 53A N 7; S 123 N 9
Hindu reversioner, bound by, transferee from widow S 53A N 14
—Immovable property, restricted to S 53A N 8
—Instrument of transfer
Applicability of S 53A N 6

Part performance (*contd.*)
Invalidity, nature of S 53A N 12
—Law prior to S. 53A S 53A N 3
—Lease, application to: S 53A N 6; S 105 N 4, 19, 39; S 107 N 14
—Limitation for defence of S 53A N 19
—Moveable property, contract relating to S 53A N 8
Oral contract—Application of S 53A; S 53A N 4
—Performance by transferee of his part
Complete, must be S 53A N 11
Willingness to perform S 53A N 11
—Plea of S 53A N 20
—Possession of transferee S 53A N 10
De hors the contract S 53A N 10
Pursuance of contract in, must be S 53A N 10
—Retrospective, S. 53A, if S 53A N 5
—Rights provided by contract S 53A N 13
—Specific Relief Act, S. 27A and S. 53A, T. P. Act, compared S 53A N 17
—*Spes successionis*, transfer of, application to S 53A N 12
—Surrender, applicability to S 53A N 6
—Terms of transfer, clear must be S 53A N 9
—Third parties, available against, if S 53A N 13
—Transferee without notice protected S 53A N 15
—Void transfers, application to S 53A N 12
—Walsh v. Lonsdale, doctrine of, distinguished from S 53A N 2
—Writing
Contract in, necessary S 53A N 9

Partition
—Agreement against—Validity S 11 N 13
—Agreement to divide by reversioner S 6 N 4
—Co-owner, right of S 44 N 5
—Coparcener, transferee from, right of S 44 N 6
—Exchange, partition whether S 118 N 5
—Fraudulent transfer, when S 53 N 5
—Hindu law, right under S 44 N 6
—*Lis pendens*, partition suit operates as S 52 N 19
—Oral S 2 N 4
—Restraint on—Void for repugnancy S 11 N 9
—Share obtained on—Mortgagee's right to S 67 N 29; S 73 N 1
—Suit for
Balance of convenience, S 44 N 5
Temporary, precarious or qualified interest, plaintiff having S 44 N 5
Unity of possession, necessary S 44 N 5
—Transfer of property, partition whether S 5 N 2, 4; S 40 N 18; S 53 N 5
—Writing S 9 N 10

Partner
—Accounts, right to call for, nature of S 3 N 24
—Assignment of rights to another, if transfer S 5 N 4
—Competency to transfer partnership property S 7 N 7

Partner (*contd.*)
—Forfeiture of interest on insolvency S 12 N 6
—Mortgage by S 58 N 25
—Notice to S 3 N 42
—Payment or tender to S 60 N 12
—Share of, transferability of S 6 N 22

Payment
—Mortgage-money, of
See (1) Mortgage-money (2) Redemption.
—Rent of: *See* Rent.

Pension
—Apportionment of S 36
—Essentials of S 6 N 24
—Instances S 6 N 24
—Meaning of S 6 N 24
—Political
Meaning of S 6 N 24
Transfer of S 6; S 6 N 24
—Stipends allowed to pensioners of the Crown
—Transfer of S 6
—Transfer of S 6 N 24

Performance of an act, condition of
—Condition subsequent as to, breach of S 33; S 33 N 2
—Ignorance of condition S 34 N 3
—Person interested in non-fulfilment of condition S 34 N 2
—Prevented by fraud, effect S 34; S 34 N 2
—Time specified for—Impossibility of performance by fraud S 34 N 2

Periodic leases
—Agricultural purpose, lease for S 105 N 31; S 106 N 12, 13
—Building purpose, lease for S 106 N 12
—Construction of lease S 105 N 31
—Determination of S 105 N 31
—Duration S 105 N 31, 32; S 106
Presumption S 106
—Essentials of S 105 N 31
—Government, lease by S 106 N 47
—Manufacturing purpose, lease for S 105 N 31; S 106 N 12, 13
—Month to month from S 105 N 31; S 106 N 12, 17
Building purpose, lease for S 106 N 12, 14
Calculation of time S 106 N 41, 42
Heritable S 106 N 17
Lease, when deemed to be S 106
Ordinary tenant S 106 N 15
Partible S 106 N 17
—Notice to quit, determined by S 106
—Notice to quit, in case of: *See Notice* to quit.
—Presumption of S 105 N 31, 32; S 106 N 12
—Single lease S 105 N 31; S 106 N 16
—Test to determine S 105 N 31
—Usage to the contrary S 106 N 10
—Year or month of tenancy S 106 N 40, 41
Calculation of S 106 N 42
—Year to year, from S 105 N 31; S 106 N 16; S 107 N 4
Agricultural purpose, lease for S 106 N 13

Periodic leases (*contd.*)
Computation of time S 106 N 41, 42
Death of lessee S 106 N 16
Defined S 107 N 4
Determination of—Efflux of time by: S 111 N 2
Lease, when deemed to be S 106
Manufacturing purpose, lease for S 106 N 13
Presumption S 106 N 12
Registered instrument necessary S 105 N 8; S 107; S 107 N 1, 4
Single lease S 106 N 16
Yearly rent fixed, lease whether: S 105 N 26, 31
Yearly rent, reservation of S 106 N 15

Periodical payment
—Apportionment of S 36; S 36 N 7
—Meaning of S 36 N 7

Permanent lease
—Absolute estate, creation of, distinguished S 105 N 42
—Acquisition of permanent tenancy
Adverse possession, by S 105 N 33
Estoppel, by S 105 N 55
Prescription, by S 105 N 54, 79
Subsequent to commencement of ordinary lease S 105 N 53
—Assertion of
Denial of title, whether amounts to S 111 N 14
Waiver of notice to quit S 113 N 1
—Construction of lease S 105 N 47
—Creation of S 105 N 41; S 106 N 5
—Determination of, efflux of time by S 111 N 2
—English law S 105 N 41, 42
—Evidence of
Circumstantial evidence S 105 N 48 to 51
Dwelling or residential purposes, lease for, in case of S 105 N 50
Long and undisturbed possession at fixed rent S 105 N 49
Successions and transfers S 105 N 51
—Forfeiture, in case of S 111 N 12
—Improvements by lessee S 51 N 9
—Local usage, by S 105 N 41
—Lost grant, principle of, as applied to S 105 N 44
—Mortgagee in possession, power to grant S 76 N 6
—Mortgagor, by S 65A N 4
—Notice to quit S 106 N 5
—Onus of proof S 105 N 43
—Origin unknown, presumption of validity of grant S 105 N 45
—Presumption against S 105 N 43
—Registration S 106 N 5
—Religious or charitable endowments, property of S 105 N 56
—Restraint on alienation S 10 N 13
—Sale distinguished from S 105 N 42
—Subsequent arrangement between landlord and tenant S 105 N 52
—Underproprietary rights, grant of S 105 N 42
—Valid S 105 N 41

Perpetuity, rule against S 14; S 14 N 2
—Alternative limitations, one void by reason of S 14 N 9
Bequest, application of rule to S 14 N 1
—Cessation of interest, if affected by S 14 N 5
—Charge, applicability to S 14 N 3
—Charities, application of, rule to S 18; S 18 N 2
—Contract, applicability of, rule to S 14 N 10
Sale of land, contract for S 14 N 10
—Covenant not to assign or alienate in, validity of S 10 N 16
—Covenant running with land, applicability to S 14 N 16
—Creation of perpetuity
Modes of S 14 N 2
Public policy opposed to S 14 N 2
—English law S 14 N 2
—Future interests whether affected by S 14 N 5
—Future interests—Remoteness in commencement necessary S 14 N 5
—Hindu law S 14 N 13
—Immovable property, application to S 14 N 4
—Living persons, one or more, transfer to S 14 N 6
—Mahomedan law S 14 N 14
—Minority of unborn person S 14 N 2, 8
—Moveable property, application to S 14 N 4
—Possible events to be considered S 14 N 2
—Postponement of vesting
Attaining age of 21, unborn person S 14 N 8
Maximum period S 14 N 2
—Power of appointment, estate created under, application to S 14 N 12
—Pre-emption, contract for, if affected by S 14 N 10
—Reason of rule S 14 N 2
—Several limitations, some void on account of S 14 N 9
—Wakf, application to S 14 N 14; S 18 N 5

Person
—Defined S 5 N 3
—Juristic S 5 N 3
Court S 5 N 3
—Person in existence
Child *en ventre sa mere* S 13 N 4; S 14 N 6, 7
Son adopted after a man's death S 13 N 6; S 14 N 7

Personal liability, mortgagor's
—Anomalous mortgage, in S 68 N 12; S 98 N 1, 5, 6
—Construction of instrument O 34 R 6 N 5
—Covenant running with land, whether: S 58 N 29; S 68 N 8
—Covenant to pay S 68 N 2
Express or implied S 68 N 2
Mortgagee when not entitled to sue on: S 68 N 2
Presumed S 68 N 2
Runs with land, whether S 68 N 8

Personal liability, mortgagor's—Covenant to pay (*contd.*)
Test to find out S 68 N 2
Void mortgage—Relief if can be given on S 68 N 13
—English mortgage—Essential in S 58 N 38
—*Ex contractu* S 68 N 1
—*Ex delicto* S 68 N 1
—Guardian's S 68 N 11
—Interest, for S 68 N 14
—Legal representative of mortgagor, of S 68; S 68 N 9
—Minor mortgagor S 68 N 10
—Mortgage by conditional sale, in S 58 N 29, 31
—Mortgage by deposit of title deeds, in S 58 N 39
—Personal decree: *See* Mortgage suit.
—Presumption of S 58 N 29
—Simple mortgage, in S 58 N 27, 29
—Simple mortgage usufructuary, in S 98 N 5
—Suit to enforce—Limitation S 58 N 29
—Transferee from mortgagor, of S 68; S 68 N 8
Agreement to pay mortgage-debt S 68 N 8
—Unregistered mortgage, admissibility of S 59 N 14
—Usufructury mortgage, in S 58 N 29, 35
—Void mortgage
Relief on covenant to pay S 68 N 13
Relief under S. 68 S 68 N 13
—Welsh mortgage in S 58 N 29
Peruarthum mortgage S 98 N 9
—Incidents of S 98 N 9
Pledge
—Decree, pledge of Pre N 2
—Future property, of S 58 N 10
—Mortgage, distinguished from S 58 N 11
—T. P. Act does not deal with Pre N 2
—Transfer, if S 5 N 2
Possession
—Actual possession
Notice, operates as S 3 N 39
Open site, stacking fodder or trying cattle, if S 3 N 39
—Delivery of
Lessor's duty S 108 (b); S 108 (b) N 1 to 4
Seller's duty S 55; S 55 N 7
—Joint possession
Co-owner, right of S 44 N 4
Coparcener, transferee from, right of S 44 N 6
Dwelling house, transferee from one co-owner, right of S 44 N 8
Ouster S 44 N 4
—Notice—Possession when S 3 N 39
—Occupation, distinguished from S 76 N 18
—Redemption, delivery on S 60; S 60 N 17
Possibility
—Charge creation of interest of owner thereafter S 6 N 6
—Contingent interest, if S 21 N 4, 5
—Contingent right S 6 N 6
—Coparcener, interest of S 6 N 6
—Future offerings, right to S 6 N 6
Possibility (*contd.*)
—Like nature, possibility of S 6 N 6
Chance of succession or bequest, if limited to S 6 N 6
Gratuity S 6 N 6
Meaning S 6 N 6
—Property, possibility not S 6 N 3
—S. 43, applicability to transfer of S 6 N 7
—Transfer of S 6
—Vested interest S 6 N 6
Postponement of prior mortgagee
See (1) Prior mortgagee
(2) Priority
Power of appointment
—Election, under S 35 N 27
—General and special S 14 N 12
—Perpetuity, rule against—Application to estate created under S 14 N 12
—Person to take in default of exercise of—Interest of S 19 N 12
—Property, power of appointment whether S 5 N 5
—Vested, interest if can be before exercise of S 19 N 12
Preamble Pre N 1
Pre-emption
—Agreement for—Validity S 10 N 16
—Condition for—Validity S 10 N 7
—Contract for S 54 N 23
Covenant running with land, whether: S 40 N 10
Nature of S 40 N 10
—Decree for—Transferability S 6 N 12
—Exchange, on S 118 N 3; S 120 N 2
—*Lis pendens*, applicability of, to suit for: S 52 N 21
—Perpetuity rule against, if affects contract of S 14 N 10
—Right of
Personal S 6 N 12
Property transferred by pre-emptor S 6 N 12
Transferability S 6 N 12
—Sale, for purpose of—Determination of S 54 N 4
—Sale necessary for S 118 N 3
—Subrogation, pre-emptor, right of S 92 N 26
—Transferee of land subject to—Improvements by S 51 N 12
Premium in lease
See lease
Price
—Ascertainment of S 54 N 12
—Defined S 54 N 12
—Different from that recited
Evidence as to S 54 N 15
Onus as to S 54 N 15
—Essential in sale S 54 N 12
—Inadequacy of S 54 N 16
—Inflation of S 54 N 16
—Meaning of S 54 N 12
—Non-payment of—Effect of S 54 N 14
—Paid or promised S 54 N 13
—Transfer for, what constitutes S 54 N 12

Principal and agent
—Agent
Authority of, secret limitation S 3 N 42
Defined S 3 N 42
Deposit of mortgage-money, notice of, to: S 102; S 102 N 2, 3
Notice to quit by or to S 106 N 38
Tender to S 102; S 102 N 2, 3
—Infant principal, notice to agent S 3 N 45
—Notice to agent—Effect: *See* Notice
—Partner, agent of firm, if S 3 N 42
—Sub-agent notice to S 3 N 42

Prior and puisne mortgagees
—Puisne not party to suit by prior
Prior mortgagee—Purchaser, rights of S 67 N 20; O 34 R 1 N 19
Purchaser, rights of S 67 N 20
—Remedies against each other S 67 N 19
—Suit by puisne mortgagee O 34 R 1
—Suit by, without impleading each other O 34 R 1 N 19

Prior interest
—Alternative transfer—Failure of one under S. 13 or S. 14, effect of S 16 N 3
—Defeasance and repugnant clause, distinguished S 32 N 9
—Defeasance clause with gift over S 28 N 2
Construction of S 29 N 3
Strict construction S 29 N 3
Definite person or persons, in favour of: S 28 N 8
Impossibility of fulfilment of condition—Effect S 30 N 3
Knowledge of condition, if necessary S 29 N 6
Strict fulfilment of S 29 N 4
—Failure of
Acceleration of subsequent interest S 27; S 27 N 2; S 28 N 11
Bequests, rule as to S 27 N 1
Effect to be given to intention of transferor S 27 N 2
Illustrative cases S 57 N 2
Failing under S. 13 or S. 14—Effect S 16; S 16 N 3
General rule as to subsequent interest: S 16 N 3
Exceptions S 16 N 3
Manner of, specified—Effect on ulterior disposition S 27; S 27 N 2
—Ulterior interest invalid, prior if affected S 30; S 30 N 2
—Void
Effect on interest to take effect after S 16 N 3
Subsequent interest independent—Effect S 16 N 3

Prior mortgagee
See also Prior and puisne mortgagees
—Acquisition of equity of redemption S 101
See also Merger
—Fraud of S 78 N 2
—Gross neglect of S 78 N 4
Evidence of fraud, amounting to S 78 N 4
Laches, institution of suit in S 78 N 7
Parting with title deed S 78 N 5

Prior mortgagee (*contd.*)
Title deeds, failure to obtain S 78 N 5, 6
—Loss of priority, effect of S 78 N 10a
—Misrepresentation of S 78 N 3
—Necessary party, mortgage suit in, whether S 91 N 7
—Posterior mortgagees, rights against S 94 N 2
Personal decree, right to S 94 N 3
—Postponement of S 78; S 78 N 1
Burden of proof S 78 N 11
Disjunctive, ingredients S 78 N 1, 4
Fraud by S 78 N 2
Gross neglect, by S 78 N 4
Evidence of fraud amounting to S 78 N 4
Misrepresentation by S 78 N 3
Constructive fraud amounting to S 78 N 3
Silence, mere S 78 N 3
Notice, subsequent mortgagee with S 78 N 9
Proximate cause of inducement S 78 N 8
Punjab, principles applied to S 78 N 13
—Preferential right to redeem, when has S 91 N 41
—Priority lost, when S 78
—Purchase of equity of redemption by—Right to redeem subsequent mortgage, on S 91 N 7
—Redemption of subsequent mortgage by—Subrogation, right of S 92 N 12
—Redemption, subsequent mortgage, of S 91 N 7
Purchaser of equity of redemption, as S 91 N 7
—Subsequent advance by, meaning of S 93 N 6
Tacking prohibited S 93; S 93 N 3

Priority
—Charge—Future advance to secure, of S 79 N 10
—Charge and mortgage, between S 48 N 3
—Charge—Floating charge S 100 N 10
—Charge, several between S 100 N 18
—Co-existence of successively created rights S 48 N 6
Simple mortgage and lease rights, under S 48 N 6
Usufructuary mortgages, successive S 48 N 6
—Contract or reservation as to S 48 N 7
—Contract to transfer, right created by, of S 48 N 3
—Crown debts S 48 N 14
—Different properties question in respect of S 48 N 5
—Exception, S. 79 is S 79 N 2
—Future advances, of: *See* Future advances—Mortgage to secure
—General rule S 48; S 48 N 1
—Loss of
Burden of proof S 78 N 11
Estoppel, by S 48 N 16; S 78 N 10
Fraud by S 78; S 78 N 2
Gross neglect, by S 78; S 78 N 4
Misrepresentation, by S 78; S 78 N 3

Priority (*contd.*)
—Mortgage of
Agreement, priority of effect S 40 N 11
Loss of S 78
—Oral transfer and transfer by registered instrument, between S 48 N 10
—Owelty liens S 48 N 13
—Postponement of prior mortgagee: *See* Prior mortgagee
—Receiver, mortgage by, of S 48 N 12
—Redemption, right of, in S 91 N 41
—Registered and unregistered instruments, between S 48 N 9
Notice of unregistered, to subsequent transferee S 48 N 9
—Registered instruments, between S 48 N 3
—Renewal of prior mortgage, of S 101 N 3
—Rights created by transfer, of S 48
—Salvage liens S 48 N 11
—Same day, rights created on S 48 N 11
—Same person, transfers by S 48 N 2
Legal representative, transfer by S 48 N 2
—Same time, rights created at S 48 N 4
—Sub-mortgages, as between S 58 N 5

Profits
See Rents and Profits

Property
—Alimony S 5 N 5
—British India, property outside: *See* British India
—Chance of obtaining legacy S 6 N 3
—Chance of succession S 6 N 3, 4
—Future S 5 N 5
Assignment of S 5 N 7: S 6 N 3
—Future crops—Mortgage of S 5 N 7
—Legal and equitable estates S 5 N 6
—Legal incidents of: *See* Legal incident of property
—Meaning of S 5 N 5
—Possibility, mere, if S 6 N 3
—Power of appointment S 5 N 5
—Real and personal S 3 N 2
—Real property—If identical with 'immovable property' S 3 N 2
—Right enforceable, if must be S 5 N 5
—Right *in proesenti* necessary S 5 N 5
—Right to sue, mere S 6 N 16
—"Thing" whether S 118 N 7
—Trade mark S 5 N 5
—Transferability: *See* Transfer of Property

Public Office
—Defined S 6 N 23
—Transfer of S 6; S 6 N 23

Public Officer
—Salary of
Provident fund amount S 6 N 23
Transfer of S 6; S 6 N 23
—Transfer, taking of S 6 N 35

Public policy, opposed to
—Agreement S 6 N 35
—Condition precedent S 25; S 25 N 9
—Condition subsequent S 32 N 5
—Future maintenance, right to, transfer of: S 6 N 15

Public Policy, opposed to (*contd.*)
—Interest restricted in enjoyment to owner, transfer of S 6 N 15
—Judicial precedents, value of, in determining what is S 25 N 9
—Marriage brocage contract S 6 N 35
—New head, Court not empowered to invent: S 6 N 35
—Perpetuity, creation of S 14 N 2
—Public servant, taking of transfer by S 6 N 35
—Restraint of trade, contract in S 6 N 35
—Restraint on alienation S 10 N 1
—Restraint on marriage, condition in S 25 N 9
—Transfers prohibited as
Pension S 6 N 24
Public office S 6 N 23
Salary of public officer S 6 N 23
—Wagering contract S 6 N 35

Public works
—Mortgagee of—Remedy of S 67; S 67 N 26

Puisne mortgagee
See also (1) Mesne mortgagee
(2) Prior and puisne mortgagees
Prior mortgagee's preferential right to redeem S 91 N 41
—Redemption by S 91 N 5
Any prior mortgage, of S 91 N 5
Interest in right to redeem, of S 91 N 5
Remedy on his own mortgage barred—
Effect S 91 N 5
Void mortgage, of S 91 N 5
—Sub-mortgagee of—Right to redeem, of S 91 N 6
—Subrogation, right of S 92 N 11
Covenant to pay, excluded by S 92 N 11
—Surplus sale proceeds, right to S 73 N 1

Purchase-money
—Buyer's charge: *See* Buyer's charge.
—Buyer's duty to pay or tender S 55 N 14
—Direction to pay to third person S 55 N 14
—Meaning of S 55 N 14
—Non-payment of
Personal liability, buyer's, if S 55 N 14
Remedies of seller S 55 N 14
Payment of—Time and place of S 55 N 14
Retention, payment of incumbrances, for: S 55 N 14
Third party, enforcement of contract, by: S 55 N 15
Unpaid—Seller's charge for: *See* Seller's charge

Ratification
—Election, ratification is not S 35 N 28
Meaning of S 35 N 28

Receiver
—Appointment of S 69A
Creation of charge, whether amounts to S 100 N 11
Public works, mortgagee of, remedy of S 67 N 26
—Fraudulent transfer, avoidance by S 53 N 29
—Mortgage by, priority of S 48 N 12

Receiver (*contd.*)
—Mortgage suit, rents and profits in the hands of S 8 N 14

Receiver of mortgaged property
—Agent of mortgagor S 69A; S 69A N 6
—Appointment of S 69A
Procedure S 69A; S 69A N 5
Who may be appointed S 69A
—Court—Advice of, application for S 69A; S 69A N 12, 13
—Insure, power of receiver to S 69A; S 69A N 10
—Money received, application of: S 69A: S 69A N 11
—Mortgagee's power to appoint S 69A
Mortgage executed before 1929 S 69A N 3
Origin and development of S 69A N 2
—Payment to S 69A: S 69A N 8
—Powers of S 69A
To take legal proceedings S 69A N 7
—Removal of S 69A
—Remuneration of S 69A: S 69A N 9

Redemption
—Accession, mortgagor's right, on S 63
—Account from mortgagee: *See* Mortgagee in possession.
—Acknowledgment registered, right to: S 60; S 60 N 20
—Act of parties, extinguished by S 60; S 60 N 22
Illustrative cases S 60 N 22
Independent of mortgage transaction S 60 N 22
Nature of act S 60 N 22
Purchase by mortgagee S 60 N 22
—Adverse possession, equity of redemption, of S 60 N 53
—Anomalous mortgage S 98 N 2
—Benamidar, by S 91 N 30
—Charge of, applicability of S. 91 S 91 N 43
—Clog on S 60 N 28 to 39
See also Clog on redemption
—Compelled to redeem, person if can be S 91 N 39
—Consolidation of mortgages, rule against S 61
See also Consolidation of mortgages
—Creditor, by S 91; S 91 N 38
—Crown, by
Escheat of mortgagor's interest, on S 91 N 19
—Forfeiture of mortgagor's interest, on: S 91 N 19
—Curator of lunatic mortgagor, by S 91 N 31
—Decree of Court extinguished by S 60
Confirmation of sale in mortgaged decree: S 92 N 7
Final decree for foreclosure S 60 N 26; S 92 N 7
Final decree for redemption: S 60 N 26; S 92 N 7
Final decree for sale S 60 N 26
—Defence of, suit for possession by mortgagee, in S 60 N 51

Redemption (*contd.*)
—Documents of title, delivery of S 60; S 60 N 16
Covenant to produce S 60 N 16
Loss of deeds S 60 N 16
Mortgage-deed, of S 60 N 16
—Donee by S 91 N 11
—Equity of redemption: *See* Equity of redemption
—Final decree in redemption suit O 34 R 8 and N 3, 4
Appeal O 34 R 8 N 9
Final decree for foreclosure or sale O 34 R 8 and N 6
Limitation for application O 34 R 8 N 8
Notice to mortgagee O 34 R 8 N 4
Redemption after due date O 34 R 8 N 5
—Growing crops, mortgagee's right to S 60 N 17
—Guardian of minor mortgagor, by S 91 N 31
—Heir of mortgagor, by S 91 N 20
—Imperfect title to equity of redemption person with, by S 91 N 34
—Improvements, mortgagor's right, to, on S 63A
—Judgment-creditor, by
Attaching creditor, by S 91 N 25
Creditor obtaining order for appointment of Receiver, by S 91 N 27
—Landlord, by S 91 N 13
—Law prior to T. P. Act S 60 N 1
—Law where T. P. Act is not in force S 60 N 3
—Lease by mortgagee, determined on S 111 N 5
—Legal right, is S 91 N 39
—Lessee, by S 91 N 12
—Liability, redemption is not S 60 N 1
—Limitation S 60 N 52
—Long period fixed S 60 N 5, 32
—Maintenance, person entitled to, by S 92 N 22
—Malabar tarwad, member of, by S 91 N 23
—Meaning of S 95 N 2
—Member of joint Hindu family, by S 91 N 22
—Mortgagee—Payment or tender to
See (1) Mortgagee
(2) Mortgage-money
—Mortgagor, by S 91 N 3
Existing right in equity of redemption, necessary S 91 N 3
—Mortgagor's rights on S 60
—Moveables, mortgage of—Redumption after default S 60 N 2
—Notice of S 60; S 60 N 40
—Occupancy tenant, mortgage by— Person recognized as tenant, right of, to redeem S 91 N 36
—Onus of proof S 91 N 42
—Operation of law, extinguished by S 60 N 27
—Order of, as between several persons entitled S 91 N 41
—Over payments, claim for O 34 R 9 N 3

Redemption (*contd.*)
—Partial
Mortgage-money, amount to be paid or tendered S 60 N 10
Piecemeal S 91 N 40
—Payment or tender of mortgage-money: *See* Mortgage-money
Person contracting to purchase mortgagor property, by S 91 N 9
—Person holding decree for sale of mortgaged property, by S 91 N 28
—Personal decree in redemption suit O 34 R 8A and N 1
—Persons entitled to redeem S 91; S 91 N 2
Besides mortgagor S 91 N 3
Classes of S 91 N 2, 4
—Piecemeal S 60; S 60 N 41
Co-mortgagees—Redemption by paying to one alone S 60 N 47
Co-mortgagor acquiring mortgagee right S 60 N 46
Mortgagee acquiring share in property: S 60 N 44
Manner, immaterial S 60 N 44
Piecemeal redemption of remaining shares S 60 N 44
Several mortgagees, acquisition by one S 60 N 44
Proportionate amount S 60 N 44
Redemption of share allowed by mortgagee S 60 N 42
Release of part of property by mortgagee S 60 N 43
Rule against S 60 N 41
When allowed S 60 N 41
—Possession, delivery, on S 60; S 60 N 17
Same state in S 60 N 17
Wrongful possession, mortgagee in S 60 N 17
—Preferential right, of S 91 N 41
Mortgagor and person entitled S 91 N 41
Subsequent mortgagee and prior mortgagee owing equity of redemption S 91 N 41
—Preliminary decree in redemption suit O 34 R 7 and N 3
Appeal O 34 R 7 N 20
Costs, mortgagee if entitled to O 34 R 7 N 6
Delivery of documents on payment: O 34 R 7 N 10
Extension of time for payment O 34 R 7 N 13; R 8 N 7
Form of O 34 R 7 N 11
Interest, mortgagee's right to O 34 R 7 N 5, 8
Mode of taking accounts O 34 R 7 N 4
Period fixed for payment O 34 R 7 N 9
Procedure on default of payment O 34 R 7 N 12
Re-transfer of property on payment: O 34 R 7 N 11
Subsequent costs, charges and expenses O 34 R 7 N 7
Trespass by mortgagor before redemption O 34 R 7 N 17
—Prior mortgagee, by S 91 N 7
Redemption (*contd.*)
Purchaser of equity of redemption as S 91 N 7
—Proof of S 60 N 21
—Provincial Government attaching under S. 88 Cr. P. C., by S 91 N 26
—Punjab, principles applied to S 91 N 44
—Purchase by mortgagee extinguished by S 60 N 22, 23, 24, 25
Court sale, purchase at S 60 N 23
Voidable, sale when S 60 N 23
Revenue arrears, sale for S 60 N 23
—Purchaser of equity of redemption, by S 91 N 8
Prior mortgagee purchasing S 91 N 7
—Puisne mortgagee, by S 91 N 5
Any prior mortgage, of S 91 N 5
Remedy on mortgage barred—Effect S 91 N 5
Void mortgage, effect of S 91 N 5
—Remainderman, by S 91 N 15
—Remedies of mortgagor for S 83 N 2
—Retransfer of mortgaged property S 60; S 60 N 18
English law S 60 N 18
Tender conveyance, mortgagee to S 60 N 18
Third party to mortgagee's obligation S 60A; S 60A N 1
—Retransfer of property, third party, to
Costs of S 60A N 3
Mortgagor's right S 60A: S 60A N 1
Subsequent incumbrancer's right S 60A; S 60A N 1
—Reversioner under Hindu law, by S 91 N 16
Surrender by widow, on S 91 N 17
—Right to redeem S 60
Act of parties, extinguishing S 60
Arises when S 60 N 5
Date of mortgage, from S 60 N 5
Default of mortgagee, redemption before period fixed S 60 N 5
Due, principal money becoming S 60 N 5
Kanom S 60 N 5
Otti mortgage S 60 N 5
Period for payment specified S 60 N 5
Charge, person having, on mortgaged property, of S 91 N 1
Co-extensive, right to redeem and right to foreclose S 60 N 5
Decree of Court extinguishing S 60
Extinguishment of S 60; S 60 N 22 to 27
Act of parties, by S 60 N 22
Illustrative cases S 60 N 22
Independent of mortgage transaction S 60 N 22
Nature of act S 60 N 22
Purchase by mortgagee S 60 N 22
Decree of Court, by S 60 N 26
Operation of law, by S 60 N 27
Purchase by mortgagee, Court sale, at S 60 N 23
Revenue sale—Mortgagee, purchaser: S 76 N 8
How exercised S 60 N 6

Redemption—Right to redeem—Extinguishment of (*contd.*)
Interest in
Nature of S 91 N 4
Person having, redemption by S 91 N 4
Puisne mortgagee, of S 91 N 5
Validity created, must be S 91 N 4
Meaning of S 60 N 4
Nature of S 60 N 4
Recover possesion under S. 62, right to, if S 60 N 4, 5; S 62 N 5
—Several persons entitled, preferential right between S 91 N 41
—Son under Mitakshara law, by S 91 N 21
—Statutory right S 60 N 1
—Sub-mortgage, of S 60 N 19
—Sub-mortgagee, by S 91 N 6
—Subrogation, on: *See* Subrogation
—Subsequent mortgagee, by
Amount to be paid O 34 R 1 N 19
Assignment of mortgage-debt to third party, right as to S 60A; S 60A N 1
Retransfer of property to third party S 60A; S 60A N 1
—Suit for S 60; S 60 N 48
Abatement of S 58 N 5
Alternative relief S 60 N 48
Assignment of mortgage, parties to suit O 34 R 1 N 13
Benamidar, by S 60 N 48
Contribution, failure to claim—Effect of S 82 N 24
Costs, mortgagee's right to S 60 N 49
Costs payable to mortgagor O 34 R 9 N 2
Decree when nothing is due to mortgagee or mortgagee has been overpaid O 34 R 9 and N 1
Deposit, condition precedent, whether S 83 N 11
Deposit of mortgage-money, in S 83 N 10
Different mortgage, relief on the basis of S 60 N 50
Invalid, mortgage found to be—Procedure S 60 N 48
Limitation S 60 N 52; S 91 N 46
Onus of proof S 60 N 50
Paramount title, person claiming O 34 R 1 N 5
Persons who may sue S 91; S 91 N 2
Pre-emption, defence of S 60 N 48
Preliminary decree: *See* Redemption—Preliminary decree in redemption suit.
Recovery of possession under S. 62, suit for, whether S 62 N 2
Res judicata, decree in, as S 60 N 48
Second suit, when barred S 60 N 26
Set off, in S 60 N 48
Sub-mortgagee, if a necessary party: O 34 R 1 N 9
—Superior proprietor under C. P. Land Revenue Act, by S 91 N 14
—Surety, by S 91; S 91 N 37
—Tenant for life, by S 91 N 15
—Tenant-in-common, by S 91 N 24
—Transferee from Hindu limited owner, by S 91 N 18
—Transferee *pendente lite*, by S 91 N 10

Redemption—Suit for (*contd.*)
Limit to S 91 N 10
—Trespasser, by S 91 N 32
—Trustee, by S 91 N 29
—Undivided property—Purchase of share by mortgagee S 60 N 45
—Usufructuary mortgage—Time limit for: S 58 N 35
—Who can redeem O 34 R 7 N 16
Assignee in breach of covenant against assignment S 10 N 18
Person claiming under agreement to sell: S 83 N 7

Re-entry, right of
—Annexed to property S 6 N 8
—Force, re-entry by S 105 N 71
—Joint owner, transfer to—Lease, provision for, in Absence of S 10 N 13
Benefit of lessor S 10 N 13
Condition, necessary S 10 N 13; S 108 (j) N 1; S 111 N 11
Forfeiture, provision for re-entry necessary S 111 N 11
Transferee of lessor, if can claim benefit S 6 N 8; S 109 N 5
—Right to property, party not having S 6 N 8
—Transfer of S N; S 6 N 8

Registration
—Actionable claim—Transfer of S 130 N 14
—Charge of S 4 N 8; S 100 N 16
Floating charge, of S 100 N 10
—Contract for sale, of S 54 N 23
—Debt secured by charge, transfer of S 8 N 17
—Document not registered though required—Effect S 3 N 20
—Effect, document when takes S 59 N 13
—Gift, of S 4 N 7
See also Gift
—Identifying witnesses, signature of, if attestation S 3 N 19
—Lease, agreement of S 53 N 16; S 107 N 15
—Lease, of: *See* Lease
—Memorandum accompanying deposit of title deeds of S 58 N 39
—Mortgage, of: *See Bortgage*—Registration
—Mortgage—Assignment of S 60 N 2
—Mortgage-debt, transfer of S 8 N 17
—Mortgage decree, transfer of O 34 R 5 N 21
—Necessity of S 9 N 5
—Notice of registered instrument, person when shall be deemed to have S 3
—Notice, registration if amounts to: *See* Notice—Registration
—Object of S 54 N 1
—Optional—Provisions of T. P. Act prevail S 4 N 2, 5
—Registered, meaning of S 3
—Surrender of lease, for S 111 N 9
—Unregistered instrument, admissibility of S 123 N 5
Release or sale V 1 N 11a

Release or relinquishment
—Coparcener, by S 122 N 1
—Fraudulent transfer, if S 53 N 5

Release or Relinquishment (*contd.*)
—Fraudulent transfer, if S 53 N 5
—Transfer of property, whether S 5 N 4; S 53 N 5
—Who can make S 9 N 12
Full owner S 9 N 12
—Writing if necessary S 9 N 12

Religious office
—Transfer of S 6 N 2a

Remainderman
—Redemption, right of S 91 N 15

Renewal of lease
—Clause for S 11 N 3; S 116 N 10
Form of S 105 N 35
Holding over
Effect of S 105 N 39; S 116 N 10
Lessee's rights S 105 N 39
No presumption as to S 105 N 35
Period of lease not extended by S 105 N 35
Specific performance of S 105 N 35, 39
Stamp on lease, with S 105 N 35
Stamp on lease, with S 105 N 35
Valid S 105 N 35
—Conditional S 111 N 3
—Covenant for S 111 N 3
Assignee from lessor enforcibility against
Assignee of lessee, enforcement by S 105 N 36
Construction of S 111 N 3
Covenant running with the land S 40 N 25; S 105 N 36; S 111 N 3
Enforcibility of S 105 N 36
Assignee of lessee by S 105 N 36
Mortgagee of lessee by S 105 N 36
Tenant holding over by S 105 N 36
Hindu widow, lessee from S 111 N 3
Mortgagor, lease by S 65A
Refusal to delivery possession on expiry of lease S 108 (q) N 1
Specific performance of S 105 N 35
Transfer of property whether S 5 N 4
—Holding over, tenant S 105 N 36; S 116; S 116 N 10, 12
—Option for S 105 N 35; S 111 N 3
Exercise of, time for S 111 N 3
Failure to exercise before expiry of term S 111 N 3
—Period of renewed lease S 105 N 35
—Perpetual, clause for S 105 N 35; S 111 N 3
—Separate contract as to S 105 N 35
—Separate contract for obligation annexed to ownership S 105 N 36
—Terms of renewed lease S 105 N 35; S 111 N 3

Renewal of mortgaged lease S 64; S 71
—Benefit of renewal S 64
Contract to contrary S 64 N 4
—Compulsion, mortgagee obtaining under S 64 N 3
—Costs of
Addition to mortgage-money S 72 N 6
Liability, mortgagor's S 64 N 6
—Expenses of—Mortgagee's right to spend for S 72; S 72 N 6

Renewal of Mortgaged lease (*contd.*)
—Impossible, renewal rendered S 71 N 6
—Mortgagee's right to, as security S 71
Contract to contrary S 71 N 7
Principle governing S 71 N 2
—Mortgagor by
After expiry of old S 71 N 3
Fraudulent renewal S 71 N 4
—Re-settlement from Government, mortgagee obtaining S 64 N 5

Rent
See also Rents and profits
—Abatement of S 108 (1) N 8, 14
Diluvion on S 108 (1) N 14
Eviction from part of property S 108(1) N 14
Land Acquisition Act, property acquired under S 108 (1) N 14
Lessee's property included in lease S 108 (1) N 14
Non-delivery of part of property S 108 (1) N 14
Surrender of part S 108 (1) N 14
Trespasser, eviction by, on S 108 (1) N 14
—Acceptance of
Assignee of lessee, from—Effect of S 108 (j) N 6
Ejectment suit, after S 113 N 3
Forfeiture, rent subsequent to S 112; S 112 N 2
Notice to quit, subsequent rent of
Cosharer, by S 113 N 3
Effect of S 113 N 3
Unauthorized person, by S 113 N 3
Tenancy by payment and acceptance of S 105 N 8
Tenant holding over, from S 116; S 116 N 6, 7
—Advance of, by tenant S 50 N 3
Transfer by lessor
Prior to S 50 N 3; S 109 N 8
Subsequent to S 50 N 3
—Advance, payable in—Transferee from lessor bound by S 109 N 8
—Agreement varying, whether lease S 105 N 11
—Apportionment of S 36; S 36 N 4; S 37 N 3, 4; S 108 (1) N 1
Joint lessors, in case of S 108 (1) N 6
Transfer by lessor, on S 109; S 109 N 10
Transferee at Court sale of lessor's interest, right of S 2 N 6
—Arrears of
Charge for—Personal to landlord, when: S 92 N 6
Debt S 3 N 22
Interest on S 105 N 66
Not rent S 108 (1) N 2
Right to S 108(1) N 2
Transferee if entitled to S 8 N 18
Mortgagee in possession, liability of S 76 N 8
Transferee from lessor not entitled to S 109; S 109 N 9
—Buyer's liability for S 55; S 55 N 17

Rent—Buyers Liability for (*contd.*)
—Certain S 105 N 59
—Charge under Rent Acts for S 100 N 12
—'Collection charges' as S 105 N 60
—Concurrent lease, right to recover in case of S 108 (1) N 10
—Consideration for lease S 105 N 57
—Covenant to pay, runs with the land S 40 N 25; S 105 N 59
—Crops, share of, as S 105 N 61
—Defined S 105
—Demand for rent subsequent to forfeiture—Effect of S 112 N 4
—Destructoin of leased property, liability after S 108 (e) N 4
—Distress for
Forfeiture, rent subsequent to, for S 112; S 112 N 3
Right of S 112 N 3
Waiver of notice to quit, by S 113 N 3
—Encroachment, additional rent for S 108 (d) N 3
—Enhancement of S 108 (1) N 8
Enhanced rent, liability for S 106 N 20
Notice to quit with option to pay S 106 N 20
—Fair and equitable, power of Court to decree S 105 N 59, 64
Agricultural tenancy S. 105 N 64
—Forms of S 105 N 61
—Future—Whether a debt S 3 N 26
—General features of S 105 N 59
—Guarantor for, waiver of notice, effect on S 113 N 4
—Interest on arrears, whether S 108 (1) N 2
—Joint lessors—Payment to one S 108 (1) N 6
—Kind, rent in S 105 N 62; S 108 (1) N 4
—Liability for
Lessee giving up possession before determination of lease S 106 N 31
Lessee in possession after determination of lease S 106 N 32; S 108 (q) N 1
Void lease, under S 105 N 19
—Liability to pay S 105 N 59
Agreement to lease, person entering under S 105 N 4
Assignee of lessee, of S 108 (j) N 4
Lessee's S 108 (1); S 108 (1) N 1
Assignment of lease after S 108 (j) N 6
Several lessees S 108 (1) N 7
—Meaning of S 105 N 59, 60
—Mortgaged property, of: *See* Mortgagee in possession—Mortgagor
—Mortgagee in possession, liability of S 76 N 8
—Non-payment, mere—Implied surrender by S 111 N 10
—Non-payment of S 108 (1) N 13
Denial of title, non-payment whether amounts to S 111 N 14
Forfeiture S 111 N 13
Relief against: *See* Forfeiture of lease —Relief against
Lease not determined by S 105 N 71
—Occupation rent S 76 N 18

Rent (*contd.*)
—Payments made on behalf of lessor, deduction of S 108 (g); S 108 (g) N 1 to 4
—Payment of
Advance by tenant S 50 N 3
Agent of lessor, to 108 (1) N 6
Bona fide, to holder under defective title S 50; S 50 N 1, 2
Advance by tenant S 50 N 3
Discharged, obligation S 50 N 2
Gross negligence in making S 50 N 2
Notice of defect S 50 N 2
Joint lessors, in case of S 108 (1) N 6
Lessee, must be by S 108 (1) N 7
Lessor, to S 108 (1) N 6
Place of S 108 (1) N 5
Period of grace provided, relief against forfeiture for non-payment S 114 N 8
Tenancy by payment and acceptance of S 105 N 8
Time for S 108 (1) N 5
—Place of payment or tender S 108 (1) N 5
—Premium—Distinguished from S 105 N 58
—Relationship of landlord and tenant essential S 108 (1) N 1
—Rent-free grants S 105 N 65
See also Rent-free grant
—Rent note, whether lease S 105 N 9
—Repairs, expenses of, deduction from S 108 (f); S 108 (f) N 1 to 3
—Right to S 105 N 11; S 108 (1) N 1
Extinguishment by limitation S 105 N 79
Seller's duty to pay S 55; S 55 N 8
—Service as S 105 N 63
—Suit for S 105 N 59
Amendment for damages for use and occupation S 105 N 70
Joint lessors, by one S 108 (1) N 6
Question of title, foreign to S 108 (1) N 9
Share of rent, for S 106 N 34
—Suspension of S 108 (1) N 14
Doctrine of S 108 (1) N 14
English law S 108 (1) N 14
Eviction by lessor, on S 108 (1) N 14
Eviction by paramount title S 108 (1) N 14
Non-delivery of possession on—Part of property of S 108 (1) N 14
Rent fixed per acre S 108 (1) N 14
—Tenancy by payment and acceptance of: S 105 N 8
—Tender of
Agent of lessor, to S 108 (1) N 6
Exact sum due, of S 108 (1) N 5
Joint lessors, in case of S 108 (1) N 6
Lessee's duty S 108 (1)
Lessor, to S 108 (1) N 6
Place of S 108 (1) N 5
Time of S 108 (1) N 5
—Third person, amount payable to, on behalf of lessor, as S 105 N 60
—Time for payment or tender S 108 (1) N 5
—Variation of S 105 N 64; S 106 N 32
—Void lease, no liability to pay in S 105 N 19; S 108 (1) N 12
—Yearly rent, reservation of S 106 N 15

Rent-free grant
—Lost grant, principle of, applied to S 105 N 65
—Prescription, acquired by S 105 N 65
—Right to rent, extinguishment by limitation S 105 N 79

Rents and profits
—Apportionment of S 36; S 36 N 4
—Appropriation, usufructuary mortgagee, by S 58 N 35
—Assignment of S 130 N 6
—Buyer's right to S 55; S 55 N 19
—Interest of transfer in, passes on transfer S 8 N 14
—Mortgaged property, of S 8 N 14
—Payment or delivery of
Advance by tenant S 50 N 3
After or before transfer by lessor S 50 N 3
Bona fide, to holder defective title S 50; S 50 N 1, 2
Discharged, obligation S 50 N 2
Gross negligence in S 50 N 2
Notice of defect S 50 N 2
—Prior to date of transfer S 8 N 14
Transfer of S 8 N 14
—Seller's right to S 55 N 11
—Transfer of—Right to open mines if passes S 8 N 14

Repairs
—Expenses of
Contract as to S 108 (f) N 3
Lessee to deduct or recover S 108 (f); S 108 (f) N 1 to 3
—Lessee's liability S 108 (f) N 1; S 108 (m) N 1
—Lessor's liability S 108 (f) N 1
—Mortgagee in possession, by S 76; S 76 N 9
—Notice of S 108 (f)

Repugnancy
—Accumulation of income, direction when void for S 17 N 3
—Condition subsequent, void for S 32 N 8
—Defeasance and repugnant clause, distinguished S 32 N 9
—Partition, restraint on S 11 N 9
—Restraint on alienation void as S 11 N 9
—Restriction on enjoyment void for S 11 N 2

Residence
—Condition as to
Subsequent, condition S 32 N 4
Substantial compliance with S 26 N 4
Uncertainty, void for S 32 N 4
—Direction as to S 11 N 9
—Right of
Enforcement of S 39 N 5
Nature and extent of S 39 N 5

Res judicata
—*Lis pendens* and *res judicata* S 52 N 1, 4
—Subrogation right, barred by S 92 N 30

Restraint on alienation
—Absolute S 10; S 10 N 6
Clog on ownership S 10 N 6
Hindu law S 10 N 1
Illustrations S 10 N 6
Indirect S 10 N 6

Restraint on alienation (*contd.*)
Mahomedan law S 10 N 1
Substance of condition or limitation must be S 10 N 6
Void S 10 N 6
Principle S 10 N 1
Void for repugnancy S 11 N 9
—Alienation
Charge, creation of S 10 N 12
Mortgage, creation of S 10 N 12
Transfer by operation of law S 10 N 12
—Attempt or endeavour to transfer, cessation of interest on—Condition subsequent as to: S 28 N 11
—Award, condition in S 10 N 15
—Company's shares on S 10 N 11
—Condition or limitation—Annexed to property S 10; S 10 N 4
—Condition subsequent in S 28 N 11
—Condition subsequent in S 28 N 11
—Contract against alienation S 11 N 13
—Covenant not to assign or alienate
See Covenant not to assign or alienate
—Crown grants S 10 N 2
—Decree
Condition in, validity S 10 N 15
Direction in S 11 N 10a
—Family arrangement, in S 10 N 3
—Gift, condition in
Section 126 if subject to S. 10 S 10 N 14
Validity S 10 N 14
—Lease
Benefit of lessor, for S 10 N 13
Breach of condition—What constitutes S 111 N 13
Condition or limitation restraining—Validity S 10 N 13
Permanent lease S 10 N 13
Re-entry, provision for S 10 N 5, 13
—Life-estate, of S 10 N 1; S 11 N 12
—Limited interest, transfer of, restraint on S 11 N 12
—Partial S 10 N 6
Repugnant to interest credited if S 11 N 9
Specified class of persons, alienation, restricted to S 10 N 9
Specified persons, prohibition of alienation to S 10 N 10
—Particular period, for S 108 N 8
—Pre-emption, condition for S 10 N 7
—Property transferred, must be of S 10 N 1
—Public policy, opposed to S 10 N 1
—Restriction on enjoyment, is S 11 N 9
—Specified class of persons, except to S 10 N 9
—Specified person, except in favour of S 10 N 7
—Specified persons, prohibition of alienation, to S 10 N 10
—Transfer by operation of law, if affected by S 12 N 8
—Transfer subject to condition or limitation S 10 N 4

Restraint on anticipation S 10; S 10 N 19
—Creditor's right to proceed against property S 10 N 19

Restraint on Anticipation (*contd.*)
—Election, benefit, coupled with S 35 N 25
—English law S 10 N 19
—Second marriage on death of husband—Effect S 10 N 19

Restraint on enjoyment S 11
—Absolute estate, if must be transferred S 11 N 7
—Alienation restraint on S 11 N 9
Absolute S 11 N 9
Partial S 11 N 9
—Award, direction in S 11 N 10a
—Beneficial enjoyment of other property, for S 11 N 11
Illustrations S 11 N 11
Subsequent events, if can be considered S 11 N 11
—Contracts relating to, validity of S 11 N 13
—Covenant, as to S 11 N 11
—Crown grants S 11 N 5
—Direction, as to S 11 N 8
Condition, included S 11 N 8
Covenant and direction distinguished: S 11 N 11
Effect of S 11 N 10
Void S 11
—Family arrangement S 11 N 6
—Hindu law S 11 N 4
—Limited interest—Transfer of, restraint on S 11 N 7
—Mahomedan law S 11 N 3
—Partition, direction against S 11 N 9
—Payment of vendee, stipulation as to S 11 N 9
—Repugnant to interest S 11 N 2
—Residence, direction as to S 11 N 9
—Transfer not absolute, effect of S 11 N 12
—Void
Exception S 11 N 11
Principle S 11 N 2

Restraint on marriage
—Condition precedent S 25 N 9
—Condition subsequent S 32 N 6

Restrictive covenant
—Breach of, acquiescence in S 40 N 23
—Easement, right amounting to, enforcement of S 40 N 4
—Enforcement of S 40
Adverse possession, person acquiring title by S 40 N 20
—Interest in immovable property, right amounts to S 40 N 3
—Negative S 40 N 17
—Notice of S 40 N 17
Onus to prove S 40 N 17
Transferee with S 40 N 17
—Second transferee from *bona fide* purchaser, enforcement against S 40 N 19
—Sub-lessee, liability of S 108 (j) N 5
—Test S 40 N 6
—Transfer by operation of law, enforcement in case of S 40 N 20
—Transferee of property S 40 N 18
Auction-purchaser S 40 N 20

Restrictive Covenant (*contd.*)
—Transferee with notice, enforcement against S 40 N 1

Restricted transfer S 11 N 2

Revenue
—Default in paying, former right of transfer S 6
Contract to pay, obligation annexed to ownership, whether S 40 N 14
Mortgagee in possession, liability of *See* Mortgagee in possession
Payment by lessee S 108 (g) N 2
Person paying—Rights of S 72 N 2
—Sale for arrears of—Mortgagee purchaser S 60 N 23

Revenue sale
—Interest of Crown, passes at S 8 N 3
—What passes at S 8 N 3
Building on land S 8 N 3

Reversioner
—Agreement to divide S 6 N 4
—Landlord's right to S 91 N 13
—Meaning of S 54 N 18
—Sale of S 54 N 18

Reversioner
—Agreement not to divide S 6 N 4
—Consent to ostensible ownership of widow: S 41 N 8
—Contract to transfer interest S 6 N 4
—Family arrangement as to, interest of S 6 N 4
—Hindu
Redemption by S 91 N 16
Surrender by widow, on S 91 N 17
Right of S 6 N 4
Right to impeach alienation, if mere right to sue S 6 N 16, 20
Spes sucessionis, interest of, is S N N 4; S 91 N 16
Surrender of widow—Effect of S 91 N 17
Redemption after S91 N 17
Whether transfer S 5 N 4
—Mortgage-debt, contribution between life tenant and reversioner S 82 N 21
—Person interested in property, whether S 41 N 9
—Transfer of interest of S 6 N 4
—Transfer of interest in property, whether S 41 N 9

Revocation of transfer
—General rule as to S 42 N 1
—Gift, of: *See* Gift—Revocation of
—Reservation of power S 42 N 1
Validity of S 42 N 1
—Transfer for consideration, person having authority to revoke S 42

Right to redeem: *See* Redemption

Right to restrain enjoyment
—Easement, right amounting to—Enforcement of S 40 N 4
—Enforcement of S 40
—Interest in property, covenantee must have S 40 N 2

Any case in the "Table of Cases" will show where to get the entire case-law on the point.

Right to restrain enjoyment (*contd.*)
—Meaning of S 40 N 5
—Money, contract to pay sum of S 40 N 5

Right to sue
—Mere right to sue
Accounts, right to sue for S 6 N 21
Decree, right under S 6 N 19
Meaning of S 6 N 16
Mesne profits, right to claim S 6 N 18
Property, if S 6 N 16
Revocation of gift, right to sue for S 106 N 14
Right of transferee of a partner's share: S 6 N 22
Right to impeach prior transactions S 6 N 20
Specific performance, right to sue for S 6 N 17
Transfer of S 6; S 6 N 16
Prohibition against, basis of S 6 N 16
—Property transferred—Effect S 6 N 16

Rules
—High Court, power of, to make: S 104; S 104 N 1, 2

Salary
—Public Officer of, transfer of S 6

Sale
—'*Caveat emptor*,' principle, applicability of S 130 N 24
—Compromise decree, transfer by, if S 54 N 3
—Condition as to title S 119 N 2
—Conditional—Distinguished from mortgage by conditional sale S 58 N 32
—Contract for: *See* Contract for sale
—Crown grants S 54; S 54 N 2
—Date of S 54 N 5
Execution, date of S 54 N 17
Registration, date of S 54 N 17
—Decree or order of Court, transfer under S 54 N 3
—Defined S 54
—Delivery of property, by S 54; S 54 N 21
Constructive, not sufficient S 54 N 22
Contract, in pursuance of delivery must be S 54 N 22
Delivery—What amounts to S 54 N 22
Proof of delivery S 54 N 22
Unregistered instrument, effect of S 54 N 21
Vendee in possession from before S 54 N 22
—Dower-debt, transfer for S 54 N 12
—Easement, creation of, if S 54 N 7
—Equity of redemution, of S 54 N 19
—Essentials of S 54 N 5, 12, 14
—Exchange, distinguished from S 118 N 2
—Execution of sale deed S 54 N 20a
—Fiduciary character, person in, by S 55
—Free of incumbrances—Court, power to provide for discharge of incumbrances: *See* incumbrance
—Gift or sale, transaction whether S 122 N 16

Sale (*contd.*)
—Hiba-bil-ewas, if S 54 N 4
—Incumbrances, free from or subject to—Test S 55 N 14
—Incumbrances, subject to—Invalidity of incumbrances benefit, who gets S 55 N 18
—Intangible thing, of S 54; S 54 N 19
Equity of redemption, of S 54 N 19
Ilustrative cases S 54 N 19
Mortgagee, rights of S 54 N 19
Registered instrument, necessary S 54 N 19
Undivided share of S 54 N 19
—Lease, distinguished from S 105 N 6
—Mahomedan law, rule of, abrogated S 54 N 4
—Modes of S 54; S 54 N 1
—Mortgage interest, of S 54 N 6
—Mortgage or sale, transaction whether S 58 N 33
—Mortgagee rights, if S 54 N 19
—Mutation, effect of S 54 N 8
—Official Receiver, by S 2 N 6; S 54 N 3
—Oral S 54 N 1
—Ownership, transfer of
—Essential S 54 N 5
Intention of parties S 54 N 5
Meaning of S 54 N 5
—Permanent lease, distinguished from S 105 N 42
—Pre-emption, for purpose of S 54 N 4
—Price
Ascertainment of S 54 N 12
Defined S 54 N 12
Different from that recited
Evidence as to S 54 N 15
Onus as to S 54 N 15
Earnest money, part of purchase-money becomes S 54 N 12
Essential ingredient S 54 N 12
Inadequacy of S 54 N 16
Inflation of S 54 N 16
Meaning of S 54 N 12
Non-payment of S 54 N 14
Effect of S 54 N 14
Remedy of seller S 54 N 14
Paid or promised S 54 N 13
Transfer for, what constitutes S 54 N 12
—Property of less than one hundred rupees, of S 54 N 21
Unregistered instrument
Admissibility of S 4 N 5; S 54 N 21
Existence of—Passing of title, if affected S 54 N 21
—Property of value of rupees one hundred or more, of S 54 N 17
Unregistered document, by S 54 N 17
—Punjab, sale in S 54 N 1
—Registered instrument, by: S 54; S 54 N 19, 20, 21
—Registration, title if passes by mere S 54 N 14
—Reversion, of S 54; S 54 N 18
—Sale or lease, transaction whether S 54 N 11
—Sale or mortgage, transaction whether S 54 N 9

Sale (*contd.*)
—Service, past and future, transfer on lieu of S 54 N 12
—Tangible immovable property, of S 54
—Title passing of
Admission, mere, by S 54 N 1
Agreement of parties mere, by S 54 N 1
Estoppel by S 54 N 1
Intention of parties S 54 N 14
Modes of S 54 N 1
Non-payment of price—Effect of S 54 N 14
Registration, mere, if passes S 54 N 14
—Undivided share, of S 54 N 19
—Value of property of one hundred or more, of—Determination of value S 54 N 17
—Writing, necessity of S 9 N 5, 6

Sale in invitum
See also (1) Execution sale
(2) Revenue sale
—Covenant for title, in S 55 N 9
—Growing crops pass in S 8 N 3
—Operation of transfer S 8 N 3
—Rules in S. 55, application of S 55 N 1

Salvage liens
Sale or release VI S 54 N 11a
—Priority of S 48 N 11
Inter se S 48 N 11
Other debts, over S 48 N 11
—Subrogation distinguished from S 92 N 1a

Salvage payments S 100 N 29
—Charge within S. 100, whether
—Meaning of S 100 N 29
—Principle of S 100 N 29
—Revenue payment of, for saving property from sale S 100 N 29

Scribe
—Attesting witness—Competency as S 3 N 17, 18

Security
—Actionable claim—Security for: *See* Actionable claim
—Debt—Security for: *See* Debt

Security bond
—Applicability of O. 34 R. 14 Civil P. C. O 34 R 14 N 4
—Assignment by Court S 2 N 6
—Construction of S 100 N 8
Charge or mortgage, if creates S 100 N 8
—Court, given to S 100 N 8
Charge, if creates S 100 N 8
—Decree-holder, if mortgagee S 58 N 16
—Enforcement of S 100 N 8

Seller's charge for unpaid purchase-money S 55 N 12; S 100 N 11
—Attachable, if S 55 N 12
—Equitable lien S 55 N 12
—Estoppel against S 55 N 12
—Exchange, in case of S 120 N 3
—Exclusion of S 55 N 12
Agreement to pay seller's creditor S 55 N 12
Covenant to pay, by S 55 N 12

Seller's charge for unpaid purchase-money (*contd.*)
Mortgage of property, by S 55 N 12
—Extent of S 55 N 12
—Extinguishment and revival of S 55 N 12
—Interest in immovable property, if S 55 N 12
—Limitation for S 55 N 12
—Non-possessory S 55 N 12
—Ownership, passing of, essential S 55 N 12
—Personal decree for S 100 N 26
—Several buyers S 55 N 12
—Statutory S 55 N 12
—Transferable S 55 N 12
—Transferee, enforceability against S 55 N 12

Seller—Covenant for title, by
See Covenant for title—Seller's

Seller, liabilities of
—Abstract of title, English practice as to S 55 N 4
—Answer questions, title or property as to S 55; S 55 N 4
—Care, to take, of property S 55; S 55 N 6
—Completion of sale, before S 55 N 1
—Conveyance, execution of S 54 N 20a; S 55
Default in S 55 N 5
Nominee of buyer, in favour of S 55 N 5
Non-tender by buyer S 55 N 5
Reasonable time, within S 55 N 5
Tender by buyer, on S 55
Time and place S 55 N 5
—Disclosure, defects of
Buyer, aware of defects S 55 N 2
Contract to the contrary S 55 N 2
Latent defects S 55 N 2
Material defects S 55 N 2
Test of S 55 N 2
Misdescription—Effect of S 55 N 2
Misrepresentation—Effect of S 55 N 2
Non-disclosure, effect of S 55 N 2, 21
Patent defects S 55 N 2
Property in S 55
Seller not aware of defects S 55 N 2
Title in S 55
—Documents of title
Buyer, when entitled to S 55 N 10
Care, to take, of S 55; S 55 N 6
Delivery of S 55; S 55 N 10
Different buyers, sales to S 55 N 10
Mortgage deed, when S 55 N 10
Production of S 55; S 55 N 3
Possession or power, not in S 55 N 3
Request on S 55 N 3
Retention, seller when entitled to S 55
—Incumbrances, to discharge S 55; S 55 N 8
Contract to the contrary S 55 N 8
Personal liability S 55 N 8
—Interest on incumbrances, to pay S 55
—Marketable title, to make out S 55 N 3
Marketable title, meaning of S 55 N 3
—Non-fulfilment of S 55 N 1
—Possession, delivery of S 55; S 55 N 7
Default in—Remedy of buyer S 55 N 7
Nature of S 55 N 7
Nominee of buyer, to S 55 N 7

Seller Liabilities of (*contd.*)
—Public charges, to pay S 55; S 55 N 8
—Registration of conveyance, if S 55 N 5
—Rent, to pay S 55; S 55 N 8
—Statutory obligations S 55 N 1

Seller, rights of S 55
—Charge, unpaid purchase-money for: *See* Seller's charge
—Completion of sale, after S 55 N 1
—Documents of title, retention of S 55 N 10
—Interest on purchase-money S 55 N 11
—Non-payment of purchase-money, remedy of S 54 N 14
—Rents and profits, to S 55; S 55 N 11

Service grants
—Burdened with performance of service
—Classes of S 6 N 26a
—In lieu of wages for services to be rendered S 105 N 69
—Resumption of S 105 N 69
—Service tenure, lease of, validity S 6 N 26a

Service tenures
—Classes of S 6 N 26a
—Forfeiture of S 111 N 22
—Lease of—Validity S 6 N 26a
—Notice to quit—Unnecessary, when S 111 N 22
—Occupation as servant S 105 N 16
—Office ended, transfer of S 6 N 26a
—Service coming to an end, transfer of S 6 N 26a

—Transfer of
Custom S 6 N 26a
Good for lifetime of transferor S 6 N 26a
Opposed to nature of interest S 6 N 26a

Sham transaction
—Person claiming under, subrogation right to S 92 N 17
—Vendee—Right of S 95 N 7

Signature
—Attesting witness, signature of—Affixing of mark S 3 N 12
—Deed of gift, signature on S 123 N 7
—Mark and signature, distinction S 3 N 12
—Sign, meaning of S 3 N 12

Simple mortgage
—Characteristics of S 58 N 2
—Charge or mortgage, transaction whether S 100 N 15
—Defined S 58
—Mode of effecting S 59; S 59 N 2
—Nature and incidents of S 58 N 27
—Personal liability, mortgagor's S 58 N 29
Covenant if runs with the land S 58 N 29
Enforcement—Limitation for S 58 N 29
Express or implied S 58 N 29
—Possession—Mortgagee subsequently acquiring S 58 N 28
—Possession with mortgagor S 58 N 28
—Remedy of mortgagee S 67 N 13
—Sale of property—Right to cause S 58 N 30
Court, sale must be through S 58 N 30
Express agreement, if necessary S 58 N 30

Simple Mortgage (*contd.*)
Implied S 58 N 30
Writing, necessity of S 9 N 5

Simple mortgage usufructuary S 58 N 41
—Anomalous mortgage S 98 N 5
—Characteristic of S 58 N 41
—Rights and liabilities of parties S 98 N 5

Spes successionis
See also Chance of succession
—Admission that property not included in succession S 6 N 3
—Agreement to transfer S 6 N 3
Transfer if can be treated as S 6 N 3
—Contingent interest, *spes successionis* if S 21 N 5
—English law S 6 N 3
—Feeding by estoppel, doctrine of. applicability S 6 N 3
—Reversioner, Hindu, interest of S 6 N 4; S 91 N 16

—Transfer of
Applicability of S. 43 S 6 N 7
Mahomedan law S 6 N 38
Part performance. applicability of S 53A N 12
Transfer purporting to be of present interest S 6 N 7
Validity S 6 N 3

Standing timber
—Attached to the earth S 8 N 15
—Immovable property, standing timber, whether S 3 N 3
—Lease of land if includes S 8 N 10
—Legal incidents of property S 8 N 15
—Test to determine, whether particular trees constitute S 3 N 3
—Timber, meaning S 3 N 3
Firewood S 3 N 3

Sub-lease
—Agricultural lease
Forfeiture of head-lease, effect on S 115 N 4
Surrender of head-lease effect on S 115 N 4
—Determination of S 111 N 5; S 115; S 115 N 1, 3
Forfeiture of head-lease, by S 115; S 115 N 1
Head-lease, determination of, on S 115 N 1
Surrender of head-lease, effect of S 115; S 115 N 1

—Forfeiture of lease
Effect on S 115; S 115 N 3
Relief against
Effect on S 115; S 115 N 3
Government, lease by S 115 N 1
—Head-lease—Determination of S 106 N 29
—Lessee's right to S 108 (j); S 108 (j) N 1; S 115 N 1
—Privity of estate, with lessor S 108 (j) N 5
—Surrender of head-lease, effect on S 111 N 8; S 115; S 115 N 1
New lease, surrender for obtaining S 115 N 2
Privity with lessor S 115; S 115 N 1

In the footnotes to the Commentary indicates either a leading case or a case giving fuller reasons.*

Sub-lessee
—Assign of lessee not S 40 N 1
—Constructive notice of covenants in head-lease S 108 (j) N 5
—Covenants in lease—Liability for S 40 N 25; S 108 (j) N 5
—Forfeiture of lease—Payment of subsequent rent by S 112 N 2
—Holding over S 116
See also Holding over
—Lessee's rights against S 108 (j) N 7
—Notice to quit to S 106 N 37
—Restrictive covenants, liability on S 108 (j) N 5

Sub-mortgage
—Decree, redemption suit by mortgagor, in: S 58 N 5
—Defined S 58 N 5
—Equitable S 58 N 5
—Mortgagor's rights, if affected by S 58 N 5
—Payment to original mortgagee S 67 N 21
—Priorities, rules applicable S 58 N 5
—Priorities, rules applicable S 58 N 5
—Property mortgaged S 60 N 19
—Provisions applicable S 58 N 5
—Redemption—Mortgagee, by S 60 N 19
—Sub-mortgagee, suit by S 67 N 21
Sale of mortgagee's rights, in S 67 N 21
Sale of original mortgagor's interest, in S 67 N 21
—Surety, mortgagee, as S 58 N 5
—Void mortgage, effect S 58 N 5

Sub-mortgagee
—Equities subject to S 58 N 5
—Meaning of O 34 R 1 N 9
—Payments to mortgagee S 58 N 5
—Puisne mortgagee, of—Redemption by S 91 N 6
—Redemption by S 91 N 6
—Rights of S 58 N 5; O 34 R 1 N 9
Procedure for enforcing S 58 N 5
—Suit by O 34 R 1 N 9

Sub-Registrar
—Attesting witness—Sub-Registrar, if S 3 N 19
—Duty of—When property is situated in more districts or sub-districts than one S 3 N 37

Subrogation
—Advancing money to mortgagor, person: S 92 N 20
Mortgagee, as S 92 N 20
Third person, payment of, advance if must be for S 92 N 20
Vendee, as S 92 N 20
—Agreement by S 92 N 1, 19
Registered instrument embodied in S 92 N 19
—Amendment, law prior to S 92 N 2
—Assignment by S 92 N 1
—Charge, in case of S 92 N 6
—Co-mortgagor redeeming, right of S 92; S 95 N 1, 15
—Contract Act, S. 69 and T. P. Act, S. 92, distinction between S 92 N 3
—Conventional S 92 N 1, 19

Subrogation (*contd.*)
Amendment, law prior to S 92 N 2
Registered instrument, necessary S 92 N 19
—Covenant to pay mortgage—Effect of S 92 N 10
Puisne mortgagee, covenant to pay S 92 N 10
Two mortgages, covenant to pay, payment of one only S 92 N 10
—Defence of S 92 N 27; 29
—Defined S 92
—Distinction between first and third paragraph of S. 92 S 92 N 19, 22
—Distinguished from salvage lien S 92 N 1a
—Doctrine of S 92 N 1
Mortgages, not confined to S 92 N 1
—Enforcement of rights acquired by S 92 N 27
—Extent of S 92 N 23, 24
—Final decree, payment after S 92 N 27
—Intention to keep alive charge S 92 N 2
—Legal S 92 N 1
Amendment, law prior to S 92 N 2
—Legal and conventional, distinction between S 22 N 19
—Limitation S 92 N 28
—Mortgagee, person paid off, must be S 92 N 8
—Mortgagor, not entitled to S 92 N 9
Agent of S 92 N 9
Successor-in-interest of S 92 N 9
—Plea of S 92 N 31
—Preliminary decree, payment after S 92 N 27
—Prior mortgagee redeeming subsequent mortgage S 92 N 12
—Punjab and N.-W.F.P., principle applied to S 92 N 4
—Purchaser, redemption by S 92 N 13
Covenant to pay mortgage, effect of S 92 N 10, 13
Free of encumbrance, purchase S 92 N 13
Legal subrogation, in case of S 92 N 13
Part of property, purchaser of S 92 N 13
Pre-emptor from purchaser, right of S 92 N 26
Subject to mortgage, purchase S 92 N 10
Whole property, purchaser of S 92 N 13
—Redeemed in full
Entire amount due, payment of S 92 N 23
Meaning of S 92 N 23
Mortgage must be S 92; S 92 N 23
Several persons, by S 92 N 23
Single person, by, not necessary S 92 N 23
—Redemption of prior mortgage—Payment sufficient S 92 N 21
—Reimbursement, principle of, distinguished from S 92 N 3
—*Res judicata*, as far to enforce rights of: S 92 N 30
—Retrospective, S. 92 whether S 92 N 5

In the footnotes to the Commentary* indicates either a leading case or a case giving fuller reasons.

Subrogation (*contd.*)
—Right of S 92
Accrues on redemption only S 92 N 7
Equitable grounds, granting on S 92 N 2
—Sale or mortgage to pay off price, mortgage S 92 N 22
—Sham transaction, person under—Redemption by S 92 N 17
—Split up, mortgage, in case of S 92 N 23
—Subject to mortgage, purchase, payment by purchaser S 92 N 10
—Subrogee
Defined S 92
Rights of S 92 N 24
Interest, right to claim S 92 N 24
Leasehold rights of prior mortgagee, right to S 92 N 24
Mortgaged property against S 92 N 24
Possession, right to S 92 N 17, 24
Same as of mortgagee redeemed S 92 N 24
Successor-in-interest, of, right available to S 92 N 25
—Subsequent mortgagee, redemption by S 92 N 11
Consolidation of mortgages for suit, on: S 92 N 27
Covenant to pay mortgage, effect of S 92 N 10
—Suit to enforce rights acquired by S 92 N 27
Limitation—Starting point S 92 N 27
—Surety, redemption by S 92 N 14
—Trespasser, redemption by S 92 N 18
—Void title, person claiming under—Redemption by S 92 N 17
—Voidable title, person claiming under—Redemption by S 92 N 17
—Volunteer, redemption by S 92 N 16

Subsequent interest
—Acceleration of, on failure of prior interest S 27; S 27 N 2; S 28 N 11
Bequest, rules as to S 27 N 1
Effect to be given to intention of transferor S 27 N 2
Illustrative cases S 27 N 2
Mode of failure specified—Effect S 27; S 27 N 2
—After prior interest, to take effect S 16 N 3
Prior interest void S 16 N 3
—Alternative transfers—Failure of one under S. 13 or S. 14, T. P. Act—Effect of S 16 N 3
—Dependent on two contingencies, one too remote—Effect of S 16 N 4
—Failure of—Prior interest failing under S. 13 or Section 14 S 16
—General rule, when prior fails S 16 N 3
—Independent of prior—Effect S 16 N 3
—On failure of prior interest to take effect S 16 N 3
General rule S 16 N 3
Exceptions S 16 N 3
—When takes effect, prior interest failing under S. 13 or S. 14—Effect of S 16

Subsequent transferee
—Transfer to defraud S 53; S 53 N 31

Substituted security
—Anomalous mortgage, applicability of, doctrine of S 98 N 3a
—Compensation for acquisition
Land Acquisition Act, under S 68 N 3; S 73; S 73 N 10
Payment out of S 73 N 7
Portion, property, of S 73 N 10
Right to S 73
Withdrawn—Remedies of mortgagee: S 73 N 14
—Doctrine of S 73 N 1
Application S 73 N 1
—Mortgage-money, due if must be S 73 N 11
—Mortgagee's right to S 67 N 29; S 73; S 73 N 1
Nature of S 73 N 1
Prevails against other claims S 73; S 73 N 11
—Partition, property obtained on S 44 N 7; S 67 N 29; S 73 N 1
—Retrospective, amendment, if S 73 N 2
—Surplus sale proceeds
Arrears of revenue, sale for S 73 N 3
Balance due after—Right to proceed against remaining property S 73 N 12
Charges of public nature, arrears of—Sale for S 73 N 5
Deductions from S 73 N 9
Default, mortgagee's, sale due to S 73 N 6
Dues recoverable as if arrears of land revenue, sale for S 73 N 3
Free of mortgage, sale S 73 N 1
Part of property, sale of—Effect S 73 N 12
Part satisfaction to take in S 73 N 8
Payment out of S 73 N 7
Right to S 73
Set aside, sale—Effect S 73 N 13
Withdrawn—Remedies of mortgagee: S 73 N 14

Suit
—Collusive suit S 52 N 13
—Commencement of S 52 N 10
Dismissal for default S 52 N 10
Forma pauperis, suit in S 52 N 10
Plaint, presentation of S 52 N 10
Court of higher grade, to S 52 N 10
Wrong Court, to S 52 N 10
Rejection of plaint S 52 N 10
—Contentious suit S 52 N 13
—Duration of lis S 52 N 11
—Mortgage suit: *See* Mortgage suit
—Transfer during pendency of: *See Lis pendens*

Surety
—Redemption, right of S 91 N 37
—Subrogation, right of S 92 N 14

Surrender
—Defined S 111 N 8
—Election, doctrine of, applicability to S 35 N 7
—Fraudulent transfer, when S 53 N 5
—Hindu widow, by S 91 N 17
Gift whether S 128 N 3

Surrender (*contd.*)
—Lease, of: *See* Surrender of lease
—Meaning of S 5 N 4
—Part performance, applicability of S 53A N 6
—Transfer of property, surrender whether S 5 N 4; S 35 N 7; S 53 N 7; S 128 N 3
—Who can surrender S 9 N 12
Full owner S 9 N 12
—Writing S 9 N 12

Surrender of lease
—Acceptance of
Lessor by, after transfer of property leased S 109 N 4
Transferee of lessor, right of S 109 N 4
—Defined S 111 N 8
—Derivative interests not affected by S 71 N 5; S 111 N 8
—Determination of lease, by S 111; S 111 N 8 to 10
—Effect of—Under-lease on S 115; S 115 N 1
—Express S 111; S 111 N 9
Conditional S 111 N 9
Form of S 111 N 9
Mutual agreement S 111 N 9
Possession, lessee to give up S 111 N 9
Registered instrument, by S 111 N 9
Writing, if necessary S 111 N 9
—Implied S 106 N 30, 31, 39; S 111; S 111 N 10
New lease, acceptance of, by S 111 N 10
Actual demise, necessary S 111 N 10
Incompatibility of new and old lease S 111 N 10
Operative, new lease must be S 111 N 10
Part of property of S 111 N 10
Non-payment of rent if effects S 111 N 10
Relinquishment of tenancy, by S 111 N 10
Tenant becoming a servant, by S 111 N 10
—Joint lessees, by one S 111 N 8
—Joint lessors, in case of S 108 (q) N 1; S 111 N 8
—Lessor to, must be made S 111 N 8
—Mortgage, effect on S 71 N 5
—New lease, surrender for obtaining under-lease effect on S 115 N 2
—Partial, abatement of rent on S 108 (l) N 14
—Subordinate interests from lessee not determined by S 111 N 1, 8
—Under-lease, effect on S 111 N 8; S 115; S 115 N 1
Privity with lessor, on S 115; S 115 N 1
—Voluntary act S 115 N 1

Tacking
—Distinction between S. 78 and S. 93 S 78 N 12
—English and Indian law, compared S 79 N 1
—Further advance of—Mortgage to secure future advances, in case of: *See* Future advances, mortgage to secure
—Mortgagee paying off prior mortgagee S 93; S 93 N 3

Tacking (*contd.*)
—Notice of intermediate mortgage, immaterial S 93 N 4
—Prohibition of S 93; S 93 N 3
—Purchaser of property against S 93 N 5
—Subsequent advance by prior mortgagee, of: S 93; S 93 N 3
Subsequent advance, meaning of S 93 N 6

Takkavi loan
—Suit by Government S 67 N 24

Tenancy at will
—Agreement of S 106 N 6
—Death of lessee S 105 N 32; S 106 N 6; S 111 N 24
—Death of lessor S 106 N 6; S 111 N 24
—Defined S 105 N 32; S 106 N 6
—Determination of S 105 N 32; S 111 N 24
Demand for possession by S 105 N 32; S 111 N 24
Notice not necessary S 105 N 32; S 111 N 24
Notice to quit S 106 N 6
—Duration of S 105 N 25; S 106 N 6
—Heritable, whether S 105 N 32; S 105 N 72; S 111 N 24
—Holding over, if creates S 116 N 1
—Interest in property S 105 N 32
—Invalid lease, tenant entering under S 106 N 6
—Lease determinable at any time S 105 N 31,32
—Lease entitling lessee to hold as long as he pays rent or as long as he may wish S 105 N 27, 32
—Lease, tenancy at will, whether S 105 N 32; S 111 N 24
—Life, lease for, if S 105 N 32
—Nature and incidents of S 111 N 24
—Non-transferable S 105 N 32
—Presumption under S. 106—Not applicable S 105 N 32
—Proof of S 106 N 6
—Registration S 105 N 32
—Tenant by sufferance, distinguished from S 105 N 37; S 116 N 1
—Tenant's right to reap produce—Whether immovable property S 3 N 2
—Transferable, if S 105 N 32; S 106 N 6
—Yearly rent fixed S 105 N 26

Tenant by sufferance
—Defined S 105 N 37; S 116 N 1
—Holding over, tenant S 106 N 3; S 116 N 1
—Landlord's right to dispossess S 105 N 37
—Liability for compensation, basis of S 105 N 40
—Position of S 105 N 37
—Tenant at will distinguished from S 105 N 37
—Use and occupation, compensation for, by S 105 N 70

Tenants in common S 45 N 3
—Bequest to several persons S 45 N 6
—Gift to, non-acceptance by one S 125 N 1
—Gift to several persons S 45 N 6; S 122 N 5
—Redemption by S 91 N 24

Tender
—Conditional—Instances S 84 N 5
—Current coin, in S 84 N 5
—Defined S 84 N 5
—Interest, cessation on S 84 N 8
Non-mortgage debts S 84 N 8
Unemployed, money if must be kept S 84 N 8
—Money actual, production of S 84 N 5
—Mortgage-money, of: *See* Tender of mortgage-money
—Plea of S 84 N 5
—Proper person to S 84 N 5
—Protest, tender under S 84 N 5
—Receipt, demand for, accompanied by S 84 N 5
—Rent, of: *See* Rent
—Time and place, proper S 84 N 5
—Unconditional, must be S 84 N 5

Tender ofmortgage-money
—Agent to mortgagee, to S 60 N 12; S 102; S 102 N 2, 3
Invalid, when S 102 N 2, 3
—Amount remaining due, must be of S 84 N 7
Larger amount tendered S 84 N 7
—Assignee of mortgagee, to S 60 N 11
—Benefit of—Who can take S 84 N 3
—Cessation of interest, on: *See* Mortgage-money—Interest
—Co-heirs of mortgagee, to one S 60 N 15
—Co-mortgagee to S 60 N 14
—Current coin, in S 84 N 5
—Deposit, a special kind of S 84 N 12
—Guardian, minor mortgagee's, to S 60 N 12
—Incompetent to contract, mortgagee
Guardian *ad litem*, appointment of S 103; S 103 N 2, 5 to 7
Legall curator of, to S 103; S 103 N 4
Procedure S 103; S 103 N 2
—Insufficiency
Plea of S 84 N 17
Question of fact S 84 N 17
—Insufficient amount, of S 84 N 7
—Interest, cessation on: *See* Mortgage-money
—Invalid
Agent, tender to, when S 102 N 2, 3
Guardian *ad litem* without, when mortgagee is incompetent to contract S 103 N 7
—Irregularities in—Waiver of S 84 N 5
—Karta of joint Hindu family, to S 60 N 12
—Minor—Mortgagee
Guardian *ad litem*, appointed of S 103; S 103 N 2; S 103 N 5 to 7
Procedure S 83 N 16; S 103; S 103 N 2
—Mistake *bona fide*, in calculation S 84 N 7
Money actual production, if necessary S 84 N 5
—Notice before tender S 60; S 84 N 14, 15
—Partial S 84 N 7
—Part-owner, by S 60 N 10
—Persons, entitled to make S 84 N 3
—Possessory mortgage in S 76 N 21; S 84 N 19

Tender of Mortgage—Money (*contd.*)
Effect on S 76 N 21; S 84 N 19
Expenses incurred after, credit for S 76 N 21
—Protest, tender under S 84 N 5
—Refusal, costs, mortgagee disentitled on: S 84 N 16
—Time and place, proper S 84 N 5
—Unconditional, must be S 83 N 8; S 84 N 5

Title deeds
—Abstract of title, practice in England, as to S 55 N 4
—Buyer's right to S 55 N 10
—Copies of—Mortgagor's right to make S 60B; S 60B N 1
—Delivery of
Different buyers, sales to S 55 N 10
Redemption on S 60; S 60 N 16
Seller's duty S 55; S 55 N 10
—Deposit, mortgage by—Mortgage by deposit of title deeds—Failure to call for and examine, by transferee S 3 N 32
—Inspection, mortgagor's right to: S 60B; S 60B N 1
—Lost, mortgagee, by S 60 N 16
—Production of—Seller's duty S 55; S 55 N 3
—Retention, seller, when entitled to: S 55; S 55 N 10

Transfer by one co-owner S 44
—Competency to transfer S 44 N 3
—Conditions and liabilities subject to S 44 N 7
—Coparcener, by S 44 N 3
—Dwelling house, transferee of: *See* Dwelling house
—Joint possession, transferee right of S 44 N 4
Coparcener, transferee from S 44 N 6
Dwelling house, transferee of S 44 N 8
—Lessee, partition, right of S 44 N 5
—Mortgagee, partition, right of S 44 N 5, 7
—Partition, transferee, right of S 44 N 5
Coparcener, transferee from S 44 N 6
Interest in share, transferee of S 44 N 5
—Rights and liabilities of transferee S 44 N 1

Transfer by operation of law
—Actionable claim of S 130 N 10
—Apportionment, rule of, applicability S 36 N 2; S 37 N 2
—Defined S 2 N 6
—Distinguished from transfer by or in execution of a decree or order S 2 N 6
—Escheat S 2 N 7
—Forfeiture of interest on alienation, condition of, if affects S 12 N 8
—Forfeiture of interest on insolvency, condition of, if affects S 12 N 8
—Forfeiture on attempt or endeavour to transfer S 12 N 8
—Fraudulent transfer S 53 N 5
—Instances of S 2 N 6
—Joint transfer—Quantum of interest of transferees S 45 N 8

Transfer by operation of law (*contd.*)
—Lease, forfeiture of, on S 12 N 8
—Lessor's interest of S 109 N 2
—*Lis pendens*, applicability of S 52 N 30
—Obligation annexed to the ownership, enforcement in case of S 40 N 20
—Official Receiver, sale by S 2 N 6
—Person with limited authority to transfer, transfer from S 38 N 10
—Restriction on transfer, effect on S 10 N 12
—Restrictive covenants, enforcement in case of S 40 N 20
—T. P. Act, not applicable to S 2; S 2 N 6

Transfer by ostensible owner
See Ostensible owner, transfer *by*

Transfer by person with limited authority
—Circumstances justifying transfer, when deemed to exist S 38; S 38 N 1
—Consideration, transfer for S 38 N 6
—Gift, by S 38 N 6
—Good faith, transferee in S 38 N 9
—Money decree, transfer of S 38 N 4
—Ostensible owner, transfer by S 38 N 3
—Persons with limited authority—Instances: S 38 N 5
—Reasonable care to ascertain justifying circumstances S 38 N 8
Nature of inquiry S 38 N 8
—Recitals in deed of—Evidentiary value of S 38 N 7, 12
—Representation of justifying circumstances: S 38 N 7
—Transfer by operation of law S 38 N 10
—Validity of S 38; S 38 N 1
Hindu law, rule of S 38 N 2
Onus of proof S 38 N 11

Transfer by persons having distinct interests S 46
—Consideration, apportionment of S 46; S 46 N 1, 3
—Distinct interests
Meaning of S 46 N 2
Succeeding jointly, persons, of S 46 N 2

Transfer by unauthorised person
—Auction-purchaser, tranferee within S. 43, whether S 43 N 12, 13
—Collector's management, person whose property is, transfer by S 43 N 4
—Contract to transfer
Competency to contract S 43 N 4
Valid, must be S 43 N 4
Void, effect of S 43 N 4
—Distinction between S. 18, Specific Relief Act and Section 43 S 43 N 3
—Equity will regard that as done which ought to be done—Applicability of doctrine S 6 N 7
—Exchange by, subsequent acquisition of title S 119 N 4
—Feeding a grant by estoppel, doctrine of S 6 N 7
—Fraudulent or erroneous representation S 43 N 7
Burden of proof as to S 43 N 7
Inquiry by transferee, if necessary S 43 N 7

Transfer by unauthorised person (*contd.*)
Knowledge of real facts to transferee S 43 N 7
Question of S 43 N 7
—Gift S 43; S 43 N 5
—Insolvent, transfer by S 43 N 4
—Interest acquired subsequently
Capacity, same, must be acquired in S 43 N 9
Manner of acquisition S 43 N 9
Same, as transferred, if must be S 43 N 9
Whole interest, if must be acquired S 43 N 9
—Larger interest, transferor having partial interest acquiring subsequently S 43 N 10
—Lease S 105 N 20
—Official Receiver, sale by S 43 N 12
—Operation of, on interest subsequently acquired S 43 N 2
—Option of transferee S 43 N 8
Exercise of S 43 N 8
Immediate Exercise of S 43 N 3
—Principles underlying 3 S 6 N 7; S 43 N 2
—Privies, position of S 43 N 12
—Prohibited transfers, applicability of S. 43: S 6 N 7
—*Spes successionis*, applicability of S. 43 to transfer of S 6 N 7
—Subsequent acquisition of interest by transferor S 43
Necessary for application of S. 43 S 43 N 9
—Subsequent transferee in good faith, for consideration S 43 N 13
—Subsistence of contract of transfer S 43 N 11
Decree on contract—Effect of S 43 N 11
Void contract S 43 N 11

Transfer contingent on happening of specified uncertain event
See Contingent transfer

Transfer, defeat or delay creditors, to
See Fraudulent transfer

Transfer for benefit of public
See Charities

Transfer of property
—Agreement to transfer S 109 N 3
—Appointment, making of S 5 N 1
—Award under S 5 N 2
—Cancellation—Non-payment of consideration S 4 N 4
—Charge, creation of S 5 N 4; S 8 N 17; S 10 N 12; S 14 N 3; S 100 N 1
—Contract Act, sections, applicability S 4 N 4
—Contract for sale S 38 N 6
—Contract of—Subsistence of S 43 N 11
—Contract precedes S 6 N 27
—Conveyance in future S 5 N 7
—Conveyance in present S 5 N 7
—Conveyance of title S 5 N 4
—Corpus of transfer: *See* Corpus of transfer
—Covenant for renewal of lease S 5 N 4
—Dedication, idol or Almighty, in favour of: S 5 N 3

Transfer of property (*contd.*)
—Definition of S 5
British India, property outside, applicability of S 5 N 1
Scope of S 5 N 1
—Easement, creation of S 5 N 1; S 54 N 7
—Executed contract—Transfer is S 4 N 2
—Execution sale S 5 N 3
—Family arrangement S 5 N 4; S 9 N 11
Transfer of property—Grant of partial mineral rights, is not
—In present or future S 5 N 4
—Modes of S 5 N 1; S 54 N 1
Act, if exhaustive S 5 N 2; S 9 N 7
—Mutation S 54 N 8
—Non-contractual character, transfer S 5 N 1
—Partition S 5 N 2, 4; S 40 N 18
—Partners, assignment of rights *inter se* S 5 N 4
—Pledge S 5 N 2
—Prohibited—By any other law S 6 N 2a
—Property which may be transferred
Burden of proof S 6 N 1
Chance of obtaining legacy S 6 N 5
Charge S 55 N 12; S 100 N 19
Charity, property dedicated to S 6 N 2a
Contingent interest S 21 N 4
Easement S 6 N 9
Future maintenance, right to S 6 N 13
Future property S 6 N 3
General rule S 6 N 1
Impartible estate S 6 N 2a
Interest in property S 8 N 8
Interest restricted in enjoyment to owner S 6
Maintenance grant S 6 N 11
Occupancy right S 6
Pensions S 6
Possibility, mere, transfer of S 6; S 6 N 6
Pre-emption, right of S 6 N 12
Public office S 6; S 6 N 23
Public officer, salary of S 6
Religious office S 6 N 2a
Reversioner, Hindu, interest of S 6 N 4
Right of re-entry S 6 N 8
Right to sue, mere S 6
Test of S 6 N 1
Undivided share S 6 N 2a
Vested interest S 19 N 8
—Release or relinquishment S 5 N 4
—Settlement of doubtful claims S 5 N 4
—Surrender S 5 N 4; S 35 N 7; S 128 N 3

Transfer of property (*contd.*)
—Test to determine, whether transaction is a transfer S 5 N 4
—Transfer to himself S 5 N 8
—Transfer within S 53; S 53 N 5
—Will, transfer by, if S 5 N 3
—Writing, necessity of: *See* Writing—Oral transfer

Transfer of Property Act
—Amendments, whether retrospective Pre N 1b
—Applicability
Agricultural lease, to S 117
British India, property outside S 5 N 1
Crown grants Pre N 4; S 10 N 2
Easement, creation of Pre N 5
—Chapters and sections, part of Contract Act: S 4; S 4 N 2, 3
—Chapter on gifts, if part of Contract Act S 4 N 3
—Commencement of S 1
—Construction of Pre N 6
Section 8, if lays down rule of S 8 N 2
—Exhaustive, Act is not Pre N 2; S 3 N 24; S 5 N 2
—Extention of
Particular sections of S 12 N 2
Provision, Government, power of S 129 N 2
—Extent of S 1; S 5 N 1
Bangalore, Civil and Military station of, applied to S 1 N 3
Provincial Government, power of, to extend S 1; S 1 N 2
Subsequent extension of S 1 N 2
—History Pre N 1a
—Interpretation clause S 3
Object of S 3 N 1
—Preamble Pre; Pre N 1
—Principles of
Cases arising before the Act, applied to: S 1 N 5
Territories to which Act is not applicable, applied in S 1 N 4
Transfer by operation of law, applied to: S 2 N 6
Transfer by or in execution of a decree or order, applied to S 2 N 6
—Principles underlying, applicability of S 1 N 4, 5; S 2 N 6; S 41 N 5; S 48 N 18; S 58 N 3
—Registration Act—Sections supplemental to S 4
—Repeal of Acts S 2; S 2 N 3
—Repeal of, by subsequent legislation S 1 N 6

Transfer of Property Act (*contd.*)
—Retrospective operation of various Sections: S 2 N 5; S 6 N 14; S 39 N 3; S 53A N 5; S 60 N 56; S 65A N 2; S 67A N 2; S 73 N 2; S 92 N 5; S 95 N 10; S 101 N 11; S 108 (j) N 10; S 119 N 10
—Short title S 1
—Terms or incidents of contract or constitution of property when not affected S 2; S 2 N 4
—When not applicable S 2; S 2 N 1 to 6

Transfer on, failure of prior interest
—Alternative transfers—Failure of one under S. 13 or S. 14—Effect S 16 N 3
—General rule as to subsequent interest S 16 N 3
Exceptions S 16 N 3
—Independent subsequent interest S 16 N 3
—Prior interest failing under S. 13 or S. 14, T. P. Act—Effect S 16
—Two contingencies, one too remote—Effect of S 16 N 4

Transfer pendents lite
See *Lis pendens.*

Transfer to a class
See Class, transfer to

Transfer where third person is entitled to maintenance, etc.
See (1) Advancement
(2) Maintenance
(3) Marriage

Transferee
—Better title than transferor, if can have S 8 N 9
—Hindu widow from, interest of S 8 N 9
—Interest acquired on transfer: *See* Operation of transfer.
—Legatee S 51 N 4
—Lunatic, if can be S 7 N 8
—Meaning of S 51 N 4
—Minor, if can be S 7 N 8
—*Pendente lite*, transferee: See *Lis Pendens.*
—Person not competent to contract S 7 N 8
—Transfer to self S 5 N 8
—Transfer within S. 51 S 51 N 4

Transferor
—Competency to transfer: *See* Competency to transfer.
—Interest of
Operation of transfer, on S 8; S 8 N 2
Passes on transfer S 8 N 9

Trees
—Accession, trees fallen, when S 63 N 4
—Legal incident of property S 8 N 15
—Lessee not to cut S 108 (o); S 108 (o) N 4

Trees (*contd.*)
—Lessee's right to remove S 108 (1) N 2
—Rooted in earth—Whether immovable property S 3 N 8

Trespasser
—Improvements by S 51 N 10
—Interruption of lessee's enjoyment by: S 108 (c) N 4
—Lessor's right to sue S 108 (c) N 4
—Mesne profits, liable for S 105 N 70
—Mortgage, enforcement against S 67 N 30
—Redemption, right of S 91 N 32
—Removal of materials on eviction S 51 N 10
—Subrogation, not entitled to S 92 N 18
—Tenancy, acquisition of, by prescription: S 105 N 84
—Transferee from—Improvements by S 51 N 10
—Use and occupation not liable for S 105 N 70

Trust
—Gift or trust S 122 N 15

Trustee
—Charge of, for expenses S 100; S 100 N 20
Section 100 not applicable to S 100 N 20
—Co-trustee, notice to quit, by S 106 N 34
—Expenses of, charge for S 100
—Gift, distinguished from S 128 N 3
—Liability of S 128 N 3
—Person interested in property, if S 41 N 9
—Redemption by S 91 N 29

Ulterior disposition
See (1) Prior interest
(2) Subsequent interest
—Acceleration of on failure of prior interest S 27; S 27 N 2; S 28 N 11
Bequest, rule as to S 27 N 1
Effect given to intention of transferor S 27 N 2
Illustrative cases S 27 N 2
Manner of failure of prior interest specified S 27; S 27 N 2
—Condition, strict fulfilment of S 29
—Conditional on special uncertain event S 28
Hindu law, rule as to S 28 N 3
Illustrative cases S 28 N 2
Mahomedan law, rule as to S 28 N 4
—Contingent interest, when S 28 N 11
—Failure of prior disposition—Effect of S 27; S 27 N 2
—Gift over S 28
—Invalidity of
Effect, on prior S 30 N 1
Bequests, rule as to S 30; S 30 N 2
Disposition

Unborn person—Transfer for benefit of S 13

Unborn person (*contd.*)
—Bequest in favour of S 13 N 1
—Child *en ventre sa mere* S 13 N 4
—English law S 13 N 7
—Hindu law S 2 N 10; S 13 N 5; S 15 N 5; S 28 N 3
—Hindu, transfer by S 13 N 5
—Immediate transfer S 13 N 2
—Mahomedan law S 13 N 6
—Postponement of enjoyment S 20; S 20 N 4
—Prior interest in favour of living person S 13 N 2
—Son adopted after death of testator S 13 N 4
—Trust in favour of S 13 N 2, 3
—Vested interest, on birth S 20; S 20 N 1
Contrary intention S 20 N 3
—Vesting of interest S 13 N 2
Postponement of—Maximum period S 13 N 2
—Whole interest remaining in transferor S 13 N 2

Under-lease
See Sub-lease.

Under-lessee
See Sub-lessee.

Undivided family
—Joint Hindu family, expression if restricted to S 44 N 10
—Meaning of S 44 N 10
—Ownership of house by S 44 N 10

Undivided share
—Coparcener, transfer by S 6 N 2a; S 7 N 7; S 44 N 3; S 58 N 21
—Gift of S 7 N 7
—Mortgage of S 58 N 21
Coparceners by S 58 N 21
Owelty, mortgagee, liability of S 48 N 13
Substituted security, doctrine, application of S 67 N 29; S 73 N 1
Mortgagee, purchase by— Redemption S 60 N 45
—Purchaser, liabilities, subject to S 44 N 7
—Sale of S 54 N 19
—Subsequent acquisition of interest by transferor S 43 N 11

Universal donee
—Insolvency of donor S 128 N 5
—Liability of S 128; S 128 N 2, 5
Extent of S 128 N 5
Independent of condition in gift S 128 N 5
Personal, when S 128 N 5

Universal donee (*contd.*)
—Mahomedan law, rule of, as to S 128 N 6
—Onus of proof S 128 N 7
—Section 53 and S. 128, distinction between S 128 N 2
—Universal gift S 128 N 2, 3
—Universal legatee and universal donee S 128 N 5
—Whole property, gift must be of S 128 N 4

Unlawful consideration
—Contract for—Void S 6 N 25
—Defeat the provisions of law S 6 N 31
Common law S 6 N 31
Hindu law S 6 N 31
Mahomedan law S 6 N 31
—Defined S 6 N 27
—Forbidden by law S 6 N 30
Excise, licence, transfer of S 6 N 30
Prohibition by order of Court, if S 6 N 30
Ultra vires act S 6 N 32
—Fraudulent S 6 N 34
—Immoral S 6 N 30
Future cohabitation S 6 N 34
Past cohabitation S 6 N 34
—Involving injury to property of third person S 6 N 33
—Partly unlawful—Whole transfer if void S 6 N 29
—Public policy, opposed to S 6 N 35
See also Public policy, opposed to.
—Transfer for—Void S 6; S 6 N 25, 27

Unlawful object
—Consideration and object distinguished S 6 N 28
—Contract for—Void S 6 N 25
—Defeat the provisions of law S 6 N 31
Common law S 6 N 31
Hindu law S 6 N 31
Mahomedan law S 6 N 31
—Defined S 6 N 27
—Forbidden by law S 6 N 30
Excise licence, transfer of S 6 N 30
Ultra vires act S 6 N 30
—Fraudulent S 6 N 32
—Immoral S 6 N 34
—Involving injury to property of third person S 6 N 33
—Public policy, opposed to S 6 N 35
—Transfer for S 6 N 25, 27
Getting back property by transferor S 6 N 27
Object carried out S 6 N 27

Unlawful Object (*contd.*)
Object not carried out S 6 N 27
Use and occupation, compensation for
—Agreement of lease, person entering under S 105 N 70
—Claim for
Essentials S 105 N 70
When arises S 105 N 70
—Implied contract S 105 N 70
—Kabuliat, person in possession under, liability of S 107 N 10
—Permissive, possession must be S 105 N 70
—Tenant by sufferance, liability of S 105 N 70
—Trespasser, not liable for S 105 N 70
—Void lease, person entering under S 105 N 70

Usufructuary mortgage
—Characteristics of S 58 N 335
—Consideration unpaid, if debt S 3 N 22
—Consolidation of mortgages, right to S 62 N 12
—Defined S 58
—Delivery of possession S 58 N 35
Actual S 58 N 35
Agreement as to, initial, must be S 58 N 35
Certain period for S 58 N 35
Lease back to mortgagor S 58 N 35
Mortgagee's remedies for failure of S 58 N 35
Nature of S 58 N 35
—Kinds of S 62 N 2
—Lease back to mortgagor
Arrears of rent, taken in account before redemption S 62 N 7
Sub-lessee of mortgagor, right to redeem of S 91 N 12
—Lease for premium distinguished from S 105 N 67
—Lease or mortgage transaction whether S 105 N 67
—Personal liability, mortgagor's S 58 N 29
Absence of S 58 N 35
Covenant to pay—Effect of S 58 N 35
—Recover possession, mortgagor's right to S 62
Co-mortgagor, right of S 62 N 3
Exercise of—Period fixed for payment, before S 60 N 5
Limitation S 62 N 11
Mortgage-money paid from rents and profits S 62; S 62 N 5
Cash payment, if permitted S 62 N 5
Term fixed, recovery before expiry S 62 N 5

Usufructuary Mortgage (*contd.*)
Whole, to be paid S 62 N 5
Nature of right S 62 N 2
Payment or tender of mortgage-money, on S 62 N 6
Appropriation of rents and profits S 62 N 6
Terms fixed, payment before expiry of S 62 N 8
Several mortgages, satisfaction of one only, on S 62 N 4
Suit for recovery
Accounts S 62 N 5
Onus of proof S 62 N 5
Proprietory right, based on S 62 N 5
Successive suits S 62 N 9
Whether right to redeem S 60 N 4, 5
—Redemption—Time limit S 58 N 35
—Rents and profits, appropriation of S 58 N 35
Express provision for S 58 N 35
Interest and principal, partly in lieu of S 58 N 35
Interest, in lieu of S 58 N 35
Principal, in lieu of S 58 N 35
—Surplus collections, claim for S 62 N 10
—Zuripeshgi lease, if S 58 N 36

Usufructuary mortgagee
—Interest, right to S 60 N 10
—Remedy of S 67 N 15
—Sale, right of S 68 N 17
—Tenant by elegit S 62 N 2

Vested interest
—Accumulation of income—Direction for S 19; S 19 N 10
—Attaining particular age, interest on S 19 N 5, 6; S 21
Direction to apply income for benefit of transferee S 22 N 4
Class, transfer to S 21 N 15
Effect of S 22 N 3
Gift over, provision of—Effect of S 22 N 3
Class, transfer to S 21 N 13
Income given to transferee S 19 N 1
—Bequest, when vested S 19 N 6
—Certain event
Attainment of particular age S 19 N 6; S 21 N 7
Death S 19 N 6
Expiration of term of years S 19 N 6; S 21 N 7
Survival S 19 N 4
—Contingent interest, distinguished S 21 N 11
—Contingent interest, when becomes

Vested interest (*contd.*)
—Contrary intention S 19
Burden of proof as to S 19 N 7
—Death of a person, interest to take effect on S 19 N 6; S 21 N 7; S 23 N 2
—Death of transferee before possession—Effect S 19; S 19 N 8
—Defeasance clause
Condition subsequent defeating interest—Effect S 19 N 10a
Effect of—On vesting S 19
Gift over—Effect on vesting S 19 N 11
—Defined S 19
—Expiration of a term of years, interest to take effect after S 19 N 6
—Heritable S 19 N 8
—Hindu law, rules as to S 19 N 3
—Immediate right, is S 19 N 4
—Intention of transferor S 19 N 4
How gathered S 19 N 4
—Interest on happening of a certain event S 19 N 6
—Interest to take effect forthwith S 19 N 5
—Interest when vested S 19 N 4
—Law leans in favour of vesting: S 19 N 4; S 29 N 2
—Mahomedan law—Rules of S 19 N 2
—Postponement of enjoyment
Effect of—Unborn person, transfer for benefit of S 20; S 20 N 4
Effect on vesting S 19; S 19 N 9
Limits to S 19 N 9
Provision for—Validity S 19 N 9
—Power of appointment—Effect on vesting S 19 N 12
Exercise of—Person when takes vested interest before S 19 N 12
Interest of person to take in default of exercise of S 19 N 12
—Survival, interest to take effect on S 19 N 6
—Test, of S 19 N 4
—Transfer, 'when' or 'if' transferee attains a particular age S 19 N 5
—Tansferable S 19 N 8
—Unborn person takes on birth S 20; S 20 N 1
Contrary intention S 20 N 3
—Whether mere possibility S 6 N 6
—Whether immovable property S 3 N 2

Waiver
—Forfeiture of lease, of: *See* Forfeiture of lease
—Intention, matter of S 113 N 2
—Notice to quit, of: *See* Notice to quit

Wakf
—Creation of S 13 N 6; S 18 N 5
—Defined S 18 N 5
—Fraudulent transfer when S 53 N 5
—Mussalman Wakf Validating Act, 1913—Effect of S 18 N 5
—Perpetuity, rule against, applicability of S 14 N 14; S 18 N 5
—Transfer within S. 53—Wakf whether S 53 N 5
—Wakf-alal-aulad—Validity of S 18 N 5
—Writing S 9 N 9

Warranty as to title
—English law S 119 N 2
—Exchange, in S 119 N 2, 8
—Moveable property, sale of, in S 119 N 2
—Sale of goods, in S 133 N 2

Warranty of solvency
—Contract to the contrary S 133 N 5
—Date of transfer, on S 133; S 133 N 2
—Limit to S 133; S 133 N 2
—Solvency, meaning of S 133 N 4
—Warranty, defined S 133 N 4

Waste
—Cutting and felling timber S 66 N 3
—Lessee, not to commit S 108 (m) N 1; S 108 (o) N 7
—Mortgagee in possession, by S 76 N 10
Not to commit S 76 N 10
Prevention, third person, waste by, of: S 76 N 10
Suit for compensation S 76 N 10
What amounts to S 76 N 10
—Mortgagor, by S 66
Acts of, amounting to S 66 N 3
Commit, mortgagor not to S 66; S 66 N 1
Easement, grant of S 66 N 6
Onus of proof S 66 N 7
Property not mortgaged, of S 66 N 4
Remedy of mortgagee S 66 N 8

Welsh mortgage
—Personal liability, mortgagor's S 58 N 29

Will
—Charge, created by S 100 N 7
—Lease if can be created by S 105 N 7

Words and phrases
—'Absolutely entitled' S 51 N 9
—'*Accesio*' S 63 N 1
—Actionable claim S 3
—"Affect" in S. 2 S 2 N 2

Reference to Official Reports are invariably given in all cases found in the Official Reports.

Words and phrases (*contd.*)
—Agriculture S 117 N 3
—Arrears in S. 73 S 73 N 4
—Attached to the earth S 3
—Attested S 3
—Buyer and seller S 54 N 1
—Chose in action S 3 N 21
—Conveys S 5 N 4
—*Cypres doctrine* S 26 N 2
—Dahyak S 100 N 32
—*Donatio mortis causa* S 129 N 3
—Easement S 6 N 9
—Emblements S 51 N 21
—Family S 44 N 10
—Fiducia S 58 N 2
—Flood S 108 (e) N 2
—Forbidden by law S 6 N 30
—From generation to generation S 8 N 4
—Hypotheca S 58 N 2
—Iladarawara S 98 N 10
—Imbedded in the earth S 3 N 9
—Immovable property S 3
—'In present or in future' S 5 N 7
—Incident S 8 N 11
—Instrument S 3
—'Interest' in S. 28 S 28 N 5
—Istemrari Mokarrari S 8 N 4
—Jenmi S 98 N 7
—*Jus in re aliena* S 58 N 2
—Kanom S 98 N 7
—Kanomdar S 98 N 7
—Kayan patta S 8 N 4
—Kayam saswata patta S 8 N 4
—Law S 6 N 31
—Legal incident of property S 8 N 11
—Malik S 8 N 4
—'Means and includes' S 3 N 1
—Mowrasi S 8 N 4
—Nankar S 100 N 32
—Notwithstanding anything contained in the Trustees' and Mortgagees' Powers Act, 1866, in S. 69 S 69 N 5
—Otti mortgage S 93 N 8
—'Permanently fastened to anything attached to the earth) S 3 N 7
—Person S 5 N 3
—Peruarthum S 98 N 9
—Pignus S 58 N 2
—'Portions for children' S 17 N 8
—Registered S 3 N 20
—*Res extra commercium* S 6 N 25

Words and phrases (*contd.*)
—Sanadi grant S 8 N 4
—Sign S 3 N 12
—Solvency S 133 N 4
—*Suggestio falsi* S 34 N 3
—*Suppressio veri* S 34 N 3
—Thing S 118 N 7
—Udhayapattam S 98 N 7
—Universal succession S 128 N 2
—Vendor and purchaser S 54 N 1
—Warranty S 133 N 4
—"Within the town of Bombay" S 69 N 11
—Year S 107 N 5
—Zarichaharam S 40 N 12

Writing
—Agrciultural lease, not necessary for S 117 N 4
—Award S 9 N 13
—Charge, creation of S 100 N 16
Moveables on S 100 N 3
—Defined S 9 N 14
—Easement, creation of S 9 N 8
—Endowment, religious and charitable, gift to S 9 N 9
—Family arrangement S 9 N 11
—Part performance, contract in S 53A N 9
—Partition—Necessity of S 2 N 4; S 9 N 10
—Release S 9 N 12
—Relinquishment S 9 N 12
—Surrender S 9 N 12
—Surrender of lease, of S 111 N 9
—Transfer of property, necessity of S 9
Expressly permitted to be without S 9 N 6
Expressly required, instances S 9 N 5
Hindu law S 9 N 1
Mahomedan law S 9 N 1
Test S 9 N 2
When not necessary S 9 N 2, 7

Zarichaharam
—Contract to pay
Covenant running with land, whether: S 40 N 12
Obligation annexed to ownership whether S 40 N 12
—Meaning S 40 N 12

Zuripeshgi lease
—Mortgage, amounting to S 58 N 36
Test to determine S 58 N 36
—Nature of S 58 N 36

TABLE OF CASES

NOTE: (1) The First Number in a column stands for the page of the Report; the Second Number, ordinarily, for the Section of the Transfer of Property Act, but when preceded by 'R' it stands for the Rule of O. 34 of the Code of Civil Procedure, 1908, given in Appendix I; and the Last Number, for the Note in that Section or Rule.

(2) The Table of Cases is arranged in the following order :

(I) The All India Reporter
(II) Official Law Reports
(III) Indian Cases
(IV) Other Journals
(V) Foreign Reports and Journals.

(I) THE ALL INDIA REPORTER

A. I. R.
PRIVY COUNCIL
1914 P. C.
16 3-38
27 9- 1
" 53A- 3
" 59- 2
" 60-22
36 58-31
" 60- 5
" 62- 5
38 38-11
" 38-12
44 5- 4
" 6- 4
48 108(d)-2
66 R 3- 7
" R 3-12
67 3-38
" 59- 6
82 8- 3
90 3-31
" 38- 5
" 38-11
92 8-20
95 58-22
136 R 1- 2
" R 1-12
137 53- 3
" 53-16
149 15- 2
150 R 4-15
164 38-12

1915 P. C.
7 53-33
18 8-20
21 3-11a
" 78-10a
30 6-2a
57 38-11
59 105-35
" 111- 2
96 111-17
" 116-13
" 123-12
101 23- 2
103 41- 8
" 41-23
115 53- 2
" 53-20
" 53-30
131 108(d)-2

1916 P. C.
7 137- 5
9 53A- 3
18 R 1- 5
27 35- 4
" 123- 4
41 2- 5
" 9- 1
" 59- 2
46 100-31
49 58-33
" 60-37
68 58- 7
" 101- 4
86 18- 5
110 3-31
" 38- 7
" 38-11
" 38-12
" 41-13
" 59- 9
115 58-39
117 6- 4
119 59-29
" 68- 1
139 54-23
" 55-11
169 58-29
169 59- 8
" 67-15
" 100-14
191 8-10
" 108(o)-6
227 60-23
238 53- 7
" 53-20
" 53-33
" 53-34
245 40- 8

1917 P. C.
6 7- 7
23 8-20
33 7- 7
41 6-2a
" 7- 7
" 58-21
61 7- 7
" 38- 5
76 7- 7
85 R 6-17
95 6- 4
" 91-16
128 7- 7
" 8- 2
163 2- 5
" 8-10
" 108(o)-6
" 114- 1
" 114- 7
188 7- 7
" 38- 1
" 38- 5
" 38- 8
197 R 5-20
207 58-33
" 111- 9

1918 P. C.
3 8-11
11 7- 7
25 11- 5
34 60-26
" 67-13
" 67-19
" 69- 3
" R 1-19
" R 5-13
48 60-34
70 6- 4
77 11-10a
102 106-19
" 106-37
" 106-38
" 106-44
" 106-45
125 111- 9
129 55-11
137 53- 7
140 6- 4
" 67-22
" 91-30
" R 1- 8
151 119- 9
156 14- 3
" 100- 5
159 R 6- 3
168 7- 7
" 43- 4
196 6- 4
" 35-28
" 38- 5
" 91-17
203 8- 4
206 21- 9

1919 P. C.
1 Pre- 2
" 2- 5
" 106-25
" 111-13
1 111-14
6 53- 6
" 53-20
11 105-48
17 8-10
" 108(o)-6
20 3-47
24 58-22
" 60-47
" 67-27
" 126-10
" R 1- 6
27 6- 4
44 54-17
" 54-21
" 59-14
" 60-27
" 123- 5
" 123-10
52 Pre- 1
55 5- 3
" 100- 8
" 14- 4
75 91-17
79 105- 4
" 107-13
" 107-15
84 105-48
117 111-16
121 58-40
" 67-18
" 98- 1
124 55- 1
" 55- 5
" 55-10
150 67- 5
" 67- 6

1920 P. C.
1 60-26
" R 1-12
8 76-12
16 100- 5
64 38-11
67 105-43
" 105-44
79 R 1-19
" R 5-13
81 48- 1
" R 1-10
" R 12-3
103 8-20
190 111-16
" 112- 1
" 112- 2
" 112- 6
216 43- 2
274 3-39
" 58-39

1921 P. C.
1 8-10
8 3-20
" 54-22
" 59- 6
56 53- 7
" 122-11
71 105- 4
89 8-20
93 59- 6
100 R 11- 2
112 3-34
" 3-35
" 43- 2
118 58-22
" 69A- 2
" 76- 5
" 126-10
" R 1- 5
125 60-41
" 76-15
138 5- 5

References to Official Reports are invariably given in all cases found in the Official Reports.

1921 P. C. *con*
138 21- 4
" 43- 2
209 8-20

1922 P. C.
11 60-26
" 101- 1
" 101- 3
" 101-10
" R1-19
" R5-13
14 122- 3
" 126-10
17 60-28
" 60-29
" 98- 1
" 98- 2
20 3-31
" 41-13
" 59- 9
56 54-17
80 8- 6
91 51-17
" 51-20
94 111- 7
107 18- 5
163 105-45
165 14-10
" 40- 1
176 55- 9
" 55-15
184 116-13
193 8- 6
247 7- 7
281 123- 4
292 105-43
" 105-48
" 105-79
" 105-84
347 84- 5
353 7- 7
382 65- 4
393 40-20
403 4- 4
" 6- 4
" 55- 1
" 68-13

1923 P. C.
6 8- 4
26 60-33
" 84- 5
37 7- 7
41 2- 9
" 54- 4
47 8-20
50 58-39
54 55-15
" 68- 8
" R6- 4
73 53-34
87 58-39
114 6-36
" 69 -3
118 105-79
122 13- 2
171 36- 1
" 36- 2
" 36- 3
189 6- 3
205 105-79
211 3-32
" 5- 6
" 48- 1

1923 P. C. *con*
211 48-10
" 58-39
" 78- 1
" 78- 4
" 78- 9
" 78-12
" 79- 5
" 79- 6
" 79- 8
" 93- 4
" 93- 6

1924 P. C.
5 6-26a
36 92-10
" 92-13
" 92-19
" 92-24
" 101- 1
50 7- 7
56 6- 4
" 38-11
60 R11- 2
65 105-41
" 105-43
" 105-44
" 105-45
" 105-47
" 105-48
" 105-49
" 105-79
102 72- 3
" 76- 1
" 76- 8
133 72- 3
144 44- 4
183 58-17
" R 2- 8
226 58-33
247 117- 3

1925 P. C.
27 21-13
42 8-10
" 108(o)-6
63 58- 8
" 58-35
75 58-33
" 60- 2
89 3-11
" 3-18
97 105-83
" 108(l)14
124 55- 5
139 5- 3
146 51-22
" 51-23
" 105-55
181 122-11
" 123-12
203 3-11
" 59- 8
204 58-22
" 122- 3
" 126- 9
" 126-10
244 14- 8
" 15- 2
261 52-17
272 6- 4
" 10- 3
" 10-16
280 R11- 2

1926 P. C.
1 55-20
9 24- 3
38 137- 3
56 R6-17
68 92-17
85 67- 5
93 R5- 6
94 54-23
" 55-20
" 100-16
100 54- 8
109 92-17
112 7- 7
" 38- 5
129 59- 8

1927 P. C.
1 R11- 2
17 R2- 6
" R2-17
" R7- 9
20 105-64
22 1- 2
" 123- 4
" 123-11
" 129- 2
32 R14-12
" 58-40
" 61- 2
" 62- 2
" 62-12
" 98- 5
" R1- 3
" R14-12
37 7- 7
" 38- 8
42 52-29
" 122- 7
" 123- 6
56 R1-12
73 R6-17
80 7- 7
84 126-10
102 105-48
" 105-49
108 R1-14
121 7- 7
" 38- 5
" 38-11
123 31- 2
" 122- 1
135 3- 6
" 8- 3
" 51- 1
148 126- 9
151 111-17
156 84- 5
159 6-2a
172 3- 7
" 3-10
191 18- 5
195 8-20
206 105-60
242 2- 5
248 3-11
272 8-20
275 8-20

1928 P. C.
20 41-13
" 59- 9
33 8-20
" 13- 2
" 15- 5

1928 P. C. *con*
35 8-20
" 19- 4
38 52-17
80 58- 6
86 123- 6
98 56- 8
" 55- 9
108 123- 4
112 8- 6
115 8-20
137 R2-18
146 105-47
" 116- 4
" 116-13
152 7- 3
" 58-24
156 13- 5
" 30- 2
165 68-10
172 122-11
174 3-24
" 6-17
177 6-26a
202 41-10
234 8-10
" 105-42
" 108(o)-6
251 7- 7
258 105-35
" 111- 3
273 53A- 3
291 10-11
303 7- 3
" 126-10

1929 P. C.
3 126- 9
34 8-20
61 60-22
72 45- 3
77 122- 1
108 108(o)-3
115 8-20
139 58-41
" 67-15
" 68-12
" 68-17
" 98- 5
141 100-16
149 8-20
" 19- 2
" 19- 4
" 123- 4
152 8-10
" 108(o)-6
156 105-43
" 105-48
" 105-49
" 105-51
163 3- 6
" 51- 1
174 100- 1
195 40- 8
" 55- 5
243 52-18
" 72- 3
" 83- 9
" 83-17
" 84- 7
256 76- 1
" 76- 4
269 54-23
279 53-20

1929 P. C. *con*
283 11- 2
288 58-35
" 92-17
" R1-19

1930 P. C.
7 19- 5
" 19-11
13 108(j)-6
" 117- 3
17 5- 5
" 21- 8
59 108(j)-5
66 59-12
76 58- 6
" 100- 5
91 60-22
100 6-35
103 105-44
" 105-45
" 105-48
142 Pre- 2
" 58-11
" 60- 3
" 60-28
" 60-38
176 58- 4
" 61- 5
" 62-12
" 100- 5
183 82- 2
" 82-4a
" 82- 7
" 82- 8
188 67- 5
239 8- 6
253 8- 6
" 8-20
255 53- 5
290 65A-1
297 51- 8
" 51-17
" 51 19

1931 P. C.
33 R5-14
36 58-39
52 3-20
" 59- 6
63 111- 7
79 51-22
" 51-23
" 53A- 3
" 105- 4
" 105-13
" 105-19
" 105-39
" 107- 8
" 108(b)-2
89 8-10
104 108(l)-14
118 7- 7
" 41- 8
143 72- 4
157 105-69
160 6-24
162 8-10
" 108(o)-6
179 80- 2
" 82- 5
186 8-10
196 5- 6
" 54-23
203 5- 7

1931 P. C. *con*
207 105-47
226 48-11
" 72- 3
" 72-10
" 100-29
229 R1- 6
239 1- 3
" 58-39
245 3-22
" 8-17
" 100-10
" 134- 3
299 8-10
" 108(a)-2
" 108(o)-6
302 8-10
" 108(o)-6
303 126-10

1932 P. C.
13 123- 4
28 108(b)-1
" 108(l) 14
32 3-22
" 6-16
" 130- 4
34 122- 2
57 52- 1
" 52-16
74 82- 1
" 82- 6
99 72- 3
" 82- 2
" 92-10
" 92-24
" 92-27
105 105-47
108 51-22
158 2- 5
" 10- 3
" 10- 6
" 10- 9
" 11- 9
186 12- 4
189 68- 5
207 67- 5
228 40- 8
235 73- 1
252 58-44
279 106-39
" 106-40
" 106-41
" 110- 1
" 110- 2
" 110- 3

1933 P. C.
29 53A- 3
49 8-20
63 68-16
72 45- 6
78 8-20
85 76-12
" 76-15
134 1- 1
136 72- 3
" 77- 1
143 55-14
" 100-25
" 100-26
178 58-35
" 76- 5
191 48- 1

Topical Index and Synopsis for each Section show where exactly to look for the point required.

1934 P. C.
58 8-20
„ 108(l)-6
67 123- 5
68 40-17
„ 54-23
77 116-13
98 82- 4
119 58-36
157 59- 6
182 105-69
205 60-26
„ 60-48
208 122- 3
234 53A-3
235 53A-3
„ 53A-5
„ 54-23
246 137- 5

1935 P. C.
108 8-17
„ 54-19
165 3-22
„ 3-38
„ 59- 6
187 11-10

1936 P. C.
20 R 1-12
24 31- 2
„ 31- 7
63 R 11-2
65 55-14
„ 58-33
„ 91- 5
91 59- 6
131 19- 6
„ 21- 3
„ 23- 5
204 54-12
„ 55-12
„ 100-17
207 8-14
„ 58-22
230 3- 2
„ 54-19
277 7- 7
281 8-20
285 19- 6
„ 19- 9

1937 P. C.
4 14- 9
„ 18- 6
124 58-44
„ 60-41
256 R 6-10
260 52- 8
„ 52-18
„ 52-40

1938 P. C.
20 111-13
38 126- 9
„ 126-10
71 6-38
128 6-13
„ 6-14
„ 101- 4
270 28- 6
„ 32- 8
„ 32- 4

1939 P. C.
6 21- 4
11 106- 2
„ 106-15
„ 106-44
„ 106-45
14 58-38
„ 108(j)-2
„ 108(j)-4
„ 108(j)-5
117 3-11
„ 3-14
„ 3-19
157 6-11
„ 10- 4
167 58-39
185 14-14
„ 18- 5

1940 P. C.
1 53A-13
11 73- 1
„ 100-30
38 61- 7
„ 92- 5
„ 92-19
„ 92-21
„ 92-23
„ 92-27
134 5- 6
„ 58-22
„ 58-23
„ R 4- 6
147 58-22
160 58-33
„ 59-11
181 6- 4
192 105-43
„ 105-49

1941 P. C.
16 100- 6
36 108(j)-4
„ 108(j)-5
47 55-20
90 59- 4
„ R 1- 6
93 34- 3
95 6-35
114 55-11
128 53A-13

1942 P. C.
50 60-42
„ 60-43
„ 82-19
54 8-20
67 54- 1

1943 P. C.
24 108(b)-3
„ 108(c)-8
„ 108(l)-14
29 68-13
115 8-20
153 105- 5

1944 P. C.
22 3-29
„ 58-39
42 105-16
46 1- 5
67 18- 2
„ 21-12
„ 21-13
95 52-11
„ 92- 6
96 92-23
„ 92-24

1945 P. C.
23 92- 1
„ 92-16
„ 92-19
„ 92-22
54 122- 1
77 108(q)-1
82 3-31
91 68- 1
„ 68- 4
„ 68-16
„ 68-20
152 5-14
„ R 5-29

1946 P. C.
96 52- 8
177 41-16
„ 53- 5
„ 53- 8
„ 53- 9
178 58-33

1947 P. C.
8 39- 1
„ 39- 2
„ 39- 3
„ 101- 5
„ 100-22
34 Pre- 4
99 43- 2

1948 P. C.
95 53A-9a
„ 53A-13
147 52- 1
„ 52-10
„ 52-13
„ 52-24
„ 52-38

1949 P. C.
90 106-39
„ 116- 1
„ 116-12

A. I. R. FEDERAL COURT

1940 F. C.
7 R 11- 2

1949 F. C.
124 116- 1
„ 116- 3
„ 116- 6

A. I. R. AJMER

1949 Ajmer
88 106-40
„ 110- 1
52 1- 19

A. I. R. ALLAHABAD

1914 All.
1 106-32
„ 108(q)- 1
1 111-27
„ 116-12
„ 116-13
42 R 1-19
„ R 7- 4
43 60-50
46 83- 2
51 R 11-2
53 84- 5
„ 84- 7
63 67-10
76 59- 6
89 51-10
95 67-30
98 R 11- 2
„ R 14-13
109 R 1-19
116 R 1-19
120 107- 1
„ 107- 3
„ 107-12
125 65- 4
„ R 1-12
131 55-14
151 61- 5
„ 61- 6
160 111-16
„ 111-26
162 3- 2
„ 59- 5
163 60-32
165 60-44
171 58-17
„ R 11- 2
176 3- 9
177 R 3- 7
187 5- 4
„ 58- 4
„ 100- 5
190 R 10- 5
199 63- 1
225 R 1- 6
227 51-11
232 41- 8
„ 41-23
265 91-20
„ R 1- 5
279 130-11
„ 130-15
298 54-15
305 111-13
„ 114- 7
306 3-12
313 48- 8
319 R 2- 7
320 126-10
330 82- 2
„ 82- 5
334 60-28
„ 60-32
„ 60-37
343 R 14- 7
349 55-12
350 2- 5
„ 58-41
„ 67-15
356 52-21
362 60-50
366 43-12
411 114- 4
418 6-31
„ 68-13
424 53- 6
428 117- 3
443 92-19
„ 101- 1
444 R 4-12
„ R 6-11
„ R 10- 8
450 60-12
460 112- 2
„ 116-12
461 6-38
464 5- 4
475 6-24
512 60-50
518 60-14
542 61- 5
559 59- 4

1915 All.
10 67-22
15 58-27
„ 100-15
27 52-18
„ 52-31
„ R 5-29
35 105-14
„ 108(j)-1
44 122- 6
56 105-13
„ 105-19
70 60-22
„ R 14- 7
88 91-10
95 82-17
99 63- 9
„ 72- 3
136 60-32
142 58- 2
143 82-27
201 91-25
203 60-22
216 33- 2
242 70- 2
„ 92- 9
„ 101- 1
251 106- 2
„ 106-24
254 59- 8
„ 68-13
255 59- 9
264 R 5-10
277 R 5-22
297 67-19
„ R 1-19
299 91- 5
„ 91- 7
„ 91-41
302 R 7-13
„ R 8- 7
313 R 11- 2
318 R 1-12
347 54-13
359 101- 1
397 R 6- 3
„ R 6-19
441 6- 4
450 60-42
„ 95- 1
466 59- 7
„ 126-10
478 7- 8
„ 105-22
480 61- 6
486 6- 3
1916 All.
44 92- 1
„ 92- 8
„ 92-19
57 R 14- 4
81 92-23
„ 101- 1
85 72- 2
91 60- 4
98 60-50
103 59- 8
„ 100-14
108 60-44
130 82-16
134 92-15
„ 95- 1
153 58-33
159 52-42
190 82- 5
„ 82-22
199 48- 8
200 40- 1
„ 40-14
219 105-13
„ 105-19
„ 107- 7
232 55-15
„ R 6- 4
251 8- 9
„ 8-20
264 100-22
273 R 1-19
302 122-5a
305 58-33
315 51-22
„ 51-23
323 R 5-20
342 40-17
„ 54-23
346 6-29
351 123- 1
„ 123- 4
357 R 6-21
366 7- 8
„ 54-14
„ 54-23
„ 105-22

1917 All.
2 44- 8
4 58- 4
16 3-11
17 R 2- 3
27 59- 8
32 53-30
89 59- 8
94 5- 3
94 122- 5
102 105-82
103 59- 8
104 100- 8
110 91- 2
„ 91-25
112 40- 8
115 6- 6
128 84- 5
149 R 6- 1
163 R 5- 6
165 60-10
„ 62- 6
179 51-11
„ 51-15
235 59- 8
237 91- 7

Remarks in foot-notes amplify principles in the Commentary and state the special features of the case.

1917 All. con
237 101- 1
239 R 7-13
" R 8- 7
248 8-20
249 40-14
290 6-29
302 118- 3
309 60-44
" 101- 1
318 60- 5
346 100- 5
357 82- 6
358 60-44
359 67-20
" R 1-19
395 105-13
401 60-41
" 83- 7
429 R 5-29
439 58-30
" 100-15
443 R 5- 7
447 6-35
462 6-35
" 25- 9
470 R 14-6
483 59- 8
" 105-60

1918 All.
2 18- 5
81 R 1- 5
97 R 6-21
98 R 2-18
115 6- 6
" 19- 8
184 6- 4
211 Pre- 6
" 53A-3
" 59- 8
255 8- 6
285 R 5-16
337 54-14
366 72- 5
" R 2-11
" R 4-12
" R 5-26
" R 6-11
" R 10-8
392 91-12
401 52-21

1919 All.
24 3-11
56 67- 5
" 92-14
74 76- 8
80 5- 4
" 10- 4
94 60-21
126 60-22
138 92-19
218 R 6-21
235 40- 5
246 60-42
253 R 11- 2
275 60-14
" 67-27
292 68- 3
" 68- 5
297 7- 7
" 72- 5
" R 2-11

1919 All. con
297 R 4-12
" R 5-26
" R 6-11
" R 10- 5
302 53A- 3
308 40- 1
320 52-14
371 6- 3
391 122-12
401 60- 4
" 60-44
435 R 14-12
448 59- 8
450 59- 6
453 58-24

1920 All.
15 73- 1
34 6- 7
" 73- 1
92 60-50
104 106-40
" 106-45
111 7- 7
128 115- 4
129 60-44
" 67-28
" 82-18
136 60-26
" R 5-13
155 R 6- 3
165 R 14- 6
204 60- 4
" 84- 5
246 52-13
253 56- 1
" 56-14
270 58-33
341 11-13

1921 All.
37 123- 2
48 68- 5
50 45- 6
54 55-12
56 R 7- 9
71 60- 4
" 83-11
74 55-12
81 59- 5
97 10- 6
" 10- 9
105 52-21
131 R 14-6
137 38- 7
140 53- 9
143 60- 5
168 117- 3
194 106-20
" 106-32
" 106-40
197 76-12
" 76-15
248 9-11
" 53A- 3
262 6-38
280 83-17
" 84- 7
298 53- 2
" 53- 5
" 53-11
" 53-14
301 60-23
" 82- 3

1921 All. con
304 R 8- 7
311 41-23
312 73- 1
" R 4- 6
323 56- 7
" 82- 3
" 82-23
326 58-24
339 3-34
" 67-20
" R 1-19.
350 82-23
353 60- 4
" 63- 9
" 83-11
358 60- 4
" 83- 2
" 83-11
392 4- 4
" 68-13

1922 All.
22 6-24
27 R 10- 7
41 61- 5
44 123- 2
45 109- 3
54 107- 5
" 107- 9
59 Pre- 2
" 92- 2
76 101- 4
104 63A- 2
" 67-20
" R 1-19
126 38-11
" 38-12
134 4- 4
" 68-13
135 67-20
" 91-41
" R 1-19
147 83-16
" 84-10
" 84-11
" 103- 2
153 65-10
" 92- 3
" 92-11
" 92-27
" 95- 1
174 58- 4
" 61- 3
" 61- 5
" 62-12
181 84-13
185 92-24
192 60-44
194 51-11
196 53-29
197 68- 5
" 68- 6
205 10- 1
210 51-22
217 6- 4
231 59- 6
275 36- 4
293 10- 6
" 11- 2
" 32- 5
316 7- 7
318 116-13
347 123- 4

1922 All. con
352 60-43
" 67-28
" 82-23
355 83-16
" 84-10
" 103- 2
" 103- 4
362 58-17
377 60- 4
" 83-11
383 R 4-15
" R 5- 5
" R 5-14
384 59- 4
" 101-10
392 41- 8
" 41-23
394 101- 1
403 61- 5
405 60-44
" 63A- 1
" 82-18
410 100- 1
" 100-13
423 111-17
" 116-13
443 53-30
449 7- 3
" 53- 6
467 123- 1
" 123- 2
479 R 7- 3
" R 9- 1
495 82-23
" R 5-19
508 8-20
" 55- 8
526 38- 8

1923 All.
7 58-17
" R 11- 2
11 51-25
24 83-17
" 83-18
" 84-10
" 84-11
" 84-14
48 58-33
77 5- 4
123 60-38
127 72- 8
140 91-12
164 53- 9
169 3-34
" 55- 9
171 92- 7
183 83-16
" 84-10
" 84-11
" 103- 2
" 103- 6
232 91- 8
" R 1-19
261 R 9- 1
263 91-13
284 R 1-12
294 52-21
295 111- 8
331 100-31
377 60-10
382 105-30
" 107- 5

1923 All. con
397 60-44
403 105-13
406 108(c)-4
408 68- 2
411 53- 9
416 44- 4
417 108(h)-2
423 R 1-10
433 53A- 3
" 68- 3
" 72- 3
" 76- 8
441 60-50
445 41- 4
446 44- 4
447 3-34
449 R 1-19
452 51-22
453 6-27
454 61- 5
457 68-14
" 101- 1
485 7- 7
486 105-50
499 60-43
504 53- 9
509 92-10
" 101- 1
511 14-10
514 14-10
" 54-23
530 54-16
560 54-11
" 105-42
583 7- 5
581 7- 5
583 41-23
584 68- 8
" 68- 4
" 68- 5
586 8-20
" 58-12
" 58-33

1924 All.
11 60-44
" 67-27
24 38-11
26 60-22
" 67- 9
" 83-20
29 38-11
47 63A- 1
" 72- 3
60 54-11
" 105-42
63 41- 3
" 41-23
65 73- 1
104 R 5-26
" R 10- 5
107 R 1- 3
" R 1- 4
" R 1-19
153 76-10
225 R 6-10
292 R 6-21
304 9-10
307 R 12- 3
315 92-17
357 122-5a
362 43- 9
" 126-10

1924 All. con
365 3-10
" 82- 5
370 128- 4
384 41-23
390 118- 2
" 118- 3
" 120- 2
396 53A- 3
" 54-17
" 54-23
400 10- 6
" 14-10
" 40-10
" 54-23
444 58-33
" 60-17
458 60- 5
460 111- 7
461 32- 5
473 59- 6
508 5- 1
" 5- 3
514 107-10
573 R 3- 7
591 62- 6
" 76-12
" 77- 1
625 5- 5
" 29- 5
" 30- 3
657 14-10
" 40-10
668 6-27
" 68-13
696 R 3-12
726 106- 2
" 111-14
738 R 1-12
749 58-33
772 53A- 3
787 58-15
795 6- 1
804 R 6- 3
818 R 7-13
825 105-13
826 53A- 3
832 61- 5
833 3- 4
" 5- 7
834 92-16
837 54-17
" 59-14
877 68- 5
" R 6- 4
880 44- 4
881 72-11
" 76- 1
" 76-20
908 R 1-12
915 105-43
923 44- 4
928 67-18
" R 1-19
929 59- 8
" 82-23
937 55- 8
938 54-14
" 54-16
939 38-12

1925 All.
6 R 5-13
" R 13- 4

1925 All. con
15 91-20
„ 91-36
34 60-28
„ 60-37
36 7- 7
42 60- 5
„ 60-28
„ 60-32
60 100-24
„ 100-28
65 10- 4
79 41- 8
„ 41-10
97 10- 7
100 107- 7
„ 108(l)-12
176 5- 4
189 76- 8
190 35-28
„ 51- 9
199 106-19
„ 106-20
„ 106-43
203 105-13
206 54-21
209 3-31
261 51- 9
„ 51-11
275 108(l)-14
323 60-26
324 38- 5
325 48- 9
346 111-16
352 R6- 3
358 53-10
389 19- 6
„ 19- 8
427 40-13
„ 60-28
„ 63- 9
437 6-34
„ 32-11
„ 126-14
449 8-15
474 6-29
„ 6-34
479 R1-11
487 52- 21
488 55-14
492 R7- 6
„ R10-5
501 58- 4
502 52-21
543 68-13
557 3-35
576 76-10
580 111- 1
593 R1- 6
622 R5-16
643 60-28
„ 60-32
698 116-13
704 55- 9
707 91-20
„ R7- 3
736 68- 5
765 6-21
770 51- 5
794 63- 9
„ 76-10
804 67-20
„ 91-41

1926 All.
46 60-44
„ R1- 6
66 108(o)-3
67 63- 9
68 R5-26
„ R10- 4
70 40-10
87 51-22
102 43- 7
119 R2- 6
„ R11- 2
130 6- 9
134 R5- 6
136 60-42
164 3- 1
„ 59- 2
171 60-28
„ 60-37
„ 61- 5
„ 100- 5
173 5- 4
179 52-21
180 52-21
181 26- 3
194 5- 4
234 60-50
283 14- 2
„ 14- 5
291 R5- 6
294 123- 4
300 54-22
324 51-22
343 R5- 6
„ R6- 3
„ R10- 5
353 3- 3
352 55-14
„ 82- 7
415 56- 1
„ 56- 8
424 72- 5
„ R5-26
„ 7- 6
432 108(j)-1
„ 117- 2
„ 117- 3
449 R1-10
457 R5-19
463 76-10
470 53- 5
„ 53- 8
480 52-31
„ 67-20
„ 91-39
„ 94- 2
„ R1-19
493 58-31
„ 67-14
498 9-11
506 61- 5
521 6-24
527 100- 1
„ 100- 5
„ 100-30
538 6- 9
549 48- 8
605 55- 9
653 92- 2
„ 101- 1
665 60-40
„ 83-16
„ 84-10
„ 103- 2

1926 All. con
665 103- 7
667 2- 5
„ 58-31
670 58-33
676 45- 5
693 60-20
695 108(e)-5
715 6- 4
722 R10- 4
725 3-11
„ 91-42
741 60-16
„ R7-10
744 92- 7
„ 92-24
755 58-31
757 R3- 7

1927 All.
1 3-11
28 92- 7
53 55- 9
78 105- 1
„ 117- 3
137 58-31
„ 58-33
144 61- 3
158 41-21
„ 41-23
167 R4-15
„ R5- 5
170 10- 6
„ 14-10
„ 40-10
204 58-33
211 92- 2
„ 101- 1
228 8-20
254 3- 3
287 54-23
290 R1-19
305 R8- 6
309 52-18
311 59-14
321 58-33
336 52-21
338 54- 8
341 67-15
„ 67A- 1
„ 67A-
342 105- 1
„ 105-13
„ 105-50
345 123- 4
355 53A- 3
357 3-34
361 54- 5
„ 54-12
395 R6-10
411 Pre- 6
„ 59- 4
414 123- 4
417 68- 5
„ 101-10
439 R5-16
467 R13- 4
484 5- 4
488 R1-19
499 68-13
588 92-23
„ R11- 2
544 51-23

1927 All. con
552 58-35
„ 76- 6
569 36- 4
589 R5- 8
611 R1-19
621 6-16
626 95- 7
631 7- 7
638 101-10
657 2- 5
„ 52-39
„ 117- 3
669 5- 5
679 52- 9
„ 52-19
689 8- 9
691 R6- 3
696 118- 6
710 R5-14
713 76- 8
„ R7- 4
714 53- 6
717 8-19
720 105-14
729 107-10
731 53- 6
743 61- 5
747 60-23
767 8- 6
781 60-50
788 105-47
789 5- 3
„ 122- 5
806 111-14
„ 111-16
807 41-10
821 116-13

1928 All.
3 52-35
„ 52-37
„ 52-38
29 53-21
34 8-20
„ 58-33
41 51- 4
„ 51- 8
„ 51-18
67 54- 3
71 68-16
„ R6-10
77 92- 2
„ 101- 1
95 105- 1
„ 105- 3
„ 106-43
„ 106-48
„ 111-23
99 60-35
„ 61- 5
102 7- 8
131 60- 5
„ 60-37
145 137- 5
156 84-19
159 3-28
„ 3-34
164 111- 7
168 2- 5
193 3-26
204 54-12
„ 118- 3
„ 118- 7

1928 All. con
234 53- 8
„ 128- 5
241 82- 6
„ 82- 7
„ 82-17
„ 92- 1
„ 95- 1
„ 95- 6
286 105-22
298 82-14
„ 82-27
311 83- 2
„ 83-15
„ 83-16
„ 84-10
„ 103- 2
„ 103- 6
378 67A- 1
381 1- 5
„ 2- 5
„ 51- 8
„ 51- 9
„ 63- 9
391 54-14
476 53- 6
480 R7-13
„ R8- 7
500 122- 2
„ 128- 4
„ 128- 7
534 108(l)-7
552 6-31
596 6-31
617 106-18
641 5- 4
„ 9-11
„ 53A- 3
„ 118- 4
699 28- 2
„ 28- 3
„ 31- 2
„ 53A- 3
„ 55A- 7
„ 122-5a
„ 123- 1
„ 123- 2
716 111-11
„ 114-10
721 6- 6
„ 6-26
726 4- 5
„ 54- 1
„ 54-19
„ 54-21
„ 54-22
„ 60- 1
„ 107- 9

1929 All.
12 Pre- 2
„ 51- 1
„ 51- 8
„ 51-15
„ 51-23
15 R2- 7
„ R6-11
52 108(l)14
53 52-16
63 6-18
„ 118- 6
„ 118- 9
„ 118-10

1929 All. con
63 113- 4
„ 119- 6
77 58-17
„ 60-10
85 3-34
„ 54-14
105 53-29
121 55-14
126 R1-10
128 38- 8
„ 38-12
161 3- 1
„ 3- 2
„ 54-19
„ 69A- 2
174 78-31
„ 38-33
210 6-30
223 38-12
238 2- 6
„ 53- 5
242 60-50
250 60-15
252 R5- 8
258 111- 7
260 60-41
„ 76- 7
„ 76-12
„ 76-15
277 2- 9
„ 5- 3
„ 53- 4
„ 53- 5
279 R3- 7
281 3- 2
„ 6-10
„ 58- 4
„ 100-13
287 R5- 6
293 40-24
„ 55- 9
296 92-11
„ R1-10
300 123- 5
305 60-60
309 56- 7
„ 92-23
„ R5-13
326 6-38
330 63- 9
348 68- 3
„ 76- 4
371 3-19
380 67-28
381 10- 7
384 76-12
„ 76-15
387 106-18
388 60-28
394 4- 4
„ 6-29
409 60-44
411 58-17
„ 60-28
„ 60-34
414 44-10
421 67-14
440 52-21
458 53- 6
465 3- 2
481 38-12
483 65- 4
492 10- 6

"Table of Cases" indicates first reference in foot-notes and reference to Official Reports.

1929 All. con
545 3-34
549 54- 8
551 R5-10
580 R14- 6
589 43- 7
601 52- 1
" 52-18
" 52-31
604 7- 8
" 58-26
" 60-44
" 105-22
610 116- 4
616 91-12
619 58-33
621 92-23
667 10- 6
" 14-10
680 3-11
696 82-14
" 82-24
737 41-18
" 41-25
745 2- 5
754 83-15
777 72- 3
" 72-11
" 76- 9
781 6-24
788 5- 4
" 51- 5
789 38- 8
791 55- 8
800 5- 3
" 41- 3
814 R1- 6
817 45- 7
" 48- 3
831 53A- 3
" 105-19
" 107- 7
834 5- 3
" 58-13
" 100- 8
837 55- 1
" 55- 9
846 52-14
854 51- 4
861 R1- 6
872 53- 6
877 51-22
881 R4-15
" R8- 4
908 8-20
941 R1-19
943 41-11
" 41-15
" 41-16
" 52- 1
" 52- 3
" 52-13
" 52-27
" 92- 2

1930 All.
1 4- 4
" 6-27
" 6-29
" 54-23
" 68-13
9 38-12
69 R6- 3
98 45- 7
98 60-14
101 54-19
" 54-23
" 58-33
105 109- 5
113 R1-10
115 43- 7
136 59- 5
" 60-28
" 61- 2
" 61- 5
" 62- 2
" 62- 4
" 62-12
" 65- 4
" 100-15
169 18- 5
175 Pre- 2
" 53A- 3
" 58-35
" 59- 4
177 105-37
" 116 13
180 128- 4
223 3-11
" 3-18
225 6- 6
252 4- 4
" 55- 1
" 126-11
283 58-33
" 60-37
" 60-40
286 R14-13
289 52-39
292 38-11
311 101- 1
315 108(j)-1
352 115- 4
354 52-13
" 52-21
355 R1-19
374 41- 9
375 58- 4
377 6-10
380 52-15
387 52-14
413 76- 6
416 61- 5
" 61- 6
" 62-12
417 41- 8
" 41-23
422 41- 1
" 41-23
426 118- 3
430 6- 4
431 59- 5
433 108(h)-2
434 54-12
438 53- 8
" 53-21
444 60- 5
462 2- 9
" 53- 4
" 53- 5
479 111-12
485 R1-19
498 5- 4
" 6- 4
" 9-11
520 R5-20
521 41- 3
521 41-23
523 83-11
561 2- 5
578 R5-19
593 6-10
" 6-18
597 52-18
" 52-40
" R5-20
609 83-16
" 84-10
" 84-19
" 103- 7
610 53-11
615 36- 3
" 36- 6
634 56- 7
" 56-14
" 60-14
" R5- 7
638 52-31
669 3-11
" 123- 1
" 126- 1
678 105- 3
" 105- 9
" 105-19
" 107- 7
" 107-10
687 2-10
" 5- 4
" 6- 4
706 2- 5
771 55- 9
786 6- 7
" 43- 7
793 123- 4
837 8-20
" 14-14
841 R6-22
847 41-23
" 41-25
852 43-11
869 91- 5
" 92-11

1931 All.
38 7- 7
" 65- 4
40 58-18
" 92- 1
" 92- 9
" 92-16
45 52-19
" 52-31
59 53A- 3
62 3-34
" 8- 3
" 100- 5
" 100-13
65 R14-11
76 92- 2
" 95- 1
" 101- 1
" R1-10
95 55-14
" 58-18
99 55-14
" 100-13
" 100-26
101 3-12
" 3-19
113 58-33
124 R5-26
" R10- 8
192 R6-21
" R6-23
193 3-34
196 58-33
197 61- 5
201 51- 8
207 40- 4
223 60-26
" R2-18
235 R1-19
237 54-12
" 123- 4
275 3-35
" 43- 7
277 2- 6
" 3-34
" 51- 1
" 51- 6
" 51- 9
" 51-15
" 59A- 3
" 63- 3
" 63- 6
" 63- 9
" 63A- 2
" 70- 3
" 70- 5
338 3-34
" 40- 9
340 R4-15
" R5- 5
347 92- 2
" 101- 3
350 R14-11
368 R6- 7
380 60-28
386 R5- 6
" R5-29
389 2- 6
" 54- 3
" 54-12
392 3- 1
411 3-11
" 3-14
427 R8- 6
461 6-31
" 68-13
466 52- 7
" 52-18
" 52-31
" 92-11
" R1-19
" R5-19
541 7- 7
546 82- 7
549 67A- 1
552 40- 1
" 40- 5
" 40-12
562 76-12
" 77- 1
582 77- 1
585 76-12
587 8-19
589 6- 3
596 123- 1
" 123-12
625 82- 6
" 82-19
" 82-22
" 82-23
631 R6- 6
649 106- 3
" 108(b)-3
" 111- 2
657 56-10
" 56-12
" R5- 8
" R5-17
741 54- 3
743 76- 6
754 55-14

1932 All.
51 68- 4
53 60- 1
" 91-13
" 91-19
" 105-42
78 11-11
" 40-20
81 44- 4
85 56- 7
" 56-10
" 56-12
" 60-41
" R4-10
" R5-24
155 60- 5
178 36- 2
210 51- 8
" 51-18
" 52- 3
" 52- 8
" 52-11
" 52-18
224 55- 9
238 R5- 6
246 60-43
" 67-28
" 82-19
250 82-17
" 95- 6
259 59- 4
314 106- 3
" 108(b)-3
" 111- 2
332 100-29
336 R6-16
" R6-21
345 3-21
" 136- 2
" 136- 3
" 136- 4
356 52- 7
" 91-25
" R1-19
358 R6-10
361 39- 5
370 123- 4
393 44- 1
437 91-13
" 91-19
" 105-42
439 R4-15
" R14- 3
" R14-14
444 122- 7
451 58-39
454 55-14
466 R6-22
473 108(j)-1
" 108(j)-2
475 R6-10
480 52-39
489 92- 5
" 92-22
" 101- 1
" 101-11
500 63- 3
" 63- 4
" 63- 9
" 76-10
" 77- 1
527 3-19
" 59- 8
546 55- 9
553 55- 9
558 61- 5
" 62-12
596 54-12
614 67-32
643 91- 4
653 8-15
662 6-11
676 67A- 4
678 44- 9
686 6-10
698 R3- 7
704 R6-10

1933 All.
21 60-50
" 82-17
" 92-15
50 3- 2
" 3- 3
" 59- 2
" 59- 8
63 55- 9
70 Pre- 2
" 60-28
" 60-32
" 60-34
" R11- 2
97 68- 2
" 68-17
146 123- 2
" 128- 4
" 128- 5
147 108(l)-5
157 R7-13
180 R11- 2
201 52-18
203 55- 9
" 55-22
223 92-15
233 59- 6
257 60-44
" 61- 5
" 62-12
299 78- 1
" 78- 4
" 78- 8
" 78-11
386 55-14
389 55- 9
412 67-20
" 101- 1
" R1-19
429 R6-21
443 58-33
449 43- 4
452 40- 8
468 7- 7
" 68-13
493 41- 9

1933 All. con
519 44- 4
579 52-35
607 3-41
642 3-22
" 6-16
735 105- 2
" 105-13
" 105-14
756 105-37
" 106- 3
" 111- 2
" 116-13
846 54-23
854 9-12
908 7- 7
917 41-23
929 82- 4
" 82- 6
" 82- 8
934 14- 3
" 58- 4
" 91-25
" 91-43
" 100- 6
" 100-13
" 100-15
" 100-27

1934 All.
8 68- 8
70 48- 8
73 67-20
" R1-19
" R12- 2
89 R5- 6
" R10- 5
93 8-20
103 111-11
" 111-12
" 111-14
115 106-20
" 106-32
" 108(l)-2
155 3-25
" 53-14
179 123- 4
" 126- 9
" 126-10
193 41- 2
" 41-11
" 41-15
" 41-23
" 44- 4
246 4- 4
253 2- 5
293 105-58
358 10- 1
406 55-14
444 59- 4
447 3-34
" 8-13
453 36- 2
507 126- 9
" 126-14
517 105-13
524 R14- 3
" R14- 4
" R14- 6
553 5- 3
557 38-11
617 4- 4
" 55-14
645 55- 9

1934 All. con
656 60-50
701 45- 2
" 53A- 5
713 52-24
731 8- 9
" 43- 9
768 53A- 5
770 55-15
787 106-19
" 111-10
888 60-37
" 72- 8
" 76- 8
902 107- 6
906 108(o)-6
946 91- 5
" 92-15
948 53- 8
950 58- 4
" 105-67
960 3-24
969 43- 7
972 52-18
973 6-24
983 14-14
1009 38-12
1035 92- 5
" 92- 7
" 92-13
" 92-24
" 92-27
1064 R6-23

1935 All.
41 7- 7
43 8- 6
" 8-20
96 R9- 3
150 58- 4
155 59-14
179 R14- 6
" R14-12
205 R1- 5
234 41- 3
" 43-13
244 6- 3
" 6- 7
263 67-27
269 43-11
" 65- 4
342 6-16
382 117- 3
391 60-41
" 67-27
411 100-25
" R6- 3
492 105-47
" 107- 3
493 10- 6
" 10- 7
" 10- 9
497 73-10
" 73-11
507 R14- 6
511 65A- 1
" 65A- 4
" 65A- 7
" 66- 1
527 59- 8
529. 59- 9
578 59- 4
" 62- 2
616 8-20

1935 All. con
632 8-20
662 8-20
678 65- 4
706 2- 5
729 8-20
770 101- 1
771 53- 8
774 3-35
778 67-18
" R2- 4
" R4- 3
" R4- 9
781 59- 8
785 107- 7
799 53- 9
837 3-22
" 8-17
" 130-13
872 5- 3
" 122- 5
894 44- 9
995 53-34
1003 R11- 2
1040 108(p)-1
1042 30- 2

1936 All.
8 R14- 6
" R14-13
9 R5-14
33 92- 2
" 92- 5
" 92- 7
" 92-28
62 92-23
77 7- 7
94 R1-11
131 6-26
169 59- 8
197 25- 3
" 122- 1
202 9- 9
258 82- 7
" 82- 8
336 92-20
" 92-22
385 106-12
" 111-11
401 53- 9
456 73- 1
479 52-40
512 91-25
" R1- 4
" R1- 6
" R1-19
522 108(l)-1
557 43- 7
573 6- 3
576 3-12
578 92-29
" 92-30
" R1-10
595 60-41
598 55-14
" 58-18
600 53-20
" 123- 4
621 100-16
636 92-11
661 52-39
663 53-14
" 53-16
" R14- 2

1936 All. con
663 R14- 6
" R14-11
708 R14-12
712 3-19
" 59- 8
803 53-20
857 R5-10
858 58-22
870 55-14

1937 All.
9 52-39
10 53A- 5
" 53A- 6
" 105- 3
" 105-19
18 55- 9
25 123- 4
32 60- 5
36 53A- 9
" 106-32
" 106-39
" 106-40
" 106-41
" 107- 8
" 107-10
39 53-19
" 53-20
" 120- 3
44 60-44
54 R6- 3
56 100-30
108 52- 7
" R3- 7
114 R11- 2
119 92-17
" 92-24
122 84- 5
197 13- 5
219 38-12
235 8- 4
" 10- 6
251 R1- 5
273 3-14
" 8-20
" 59- 8
287 43-9
317 6-16
" 77- 1
328 53A- 3
" 84- 7
" 105-35
" 105-36
" 105-39
" 108(q)-1
" 111- 3
337 76- 7
" R7- 4
424 130-11
" 130-12
" 130-13
442 R11- 2
470 3-22
478 58-35
512 108(b) 4
533 10- 2
547 123- 4
561 117- 3
578 5- 4
" 53A- 6
588 92- 1
" 92- 2
" 92- 3

1937 All. con
588 92- 5
" 92-19
" 92-20
" 92-22
" 92-23
" 92-24
610 7- 3
" 43- 4
618 100-29
646 3-13
" 59- 8
" R1- 6
" R1-19
652 R5-10
665 118- 2
" 118- 3
" 120- 2
705 100- 5
706 83- 2
" 83-17
" 84- 6
" 84-11
711 59- 6
" 59-15
" 68- 2
" 68-13
724 58-33
762 60-10
" 76- 7

1938 All.
22 43- 7
" 58-19
" 60-44
" 100- 4
32 105-13
" 105-19
" 107-10
42 2- 5
" 106-12
64 41-23
98 R6- 3
115 3- 3
167 108(j)-5
" 108(j,-6
188 68- 4
" 68-17
221 73- 1
" 73- 2
" 73- 7
" 73-10
" 73-11
" 73-14
" R4- 7
229 118- 2
" 118- 3
" 118- 6
242 41- 8
341 R14- 6
342 51- 1
388 106-45
418 58- 7
" 58-30
" 58-35
" 67-15
" 68-17
" 101- 4
423 83-15
" 84- 4
" 84-10
" 84-11
431 48- 8
452 123- 1

1938 All. con
473 79- 5
" 79- 6
544 3-22
" 130- 2
574 100-10
577 3- 2
" 58-35
649 106- 2
" 106-41
" 116-12
651 91-25
" R1- 6

1939 All.
6 R1-12
28 R5-14
52 R2- 3
" R3- 6
" R3- 7
72 38-11
86 82- 5
" 82-18
88 R9- 1
141 92- 2
157 Pre- 1
170 55- 9
174 R5-14
190 59A- 3
" 92-13
" 92-27
221 10-14
" 126- 2
260 68- 2
" 68- 4
263 Pre- 4
291 8-15
305 Pre- 1
" 3- 2
" 3-24
" 54-19
314 56- 1
" 56-10
" 56-12
" R4-10
" R5-17
348 54-12
401 R6-16
415 5- 3
" 5- 5
" 8- 3
" 8- 8
504 53A-13
513 38- 8
" 38-11
529 53A- 6
539 58-33
579 100- 1
" 100-25
" 100-28
" 100-30
" R14- 3
" R14-12
600 60-14
" 60-44
611 52-35
" 53A-13
615 58-41
660 101-10
687 2- 6
" 5- 3
" 100-22
" 100-24
688 R1-19

*In the foot-notes to the Commentary * indicates either a leading case or a case giving fuller reasons.*

1939 All. *con*
689 6- 4
713 58-33
719 58- 5
1940 All.
29 2- 5
" 60- 5
55 53- 4
65 84-13
75 92- 5
" 92-23
99 R5- 8
101 59- 8
" 61- 5
141 52-35
196 R14- 4
227 58-33
237 92- 5
" 92-22
256 41- 3
340 53A-13
351 55-14
" 55-18
385 6-34
407 53- 5
" 53-24
416 60-26
" 92- 7
" 92-11
427 8- 3
" 8-15
444 106-41
" 110- 3
" 116-13
453 43- 9
456 2- 6
" 3-29
" 100- 6
" 100-11
" 100-13
" 100-21
" 100-22
" 100-24
457 8- 9
458 5- 4
" 54-19
478 119- 4
528 60-44
540 92- 7
" 101- 3
1941 All.
51 105-50
56 8-20
" 58-36
" 105- 3
" 105- 6
" 105-67
169 53-34
" 53-40
" 67-18
" R4- 9
200 60-44
" 101- 3
327 108(m)-4
345 14- 3
" 58- 4
" 100-10
" 100-13
" 100-17
399 106-12
1942 All.
39 54- 3
" 55- 9

1942 All. *con*
71 54-12
104 67-28
" 82-18
119 100-10
175 41- 9
" 101- 1
254 14- 5
" 14- 7
267 73- 1
308 122-11
326 58-35
" 67-15
" 68-17
330 105- 9
" 107-10
331 3-31
" 59- 9
344 53- 5
402 8-20
409 6-31
" 68-13
444 R11-2
1943 All.
2 53- 4
" 53- 5
" 53- 6
" 53-14
" 53-34
82 105-20
95 122-17
101 5- 4
" 9-11
109 76-13
115 2- 6
" 3-29
" 100- 6
" 100-11
" 100-13
" 100-21
" 100-22
" 100-24
156 56-10
" 101- 1
197 41- 8
212 105- 9
" 107-10
279 107- 7
" 107-15
" 111-14
" 114A-1
321 R1- 1
" R2- 5
" R2-17
" R4-15
" R5- 5
" R5-10
334 82- 2
337 8-20
" 58- 4
" 58-12
" 58-41
393 60-50
" R7- 3
1944 All.
1 41- 1
" 41- 8
17 8- 5
" 41- 3
42 3-31
" 41- 8
" 41-13
" 41-23

1944 All. *con*
42 41-24
" 41-25
" 58-22
" 126-10
61 2-12
91 6-13
104 8- 3
195 65- 4
" 65-10
198 58-35
204 60-28
" 60-33
" 63- 3
" 63A-1
" 63A-4
212 6-13
214 53- 5
" 53- 6
" 53-24
221 58-35
" 105- 9
" 105-70
" 107-10
232 60-41
" 76-12
" 77- 1
243 55- 9
1945 All.
39 55- 8
42 53-16
48 76-15
139 55-12
" 55-14
158 101-10
202 68- 6
239 92- 5
" 92-20
" 92-28
285 111-12
293 111-11
" 111-14
" 112- 4
388 60-44
409 123-12
" 130- 4
422 53A-13
425 108(c)-1
" 108(c)-8
433 128- 5
1946 All.
121 122- 3
125 54-19
" 118- 9
267 5- 4
" 53- 5
328 112- 2
" 114-4a
" 114- 5
400 60- 4
" 62- 2
403 105- 9
" 107-10
476 3- 2
" 53A-13
1947 All.
22 R7- 4
27 58- 4
49 108(j)-1
" 111-11
68 84- 5
74 101-1a

1947 All. *con*
74 101- 3
" 101-10
83 5- 6
" 5-20
" 5-29
110 6-16
" 54- 5
" 54-12
179 124- 1
214 101- 1
" 101- 2
" 101- 4
240 65A- 1
" 111- 8
314 122-11
334 58-33
383 53-11
1948 All.
55 60-42
123 R6-22
261 2- 5
307 55-14
312 58-35
331 92-24
1949 All.
173 106-19
" 106-40
189 76- 4
" 76-12
" 76-15
194 58-33
204 54-12
" 118- 4
257 52- 2
" 52-39
317 R5- 5
335 58-33
340 55-18
427 R6-10
455 105- 9
" 107-10

A. I. R.
ASSAM
1949 Assam
8 53A- 4
" 53A-13
" 53A-19
17 41- 8
" 41-23

A. I. R.
BOMBAY
1914 Bom.
15 58-39
25 101- 1
102 68-13
109 18- 5
123 60-22
124 60-22
141 68-13
152 106-16
" 106-30
177 58-33
178 137- 5
179 58-33
181 6-26a
200 60-26
" R2-18

1914 Bom. *con*
231 54-23
" 58-33
259 60-44
" 91- 5
267 100- 4
" 100-25
268 67-20
" 101- 1
" R1-10
" R1-19
283 53- 9
286 137- 4
290 4- 3
" 137- 5
294 105-47
" 105-79
299 132- 2
" 132- 7
312 66- 7
" 108(h)-2
318 6-2a
1915 Bom.
22 53A- 3
" 54-23
49 105-60
54 67A- 1
89 53- 5
" 53- 9
" 53-10
" 53-32
102 65- 4
" 68-13
" R6- 3
109 8- 9
150 38- 5
" 38-11
229 8-20
" 58-33
272 R1-11
1916 Bom.
1 53A- 3
" 55- 1
59 2- 3
61 R14- 7
77 9- 7
" 58-11
" R2-20
95 40- 8
99 R5-27
104 40- 9
108 60-23
" 76- 8
123 3-11
" 3-16
" 3-18
" 59- 7
130 7- 7
" 44- 6
" 44- 7
197 105-69
215 58-33
223 54-18
" 91-13
278 R1-12
279 55- 9
302 92-16
305 R4-16
1917 Bom.
5 111-16
15 41- 9
34 108(a)-1

1917 Bom. *con*
34 108(m)-1
" 108(m)-3
46 108(m)-1
" 108(m)-3
111 108(j)-3
149 72- 3
151 2- 6
" 52-18
" 52-34
155 51-11
203 4- 5
" 54-21
235 7- 7
274 105-32
" 107- 5
287 3- 2
1918 Bom.
1 60-26
79 6- 8
" 109- 5
" 111-19
84 72- 3
" 63A- 1
101 44- 6
105 52-18
115 6-26a
" 105-69
132 111-14
152 63- 5
181 82-12
217 R5-10
251 44- 5
1919 Bom.
34 2- 5
45 105-69
56 R14- 3
61 R1-11
78 60-15
84 7- 7
" 44- 6
97 105-37
" 116-13
99 53-15
135 R1- 3
" R1-11
" R1-19
1920 Bom.
1 38- 5
10 53-14
53 111-14
56 R5-23
" R14-11
73 10- 4
" 11- 4
" 11- 9
82 60-28
87 51-25
" 108(h)-3
" 108(h)-4
95 R6- 3
" R6- 8
" R15-10a
96 R1- 5
117 58-33
135 123- 4
142 6-34
191 60-44
202 R14-10
" R14-12
210 54-23
215 111- 3

In the foot-notes to the Commentary † indicates a case which is most appropriate for the proposition.

1920 Bom. con

219	39- 1
"	39- 5
249	3-11
"	3-18
"	59- 8
295	21- 3
306	82-20
"	R1- 6
333	3-11
341	7- 7
355	6- 4

1921 Bom.

27	10-17
"	108(j)-1
"	103(j)-6
28	58-35
"	68- 6
"	R2- 8
51	60-28
93	3- 2
"	108(q)-1
152	R1-19
156	59- 7
161	3-34
"	3-38
"	40-17
172	92- 2
198	123- 5
200	105- 4
209	3- 2
224	105-43
"	106-12
227	105-79
248	123- 4
250	63A- 1
262	28- 3
"	30- 2
"	32- 5
282	67A-1
284	60-26
285	R14- 7
"	R14-12
307	111-16
"	112- 6
388	18- 2
"	18- 3
395	111-14
401	53A-3
403	114- 8
413	91-11
"	91-18
421	69- 9
426	41- 6
442	58-33
446	6- 4
454	105-43
459	3-39

1922 Bom.

45	105-72
78	6-30
84	14-10
"	54-23
124	54- 4
127	R7- 3
"	R8- 3
137	44- 6
150	82-17
"	95- 1
156	60-17
"	R1- 6
179	8- 6
186	55-11

1922 Bom. con

197	116-13
211	101- 1
"	101- 2
217	66- 4
"	68- 3
237	R6-12
"	R14-13
277	60-28
"	60-30
334	R1-12
350	R1- 9
352	122-12
402	105-43
"	105-49
404	105- 4
424	60-19
"	60-41
"	R1- 9
433	60-16
"	60B- 1
437	6- 4
440	58-39

1923 Bom.

13	3-39
32	R6- 3
42	60-17
90	59- 8
107	5- 1
"	6- 3
146	105-42
"	105-82
148	55- 3
199	61- 6
213	7- 7
228	105-14
276	5- 4
"	6-10
"	6-11
"	10- 3
287	58- 6
"	100-16
296	7- 7
358	6-2a
385	63A- 5
398	105-40
"	116-13
403	3-22
"	6-16
410	3-34
"	40-17
411	R1-11
415	19- 6
"	19- 8
420	R2- 1
473	3- 2
"	53A- 1
"	53A- 3
"	58-33

1924 Bom.

33	R7- 3
58	3-31
88	122-15
"	123- 1
"	123-12
98	R8-9
115	106-18
"	106-19
"	116-12
135	6-34
169	R5-27
170	6-2a
172	R7- 6

1924 Bom. con

212	115- 1
252	55- 3
264	60-34
"	60-40
"	65- 5
"	72- 2
"	72- 4
"	72- 5
"	84- 7
"	84-14
"	84-15
"	84-18
282	55- 3
"	55-20
290	1- 1
300	43- 9
322	116- 1
"	116-2
387	2- 5
"	67-15
410	123- 4
434	52-27
"	123- 6
454	105-50
"	111-14
"	112- 4
467	52- 1
"	52-31
516	122-12
517	119-5

1925 Bom.

12	Pre- 4
"	8- 4
"	8-10
"	8-20
64	55- 3
69	55- 3
"	60-14
"	108(l)-6
85	55- 2
"	55-21
167	106-10
"	106-40
168	108(g)-2
176	52-28
"	52-36
181	55- 7
183	3-32
"	40- 1
"	55- 2
210	52-29
"	123- 6
239	R14-12
287	53- 5
288	58-33
299	41-10
"	41-23
305	123- 4
320	7- 7
330	40- 1
"	76- 1
"	76- 8
"	108(j)-4
"	108(j)-5
"	108(j)-6
348	41- 8
"	100-28
362	R11-2
390	105-48
484	95- 4
501	58-33
509	R3- 7

1925 Bom. con

512	107-10
514	38- 8
524	111-14

1926 Bom.

24	54-23
28	100-10
31	Pre- 2
"	60-43
40	60-22
97	54-23
"	58-33
107	58-31
"	58-33
115	67-22
131	54-23
"	58-33
209	8-20
261	123- 5
"	123- 7
273	R3- 3
279	R14- 4
"	R14-11
303	60-41
"	60-44
304	114A- 1
363	60-41
374	105-27
"	107- 3
"	107-10
"	108(j)-1
384	53A- 1
"	53A- 3
"	105-79
"	107- 7
399	44- 6
427	100-10
495	60-33
"	100- 5
"	100-16
497	14-10
"	58-33
522	R1-15
559	123- 4
567	50- 3
"	65A- 1
595	76-10
599	51- 1
"	51-18

1927 Bom.

32	R7-13
"	R8- 7
49	R1- 7
93	52- 1
"	52-40
115	105-14
"	108(f)-1
"	108(m)-1
131	R3- 7
"	R5- 4
143	6- 6
145	76- 6
"	109- 4
157	54-23
167	58-39
175	R7-13
"	R8- 7
192	106- 3
"	106-34
"	116-18
195	54-23
"	55- 3
"	55- 4

1927 Bom. con

195	55-20
368	41- 3
384	126-14
474	R1- 6
513	60-48
"	R1- 6
540	50-23
"	73- 6
611	51- 4
"	51- 8
"	51-16
627	53A- 3
650	116-13
655	59- 8

1928 Bom.

16	3-11
61	108(e)-3
65	52- 1
"	52-19
"	52-40
123	104 -1
"	R2-11
150	51- 8
"	63A- 1
250	53A- 7
"	122- 2
"	123- 5
265	111-17
267	3-11
"	3-18
"	3-19
"	59- 8
269	48- 9
305	53A- 3
323	R6-10
328	55- 5
"	55-20
377	105-58
"	105-67
"	105-82
380	65- 4
420	108(l)-6
427	3-32
"	55-21
484	59-14

1929 Bom.

24	55- 7
"	60-25
"	69-27
"	69-28
51	8-14
55	38- 8
60	55-12
66	105-25
"	105-27
"	105-29
139	60-41
"	91- 4
"	91- 8
"	92-16
"	95- 1
147	6-27
"	53- 9
"	54-14
"	54-15
186	60-28
200	52-31
"	52-33
213	R1-12
227	R5- 5
"	R14- 3
230	51- 7

1929 Bom. con

246	51- 1
"	51- 8
"	51-17
"	51-19
262	52-11
337	52-27
"	52-35
"	R7-16
"	R9- 1
361	55- 9
467	3- 2
"	108(o)-4
471	3-17

1930 Bom.

11	R4-12
39	105-49
"	105-64
47	39- 8
55	2- 5
79	58-33
125	8-20
135	65- 4
165	105-14
191	18- 5
"	21- 3
208	R6- 8
210	105- 4
"	105- 7
"	105-24
213	55-20
221	67-11
"	67-20
"	109- 4
"	111- 8
373	35-28
395	111-17
401	60-18
"	60-26
409	3-22
466	60-41
592	108- 1

1931 Bom.

118	84- 5
178	105-22
"	105-25
"	105-27
"	105-39
"	111- 6
218	44- 6
227	41-24
269	6-35
"	25- 9
280	52-40
371	58-33
399	7- 7
430	3-33
436	105-43
"	105-44
"	105-49
460	105-25
"	105-47
533	R1- 7
539	52- 1
"	52-39
545	92-24
"	101- 1
578	14-14
"	54-23

1932 Bom.

3	105-52
"	105-79

References to Official Reports are invariably given in all cases found in the Official Reports.

1932 Bom.con
136 R 5- 8
190 51- 4
244 6- 4
247 54- 5
" 54-14
" 55-12
257 6-26
301 52- 8
" 52-14
401 58-39
446 130- 5
" 130-12
" 130-13
449 8-20
478 6-18
493 107- 3
498 53-24
526 63- 5
599 111-14
613 58- 11
642 Pre- 6
" 5- 1
" 58-39

1933 Bom.
25 91- 5
" R1-19
34 28- 3
" 30- 2
" 32- 5
42 6-20
" 43- 9
51 R1- 1
" R14-13
87 8-20
97 91-12
" 91-13
" 105-42
" 105-50
" 111-12
121 44- 5
168 117- 2
209 6-27
" 6-28
" 6-34
" 54-12
" 122-13
217 3-31
262 6-35
298 4- 8
" 58- 4
" 100- 5
" 100-16
324 19- 2
377 8-20
" 105-69
381 53A- 5
" 53A- 9
" 53A-11
" 53A-13
" 53A-16
439 53-31
475 54-23

1934 Bom.
1 41-23
21 123- 4
24 100-14
32 91- 4
" 108(j)-2
" 108(j)-4
" 108(j)-5
140 105- 3
" 105-20

1934 Bom.con
189 48- 3
" 48-10
" 100-13
" 100-16
" 100-22
194 105-79
234 6-20
241 R14- 3
" R14- 6
321 76- 3
329 44- 6
356 137- 4
434 8-20

1935 Bom.
16 55- 2
" 55- 3
41 2- 5
" 111-14
" 111-25
" 114A- 1
54 52-35
84 123- 4
91 53A- 5
97 R7- 4
" R11-2
122 R7- 4
144 111-17
208 53A- 3
" 53A- 5
219 51-22
" 51-25
" 106-34
247 105-79
" 106-20
" 106-23
" 106-37
" 106-45
259 38-11
262 106-34
316 53-29
340 55- 5
343 137- 4
347 100-11

1936 Bom.
10 5- 4
" 53- 5
62 3-42
" 5- 3
88 108(j)-6
" 109- 5
94 3-19
" 69-19
98 111-24
160 53-10a
175 54-19
177 R14- 7
246 105-19
" 107- 8
276 40-17
290 53A- 3
330 8-12
" 8-20
389 7- 7
" 38- 5

1937 Bom.
39 58-39
98 7- 7
142 54-23
" 55-20
244 52- 1
" 52-14

1937 Bom.con
244 52-35
" 52-40
382 3-22
" 3-27
472 8-20
476 53-24
483 76- 5
" 76- 7
" 76-12

1938 Bom.
71 51- 1
77 55- 3
97 126- 7
115 92- 5
" 92-19
121 6- 4
" 52- 9
125 8- 6
" 8-20
" 41-10
" 41-23
196 67A- 2
" 67A- 6
228 6- 7
234 38-11
289 53-20
" 53-24
304 126- 9
357 48- 3
" 58- 6
386 92-19
388 38- 8
508 92- 5
" 92- 9

1939 Bom.
31 53A- 5
" 54-19
" 54-22
98 115- 1
" 115- 2
183 100-11
" 100-21
206 R15-10a
215 105-30
303 60- 1
322 R2-11
" R10-3
403 52- 1
" 52-20
435 8-20
496 5- 4
" 53- 5
508 53-10
" 53-15
" 53-16
" 53-20
" 53-24
" 53-26
" 53-32

1940 Bom.
1 58-33
15 91-12
63 58-33
90 53A- 5
154 108(j)-4
193 53A- 5
225 8-20
" 58-12
276 R4- 5
" R15-10a
281 53A-13

1940 Bom.con
287 76- 5
" 76- 6
" 76-13
321 R5-13
395 52-20

1941 Bom.
28 76-13
48 55-10
65 53-23
71 100-19
" R6- 8
" R15-10a
90 101- 1
" R6- 8
" R15-10a
153 92- 6
" 92-22
198 55-12
286 108(l)-5
337 108(h)-3
" 108(h)-8
339 69- 7
" 69-13
" 69-26
346 53A- 4
" 53A-11
" 53A-13
389 6-23

1942 Bom.
46 69- 4
" 69-26
" 69-26a
" 69-27
" 69-28
67 55-12
95 82-15
" 101- 1
" 101- 9
98 59A- 4
" 92-13
" 92-22
146 R1-19
155 16- 3
" 27- 4
161 105-43
" 105-50
227 83- 7
" 92- 5
" 92-22
278 R14- 2
" R14-12
291 3-18
339 3-34

1943 Bom.
7 19- 4
" 122- 8
" 122-11
" 123-12
21 100-11
24 R5-27
27 52-10
" 52-24
" 52-31
65 R7- 3
141 108(q)-2
148 105-27
" 105-47
" 105-72
" 105-79
" 105-80a
" 108(j)-1

1943 Bom.con
158 R15-10a
187 39- 1
" 39- 2
" 39- 3
191 60- 4
" 62- 3
" 92- 1
" 92-15
" 92-24
" 95- 1
306 105-25
" 105-31
" 106- 2
" 106-19
" 106-41
" 110- 1
406 53A- 9
" 53A-10
" 53A-11
412 39- 1
" 39- 2
" 39- 5
414 100- 5
" 100-22
453 123- 1
" 123-12

1944 Bom.
25 3-16
" 59- 8
35 R1-12
" R5-13
50 39- 1
" 39- 2
" 39- 5
" 54-14
105 53A- 3
" 53A- 5
" 53A- 9
156 60-22
" 69- 3
" 69-22
181 106-40
" 108(q)-2
191 52-6a
" 52-14
" 52-20
" 52-31
" 52-38
" 100-28
196 21- 3
" 32- 3
210 105-35
" 105-52
" 111- 3
" 116-10
267 53-35

1945 Bom.
11 130- 3
" 130-19
" 134- 5
34 39- 1
" 39- 2
69 60-44
" 92-15
" 92-24
116 101- 1
" 101- 5
132 113- 1
" 113- 3
" 116- 6
137 108(q)-2
161 60-22

1945 Bom.con
169 R4- 6
187 55- 2
" 55- 8
237 108(q)-2
248 70- 2
" 70- 4
" R5-17
307 60-26
351 67-27
395 13- 2
" 15- 2
399 108(j)-1
409 52- 8
" 52-35

1946 Bom.
207 52-12
" 52-20
462 52-38
499 58-38
" 67-16

1947 Bom.
49 3-30
" 3-34
" 41- 1
" 41- 7
" 41-23
" 122-17
" 126-16
57 7- 7
86 114- 4
" 114- 7
" 114- 9
152 68- 5
185 5- 5
" 6- 6
" 13- 6
" 19- 2
" 19- 8
191 10- 1
" 14-10
198 6-34
" 122-13
206 59- 4
" 60-48
241 51- 8
" 51- 9
" 105-14
396 3-19

1948 Bom.
53 45- 3
" 45- 4
114 123- 4
188 13- 2
" 15- 2
" 20- 3
211 R1- 6
" R1-19
226 60-26
233 6-2a
" 6-23
265 53-11
" 53-12
" 53-35
322 3-19
336 106-17
349 108 j)-1
" 108(j)-3
" 108(j)-6
" 111-23
379 76- 5
" 101- 1

1948 Bom. *con*
379 101-1a
" 101-10
385 116- 6
415 15- 2
1949 Bom.
131 108(j)-1
154 55- 9
" 60-22

A. I. R.
CALCUTTA

1914 Cal.
4 8- 4
21 53A- 3
51 111-14
60 6-19
129 55-15
137 51- 8
" 55- 3
143 R1- 5
173 105-84
200 122-5a
202 6-10
205 8-10
208 82-14
214 R4- 5
" R6- 3
223 126-10
233 101- 1
234 54- 4
239 54-14
" 55-12
263 100- 5
" 100-29
283 44- 4
300 105-47
318 92- 2
321 43- 9
323 67-22
" R1- 8
331 3-39
" 48- 9
333 3-39
335 54-12
" 54-23
376 115- 4
382 3-32
" 105-35
" 105-79
385 54-14
455 67A- 5
" R1-12
475 103(l)-8
480 108(l)-14
485 105- 8
489 111- 7
503 53-11
566 123-12
" 130-11
" 137- 4
570 27- 2
" 28- 2
595 105-69
617 43-10
618 2- 1
" 2- 2
" 111- 7
" 117- 8
638 43- 9
645 105-79
" 111-14

1914 Cal. *con*
646 67A- 1
685 2- 5
" 108(j)-1
669 67-20
672 82-14
685 105-21
730 108(l)-14
740 84- 5
754 54-22
" 107- 9
" 116-12
775 108(l)-8
777 8-20
781 105-60
788 67-27
" R1- 6
793 58-44
823 58-31
" 58-33
" 84-17
828 52-40
" 56-10
" 81-13
" R4-10
850 111-11
" 111-13
866 92- 7
894 60-48
" 62- 2
896 108(b)-3
" 108(b)-8
910 R14-12

1915 Cal.
8 R6-17
24 73- 1
64 2- 5
" 105-38
" 111- 5
" 116- 5
" 116-11
68 112- 6
" 116-12
77 58-17
" 101- 3
141 38- 8
" 38-11
154 40-25
" 105-72
" 108(j)-1
161 58-11
" 65- 4
" 67-14
" R2-20
182 117- 2
203 R4- 7
209 10-12
" 108(j)-1
242 10-12
" 105-67
250 8-10
" 105-44
264 44- 4
278 82- 4
313 106-15
" 106-39
" 106-43
" 106-45
" 116-11
" 116-12
334 82- 2
" 82-22
869 72- 9

1915 Cal. *con*
369 72-10
" R10- 6
370 105-60
373 R1-10
376 58-35
" 67-15
380 73- 1
386 108(d)- 3
403 105-42
414 8- 6
" 24- 2
427 R14-12
432 R1- 2
" R1-12
452 101- 1
" 111- 7
454 112- 2
478 3-28
" 58- 4
" 100-11
" 100-13
" 100-21
" 100-22
" 100-23
487 8- 6
492 53- 9
494 105-12
" 105-70
498 72- 2
" 83-17
502 R2-17
528 60-14
533 58-13
" R14-4
536 52- 1
" 52-31
543 55-12
" 100-19
554 108(l)-14
568 108(l)-14
570 R12- 3
601 108(g)-4
" 123- 4
612 8- 4
660 111-14
679 R11-2
699 60- 5
" 68- 3
" 73-11
709 105-51
" 106-49
711 2- 5
" 105-43
" 108(j)-1
712 65- 4
729 R1- 2
735 8- 5
749 73- 1
751 43- 7
" 43-12
759 82- 3
" 82-16
" 82-17
" 95- 1
" 95- 7
769 58-36
" 105-67
796 R11-2
813 100-25

1916 Cal.
31 5- 4
82 117-8

1916 Cal. *con*
33 3-34
" 78- 1
" 78- 3
" 78- 4
" 78- 5
61 59- 7
63 108(l)14
70 18- 1
" 18- 4
74 6-35
104 108(l)14
108 107- 7
118 117- 3
120 53-34
" 54-14
124 44- 5
136 54- 1
156 8-10
170 44- 8
173 R1- 5
269 6- 6
" 6-25
295 32-11
325 118-10
349 53-16
" 58-18
358 105-26
" 105-72
" 106-15
" 107- 8
376 53A 3
404 53- 6
410 37- 9
452 65- 4
454 111- 9
" 117- 2
465 82-21
485 60-43
530 58-18
532 53- 9
546 117- 2
551 54-21
576 106-42
596 108(d)-3
609 117- 3
644 2- 6
" 6-11
" 10- 1
" 10- 6
645 5- 4
654 32- 4
664 105-19
" 105-47
707 106-21
" 108(e)-4
714 53- 4
722 53A- 3
728 7- 7
730 117- 3
745 41-23
760 8-20
771 R1-19
775 8- 6
" 8-20
" 28- 3
" 32- 3
792 38-12
801 92-10
" 100-13
" 101- 1
808 R1-10
816 100-28
827 2- 5

1916 Cal. *con*
827 108(j)-1
843 3-31
" 8-20
870 65A- 4
876 53-34
884 3-11
" 3-11a
891 44- 5
906 106-34
931 112- 2
" 112- 3
" 112- 4
934 54-22
962 108(l)-14
974 55-20

1917 Cal.
19 8- 6
25 54-22
37 106- 2
" 117- 2
80 108(l)-14
82 82- 5
" R14-11
86 111-12
104 58-39
113 105-62
116 2- 5
" 105-69
" 111- 4
" 111-14
" 111-22
177 108(l)-14
217 58-31
" 76- 5
" 76-12
219 106-27
" 108 (q)-1
" 116- 1
222 52-39
" 65A- 1
235 7- 7
236 10-17
" 12- 8
" 111- 1
" 111- 8
" 111-12
" 111-16
" 115- 4
249 105-35
345 44- 4
375 58-25
397 105-62
426 10-17
" 106-24
" 111-16
432 43- 2
467 43-10
509 105-35
" 111- 3
526 105-35
" 111- 3
565 58-33
574 108(j)-1
589 54- 14
609 10-17
" 111-13
621 106-34
" 106-38
" 111-26
655 41-23
663 8- 4
681 Pre- 1

1917 Cal. *con*
681 Pre- 5
" 3- 2
" 6- 9
" 9- 8
" 54- 7
" 123- 1
693 59- 8
734 108(l)-14
737 105-60
746 105-47
798 108(j)-1
827 105-62
830 81-13
853 62- 5
" 76-12
" R2- 6

1918 Cal.
1 105-44
8 108(l)-14
19 44- 4
20 3-39
34 105-49
49 108(j)-6
59 105-35
" 111- 3
80 R1-19
82 53- 6
" 53-16
" 53-19
95 R1-16
113 54-12
151 R11- 2
163 2- 5
165 8- 8
" 58-11
" 58-39
182 108(j)-1
192 60-23
194 58- 4
216 106-45
233 9-12
" 111- 9
244 108(n)-1
265 73- 1
" 100-12
306 40- 1
355 106- 6
363 126- 9
391 108(q)-1
" 111- 3
" 116-13
393 44- 5
411 3- 2
" 8-17
" 48-16
" 54- 6
" 58- 4
" 60A- 2
" 78- 1
" 78-10
419 43-10
424 R2-18
" R3- 5
" R3- 6
445 6-21
450 76-11
459 105-47
" R5-20
463 82-10
472 R2-16
" R5-14
475 R14-12

Remarks in foot-notes amplify principles in the Commentary and state the special features of the case.

1918 Cal. *con*

517 105-47
524 52-18
525 108(l)-14
532 8- 5
539 48- 8
552 112- 4
557 10-18
" 58- 9
" 58-22
" 60-34
" 69A- 2
" 100- 5
" 100- 6
" R1- 5
601 105-13
" 105-37
602 60-46
609 8-20
615 122- 6
" 126- 5
" 126-16
629 51-22
638 60-28
" 60-29
639 105-41
" 105-47
" 105-81
" 108(d)-3
665 103- 2
705 100-25
" 100-28
" R14- 3
" R14- 7
" R14-11
750 72- 2
794 108(o)-4
797 67-15
" 68-17
" 105-62
799 105-47
" 105-64
804 7- 7
" 100- 1
806 60-44
" 91- 8
823 105-47
" 195-72
828 54-21
849 105-47
906 106-15
" 107- 9
923 53A- 3
933 58-27
" 60-53
" 67-30
" R1- 5
941 55-15
960 48- 8
969 111-16
975 60-41
" 91- 8
1027 7- 8
1039 R7- 7
" R10- 6

1919 Cal.

14 105-18
40 52-10
41 105-44
46 58-17
" 60-10
" 68- 5
" 68-17

1919 Cal. *con*

46 72- 3
54 106- 2
" 106-49
65 106-15
" 107- 4
68 R2-18
107 3- 2
" 54-19
109 58-33
110 116- 7
132 108(j)-1
" 117- 2
159 108(l)-2
168 105- 4
193 54- 3
199 122-5a
212 106-15
" 216-11
234 84- 7
235 3-38
251 108(j)-1
264 105-18
309 76- 8
314 60-23
" 67-22
" 76-12
" 77- 1
325 54-19
" 54-22
352 60-43
" 82-12
365 7- 7
378 108(d)-3
379 108(l)-14
391 108(l)-2
400 106-12
" 106-15
" 106-44
" 107- 4
404 55- 9
405 10-17
" 111-13
432 R6- 3
482 2- 5
" 105- 47
520 67- 5
529 2- 5
" 105-35
" 106-15
" 106-49
" 107- 1
" 116-11
542 8-20
550 3-17
551 Pre- 1
588 8- 3
593 60-14
603 38- 8
" 38-11
" 38-12
607 Pre- 2
" 53A- 3
620 111- 3
634 92-15
" 100-13
642 2- 2
" 111- 7
650 7- 7
671 3- 2
694 9-12
" 111- 9
710 53A- 3
716 67-30

1919 Cal. *con*

725 105-81
741 123- 4
746 38-12
773 53-16
" 53-19
776 111-16
796 105- 8
809 18- 2
822 6-13
" 60-44
828 6- 4
837 105- 4
" 110- 1
840 111- 9
844 54-14
845 53A- 3
847 8- 6
855 54-14
858 53-20
901 105-62
908 8- 8
" 48-14
" 58-38
942 10-13
" 10-17
951 R6-10
972 105-35
" 111- 3
992 44- 4
997 37- 3
" 108(l)- 6
1004 108(l)-14
1008 R14- 7
1024 43- 3
" 43-13
" 59- 8
1028 111-13
1055 44- 9
1057 105-69
1061 60-41
1075 11- 3
1077 58-33

1920 Cal.

26 53-34
" 73- 6
47 105-42
93 122-13
96 105-35
" 111- 3
112 7- 7
140 10- 1
166 8-20
192 105-68
270 8-20
287 106-45
" R1- 5
312 58-39
325 105-49
334 68- 4
361 106-15
" 106-39
363 R14- 7
" R14-12
388 53A- 3
435 2- 5
448 3- 2
513 106-34
533 R6-19
548 105-18
552 105-50
581 107- 4
594 105-64

1920 Cal. *con*

610 44- 4
651 55- 5
655 112- 2
675 52-10
679 55-20
683 58-33
693 105- 8
" 105-42
706 115- 1
734 111-14
746 6-13
784 3-16
799 8-20
822 54-17
832 7- 7
858 106-15
" 107- 4
" 111- 9
866 111-16
875 105-62
888 R2- 7
" R11- 2
899 112- 4
931 55-20
951 16- 4
956 100-29
965 108(l)-1
969 16- 4
986 14-13
" 100- 5

1921 Cal.

83 108(d)-3
126 106-23
" 106-49
" 113- 3
127 105- 4
148 122-15
157 67-20
" R1-19
162 14- 2
" 14-10
166 82-17
" 95- 1
169 60-26
172 58-14
175 122-5
202 6- 6
208 3-18
220 108(l)-14
225 123-4
276 3-17
" 59- 8
300 116- 1
" 117- 2
303 108(l)-14
321 61- 2
" 67A- 1
323 14-10
343 R1- 5
379 106-13
" 117- 3
383 53A- 3
389 18- 2
" 26- 2
408 11- 2
435 58-18
" 58-22
" 59-11
444 115- 4
453 105-49
" 105-72
456 R6-17

1921 Cal. *con*

474 10-17
" 105-26
" 105-47
" 105-51
" 111-13
486 6-34
501 6- 3
" 6- 4
" 6- 7
519 53A- 3
532 108(c)-1
" 108(c)-2
" 108(c)-3
549 41- 7
" 41-15
551 R5-24
" R5-29
554 R1- 6
" R1-19
565 114- 9
572 7- 7
574 105-35
" 105-37
" 105-39
" 106-26
" 111- 3
582 2- 5
" 43- 9
" 108(j)-1
599 101- 6
647 123- 2
" 123-15
653 67-22
730 3-32
" 52-14
" 52-18
741 8-20
" 108(j)-1
" 116- 4
748 43- 3
750 8-20
781 92- 2
" 101- 1
789 116- 6
792 60-41
795 3-22
" 6-16
801 52-40
" R1- 6
806 108(l)-14

1922 Cal.

23 91- 8
" 91-12
" R1-19
" R5-13
27 100- 5
32 67-30
" 91- 8
35 R14- 3
" R14- 6
" R14-14
52 67-16
" 68- 2
" R6- 5
87 108(c)-1
" 108(l)-14
96 10-12
" 111-13
114 101- 4
116 25- 3
150 7- 7
153 108(l)-14

1922 Cal. *con*

160 59- 8
168 3-17
" 68-13
185 105-84
189 R9- 1
193 105-80
201 106-13
235 52-18
237 108(c)-2
" 108(c)-3
284 111- 7
300 8-20
345 44- 5
348 105-83
" 108(b)-2
358 52-13
" 52-38
412 52-24
" 109- 4
422 123- 4
436 53A- 3
" 105-30
458 7- 7
461 8-20
511 105-11
542 43- 7

1923 Cal.

27 14-13
" 100- 5
35 54-17
41 108(c)-1
53 65- 4
60 5- 3
" 122-5a
63 53A- 3
" 106-31
90 53- 9
121 60-23
" R14- 7
" R14-12
130 53A- 3
" 105-39
" 105-82
149 59- 7
" 59- 8
154 6-27
" 6-35
" 53- 9
162 108(l)-14
165 43- 7
189 109- 2
" 109- 4
192 108(c)-4
228 53- 7
240 41-14
" 41-15
" 41-23
" 41-25
252 52-13
" 52-31
" 52-40
274 R1-19
335 8- 2
345 53A- 3
351 105-47
" 105-64
368 109- 4
373 111- 7
423 43- 7
429 108(l)14
432 105- 4
" 117- 4

1923 Cal. *con*

505 105-47
524 106-31
" 106-40
" 108(f)-1
"108(m)-1
" 116-12
563 38-11
" 38-12
567 58-18
575 38-12
626 R4-15
" R5- 5
641 55-21
663 112- 2
" 113- 3
" 113- 4
669 8-20
670 107- 3
679 10-17
" 40-12
" 40-25
681 73-10
682 105-49
" 106-44
691 115- 1
705 105-47
708 18- 2
719 130- 2
" 130-17
" 131- 2
" 131- 4
" 131- 6

1924 Cal.

56 108(o)-7
57 6-31
148 55- 9
156 51-22
" 105-44
" 105-50
172 55- 9
188 52-40
209 82-19
" R6-10
240 2- 5
" 108(q)-1
" 116-13
346 105- 4
" 105-35
" 105-36
" 105-59
348 3-20
" 59- 6
355 111-10
359 108(j)-6
361 10-17
415 3-11
438 51-22
445 116-13
465 105-44
" 105-50
467 53- 7
483 53A- 3
485 R14- 4
487 40- 1
" 40- 5
520 112- 2
535 105- 8
558 105- 4
592 58-40
" 68-12
" 68-17
" 98- 1

1924 Cal. *con*

592 98- 3
" 98- 5
600 48- 8
645 R14-11
" R14-14
647 111-14
710 60-14
792 44- 4
881 R5-13
983 2- 5
990 Pre- 2
" 58-11
1012 2- 5
" 108(j)-1
1047 5- 1
" 6-16
" 6-21
" 8-20
" 54-22
1069 36- 2

1925 Cal.

59 67-20
" 91-41
61 54-23
77 58-38
94 60-43
" R1-19
105 58-33
" 60- 5
114 105-62
139 108(o)-4
152 R1-19
155 108(n)-1
181 105- 1
193 108(d)-3
197 108(l)-6
202 117- 3
235 44- 4
239 52- 1
" 52-23
" 126-10
251 50- 2
" 52-39
" 65A- 1
268 R11- 2
272 44- 4
309 105-44
" 105-48
" 105-49
" 105-50
" 107- 1
340 105-44
" 105-47
346 8-20
370 8-20
" 105- 4
" 105-14
395 52-17
423 108(j)-6
" 108(j)-9
435 7- 7
471 10-12
485 58-39
516 105-35
599 55-15
640 53-30
656 8-20
703 52-17
724 35-22
" 35-23
750 111-15
752 106-37

1925 Cal. *con*

758 108(d)-1
785 R1-14
805 108(l)-14
856 53A- 3
862 58-33
" 62- 2
962 2- 3
973 58-39
" R1- 5
" R1- 8
993 41- 1
" 41-10
996 122-5a
1027 44- 4
1034 41- 8
" 41-23
1048 60-43
1056 108(j)-4
1067 100-11
1087 105- 4
" 105-24
1114 108(d)-3
" 108(q)-1
1135 72- 5
" R2-11
" R4-12
1145 73- 1
" 73-13
1151 58-31
" 58-33
1171 105-11
" 105-19
" 107- 7
1187 108(l)-14
1212 111-11
" 111-14
1225 105-19
" 107- 7
1238 111- 8
1243 52-40
1248 8-20

1926 Cal.

59 6-35
97 8- 3
150 3-18
165 101- 1
" R5-19
170 122- 1
191 52-14
193 111-16
204 3-39
" 8-14
" 50- 3
" 52-35
" 58-39
215 105- 1
231 92-16
310 84- 8
312 105- 1
" 106- 2
" 106-13
" 117- 3
322 105-43
" 105-45
" 105-47
333 108(l)-6
339 54-23
" 55-20
354 106- 3
" 108(q)-1
373 105- 1
" 106-13

1926 Cal. *con*

373 117- 3
379 106- 7
385 55- 2
" 55-17
416 R1- 6
" R1-19
428 6-18
" 8-14
447 130- 2
" 130-12
" 130-13
" 130-15
" 137- 4
451 10-12
" 10-13
458 58-33
525 56- 7
" 81- 6
533 10-17
" 105-47
546 108(f)-1
558 105-26
" 105-47
" 106-15
" 111- 6
561 30- 2
" 32-11
592 105-49
634 105-44
" 105-52
" 105-79
" 105-80
" 105-81
" 106-37
637 3-16
" 59- 8
657 82- 2
696 116- 2
705 54-21
714 52-19
763 113- 3
765 68-18
" 72- 9
845 108(j)-6
850 53- 9
883 108(d)-3
889 R14- 4
906 108(c)-2
908 108(l)-14
916 41- 1
" 41-20
" 41-23
" 41-25
952 105-38
" 105-80
993 32- 5
" 105-42
" 105-72
1065 105-35
" 105-39
" 111- 3
1068 39- 1
1076 44- 5
1148 108(l)-14
1175 19-11
1181 111-14
1192 R1- 5
1205 111-14
1226 108(l)-14
1239 58-35
" 77- 1
" 116- 1
" 116-12

1927 Cal.

39 2- 5
" 108(j)-1
41 14-10
" 40-25
54 51-22
79 108(l)-6
100 105-36
" 108(j)-5
140 53- 7
160 38- 8
" 38-11
168 105-64
179 105-26
" 111- 6
195 60-43
197 123- 4
220 41- 8
" 108(j)-1
234 105-50
" 105-72
243 105-62
259 91- 8
" R1-19
270 50- 3
275 105- 4
279 116-12
" 117- 3
365 53A- 3
373 108(j)-1
393 68-18
" 92- 3
425 60-14
" 67-27
474 53-29
479 60-41
" 91- 4
" R1-18
522 56- 7
" 56-10
" R4-10
538 3-32
" 48- 1
" 58-39
" 78- 1
" 78- 9
" 78-10
559 91- 8
561 2- 5
" 105-69
" 111-22
665 43- 9
" 82-20
682 100-10
691 2- 6
" 136- 5
725 58-38
" 76- 8
" 105-36
" 105-38
" 105-39
" 105-59
" 106-41
" 116- 4
" 116-10
737 108(l)-14
748 2- 5
763 Pre- 1
" 2- 5
" 3-11
766 53-16
806 3-32
808 123- 4
836 7- 7

1927 Cal. *con*

836 53- 6
" 53-14
" 53-20
" 58-40
" 98- 1
880 67-27
884 R14-12
889 54-12
902 108(d)-1
908 114- 7
913 107-13
926 59- 8
933 3-31
936 44- 4
941 106-42
951 108(l)-14
954 53A- 3
956 5- 1
" 54-23

1928 Cal.

99 111-13
112 105-62
116 91- 5
125 60-12
130 13- 6
136 108(l)-14
137 108(l)-14
154 3-19
158 76- 5
166 105-62
191 R14-11
279 106- 6
312 111-14
315 105-48
" 105-50
371 3-42
376 105-19
385 59- 6
392 105-24
" 105-47
" 106-40
" 107-10
" 110- 1
428 108(l)-14
436 106- 9
" 106-24
" 106-32
" 111-27
441 52-14
539 44- 9
" 44-10
546 111-17
593 82- 4
" 82-27
" 95- 1
" 95- 7
597 105-44
" 105-48
668 R6- 8
681 111-13
713 111-14
753 116-13
763 6-31
808 2- 5
825 58-31
874 84- 8

1929 Cal.

11 R4-15
" R5- 5
22 108(c)-3
" 108(l)-14
" 111-17

"Table of Cases" indicates first reference in foot-notes and reference to Official Reports.

1929 Cal. *con*

37 105-43
" 105-44
" 105-48
" 105-49
" 105-50
" 105-51
50 40-25
" 105-35
" 111- 3
77 126-10
83 3-33
" 41- 1
" 41-23
" 41-25
101 51-23
" 53A- 3
113 108(l)-14
121 68- 3
" R6-10
123 3-11
" 3-16
" 3-18
" 3-19
130 108(l)-14
166 8-20
186 53A- 3
197 105-17
224 105-63
228 111-13
231 44- 9
" 44-10
" 54-17
233 R1-19
" R5-13
250 44- 1
263 14-10
" 54-23
272 108- 1
" 108(c)-1
" 108(l)-14
" 108(n)-1
304 67-15
" 83-17
" 84- 7
330 2- 5
" 108(o)-4
387 R6- 3
" R6- 8
392 73- 1
395 108(l)-14
407 111- 3
433 105-20
" 105-58
454 105-47
462 105-11
473 105-49
" 105-50
494 54-23
497 3-47
516 108(l)-14
544 R2-11
" R10- 3
548 58-33
553 116- 1
568 108(l)-14
609 91- 5
612 7- 7
636 41-25
651 106-19
" 106-37
" 106-38
" 106-45
672 R1- 5

1929 Cal. *con*

697 52-19
" 52-35
710 44- 5
" 54-17
" 106-17
719 6-18
" 108(l)-14
736 3-28
787 7- 7

1930 Cal.

15 52-40
22 48- 1
" 78- 1
" 78- 2
" 78- 4
" 78- 5
" 78- 8
92 41- 1
" 41-17
94 105-47
" 107-13
113 53A- 3
151 48-11
" 72- 2
" 72-10
" 100-29
180 6-2a
207 60-34
240 108(o)-4
262 116- 1
263 54-23
270 7- 7
335 65A- 3
" 101- 1
357 40- 6
" 40-12
385 108(b)-3
422 2- 5
474 8- 6
508 38-12
530 101- 1
536 100-10
539 52- 1
" 52-38
559 107-13
561 55- 2
" 55- 9
" 108(a)-2
" 108(c)-2
" 108(o)-6
568 55- 8
572 101- 1
619 60-44
731 11- 7
" 11-12
738 76- 6
739 105-17
750 3-18
" 3-19
782 130-15
810 60-44

1931 Cal.

58 R5-11
87 105-47
129 108(g)-3
131 7- 7
133 108(h)-8
135 105- 1
" 117- 3
144 41- 8
" 41-23

1931 Cal. *con*

160 105-41
" 105-47
171 54-23
223 3- 2
" 8-17
" 9-10
" 9-12
" 58- 4
" 100-10
" 100-13
" 100-16
" 137- 4
227 137- 2
251 82-17
" 92-15
" 95- 1
" 95- 3
" 95- 6
" 95- 8
387 137- 4
397 108(l)-14
457 114- 1
" 114- 5
" 114- 6
" 114- 7
468 105-62
537 108(l)-14
546 R3- 7
" R5- 5
596 8-20
651 14- 5
" 15- 2
" 19- 5
" 19- 7
" 21-15
732 58- 9
763 52- 9
" 57- 6
" 91-25
" R1- 6
790 108(j)- 4
806 3-15
" 67-27

1932 Cal.

12 R1- 5
34 67-27
" R1- 4
" R1- 6
" R1-11
" R1-19
77 111-22
83 105-19
" 107- 7
126 60-28
" 67-19
" 92- 1
" 92-11
" 92-13
" R1-19
" R4- 6
" R5-19
167 41-25
198 2- 5
" 105-48
" 105-49
" 105-50
" 105-51
" 106-15
215 105-72
221 111-16
" 111-22
241 106-29

1932 Cal. *con*

241 111-17
" 115- 1
319 60-44
" 67-28
" 82-18
350 32- 5
" 32- 6
356 55-20
" 58-39
385 108(l)-14
398 105-43
" 105-44
" 105-45
" 105-47
" 105-48
" 105-49
" 105-50
" 105-51
414 R6- 8
431 2- 5
" 108(j)- 1
434 53-34
436 105-64
451 39- 1
" 39- 5
" 40- 9
" 100- 6
" 100- 9
" 100-13
" 100-22
497 123- 4
512 R1- 5
524 5- 7
" 58-11
" R1- 1
" R4-12
561 R1-19
589 5- 6
" 58-39
" 78- 1
" 78- 4
" 78- 6
600 5- 4
" 6- 4
" 19- 4
" 19- 6
" 21- 3
" 21- 8
642 53-29
661 R1- 6
689 R11- 2
715 117- 4
764 105-47
772 101- 1
775 58-38
" 100-25
" R4-15
" R6- 3
" R6- 6
" R6-15
" R15-2
" R15-10a
787 111-13
" 112- 5
791 3- 2
823 58-39

1933 Cal.

39 60-26
" R5-13
" R5-19
154 Pre- 2
" 5- 7

1933 Cal. *con*

154 60-41
" 60-43
" 67-27
" 100- 3
" 100-10
" 100-16
181 91-41
" R1-19
212 59-13
" 123- 6
260 106-19
" 106-39
" 116-11
290 108(l)-14
316 R4- 5
321 3-32
325 R1- 4
" R1- 5
" R1-19
381 8-20
" 58-33
393 53A- 3
398 78- 4
" 78- 5
411 54-22
429 3-32
454 6-20
461 6-21
467 5- 1
" 5- 4
477 105-35
" 111-10
482 92-19
488 122- 7
" 127- 3
506 40-12
529 122- 4
535 8-20
544 54-22
566 108(l) 14
588 60-43
609 105- 2
612 51-23
" 107- 7
621 R1- 6
" R1-19
643 106-13
" 117- 3
701 12- 8
728 91- 8
745 117- 2
785 123- 4
786 59-14
" 68-13
798 R5-29
812 53- 8
" 53-24
822 116- 4
" 117- 3
875 108(h)-3
" 108(h)-4
890 111-11
900 38-11
" 38-12

1934 Cal.

1 60-14
51 105-48
64 R14- 4
73 68- 1
" 68- 2
" R14-13
82 43- 9

1934 Cal. *con*

127 106-34
" 111-26
134 106-24
135 116-11
" 116-12
146 108(l) 14
148 55-20
149 62- 6
" 68- 6
" 76- 8
202 44- 9
" 44-10
235 53A- 3
" 53A-10
288 105-48
" 105-50
" 105-51
290 51-17
325 67A- 1
" 67A- 2
" 67A- 3
" 100-11
" 100-17
327 R14- 3
379 8-20
" 11- 7
" 15- 4
421 60-43
" 67A- 4
" 82-12
" 82-20
426 R6- 3
437 108( )- 2
549 137- 4
552 48- 1
" 52- 4
571 8-20
610 8- 3
" 8-15
667 108(g)-3
693 54- 4
699 55- 5
716 105-49
" 105-50
735 R4-15
" R5- 5
747 105-61
764 R6- 3
772 3-19
" 123- 1
" 123- 8
775 60-43
" 60-56
803 105-57
" 105-58
" 105-59
" 105-60
822 R5-13
837 106-40
" 106-41
" 110- 1
" 113- 3
842 R12- 3
851 8-20
861 105-47
862 Pre- 1
" 67A- 1
" 67A- 3
" 67A- 6
" 67A- 7
" 100- 1
" 100-11
" 100-17

1935 Cal.
89 2- 6
" 36- 2
94 38- 8
" 38-12
131 R1-19
134 108(l)-14
139 60- 1
" 91-39
" R1-19
193 105- 5
202 108(b)-3
218 130-19
" 134- 2
" 134- 6
261 105- 1
" 105-68
" 105-82
" 107-13
368 8-10
" 40-25
" 105-59
" 108(j)- 4
" 108(l)-14
" 108(o)-6
388 59- 4
393 111-14
" 123- 4
460 R1-14
464 108(c)-2
" 108(c)-8
541 51-25
" 53A- 3
" 53A- 5
554 108(l)-14
577 106-34
" 106-38
" 111-26
609 111-16
625 51- 8
" 51- 9
638 105- 1
" 105-14
" 117- 3
659 8-20
" 58-38
666 56- 5
" 60-43
" 65- 4
" R1-19
671 122- 3
" 126-10
746 52- 5
751 6-19
756 8-22
" 8-23
" 130- 3
" 130-17
" 130-22
" 136- 3
771 108(d)-3
779 14-10

1936 Cal.
12 55-22
17 54-17
42 92- 9
" 92-10
51 55-20
100 105-50
112 100-28
116 38- 8
" 38-11
125 58-39
130 54-21
135 108(l)-14
155 107- 7
200 60- 4
" 83-20
" R9- 3
256 7- 7
260 6-17
279 52-14
" 54-17
283 78- 1
" 78- 4
" 78- 5
" 78- 9
" 78-11
313 92- 2
" 101- 1
326 7- 7
351 106- 2
" 111-23
378 58-22
412 58-39
454 108(d)-3
537 60-44
" 82-18
556 8-20
" 18- 4
" 122-5a
581 106-28
" 111-23
590 52-31
628 53A-13
" 107- 7
" 108(l)-12
" 108(l)-14
646 58-38
" 69A- 3
698 67A- 1
711 51-22
721 126-10
727 40- 2
" 40- 6
" 40-25
" 54-11
" 105-42
" 108(j)-5
763 52-39
770 9- 7
774 111- 9
780 58-44
802 5- 5
" 19- 8

1937 Cal.
129 51-10
" 100-17
" 100-24
" 100-25
" 111-16
" R15- 2
167 8-20
194 61-11
" 92-19
207 2- 5
226 128- 3
331 106-19
336 92- 7
347 59-15
" 68-13
373 2- 5
" 105-50
" 108(j)-1
" 108(j)-4
446 R 1-10
" R 4- 6
" R12- 3
467 53A- 5
499 107- 7
" 107-13
547 R10- 5
636 111-11
" 111-13
654 R11- 2
669 111- 1
695 117- 2
717 R4- 6
741 58-39
763 8- 2
" 76- 6

1938 Cal.
1 52-38
34 13- 5
48 68- 4
97 53A- 2
" 53A- 3
" 53A- 4
" 53A- 5
128 2- 5
" 111- 1
" 111- 7
157 126-17
" 129- 4
171 5- 1
172 107- 7
" 117- 3
211 Pre- 1
" Pre- 4
225 8-20
308 58-39
358 110- 1
" 110- 3
377 3-21
" 6-17
" 130- 8
405 6-10
" 6-11
" 6-15
471 R1- 6
" R1-19
478 10- 5
" 10-13
" 10-17
490 5- 4
" 8-20
" 122-5a
507 69A- 2
" 69A- 3
" 69A-11
524 58-27
" R1-19
541 38-12
589 114A- 2
" 117- 3
602 41-23
606 5- 7
618 60-44
" 67-28
" 82- 8
634 R1-19
656 106- 2
690 108(c)-1
" 108(l)-14
702 8-11
724 105-35
" 111- 3
795 53A- 5
" 107- 7
818 53- 1
" 53- 6
823 58-39
" 65A- 1
840 6-35

1939 Cal.
15 R1-19
" R5-13
23 2- 6
26 R6-12
77 105-35
" 111- 3
116 6- 4
163 53A- 3
" 53A-13
" 53A-19
166 R2-11
" R4-12
" R5-26
216 108(l)-14
226 28- 3
" 31- 2
" 32- 5
" 32- 8
" 32- 9
275 63- 3
" 70- 2
291 106-19
323 58-27
387 35-28
" 38-11
" 38-12
403 R1-19
423 8- 7
" 105-27
425 95- 6
460 6-20
523 10-13
601 R5- 6
655 52- 7
" 52-20
" 52-31
692 70- 2
" 111- 7
" R1- 5
715 3-22
" 3-23
" 5- 7
" 6- 8
730 58-32

1940 Cal.
60 60-41
" 82-12
" 100-25
" 100-27
" R15-12
89 105- 3
" 105-17
" 105-25
" 105-31
" 105-32
" 105-72
" 106-12
" 106-17
" 106-37
" 107- 8
" 111- 6
" 111-24
93 100- 5
" 100- 6
150 52-18
" 60-41
" R1-19
159 R4-10
" R5-17
254 53A- 3
" 123- 2
" 123- 5
281 58-35
356 51- 1
372 58-40
380 55-14
393 105-48
" 105-50
" 105-51
417 8-20
426 58-35
" 58-40
429 58-38
436 58-35
437 60- 5
" 62- 8
" 67-15
486 58-31
" 58-35
544 58-35
550 R8- 3
565 41-20
" 41-23

1941 Cal.
18 67- 9
" 83- 5
" 83-20
33 53A- 3
" 53A- 5
" 53A-20
92 11- 2
117 100- 6
144 41- 8
163 48-12
205 R5-17
233 53- 6
" 53- 9
287 53A- 5
" 53A-14
302 111-13
308 69A- 6
" 69A- 7
318 41- 8
" 41-15
" 41-25
378 53-15
" 53-16
" 53-20
384 108(l)-14
416 45- 8
436 5- 6
" 52-19
" 58- 4
" 100-18
" 100-28
484 91-39
" R1-19
506 111-22
613 R1-19

1942 Cal
55 58-40
" 62- 8
" 68-17
128 R2- 3
" R11- 2
138 67-20
" R1-19
" R12- 3
153 67-16
" 73- 1
" 92-31
224 R3- 9
226 R1-19
241 6-13
290 91-39
314 105-32
330 117- 3
341 105-37
" 106-24
" 116- 1
356 111-14
367 R2- 3
" R11- 2
386 122-5a
" 122- 8
394 52-31
" R1- 6
" R1-19
406 106-19
452 10-13
" 58-32
" 67-10
" 111-13
486 107- 3
514 108(j)-6
" 108(j)-9
522 58-35

1943 Cal.
91 108(l)-14
122 8-20
160 109- 2
" 109- 5
162 5- 4
214 R4- 8
227 52- 1
" 52-14
" 52-20
" 52-24
" 52-38
247 108(q)-2
330 92-15
344 53A-14
372 R4(Cal)
" R6- 3
" R6-22
417 5- 6
" 14-10
455 67-27
" R6- 3
474 106-15
" 107- 5
" 107- 6
" 107- 8
" 116-14
577 52- 7
" 52-18
" 52-35
" 52-39
" 67-19
" R1-19

In the foot-notes to the Commentary ✠ indicates either a leading case or a case giving fuller reasons.

1944 Cal.
72 108(q)-2
84 106-40
" 106-41
" 106-42
" 107- 8
" 110- 1
" 110-1a
157 122-5a
219 108(j)-4
282 111- 7
288 83-20
322 R11- 2
335 3-22
" 3-24
" 130-12
" 130-13

1945 Cal.
6 R4- 5
" R5-13
24 111- 7
89 40- 6
" 40-25
" 108(j)-5
135 91-12
194 92- 2
" 92- 5
" 92- 7
" 92-24
" 92-27
" 92-28
" 95- 1
322 52-14
" R14- 7
" R15- 2
355 5- 7
" 6- 3

1946 Cal.
81 108(q)-2
113 108(q)-2
129 5- 4
317 106-13
460 110- 1
" 110-1a

1947 Cal.
36 117- 3
68 110- 3
73 65A- 4
154 53- 6
" 53-19
" 53-20
" 53-34
159 108(h)-2
185 108(q)-2
200 6-16
209 105-65
236 105-14
" 108(q)-2
244 106-40
328 55- 1
351 106-18
" 107- 5
" 107- 8
" 110- 1
" 110-1a
" 110- 3
353 51- 9
" 51-22
" 53A- 3
" 53A- 4
" 108(h)-2
" 108(h)-4

1947 Cal. con
378 105-35
" 111- 3
440 105-57
441 111-13

1948 Cal.
8 105-16
61 2- 6
" 44- 1
" 44- 8
147 53A-13
208 55-20
250 59A- 3
" 72- 3
" 76- 1

1949 Cal.
47 108(h)-8
" 116- 6
208 105-69
414 R11- 2
530 68- 4
533 14- 2
571 112- 2
576 108(q)-2

A I R
EAST PUNJAB

1948 E. P.
17 60-38

1949 E. P.
213 R6-11
" R6-20
254 92- 1
" 92- 4
" 92-15
" 92-24

A. I. R.
LAHORE

1914 Lah.
42 108(l)-14
64 R2- 6
108 53- 6
" 118- 9
186 108(f)- 2
187 58-18
204 3-34
241 60-34
274 58-31
289 91- 8
290 54-11
" 105-42
316 58-18
326 3-34
344 61- 5
" R7- 5
345 6-24
350 R11- 2
356 52-14
" 53-19
396 58-31
418 59-11
472 108(j)-1
" 111-13
500 108(l)-7
510 3-22

1914 Lah.con
510 6-16
524 R4- 5
534 7- 7

1915 Lah.
70 38-11
75 73- 1
86 130-24
113 R11- 2
174 58-33
199 91- 4
" 91-44
218 118- 3
221 R2- 7
" R4- 5
228 60- 1
" 60-41
" 83- 2
" 83- 7
232 48-10
235 51-25
" 108(h)-4
237 55-20
251 54-12
264 53- 9
302 R11- 2
305 51-25
331 58-17
" 63A- 7
353 6- 4
362 1- 4
" 60- 3
374 R6- 7
389 38-11
416 44- 5

1916 Lah.
39 48-10
" 58-39
54 9- 2
" 100- 3
98 6-2a
130 53- 9
155 54- 1
" 54-14
" 58- 3
" 58-18
179 7- 3
196 R14- 7
" R14-12
219 67-19
" 81-13
" R1- 6
" R1-19
239 7- 7
" 51-25
257 11- 2
291 48-10
336 54-14
353 105-31
" 105-79
" 107- 2
" 111-14
" 116-13
356 51-11
359 R11- 2
379 51- 1
" 51-19
" 52-26
403 112- 6

1917 Lah.
13 52- 8
" 52-11

1917 Lah.con
28 76-15
31 60-10
" 68- 8
43 54-23
80 61- 5
109 7- 8
164 119- 2
" 119- 5
" 119- 8
181 123- 4
216 8-20
222 6-20
242 54-14
247 60-30
372 3-35
396 92-27
397 3-34
" 40- 4
430 63- 7
" 63- 8
443 60-14
" 101- 4
446 61- 2
" 61- 6

1918 Lah.
1 7- 7
39 84- 5
" 84- 7
88 R11- 2
95 41-23
99 58-17
179 63- 5
238 108(b)-1
281 3-39
" 41-23
286 111-25
309 41-13
310 58- 5
314 76-15
317 8-20
348 7- 7

1919 Lah.
5 60-36
20 58-35
" 58-37a
31 106-33
" 106-35
" 109- 4
40 R1- 6
" R1-12
78 59- 7
85 137- 4
109 97-17
127 118- 2
196 48- 8
246 118- 6
279 R11- 2
296 48- 9
304 106-20
" 106-34
" 108(j)-6
319 6- 3
354 72- 2
" 72- 3
" 72- 7
372 63A- 1
398 63A- 1
402 58-18
404 48-10
407 60-36
427 52-13

1919 Lah.con
427 52-21
439 R14- 2

1920 Lah.
24 53-22
28 63A- 4
66 111-14
74 6- 3
" 43- 3
" 43- 7
96 106- 2
116 39- 1
" 39- 5
135 39- 5
176 51-23
217 105-32
" 105-79
" 111-14
234 95- 1
239 60-17
" R8- 4
249 123-11
271 58-17
302 3-38
" 59- 6
310 3- 2
322 8-20
345 67-14
355 68- 5
370 8- 6
372 7- 3
373 108(h)-2
387 61- 5
390 108- 1
" 108(c)-1
" 108(c)-3
480 91- 4
" 91-29

1921 Lah.
9 60- 1
" R2-18
11 32- 3
53 72- 3
" 72-11
65 60-41
82 54-12
96 105-31
" 107- 5
97 53- 2
110 51-22
133 6- 4
136 100-15
137 3- 2
138 6- 6
170 61- 5
253 58-39
" R1- 9
270 R6-16
309 68- 5
333 53- 3
351 60-10
" 68-14
357 55- 9
363 52-21
365 7- 7
384 R4- 8
" R4-15
" R5- 5

1922 Lah.
40 123- 4
43 107- 5

1922 Lah.con
64 3-34
" 60-14
205 7- 7
213 76-12
" 76-14
" 76-15
252 60-10
" 63A- 4
254 58-17
" R11- 2
269 54-23
273 39- 1
275 101- 1
300 6-12
329 105-48
" 107- 2
356 54-14
403 52-27

1923 Lah.
22 60-41
70 54-12
71 60- 1
" 76- 6
" 76-12
" 76-15
129 60-41
" 60-46
" 82-17
" R7- 3
150 3- 9
219 60-50
222 91-42
242 59- 7
243 60-22
" 60-50
261 132- 7
281 106- 2
" 106-32
309 63A- 7
310 54- 1
311 92-15
" 95- 1
357 68- 7
" 68-13
389 109- 7
404 R11- 2
409 111-14
423 53-15
" 53-19
454 111-14
456 118- 2
" 120- 1
459 55-15
" 68- 8
478 53- 2
" 53-12
495 54-17
" 60-27
522 3-35
560 48-10
587 58-17
" 63A- 1
" 72- 3
590 55- 1
" 55- 9
601 7- 7
632 58-17
" 63A- 7
" 84- 5
" R11- 2
646 1- 4
" 60- 3

In the foot-notes to the Commentary † indicates a case which is most appropriate for the proposition.

1923 Lah. con
648 58–17
652 100– 5
659 106– 2
" 106–12
660 38– 8
" 38–11
665 60–50
1924 Lah.
49 111–19
" 114– 1
74 8–20
129 60– 5
" 60–32
132 R 6– 3
154 72– 2
" 72– 3
196 8–20
200 7– 7
249 59– 7
273 58–17
" 60–10
281 1– 4
" 111–14
" 111–25
" 112– 4
337 54–23
347 8– 6
370 51–10
377 101– 1
381 58–18
474 108(q)–1
476 55–20
562 123– 4
564 7– 7
611 7– 8
" 105–22
635 R 7– 3
643 106– 2
" 106–20
" 106–32
" 116–13
652 6–2a
674 10– 1
684 130–13
689 38–12
696 58– 4
707 1– 4
" 53– 2
" 53–19
" 53–22
709 6–17
" 136– 3
724 8–13
" 8–16
729 10– 6
738 41–22
" R 8– 4
1925 Lah.
25 3–34
32 100–30
45 60–38
55 58–33
76 72– 3
92 1– 4
" 55– 1
118 58–17
122 32– 3
130 6–2a
174 58–18
182 60–10
" R 2– 8
183 123–15
196 122– 3

1925 Lah. con
196 126–10
240 38– 7
" 38–11
262 108(b)–3
284 54– 5
" 54–23
326 118– 3
341 6– 4
353 84–17
356 59–14
405 55–14
430 3–14
467 55– 9
481 55– 2
" 55– 9
491 107– 6
" 107– 7
500 107– 7
501 123– 4
503 7– 7
509 7– 7
520 7– 7
541 60–12
542 3–34
548 6–16
575 1– 4
" 130–25
" 137– 4
594 29– 2
" 29– 5
632 60–50
640 R 4– 5
" R 5–10
648 13– 5
" 122– 4
" 123– 2
651 60–41
" 82–17
1926 Lah.
11 R 11– 2
25 53–19
" 53–22
39 1– 4
" 6– 3
90 61– 6
120 60–50
129 106– 6
" 106–24
" 111–24
148 6– 3
167 53–16
" 53–24
170 7– 7
" 51– 1
197 7– 7
220 59– 2
225 67– 5
238 60–46
" 92–15
286 123– 4
" 123–15
302 58–31
364 R 5– 7
371 108(c)–1
" 108(e)–4
" 108(q)–1
372 123–15
415 3–34
430 63A– 2
" 92–24
" 101– 1
457 60–32

1926 Lah. con
490 R 14– 7
494 61– 5
" 61– 6
" 62–12
530 58–17
601 60–41
" 60–46
607 91– 5
624 58–17
629 51–12
633 61– 5
677 45– 6
694 51–10
" 51–22
1927 Lah.
1 108b– 1
" 108c– 8
" 111– 1
18 6–35
57 59–14
" 60–50
75 91–13
81 91–42
89 137– 4
90 53A–18
" 118– 9
103 55– 1
" 55–12
126 45– 6
147 6–16
166 19– 6
" 19– 8
188 109– 4
225 108(p)–1
226 60–28
237 60– 7
" 60–12
373 3– 2
" 3– 6
" 3– 7
" 38–12
404 11– 2
" 19– 9
420 53– 2
" 53– 6
" 53–11
" 53–34
423 105–72
" 111– 6
445 R 6– 3
" R 11– 2
489 53A– 6
534 51–10
574 60–50
629 38–12
666 41–23
763 59– 4
773 7– 7
815 72– 2
" 72– 3
817 58–17
828 58–37a
844 108(b)–3
850 58–17
880 108(c)–8
883 39– 2
" 100–30
1928 Lah.
9 53– 9
" 123– 2
35 Pre– 1
83 38– 8

1928 Lah. con
96 R 11– 2
105 60–41
" 91– 8
148 1– 4
" 59– 2
" 59– 8
154 55– 3
" 55– 5
160 63A– 1
192 R 11– 2
209 R 14– 2
" R 14– 3
250 7– 7
269 R 14–13
301 101– 1
" 101– 3
342 58–17
348 106– 2
" 106–49
351 108(d)–3
355 58–35
" 58–41
" R 7–12
" R 8– 9
357 40–24
" 55– 9
432 3–31
440 100– 1
" 100– 5
505 52– 7
" 52–18
" 67–19
" R 1–19
554 105–50
" 106–32
" 116–13
593 67–19
" 73– 1
601 60–34
627 2– 5
653 68–14
" R 6– 3
662 59–15
668 60–51
720 105–48
726 58–33
792 60–44
875 38– 9
" 38–11
901 R 13– 2
904 R 5– 6
937 105–27
" 105–31
" 105–71
" 105–72
" 105–79
" 107– 5
" 111– 6
" 111–14
" 111–16
1929 Lah.
1 53–19
" 53–21
20 122–12
45 8–20
" 123– 4
86 R 4–15
143 8–20
" 122–17
207 59A– 2
" 76–10
" 94– 2

1929 Lah. con
207 94– 3
274 100– 3
289 58–30
" 58–41
" 67–13
291 105–11
" 107– 7
295 6– 3
309 126– 9
314 78– 4
" 78–13
385 R 11– 2
390 R 4–15
409 53–19
" 53–20
" 53–34
416 55– 1
" 55– 9
469 108(d)–3
485 6– 4
495 59– 2
" 59– 8
500 3–41
" 48–10
509 63A– 1
" 72– 2
" 72– 3
516 63A– 1
523 60– 5
528 89– 2
530 58–33
552 R 5–20
583 105–42
599 52– 7
" 52–21
625 51–22
648 11– 2
" 11– 9
721 53A–18
741 76–15
761 2– 5
810 7– 7
812 8–20
816 7– 7
825 51– 7
833 58–33
868 7– 7
1930 Lah.
9 9– 2
12 53–34
100 3–22
103 R 6– 3
" R 6–19
115 122–12
116 R 5– 5
117 39– 2
" 39– 5
131 54– 1
" 55–11
132 R 5– 7
136 1– 4
" 7– 7
" 53– 2
" 53–34
145 123– 2
148 60–34
" 68–14
" R 14–13
217 53– 6
" 53–11
356 1– 4
" 52– 2

1930 Lah. con
356 52–21
386 58–35
" 76– 6
" 106– 3
" 111– 2
437 105–79
" 105–81
515 45– 5
" 108(j)–4
549 58–18
568 55–11
" 55–12
620 1– 4
" 101– 1
731 56–10
" 58–39
737 68–14
791 94– 3
" R 1–14
" R 6–14
816 6–24
858 52–14
904 6–24
915 105–70
" 107– 7
920 1– 2
" 1– 4
" 48–10
" 48–18
" 58–39
" 59– 2
" 78– 1
" 78– 6
" 78–13
928 6– 3
937 55– 9
985 54–17
1004 8–20
1020 54–23
1027 53–15
" 53–16
" 53–19
" 53–20
1060 60–32
1063 1– 4
" 101– 1
" R 12–3
1068 R 1– 5
1931 Lah.
213 53– 6
227 3–42
258 58–33
349 8–20
379 6–2a
419 38– 5
" 38– 8
435 52– 7
" 52–21
438 R 1–19
483 R 14–2
498 58–35
501 107– 7
" 107– 9
614 108(j)–5
620 123– 4
675 116–12
694 65– 4
" 68– 5
718 39– 2
" 39– 5
1932 Lah.
30 1– 4

1932 Lah. *con*
30 130-25
" 137- 4
43 111-14
" 111-16
56 101- 1
95 54-23
141 39- 1
" 39- 2
164 58-29
" 58-35
" 68- 2
" 68- 9
" R6- 5
174 53-15
214 R3-13
" R5-24
231 R5-14
237 101- 1
" 101-11
275 108(q)-1
" 116-13
281 54- 5
316 123- 4
465 58- 3
" 58- 4
" 100-13
" 100-15
503 6-27
" 53- 9
518 1- 4
" 6- 1
" 108(j)-1
566 3-31
586 105-79
" 111-14
" 117- 2
630 58-28
" 68- 2
" 68-19
655 54-21
" 107- 7

1933 Lah.
1 58- 6
10 52-31
48 R5- 5
61 107- 2
" 108(q)-1
" 111- 2
" 116-13
75 R1-19
84 60- 5
" 67- 5
91 95- 1
102 130-15
104 58-33
129 60-41
134 106-49
141 76-15
151 1- 4
" 58- 3
" 58-35
" 67-15
" 98- 5
155 58-33
171 52-31
174 58-31
" 67-14
" 68- 5
" 68-19
178 55-15
179 R1- 1
" R1-19

1933 Lah. *con*
201 10- 8
" 11- 2
" 11- 9
210 3- 2
221 111-12
" 111-14
258 41-11
262 54- 1
" 55- 7
" 65- 4
289 58-17
" 62- 7
" R11- 2
329 R4-12
" R5-26
" R6- 3
" R6- 4
343 6-2a
361 60-26
" R5-13
373 60-32
374 1- 4
" 82- 2
" 82-18
377 106-24
" 106-25
" 111-14
378 6- 3
416 92-22
496 39- 2
503 91- 5
509 108(q)-1
" 111-27
" 116-13
517 8-20
" 108(e)-4
" 108(e)-6
540 51- 1
" 51- 8
" 51-12
551 3-31
" 59- 9
601 123- 4
609 48- 9
648 53A- 6
658 55-15
676 58-31
682 44- 7
" 73- 1
" R11-2
703 3-31
768 R6-10
771 63- 3
" 73- 1
776 111-14
786 105-67
792 R6-10
810 92-19
821 1- 4
" 54-17
" 59-13
831 R6-10
833 122-5a
836 48- 9
" 68- 7
864 61- 5
" 62-12
901 39- 2
" 100-30
972 58-39
" 59- 2
1000 92-17

1933 Lah. *con*
1000 101- 1
1001 58-39

1934 Lah.
1 44- 4
39 8-20
121 60-50
129 105-29
" 105-37
" 111-27
" 116-13
143 3- 2
" 60-22
" 101- 1
161 53- 2
" 53-20
174 R6-10
175 116-13
197 123- 2
242 63A- 1
248 92-15
" 92-27
289 111-14
318 53-19
" 53-20
348 55-12
365 53-34
453 58-33
457 52-19
460 2- 6
" 53- 5
543 59-11
658 41-21
" 41-22
" 41-25
660 73- 1
705 53-20
743 105-11
" 107- 7
751 53A- 3
" 53A-18
765 100- 9
799 91- 5
806 92-19
" 101- 1
809 43- 4
" 73- 1
823 118- 3
837 38-12
853 68- 5
" 68-19
858 123- 2
885 41-23
895 38- 7
917 54-14
934 119- 2
" 119- 3
" 119-10
938 61- 5
" 100- 5
978 52-27

1935 Lah.
10 58-39
26 58- 6
42 38- 8
" 38-11
50 55-14
103 58-35
" 58-41
" 67-15
" 68- 2
" 68-12
" 68-17

1935 Lah. *con*
103 98- 3
" 98- 5
142 58-17
160 38- 8
164 54-22
168 R5-14
203 101- 3
" R1-11
218 130- 2
" R12-2
316 R1-14
334 R13-2
344 38- 8
350 1- 4
" 63- 3
" 101- 3
404 53-15
" 53-19
" 53-20
410 3-34
" 41- 9
" 41-23
441 111-14
503 10- 6
" 10- 8
522 111- 7
523 92-16
529 52-21
536 R6-10
640 52-40
" 58-39
651 44- 1
672 58-29
" R14-2
" R14-11
714 101- 1
721 58-39
795 123- 4
804 111-14
808 52-21
820 7- 7
821 3-43
" 9- 2
" 41-23
" 58-39
850 R6-10
863 111-13
884 8-20
887 3-34
" 78- 1
" 78- 5
" 78- 9
" 78-13
889 58-39
906 84- 3
936 73- 1
940 R6- 7
955 53A-18
957 58-39
958 105-13
" 105-20

1936 Lah.
153 48- 6
" R1-19
" R5-13
161 41- 8
168 60- 5
" 60-32
" 84- 5
" 84- 7
196 3-22
" 6-17
220 5- 4
222 53- 6
" 53-34
234 8-20
" 118- 3
242 3- 9
251 58-39
286 53-19
" 53-21
291 44-10
307 54-17
366 1- 4
" 53A-16
" 53A-18
388 R6- 3
" R6-22
390 1- 4
" 92- 4
405 1- 4
" 41- 8
" 41-23
461 111-14
482 3-37
" 58- 4
" 100-13
" 100-15
" 100-22
508 8-20
" 100- 5
511 51- 1
" 63- 3
512 52-31
547 1- 4
" 130-25
562 60-26
" R5-13
" R5-24
587 8-20
593 53- 6
607 R4-12
610 100- 5
612 54- 1
727 58- 6
753 1- 4
" 6- 3
756 54-22
815 108(b)-2
" 108(l)-1
816 41-11
" 41-23
890 105-25
944 1- 4
946 38- 5
" 58-25
" 58-39
" 59- 2
978 3-31
982 R2- 3
1002 21- 3
1020 67A- 1
67A- 2

1937 Lah.
6 R6- 3
" R6- 7
35 48- 3
" 58- 4
49 60- 3
" 60-28
" 60-38
56 105-52
57 43- 9
79 68-14
97 105-42
121 108(q)-1
135 58-39
204 R6- 3
220 53-20
272 41- 2
" 41-23
360 108(j)-1
370 105-52
500 51-19
507 54- 1
589 100-31
608 55-12
" 55-14
665 92- 2
686 6-35
764 54- 1
790 62- 7
819 53- 6
" 58-39
847 53- 6
874 R4-15
" R5-20
894 R11-2
920 8-20
926 58-39
930 108- 1
" 108(c)-1
934 6-16
940 8-20

1938 Lah.
21 58-18
39 3-39
73 53-21
" 53-34
86 41-12
" 41-14
88 51-22
97 3-31
136 53- 6
" 53-14
145 58-40
" 67-18
" 67-21
156 1- 4
" 53- 1
" 53- 2
" 53-20
184 82-17
" 92-15
188 R10-8
217 R6-16
255 58-39
270 8-20
286 1- 4
" 101- 8
289 R13-2
304 54-18
360 43-12
430 48- 1
" 48-18
448 52-26

1938 Lab.con
479 11- 2
509 100- 5
564 53- 6
721 53A-16
732 6-27
856 53-28

1939 Lab.
15 58- 9
" 58-11
29 3-39
" 48- 9
49 109- 7
57 53A-14
" 53A-18
79 R2-16
" R5-14
129 58-17
" 63A- 1
" 63A- 3
" 72- 3
135 41- 8
146 52-31
" R1- 6
162 105-19
" 107- 9
295 58-85
" 62- 8
278 55-12
303 R4-12
330 1- 4
" 114A- 1
398 58-11
" 58-39
423 4- 5
" 105- 9
" 105-19
" 107- 2
" 107-10
438 53- 6
455 116-13
473 R5-20
501 137- 4

1940 Lab.
18 105-13
98 61- 5
166 58-39
197 R4- 3
198 53-21
" 58-35
199 63A- 7
201 91- 8
" 92-13
247 92-23
252 41-24
269 3-34
" 41-23
" 78- 4
" 78- 5
" 78-13
" 92-11
" 92-25
285 58-89
" 127- 2
" 128- 5
291 1- 4
" 56- 1
" 56- 7
308 78- 4
" 78-13
311 118- 9
388 76- 2
" 76- 7

1940 Lab.con
333 R11-2
370 82-12
401 58- 3
" 58-35
410 106- 3
" 111- 2
" 116-13
486 58-27
" 58-29
" 59-14
497 52-12
505 4- 4

1941 Lab.
10 55- 1
" 55-12
53 92- 4
" 92-22
96 R1-19
171 R6- 8
224 58-39
240 54- 1
274 58- 3
" 58- 4
" 58-29
" 100-13
" 100-15
337 3-21
" 130- 8
" 130-25
386 R13-2
407 1- 2
" 9- 2
" 55-20
" 53A- 3
" 53A-18
" 54-22
" 55- 1
" 59-15
416 8-20
" 41-23
421 60-41
" 60-46
" 82-17
433 52-21
" 52-35
444 52-21

1942 Lab.
135 92-15
138 6- 4
234 58- 6
" 58-18
243 122-20
" 123- 2
275 55- 1
" 55-12
" 55-14
" 55-15
284 6- 6
" 6-26

1943 Lab.
96 53-24
" 53-25
113 52-18
" 78- 4
" 78- 5
" 78- 8
" 79- 9
" 78-13
" 92- 1
" 92- 4
" 92-11

1943 Lab.con
118 92-24
" 92-25
127 105- 9
" 107- 1
" 107- 2
" 107- 9
" 107-10
" 107-15
168 10- 3
" 41- 1
" 41- 7
" 41- 8
189 R4- 15
265 6-26
275 R11- 2

1944 Lab.
1 3-31
" 106- 3
" 111- 2
" 111-10
9 111-10
175 58-33
179 53A- 3
" 53A- 4
" 53A-18

1945 Lab.
158 108(l)-5

1946 Lab.
97 6-17
142 52- 1
" 52-21
" 52-40
322 52-21
" 52-31
" 54-23
330 111-14
" 112- 1
" 112- 7
" 114A-1
399 45- 3

1947 Lab.
1 1- 4
" 53A-18
40 58-30
" 58-35
" 58-40
" 98- 5
147 3-34
" 41- 5
" 41- 7
" 41-10
" 41-23
175 5- 4
" 52-21
" 52-40
199 41- 5
" 41- 8
" 41-23
230 56- 1
" 56- 7
" 56-13
" 56-14
278 61- 5
324 59- 2
335 59-14
" 59-15
388 106-38
" 107- 2
" 111-26

A. I. R. MADRAS

1914 Mad.
23 91-42
37 58-33
42 58-31
" 58-41
" 60-28
" 60-29
" 98- 5
64 19- 6
" 19-11
81 111-14
84 51-25
" 107- 8
96 107-10
107 51- 8
113 108(l)-14
114 58-27
" 68- 2
" 100-13
138 51- 7
" 51-19
150 7- 7
151 76- 8
" 76- 9
170 R6- 8
204 123- 1
218 84- 5
225 108(i)-1
" 117- 2
251 R6-10
264 123- 4
281 130-15
290 61- 2
" 63- 2
296 116-13
301 106- 3
" 111- 2
306 58- 2
" 58- 9
317 58-35
" 67-18
" 68- 2
" 98- 7
332 R1- 5
333 58- 4
" 58-30
353 8-17
" 54- 6
359 107- 7
365 R5- 4
371 92- 1
" 92- 3
" 92-16
" 92-17
380 51- 8
392 R7- 3
428 8- 6
439 91-25
" R1- 6
440 44- 6
" 44- 7
446 123- 4
465 55- 7
470 41-25
489 5- 2
" 9- 7
" 54-17
" 101- 4
" 118- 2
" 118- 6
" 118- 7

1914 Mad.con
489 118- 9
495 7- 7
512 3-23
" 136- 2
" 136- 3
552 Pre- 4
563 60-40
" 91- 5
564 105-43
" 105-49
" 105-69
" 105-79
" 105-80
" 108(b)-4
" 116-13
577 54-23
578 60-27
623 6- 4
634 40-17
" 48- 3
638 107- 7
639 58-33
641 53-11
648 43- 7
655 55-14
661 76- 5
" 76-12
" 77- 1
" R7- 4
663 R6- 3
669 105-69
684 58-18
686 38-12
693 92- 2
" 101- 1
696 53- 9
698 100- 1
706 2- 5
" 111-16
" 114- 7

1915 Mad.
1 123- 4
12 38-12
33 58-31
" 60-28
34 108(j)-9
48 108(l)-6
50 44- 6
76 107- 7
82 53-15
85 111-14
" 111-16
" 117- 2
90 38-11
100 76- 8
103 5- 2
" 9- 7
" 9-10
" 118- 5
113 6-2a
209 8-17
210 84- 5
256 84-13
263 51- 4
" 51- 7
" 51-19
288 67A- 1
296 6- 1
" 6-11
305 54-23
331 8- 6
344 67-27

1915 Mad.con
345 105-37
" 105-80
" 111-17
" 116-13
357 8- 5
358 108(c)-4
370 58- 4
" 58-30
382 58- 2
" 58-12
" 58-35
387 54-14
" R1-12
398 R11- 2
402 Pre- 2
" 2- 4
" 58-17
" 60-10
" 72- 2
" 72- 5
" 84- 5
412 7- 8
" 105-22
414 R6- 3
425 60- 5
447 8- 9
" 44- 1
449 R6- 3
452 R6- 3
" R6-10
453 44- 1
464 39- 2
" 100-30
481 60- 5
" 60-28
" 76- 8
495 52-11
" 52-12
502 52-15
519 53- 9
546 55- 5
" 55-20
554 6-26a
561 6-2a
573 54-17
" 54-21
" 54-22
" 60-27
597 3- 2
603 13- 5
606 105-69
614 41-11
" 41-23
633 66- 8
" 68- 4
" 68- 8
" 68-20
639 13- 5
" 14-13
651 58-33
654 83-20
656 58-38
659 108(f)-3
664 14- 3
" 100- 5
675 82-20
689 55- 9
708 55- 9
717 108- 1
" 108(c)-1
" 108(c)-2
" 108(l)-14

Remarks in foot-notes amplify principles in the Commentary and state the special features of the case.

1915 Mad.con
717 117- 2
742 55- 9
760 73- 6
766 55- 9
774 38-11
781 117- 3
786 38-11
" 38-12
790 58-33
795 8-13
" 8-20
800 3-31
805 52-28
807 53A- 3
813 37- 4
" 37- 9
" 109- 5
" 111-16
" 111-26
" 117- 2
884 52-13
891 108(h)-2
894 51- 8
896 55-20
921 123- 4
944 60-41
945 58-18
" 72- 4
971 6-2a
972 6- 7
" 43- 3
" 58-19
" 123- 4
998 6- 7
" 43- 4
1031 130- 3
" 130-19
" 134- 5
" 137- 4
1035 11- 4
" 11-13
1052 3-18
1055 54-16
1056 123- 4
1059 54-21
" 54-22
1070 105-48
" 117- 4
1071 10-13
" 10-17
1079 8-20
1085 43- 7
" 43-11
" 43-12
1135 106- 2
" 111-22
1145 123- 6
1148 60-45
1150 60-22
1161 R11- 2
1164 53- 9
1172 100-13
1182 38-11
1191 6- 4
" 11-13
" 32- 5
1203 81-11
" R1- 6
1215 65- 4
" 72- 7
" 76-12

1916 Mad.
13 58-29
" 68- 2
" R6- 5
14 53A- 3
" 55- 5
" 55- 9
20 111-22
27 8- 5
57 100-20
102 8- 4
" 40- 1
" 40- 9
127 76- 8
186 8-20
208 50- 2
" 103(l)-6
214 54-17
" 118- 9
220 51-25
" 108(h)-4
229 60-43
239 7- 7
242 8-20
" 132- 2
" 132- 4
249 105-69
" 111-14
273 7- 7
298 14-10
" 40- 1
" 54-23
323 2- 6
" 8- 3
" 36- 2
" 36- 3
" 44- 7
" 52-39
" 73- 1
338 8-20
347 38-11
383 83- 8
" 84- 6
385 14-10
" 40- 8
413 51-11
434 58-35
473 6-18
" 8-14
480 54- 6
" 55- 9
481 53- 5
494 53-10
" R6-23
497 111-16
500 8- 4
" 8-20
502 7- 7
" 51- 9
" 108(h)-4
503 83- 8
" 84-12
517 6-18
" 107- 7
523 R5-29
526 55- 9
534 107- 7
536 8- 6
558 83-17
578 53-20
579 6- 3
595 6-16
" 8-14
601 8-20

1916 Mad.con
603 55- 9
633 55- 9
637 92-24
642 105-67
" 105-79
646 8- 6
649 53-15
" 92-17
652 58-37
" 60-29
" 111-11
680 114- 1
" 114- 5
" 114- 8
" 117- 2
690 8- 6
694 R2-23
" R7-13
" R8- 7
" R8- 9
745 52-42
749 111-14
750 137- 5
763 R6- 4
" R6- 6
768 38- 2
" 108(j)-4
786 R5-20
807 8- 6
821 53A- 3
" 118- 9
" 120- 3
828 R1-18
" R1-19
841 58-31
" 60-28
" 60-29
" 98- 5
856 14-10
859 3-10
" 65-11
" 72- 3
" 72-10
" 76- 8
" 101- 1
" 101-1a
863 60-41
" 60-43
" 60-44
" 60-45
" 91-40
875 101- 1
" 101- 2
" 101-10
882 R2-18
" R8- 7
911 76- 6
934 61- 1
" 61- 2
" 67A- 1
937 R5-29
939 108(h)-2
" 108(o)-4
940 60- 5
959 92-23
974 3-26
" 6-16
" 6-18
" 58-35
980 55-17
" 55-18
" 82- 2
" 82-14

1916 Mad.con
980 100-29
990 67-30
1040 84- 7
1069 73- 6
" 76- 8
1074 58-33
1080 82-18
1090 51-17
1126 54-21
1128 60-15
1143 83- 8
" 84- 5
1202 R2- 9
1215 55-12
1219 58- 2
" 100-15
1224 108(q)-1

1917 Mad.
4 40- 8
" 40-20
11 58- 5
20 123- 4
" 130- 2
" 130-11
27 123- 6
61 8- 9
" 8-17
71 7- 7
79 3-22
" 6- 1
" 6-13
" 6-15
111 44- 6
128 52- 8
" 52-39
" 104- 1
135 63A- 1
141 106- 3
" 111-23
143 108(l)14
151 111-26
182 114- 8
198 58-41
228 65- 3
" 65-11
" 67-30
232 2- 5
" 58-31
" 67- 2
269 60-14
274 105- 7
" 107- 7
296 55- 9
297 53- 9
315 R5- 4
333 108(h)-6
336 45- 6
358 3-22
" 3-24
" 6-17
" 54-23
" 58- 9
364 48- 8
" 59-13
368 58- 2
" 58-33
372 81- 6
" 81-13
390 119- 2
415 8-20
465 108- 1
" 108(b)-3

1917 Mad.con
465 108(c)-2
" 108(c)-6
" 108(c)-7
473 3-18
484 53- 6
" 122- 5
492 54-14
" 58-18
495 60-50
517 83- 7
519 53- 2
" 53- 4
" 53-14
" 53-24
536 101- 1
547 38-12
592 R14- 7
619 63A- 6
630 7- 8
" 58-18
" 58-26
" 105-22
649 117- 3
661 54-17
669 R5-10
689 116- 1
735 6-18
" 105-38
" 105-40
" 107- 7
" 116- 6
" 116-13
743 67- 6
751 52-31
" 67-20
" 91- 7
" R1-19
760 108(c)-4
761 R1-12
772 R4-10
773 58-39
" 59-14
775 41-18
" 41-25
787 107- 8
" 117- 3
789 111-17
799 58-39
802 55- 9
826 105-47
841 53- 4
844 R5-29
849 59- 8
" 100-14
880 58-27
" 66- 1
" 66- 3
" 66- 7
" 66- 8
885 41- 3
" 41-22
886 53-20
901 105-37
" 105-40
" 111-27
" 116-13
918 105-69
922 83-17
" 83-18
" 84- 7
" 84-10
" 84-11
926 41-24

1917 Mad.con
926 43- 9
" 122-11
928 3-21
" 58- 5
" 130-18
" 132- 2
951 54-21
955 3-39
" 40- 8
984 100-29
997 60-26
1009 54-23

1918 Mad.
19 92-15
29 60-14
" 60-15
44 105-55
81 8- 4
" 10- 4
" 11- 2
82 55-12
88 83-12
" 83- 7
" 84- 5
" 84- 7
103 76- 5
" 92-10
" 92-13
" 92-24
" 101-1a
" R1-19
" R5-13
119 6-38
121 60-50
123 6- 3
" 6- 7
" 6-30
" 43- 4
" 43- 7
148 53- 9
172 130- 3
" 130-15
194 123- 6
219 84- 5
" 84- 8
278 108(d)-3
284 R9- 3
320 41-11
333 101-1
357 8- 5
" 105-68
364 58- 6
365 53- 9
373 10-12
" 58-38
377 53- 6
" 53-15
383 43- 7
" 43-11
395 7- 7
407 67-22
414 126- 6
419 51-25
" 106-12
421 53-13
" 53-14
425 40- 1
" 76- 8
" 108(j)-5
" 108(j)-6
453 106- 2
458 19- 6

1918 Mad.con
458 122- 2
460 101- 4
490 83- 8
" 84- 3
" 84-12
491 3-18
500 58-33
509 60-29
530 68- 2
" R6- 3
" R6- 5
557 2- 6
" 36- 2
" 53- 5
558 58- 4
" 58-29
" 68- 2
" R11- 2
564 59- 8
572 51- 9
" 58-41
" 60-28
578 52- 1
" 52-31
" 52-37
587 R7- 4
607 R6- 3
668 39- 5
" R14- 3
" R14-12
669 R6- 3
" R6-23
674 100- 9
681 54-23
697 53- 24
705 R1- 5
716 55-11
743 6-38
807 8-20
888 68- 2
" 76-22
889 7- 5
898 58-18
928 108(j)-9
" 117- 2
992 51- 9
" 105-55
942 60-49
" 62- 7
" R7- 6
945 8- 6
956 Pre- 4
997 58-14
" 58-29
" 100-18
1012 55-12
" 82- 2
" 82- 3
" 82- 7
" 82- 8
" 82-14
1030 56-10
" 60-43
" 82-19
1033 58-35
" 101- 3
1045 55-12
1069 59- 8
1083 108(d)-2
1095 52-31
" 52-35
1111 48-14
" 69-30

1918 Mad.con
1135 55-14
1142 60-45
" R1- 6
1152 111- 8
1187 R6- 3
1204 58- 4
1260 92- 2
1264 7- 7
1302 38-11
" 38-12
1314 84- 8
1315 55- 9
1327 101- 3
1332 60-28
1397 123- 4
" 130- 8
1360 83- 8
" 83- 9
" 83-15
" 84- 2
" 84-12
" 84-18

1919 Mad.
1 58-33
12 114- 1
" 114-11
" 114A-1
" 117- 2
37 55- 9
50 41- 2
" 41- 23
59 72- 8
" 76- 7
87 53-14
100 R4- 6
105 92-17
121 43- 2
129 61- 6
130 7- 7
" 51- 9
140 137- 5
145 43- 7
167 53-28
168 105- 1
" 105- 3
" 108(b)-3
174 8- 6
186 R11- 2
224 7- 3
231 R11- 2
247 41-14
" 41-23
257 53-24
266 111-12
" 111-14
" 111-16
272 63A- 6
" 76-21
284 95- 1
293 105-43
" 105-49
" 105-75
320 98- 7
322 58- 6
" 58-36
" 77- 1
" 105-67
338 8- 2
" 8-20
" 105-47
367 55-14
429 R5- 5

1919 Mad.con
464 35- 3
" 35-11
469 59- 8
500 7- 7
524 67-22
528 40- 8
" 100- 6
" 100-13
542 101- 1
547 8- 2
" 8-17
" 9- 7
" 54- 6
557 8- 6
590 100-11
669 123- 4
685 38-12
" 51-11
700 92-17
709 R5-24
711 58-33
718 5- 7
" 6- 6
" 58- 9
733 100-12
757 55- 9
758 105-79
768 19- 6
" 19- 8
779 58-11
781 4- 4
" 58-18
792 R2-16
" R5-14
798 6- 7
809 5- 3
" 9- 9
" 122-5a
818 101- 1
" 92- 2
" 92-27
819 60- 5
" 62- 5
847 58-29
" 60-40
" 18- 2
876 68- 4
" 68- 5
886 105-47
" 111-11
894 R14-8
897 2- 5
" 105-47
" 111-11
" 111-12
" 111-14
" 111-16
" 111-23
937 6- 4
946 60- 2
948 88- 9
1076 130- 5
" 130-13
" 130-17
" 130-19
1082 58- 5
" 67-21
1088 51- 4
" 51-22
" 53A-3
1102 72- 4
" 72- 8
1106 111-14

1919 Mad.con
1106 111-25
" 114A-1
" 117- 2
1113 5- 2
" 9- 7
1117 58- 2
" 58- 9
" 58-18
1135 105-43
" 105-49
" 106-24
" 111- 1
1164 67-15
" 68-17
1186 106-18
" 106-33
" 106-35
" 109- 5
1188 61- 2
" 61- 6

1920 Mad.
20 5- 4
" 53- 5
26 53- 5
88 53- 5
97 R5-14
99 R7-13
" R8- 7
106 39- 5
126 52-31
" 52-35
" 91-25
" R1- 6
152 55-12
164 54-14
" 55-12
183 100-12
" R14- 8
221 R6-10
256 111-14
" 111-22
274 8- 6
286 R8- 7
312 114A- 1
316 44- 6
319 R14- 6
375 60-23
" 60-44
" 82-18
385 55-12
386 8-14
389 91- 8
" 92-11
" 92-24
" 101- 1
391 52- 1
" 52-38
" 52-40
401 91-23
423 55- 5
426 130- 3
" 130-19
" 134- 5
479 R6- 3
" R6-10
493 108(e)-5
" 108(m)-4
496 38- 4
504 105-45
509 108 (l)-7
531 R8- 3
" R9- 3

1920 Mad.con
584 108(e)-2
585 92-25
596 59-11
609 3-31
634 55- 9
" 55-22
" 119- 9
650 48- 7
" 58-14
" 100-15
" R1-10
" R1-19
659 43- 7
660 54-23
722 100- 1
" 100-30
739 82- 2
" 100-29
742 60- 7
" 60-13
" 130-18
746 72- 9
" 91-29
748 53-13
" 53-14
783 19- 3
" 19-11
" 28- 2
" 28- 3
812 119- 9
" 119-10
814 R1-12
834 7- 7
838 109- 5
857 8- 6
859 55- 3
885 105-69
906 58-18
927 7- 7
941 101- 1
" 92-19
965 91-29
974 59- 6
" 59-11
1006 10- 5
" 108(j)-1
" 111-13
" 112- 4
1026 60-26
" 67A- 1
" R1-19

1921 Mad.
12 58-31
" 58-35
" 58-41
" 60-29
30 52- 8
" 91-25
" R1- 6
42 108(b)-3
51 60-18
" 91- 3
" 92-17
56 6-18
" 6-19
" 8-14
80 105-20
" 105-35
82 54-17
" 60-27
90 123- 6
113 3-23

1921 Mad.con
122 130-13
" 137- 4
126 R4- 1
" R5- 4
137 3- 2
" 3-22
" 8-17
" 54- 6
" 122- 6
" 123- 5
" 123-14
" 130-11
" 130-14
" 137- 4
141 55- 5
183 58-35
" 65-11
" R14-13
213 60-27
229 58-17
" 67- 5
" 67- 6
243 59- 2
" 98- 7
272 91-16
277 54- 6
" 55- 9
" 55-22
" 60A- 2
284 108(h)-8
" 112- 4
" 116- 1
326 6-27
" 92-15
" 95- 1
337 4- 5
" 107- 9
374 3-35
" 58- 5
" R1- 9
384 43- 9
" 55- 9
393 111- 5
" 92-24
394 126- 9
410 43- 4
418 114- 6
459 79- 2
" 79- 4
" 79- 5
" 79- 9
" 100- 9
462 105-43
" 105-79
472 59- 8
477 R14- 6
480 72- 3
498 6-17
" 55-11
" 58-33
514 58- 4
" 100-16
517 58-35
" 60-28
541 5- 4
" 14-11
" 40-25
" 105-35
" 105-36
559 40-17
" 52-40
563 8-12
612 91- 5

1921 Mad.con
612 91- 7
624 67A- 1
" 67A- 5
627 63- 1
" 63- 6
" 70- 4
636 68- 2
" 68- 5
648 67-20
" 91- 7
" 91- 8
" 91-41
" R1-19
657 3-34
" 53- 9
" 53-13
" 53-32
681 3- 2
" 54- 6
" 60A- 2
" 134- 3
693 48- 4
" 101- 3
701 59- 8
" R1- 5

1922 Mad.
106 6-30
181 6-28
185 60-50
197 6-26a
249 48- 1
" 48- 2
" 52-29
" 67-20
" 92-23
" 92-25
" 92-27
" 101- 8
" 101-10
" R1-19
274 111-13
290 6- 1
" 111-13
299 60-16
" R3-10
" R5-15
307 67-19
" R1-19
311 9- 7
" 54-12
" 118- 2
" 118- 4
" 118- 6
" 122- 2
335 52-30
" 55-12
344 3- 2
" 8-17
" 54- 6
349 106-21
" 103(h)-8
" 111-16
351 117- 3
357 35- 3
" 35- 9
390 52- 7
" 69-20
" 69-24
" 69-25
397 6-16
441 92-28
447 53-20

1922 Mad.con
457 5- 3
514 106-25

1923 Mad.
36 59- 8
52 123- 4
54 105-48
" 105-49
55 44- 6
67 2- 2
" 31- 3
" 32- 5
" 32-12
" 126- 2
" 126-17
71 58-35
" 72- 3
160 67-30
177 6-16
" 8-14
241 54- 1
262 58-39
282 123- 6
284 84- 5
288 7- 7
297 5- 4
316 6- 6
349 92- 2
" 92-11
354 83-15
" 84-10
" 84-19
358 51- 5
392 92-17
" 95- 7
" 108(c)-8
442 52-31
447 59- 6
" 59-15
454 105-67
459 108(l)-14
467 44- 6
511 8-20
" 58- 9
533 60-10
" 60-44
" 60-45
" 76- 1
" 76-21
" 83- 7
" 83-13
" 83-17
" 91- 8
553 60-40
" 67- 4
558 53-19
" 53-21
563 3-28
572 105-69
577 5- 4
" 53- 5
706 91-23

1924 Mad.
22 6-10
" 6-13
57 60-37
" 60-48
67 3-39
" 8- 9
" 53-21
" 58-20
75 6- 4
81 44- 6

1924 Mad.con
81 44- 7
102 R8- 4
103 101- 1
187 3-10
" 8-16
189 53- 9
193 R1- 5
" R5-23
271 14-10
" 53A- 3
281 59- 6
292 59-14
" 62- 2
296 53A- 3
307 52-24
" 52-31
358 55-14
359 52-13
" 52-38
360 55- 7
364 60-23
" 60-44
366 56-12
" 67A- 1
" R4-10
449 52-31
" 52-35
450 53-15
" 53-20
453 59A- 3
" 83-15
" 84- 4
" 84-10
493 8-20
509 56-10
" R4-10
513 58-29
" 68- 2
521 73-10
542 59- 2
544 7- 8
" 26- 3
" 54-14
" 55- 1
547 58-39
559 83- 8
" 83-15
" 84-10
602 52-27
603 R5- 4
604 53- 9
605 122-17
610 40-21
" 54-23
619 101- 3
645 R4-15
" R5- 5
649 112- 1
" 114-12
650 R1-19
" R5-13
657 2- 5
736 58-17
" 67-16
" 76- 1
741 44- 1
749 56- 2
" 82- 7
771 106- 2
" 106-34
" 111-26
776 111- 1
" 112- 6

1924 Mad.con
776 115- 4
779 53- 6
" 53-11
786 R5-29
800 8- 5
" 123-10
811 19- 6
812 8-13
819 3-31
828 105-43
" 105-48
" 105-49
833 105-49
849 6-27
854 55-12
903 55-20
904 106-24
" 106-35
" 111-23
907 111- 1

1925 Mad.
37 58-33
57 12-11
" 111-11
" 111-13
61 19- 6
62 6-17
" 58- 6
76 91- 5
80 92-27
" R5-14
95 3-31
" 41-23
" 91-16
" 100-22
127 R14-12
129 92-16
" 92-27
164 35- 3
211 55- 5
215 55-12
245 73-10
249 43- 9
254 8- 6
261 60-14
266 91-25
" R1- 6
275 73- 1
" 73-10
332 58-10
338 92- 2
346 106-49
" 117- 2
351 60-41
359 52-29
366 58-35
" 60-28
" 60-29
425 68-11
430 59- 6
434 105-14
446 116-13
471 8-20
" 122-17
483 82-18
487 52-28
492 5- 4
" 40-18
566 54-22
599 19- 6
" 20- 1
" 21- 8

1925 Mad.con
599 28- 6
" 29- 3
624 11- 2
645 45- 6
660 55-11
" 55-12
670 51-11
673 38-11
710 52-29
723 58-39
732 14-11
" 105-47
" 108(h)-8
751 59- 8
753 130- 2
" 130- 5
" 130- 8
" 130-15
763 53A- 3
778 91- 4
" R10- 3
786 101- 1
825 60- 5
" 62- 5
" 76-12
" 77- 1
833 111-13
881 98- 1
" 105- 8
" 105-67
" 111- 1
885 6- 6
902 41-22
914 111-13
" 112- 2
919 105-47
" 114- 7
941 6- 4
963 51- 8
965 53A- 3
968 55- 2
" 55-21
991 58-29
" 59- 8
" 68- 2
" 68-13
997 10- 1
" 13- 6
1005 53- 5
1013 11-10
1017 83-16
" 84-10
" 103- 2
1039 52-18
1043 6- 3
" 6- 4
1083 R4- 4
" R5- 4
1101 100- 1
" R4- 4
" R14-3
1155 6-26a
1174 118- 9
" 123- 5
1175 92-16
1191 60-26
" R5-13
1209 55- 9
1214 56-10
1217 92- 2
" 101- 1
1219 92-11

1925 Mad.con
1226 51- 7
1277 111-10

1926 Mad.
6 7- 7
18 108(c)-4
39 48- 8
" 48-16
50 52-38
55 Pre-2
" 100- 1
" 105-42
" 105-58
" 108(l)-3
66 53-24
" 53-29
101 73- 1
" 94- 2
" R13-4
120 40- 8
143 106-25
" 111-14
173 55- 8
186 48-13
194 R14-3
" R14-4
" R14-6
" R14-12
218 6-30
250 8-12
255 55- 9
278 45- 6
305 R7- 3
314 51- 8
" 51-25
343 3- 9
" 66- 3
" 66- 4
" 73- 1
371 19- 8
" 19- 9
386 58-31
" 60-28
405 76- 1
" 76- 8
" R7- 6
" R10-3
415 R5-29
" R6- 3
417 6-16
495 55- 9
526 105-42
543 9- 8
" 54- 7
" 118- 9
566 116- 1
" 116- 8
" 116-13
569 55- 1
" 55- 8
594 60- 5
597 88- 7
" 91- 9
601 83- 2
" 88- 8
" 84-13
609 3-31
" 6- 4
" 51- 8
" 51-17
" 51-18
" 59- 9
624 53-16

1926 Mad.con

644 R7- 3
645 19- 9
" 21-10
648 10- 6
" 25- 2
" 28-11
650 98- 7
" 130-21
683 44- 6
692 38-12
699 6-17
" 14-10
706 Pre- 4
" 10- 2
715 6- 4
743 58-39
744 65- 4
" R1- 5
757 53A- 3
774 44- 6
816 60-26
" R5-13
826 53-29
841 68- 2
" 69- 7
" 69-15
" 69-16
" 69-23
" 69-30
853 108(c)-4
903 8-17
" 55-12
" 58- 4
" 60A- 2
" 100-13
921 51- 8
936 27- 2
955 60-48
" 76-12
" 76-14
966 60-55
978 6-16
" 105-14
1031 55-14
" 56-12
1052 51-22
1060 59-11
1069 R5-14
1071 116- 1
1082 92- 2
" 101- 1
1087 83-15
1117 54-23
1144 56-12
" 81-18
1161 52-32
1167 100- 5
1173 8-26
1188 58-39
1196 53- 9
1202 111-11
" 111-13

1927 Mad.

1 2- 6
" 43-12
" 54- 3
59 76- 8
85 3-11
92 59- 6
" 59-14
" 59-15
" 60-50

1927 Mad.con

143 59- 8
173 62- 8
182 105-70
189 60-48
190 R5- 4
193 55- 8
204 55-20
" 92-17
219 55-12
233 7- 7
" 58-25
239 114- 1
" 117- 2
261 111-13
" 112- 4
273 55- 9
278 53-15
" 53-16
" 53-19
" 53-20
301 R1- 5
357 8-20
403 52-20
421 55-15
458 13- 5
" 43- 7
427 44- 7
502 39- 2
" 52-20
" 100-30
513 40-25
" 105-35
" 105-36
" 111- 3
528 44- 6
560 82-18
" R5- 4
572 123- 4
586 3-38
" 59- 6
604 6-24
609 R1-14
636 5- 3
" 122-5a
649 43- 7
657 53-10
" 53-11
" 53-12
662 59- 8
666 53-11
" 53-24
" 53-25
684 53-20
699 3-39
" 40-17
703 58- 5
" 59A- 3
" R1- 9
773 58-14
" R1- 6
779 R6- 3
805 53- 5
817 6-18
" 8-14
" 130-19
880 53A- 3
883 59- 6
890 38- 8
" 38-12
903 53- 9
931 108(j)-4
945 R1- 5
984 76- 5

1927 Mad.con

1023 51- 9
1039 60-44
" 61- 2
" 61- 3
" 61- 4
1069 100- 9
1071 R1- 5
" R1-19
1072 55- 1
" 55- 8
1081 58-33
1084 44- 6
" 44- 7
1086 82- 7
" 82- 8
1091 43-12
1092 39- 1
" 39- 2
" 39- 5
" 100-30
1135 R14- 7
1138 41-23
1139 105-79
1144 53-20
1145 58-39
1156 76-12
" 76-15
1165 38- 5
1180 92-19
1184 6- 4

1928 Mad.

2 R1- 5
20 53-15
28 14- 5
" 58-31
" 58-33
35 6-26a
" 58-36
" 105-67
38 R5- 5
193 114- 5
199 R1- 5
226 7- 7
" 67-18
" 98- 1
234 60- 5
" 60-28
250 114- 1
" 114- 7
" 114- 8
344 55- 5
349 8-20
" 51- 8
380 108(b)-3
" 108(g)-2
" 108(l)14
382 58- 5
" 60- 7
392 3- 8
407 40- 8
430 54-12
459 54-17
" 58-33
478 3-23
486 55-12
500 56- 1
" 56-10
" 81- 2
" 82-4a
541 92-16
" 92-17
546 48- 9

1928 Mad.con

546 54-21
571 5- 3
604 R5-26
612 52-18
" 52-20
" 52-35
613 123- 4
635 41- 8
" 52-35
637 67- 5
648 8-20
" 58-35
" 68- 2
687 106- 2
" 111-23
690 58-33
703 92-19
" 101- 4
713 6-13
" 14- 3
" 52-20
" 92-23
" 100-30
735 52-12
" 52-27
" 53- 5
764 R1- 5
773 3-11
778 41-18
" 41-23
793 53-20
" 53-33
" 53-34
860 53-20
878 52-35
894 2- 6
" 14-10
" 40-24
" 55- 9
909 58-39
" 96- 1
914 R5-29
919 58-39
" 96- 1
933 60-14
" 67-27
950 95- 1
" 95- 7
972 58-39
978 R1-5
1050 60- 7
1109 101- 1
1131 7- 7
1133 3-21
1140 108(e)-4
"108(m)-4
1191 105- 3
1201 6-13
" 130- 8
1270 R1-15

1929 Mad.

1 3-11
" 8-19
16 54-17
" 60-27
32 19- 8
47 100-30
64 10- 1
" 11- 2
79 6- 9
" 9- 8
" 54- 7

1929 Mad.con

110 7- 7
" 92-17
141 100-29
189 55-20
195 108(c)-3
" 108(c)-6
197 R5-29
230 84- 3
" 84- 5
" 84- 8
242 55-12
243 54-23
" 60-30
251 6-17
268 R1- 8
291 53A- 3
313 6-20
323 53-28
339 60- 5
393 R3- 7
" R5-11
426 3-41
" 59- 6
432 59- 6
506 R5-24
575 108(e)-3
609 100-31
611 108(b)-4
617 106-49
641 6-22
691 8- 6
775 55- 9
783 55- 3
807 53- 8
" 54-23
856 7- 7
860 92- 1
" 92- 2
" 92-16
" 92-19
" 95- 7
881 59- 8
" R6- 3
890 92- 8
" 92- 9

1930 Mad.

1 53A- 3
16 108(b)-4
48 55- 9
51 92-10
69 R1-12
84 53A- 3
" 53A- 8
105 R2-16
" R3- 7
" R5-11
" R5-14
138 R14- 6
160 62- 2
" 62- 5
" 76-12
" 77- 1
" 77- 2
" 105-67
178 81- 7
" 81- 8
" 81-13
" R4-10
272 107- 8
" 111-16
298 51- 9
" 53- 9

1930 Mad.con

298 53A-12
305 60-28
317 126- 9
371 67-28
382 55-15
405 7- 7
422 7- 7
425 7- 8
" 105-22
434 105-40
" 105-45
" 105-47
" 105-53
" 105-72
" 105-79
471 92-24
512 6-30
538 R1-19
561 44-10
567 55-15
570 52-31
" R1-19
582 6-2a
593 123- 4
644 82-23
665 53- 6
" 53-16
" 53-20
" 53-34
683 54-23
688 6- 7
" 38-11
744 122-17
748 55- 9
755 105-69
770 59- 8
801 91-25
" 91-37
" R1- 6
824 39- 2
" 52-20
" 52-31
" 100-28
" 100-30
924 2- 5
" 60- 1
930 52-35
956 6-34
985 67-27
1017 91-26
" R1- 6
1021 53A- 3

1931 Mad.

110 92- 2
" 92- 5
" 92-11
" 92-16
" 92-17
120 52-11
" 52-18
" 100- 9
124 58-39
" 59- 8
" 59-14
" 68-13
" R6- 3
140 3-14
" 54-12
" 59- 8
" 68-10
" 68-13
" 100- 5

In the foot-notes to the Commentary† indicates either a leading case or a case giving fuller reasons.

1931 Mad.con
140 118- 7
147 7- 3
" 105-22
199 81- 2
207 92-18
272 R5-26
" R10-8
274 7- 7
335 3-14
" 3-19
" 59- 6
352 106-19
" 106-40
" 106-41
" 107- 9
374 13- 2
" 13- 5
404 8-20
468 7- 7
479 R9- 1
513 53-15
529 7- 7
542 67-13
" 91- 8
" 91-39
" R1-19
552 82-18
577 105-43
" 105-49
" 105-79
" 111-17
580 53A-3
" 53A-5
592 55-20
" 92-16
" R5-14
" R7-12
603 R14-3
613 58-39
626 67-13
642 92- 9
659 117- 3
720 92-16
726 3- 2
795 R5-16
799 10-16

1932 Mad.
18 60-44
" 67-28
71 3-39
84 101- 1
" 101-10
95 50- 2
97 38- 8
109 84- 8
115 3-28
" 3-35
" 58- 5
" 67-21
" R1- 9
" R5-14
141 60- 7
154 76- 8
155 R6-11
" R10- 8
" R13-2
173 68-14
175 60-10
" 68-14
182 53-20
" 53-34
" 101- 4

1932 Mad.con
189 100-12
" 100-22
" 100-29
196 81- 2
" 81- 3
218 82- 7
272 3-12
" 3-17
" 3-19
" 122- 7
298 111-17
305 3-28
" 105-35
" 105-36
" 105-39
328 105-79
" 105-80
" 105-82
" 108(P)-1
566 52- 7
" 52-31
" R1-19
689 8-20
716 100-12
" R5-20
734 3- 2
" 53A- 5
" 53A-16
" 59-14
762 38-11
768 58-35
" 58-41

1933 Mad.
33R15-10a
55 R5-16
63 R6-23
67 111-23
80 28-11
" 32- 9
86 123- 4
126 55- 9
133 137- 4
158 44- 7
165 106-49
" 111-25
171 58-17
" R11- 2
181 8-17
" 55-12
185 59-13
194 8-20
207 4- 3
" 137- 5
241 58-11
" R4- 3
293 Pre- 2
" 58-39
352 7- 7
364 53A-12
382 55- 7
398 92-19
424 55-14
451 117- 4
457 53- 9
465 108(c)-1
481 7- 7
482 8- 3
527 53-29
583 67-20
" 91- 5
" R1-19
595 R1-10

1933 Mad.con
613 58-41
" 67-15
" 68- 2
" 68-17
624 7- 3
635 91-30
" R1- 8
639 7- 7
" 38- 5
" 38- 8
649 73- 3
672 68-14
710 6-16
" 6-21
715 3-32
" 40-14
" 82- 8
" 92-10
" 92-23
" 100- 5
736 55- 5
" 69-21
762 R7-13
795 6- 7
" 8-20
838 52-31
844 55-11
852 7- 7
" 105-35
858 52-20
" 52-30
876 65A- 1
" 65A- 2
" 65A- 3
" 98- 7
879 67- 9
" 101- 1
" 101- 4
885 19- 4
" 19- 6
" 19- 8
" 19- 9

1934 Mad.
1 100- 8
16 8-20
" 45- 6
31 60-34
" 92-23
" 101-10
40 52- 9
" 52-11
" 52-15
" 52-31
65 R5- 6
82 R6-10
169 38-12
189 82- 2
198 R5-24
227 67- 5
" 92-10
250 60-44
" 82-18
252 53- 9
256 92-11
" 92-16
" 92-19
" 92-25
268 92-10
" 92-24
294 53-20
302 78-10
353 52-11

1934 Mad con
353 52-18
" 92- 6
" 100-22
" 100-28
365 59- 8
418 105- 4
" 107- 8
458 116- 1
" 116- 6
" 116-12
461 3-22
" 6-21
529 130- 9
" 137- 4
552 6- 3
563 108(j)- 5
583 53A- 3
585 52- 1
" 52- 7
" R1-19
587 53- 5
" 53- 6
" 53-15
" 53-16
" 53-20
605 7- 7
615 8-17
" 55-12
" 100-16
624 7- 7
637 54-17
" 59-13
644 68- 3
" 69-12
646 8- 6
656 60-14
658 108(g)-2
" 109- 6
687 55- 9
703 14-10
" 51-15
713 8-17
" 100- 5
" 100-16
726 R6-10
734 39- 1

1935 Mad.
12 67-20
17 100- 5
29 18- 5
33 10- 6
55 2- 6
" 54- 3
101 72- 5
" R4-12
" R10- 8
118 9-12
115 55-15
" 68- 8
146 100-11
163 12-11
" 111-11
178 3-12
" 3-19
240 8-17
" 137- 4
250 53-20
262 67A- 1
307 105-40
320 105-67
360 92-24
390 82- 3

1935 Mad.con
390 92-24
404 53A- 3
" 53A- 5
453 R12-1a
454 111-16
" 112- 2
456 82-4a
" 82- 9
" 82-24
468 R10- 5
478 R7-12
628 44- 9
636 55- 9
660 92-24
" R12-1a
" R12- 3
669 108(j)-4
" 108(j)-6
716 R3- 7
" R5(Mad)
" R5-11
813 91-12
815 6-13
848 6-10
865 19- 4
" 19- 9
867 52-20
" 91-43
" 100-13
872 55-12
875 52-39
884 67- 5
918 111-16
943 2- 5
" 111-16
947 53- 9
961 55- 9
973 108(o)-1
" 108(o)-3
975 40-15
1003 130- 2
" 130-17
1011 73- 1
1045 58- 6
1059 44- 1
1072 83-17

1936 Mad.
84 R6- 3
" R6-23
61 101- 4
" 101-10
70 91- 8
" R1-19
84 52-20
88 53- 9
106 56- 2
" 82- 7
" 82- 8
" 82-10
113 82- 7
" 82- 8
116 109- 4
" 111-19
" 114- 3
" 114- 6
130 8- 6
171 92- 1
" 92- 5
" 92-10
" 92-19
" 92-20
" 92-22

1936 Mad.con
171 101- 1
252 111-11
" 111-16
" 112- 1
256 58-39
264 92-16
" 92-17
" 92-18
293 82- 2
" 82-19
301 107- 9
308 92-16
338 R1- 5
388 8-20
408 53-13
" 53-32
422 115- 4
433 65-10
473 73- 1
" 101- 5
477 19- 6
500 82- 4
" 82-17
" 95- 1
528 8-20
" 55-14
559 6-26a
564 7- 7
" 108(f)-1
" 108(f)-2
573 100-19
589 52-14
" R14- 4
664 108(e)-1
" 108(e)-2
" 117- 2
666 44- 4
709 100- 5
717 53- 9
752 76- 8
" 82- 2
" 92-15
" 100-29
" R5-18
814 92-27
" 101-10
" R1- 6
825 53-10a
831 105-69
853 52-10
865 100-16
887 52-19
" 52-39
895 67-27
898 82- 7
" 82- 8
901 40- 1
" 82- 7
" 82- 8
" 92-10
910 82-26
916 53A- 5
918 5- 4
" 8-20
" 54- 5
942 52-39
" 65A- 2
967 7- 7

1937 Mad.
22 54-17
40 8-20
91 109- 5

In the foot-notes to the Commentary † indicates a case which is most appropriate for the proposition.

1937 Mad.con
92 55-12
" 100-22
100 8- 6
126 60-29
136 60-41
" 60-44
" R1- 3
" R1-19
148 58- 4
" 58-30
" 100-14
" 100-15
" 101- 4
193 39- 8
195 78-10
214 60-26
" 60-48
219 36- 2
265 54-21
274 38-12
293 54-23
" 101- 4
398 111- 7
421 R5- 6
424 53- 5
451 92-16
" 92-17
" 92-18
478 103(Q)-1
501 R14- 6
" R14-11
" R14-13
554 R12-1a
560 R5-13
638 53A-13
656 107- 7
681 55-20
714 54-12
" 55-20
769 101- 4
799 67-21
826 65-10
" 92- 2
879 108(I)-1
882 9- 2
" 54- 1
" 54-12
" 105-42
" 105-57
" 105-58
" 105-59
" 105-68
" 105-75
" 105-83
915 100-80
918 R5- 8
" R5-20
" R5-29
965 81-13
" 82-18

1938 Mad.
6 82- 8
78 111-17
85 59- 5
87 78- 4
" 78- 5
90 8-11
100 54-18
" 107-10
" 130- 6
132 68-18
161 78- 4

1938 Mad.con
161 78- 9
" 92-19
212 R10- 8
236 130-11
" 130-13
246 55-20
293 R1- 5
" R1- 6
300 38-12
357 52-20
" 53A- 3
377 8-17
" 137- 4
405 40- 1
" 60-40
" 83- 8
" 83-16
" 84-10
" 84-12
" 84-13
" 84-19
" 103- 2
" R7- 4
" R9- 3
" R10- 6
457 55-12
" 100-19
465 101- 4
503 56-10
547 48- 5
" 58-39
" 78- 1
562 61- 5
677 45- 6
" 51- 4
713 6-2a
746 3- 2
" 53A- 4
" 53A-13
" 105-19
" 105-70
" 107-10
765 7- 3
767 73- 1
" 100- 6
779 92- 2
" 92- 5
" 92- 9
" 92-10
" 92-28
865 58- 5
" 58-39
" 59-14
881 6- 3
" 6- 6
889 59- 6
" 100- 5
959 3-19

1939 Mad.
4 69- 8
151 52- 9
162 R6- 3
165 54- 6
200 88- 9
202 4- 8
" 58- 4
" 100-16
" 103-17
220 54- 1
" 54- 3
" 54-17
" 54-23

1939 Mad.con
247 51- 9
" 51-22
" 51-25
" 106-12
256 52-32
275 52-10
" 52-19
290 122- 7
" 123- 1
" 123- 6
299 41- 8
393 82-18
" 101- 4
411 130- 3
431 11-11
436 R14-12
479 45- 6
503 83-17
" 84- 7
509 11- 2
" 11- 9
538 92- 1
543 3-23
" 130-12
" 130-16
590 55-12
614 8-20
654 R10- 3
" R10- 9
678 92-29
684 63- 1
" 63- 3
718 92- 5
" 92- 9
722 55-12
745 53-15
" 53-20
769 10- 9
774 55-10
802 3- 2
" 8- 9
" 8-20
846 8-17
867 6-26(a)
876 55-12
887 58-35
894 53- 8
" 53-23
949 92- 2
" 92- 9
" 92-11
" 92-19
" 92-20
" 92-22

1940 Mad.
16 6-20
21 36- 2
32 108(o)-3
" 108(o)-8
59 R14-12
140 4- 8
" 100-16
157 130-12
233 R10- 2
236 122-17
258 130- 8
" 130-15
" 134- 6
296 67A- 8
410 103(g)-1
" 108(g)-2
" 108(j)-5

1940 Mad.con
410 117- 2
426 119-10
453 40- 1
" 40-15
461 R5-14
491 44- 5
498 60-41
" 60-44
523 41-23
527 3- 6
" 3-10
557 60-26
646 67-20
" 101-10
" R1-19
669 65A- 2
671 58-39
686 76- 8
" 76-12
" 77- 1
701 100-22
" 100-24
776 56- 7
" R4-10
789 53-24
903 69-18
929 3- 4
" 58-11
946 58-35

1941 Mad.
66 82- 7
" 82- 8
128 55-12
147 130- 3
" 130-12
" 130-13
154 123- 1
188 18- 2
" 18- 3
" 18- 6
" 53- 6
208 52-14
" 52-37
217 6-26a
345 51- 4
367 8-20
389 6-16
394 137- 3
401 76- 1
" 76- 8
430 35- 2
" 35- 6
" 35- 7
484 60- 5
" 84- 5
" 84- 7
507 6-13
549 76- 8
" 76-12
" 77- 1
563 92-23
602 107- 7
666 58-31
" 60-28
690 53-15
" 53-34
707 3-29
" 39- 1
" 39- 3
710 R1- 6
794 100- 6
805 58-11

1941 Mad.con
805 59- 2
817 R5-24
" R5-29
885 67-15
" 68- 2
" 68-17
903 53-28

1942 Mad.
24 52- 9
28 41- 4
44 60-44
" 70-3a
" 82- 2
" 82- 5
" 82-18
67 40-21
" 54-23
97 6- 6
125 53A-13
128 53-26
139 8-20
151 R6-16
193 41- 3
" 41- 8
205 67-27
209 6-16
" 130- 4
232 69- 3
" 69-4a
" 69-30
273 R6-16
307 84-16
369 58-39
391 6-23
483 53-28
" 53-35
485 6-2a
503 122-11
522 53-22
525 55-14
527 55-18
558 Pre- 2
" 101- 1
" 101- 2
" 101-10
" 101-11
583 55-14
592 72- 5
" 83-20
" 84-16
" R10- 3
628 58-38
632 2- 6
" 5- 3
" 53- 5
634 54-12
650 55-14
685 82- 3
" 82-4a
" 82-13
" 82-16
711 100-19
714 53- 3
" 53- 9
" 53-14
720 6- 4
" 6-29
730 41-17
751 53-15
" 92-19
" 92-22

1943 Mad.
15 123- 5
28 55-12
62 76- 7
73 58-11
74 137- 3
81 R5-14
94 52-15
100 58- 5
" 58-33
" 76-12
" 77- 1
" 100-15
109 58-17
" 62- 7
" 62- 8
" R7- 5
" R11- 2
188 73- 1
202 R14- 2
" R14-12
220 58-35
" 108(l)-14
244 130-17
252 53-29
253 6-34
301 69-27
" 69-28
311 106-12
" 106-24
" 108(h)-5
373 100- 1
407 60-14
429 82- 2
" 82- 3
" 82- 5
" 82- 7
" 82- 8
" 95- 3
" 101- 1
" 101- 2
445 53A- 5
449 R5- 6
455 R1- 1
" R12-1a
459 41- 1
" 41- 8
" 41-11
" 41-23
" 41-24a
482 55-11
" 55-12
" 55-14
" 55-18
498 67-21
" R1- 9
531 53- 6
" 53-24
" 53-34
573 92-1a
" 92-24
" 100-29
593 55- 3
627 76- 8
637 82-12
" 82-18
705 56-12
" 81-11
706 53A-14
752 55- 9

1944 Mad.
22 13- 2
65 R6- 3

References to Official Reports are invariably given in all cases found in the Official Reports.

1944 Mad.con
98 8- 9
124 54-14
" 55-12
195 91-37
" 92- 7
" 92-14
" 92-23
237 41- 1
" 41-23
" 41-25
" 55- 2
" 58-33
" 60-28
273 107-13
" 108(b)-1
276 82-4a
" 82-8a
" 82-16
299 41-10
" 41-11
" 41-15
" 41-23
337 53 A-13
381 53- 5
" 53- 6
492 3-10
501 60-32
" 77- 1
518 105- 4
" 105-24
" 105-59
" 110- 1
530 43- 7
553 R6-11
" R10- 5
" R10- 8
556 53 A- 5
" 55-20
568 2- 6
" 36- 2
572 55- 8
" 55-22

1945 Mad.
46 83-17
53 53- 5
91 52-31
" R1-19
126 52-6a
" 52-20
171 53 A- 5
175 92-17
189 105-67
205 55- 9
219 52-10
" 52-11
" 52-12
" 52-14
" 52-20
" 52-36
225 60-26
" 60-51
297 76-22
340 60- 5
" 62- 8
350 52-6a
" 52-11
" 52-20
" 52-30
" 100-22
392 R13- 2
407 54- 5
" 54-11a

1945 Mad.con
407 54-12
" 55-12
422 R5- 3
" R5-13
425 R6-21
454 52-14
" 52-35
463 R5-10
500 92-17
" 92-28
509 108(f)-2

1946 Mad.
25 53-24
" 53-25
" 53-28
38 R7-12
" R8- 5
51 52-18
" 52-20
" 52-35
" 91-10
" 91-43
" 100-28
57 111-14
" 111-16
59 56- 8
107 43- 7
145 92-19
" 92-22
180 107-12
244 55- 8
251 R7- 3
293 70- 5
" 100-16
310 53 A- 6
" 53 A-14
" 105-61
" 105-63
383 R5- 6
452 53 A- 7
" 53 A- 9
456 58-33
464 76-21
542 60-40

1947 Mad.
18 52-35
" 60-48
" 61- 2
" 61- 6
" 61-10
" 92-10
" 92-19
" 92-20
" 92-21
" 92-22
51 60-30
52 R5- 8
60 58-33
68 111-16
" 111-25
" 117- 2
72 R14- 7
86 82-15
88 105-49
92 55-12
101 R5- 3
119 114 A-1
" 114 A-3
" 117- 2
127 41- 8
" 122- 7
" 126-16

1947 Mad.con
175 3-38
" 59- 6
197 58-18
" 60-10
" 63 A- 4
" 77- 1
203 53- 5
" 53- 6
277 82-18
282 51- 9
" 51-10
287 41- 1
" 41- 7
" 41-21
376 39- 2
" 39- 5
" 39- 8
424 100- 5
" 105-29
436 116- 2
" 116- 6
441 111-13
458 52-12

1948 Mad.
1 73- 1
" 100- 5
" 100-22
7 60-30
17 67-27
33 R6- 3
" R6-10
105 R1-19
130 69-10a
132 R1-19
171 137- 4
208 39- 1
" 39- 2
" 39- 5
275 105- 1
" 106-13
" 116- 1
" 117- 2
320 41- 7
" 41-10
" 41-23
" 41-25
336 R4- 6
373 R5-14
412 91- 5
" 100-11
430 43- 4
458 6-16
" 6-21
505 5- 4
526 53A-9a

1949 Mad.
1 R6- 6
" R6-12
19 82- 7
81 65- 4
127 106-13
" 117- 2
143 R5- 3
" R14- 3
" R14- 6
" R15- 2
148 105- 1
" 105-2a
" 105-14
" 106-13
207 52-31
" 52-40

1949 Mad.con
265 14-10
384 81- 1
" 82- 7
387 111-23a
" 115- 1
" 115- 3
443 60-48
535 108(l)-5
613 76-12
" R8- 3
" R8- 9
615 83- 4
" 100-17
715 119-10
760 111-23a

A. I. R.
NAGPUR

1914 Nag.
8 R2-18
" R2-23
" R7- 3
16 68-14
" 76- 8
" 77- 1
31 60-41
" R1-12
32 3-11
" 58- 4
" 58-27
" 58-30
" 59-15
" 100-13
" 100-14
" 100-15
36 58-41
38 111- 8
54 9- 7
68 63- 9
84 111- 8

1915 Nag.
26 60-28
28 91-10
" R5-29
46 55- 9
49 117- 3
55 R5-14
57 117- 3
63 58-27
" 58-29
" 68- 2
89 52-13
" 52-19
" 52-39
114 54-22
133 67- 5
" 67- 7

1916 Nag.
1 R6- 3
5 59- 8
" 68- 2
15 111-14
22 2- 5
25 7- 7
55 122- 7
" 127- 4
78 55-20
" 100-15

1916 Nag.con
84 73- 1
" 73-14
93 54-21
" 54-22
100 6- 4
104 55-20
120 60-26
" 91-39
" R1- 5
" R1-19

1917 Nag.
1 8- 5
" 105-68
21 111- 2
33 76- 5
36 105- 7
" 105-12
37 3- 2
44 52-19
45 44- 1
" 44- 4
51 115- 1
57 58-31
61 6-16
" 8-14
75 92-15
79 60-28
" R5-14
86 111- 8
" 115- 1
" 115- 3
105 R1-12
107 76-18
" 76-15
116 66- 1
125 55- 9
133 65 A- 1
" 91- 4
" 91-12
137 61- 2
" 91- 8
152 92-11
207 105- 4
209 48- 9
214 54-22
215 6- 7
" 7- 3
" 7- 7
" 43- 2
" 43- 4
" 43- 7

1918 Nag.
18 7- 7
28 62- 2
74 107- 7
102 54- 1
148 106- 3
155 108(j)-9
" 117- 2
160 6-17
180 105-13
" 105-14
184 53-20
185 R2-11
" R2-23
202 106-45
206 8-15
208 7- 7
210 51- 9
" 105-49
" 106-13
" 106-49

1918 Nag.con
210 117- 3
217 84- 5
218 52-39
221 52-11
" 55- 7
234 7- 7

1919 Nag.
29 7- 7
43 53- 9
62 6-13
70 54- 1
" 54-12
80 95- 4
88 116- 1
93 91- 5
" 91-41
100 123- 1
106 7- 7
109 55-12
122 53-32
124 3-31
129 59- 6
144 51- 9
" 105-50
" 108(h)-4

1920 Nag.
24 R2-18
55 76-20
62 105-48
" 106-12
" 111-23
80 53- 5
" 53-14
" 53-24
83 53-14
" 53-15
92 52-14
96 68- 6
99 59- 6
113 108(h)-2
" 108(o)-4
144 Pre- 2
" 55- 1
" 55- 8
150 7- 7
164 3-11a
176 67-19
" 91-12
" R1-19
177 63- 5
183 68- 2
" 68-13
205 105-20
206 8-20
215 101- 3
244 58-31
247 R1- 3
" R1- 6
" R1-21
251 R1-19
254 7- 7
265 9-12
" 54- 1
279 7- 7

1921 Nag.
10 111-13
22 60- 5
67 R1- 5
" R1- 6
69 52-95
" 67-19

Topical Index and Synopsis for each Section show where exactly to look for the point required.

1921 Nag.con

84 54-12
" 123- 4
96 60-44
" 82-18
103 53-19
137 105-58
161 58-36
167 51-22
" 51-23

1922 Nag.

58 54-21
79 41-12
" 41-14
81 52-31
" 55-20
89 52-18
" 52-31
" 67-20
" R1-19
98 58-27
" 58-29
" 68- 2
" R6- 5
" R6- 6
119 58-29
" 68- 2
155 92-24
156 105-67
174 84-17
175 R2-18
" R5-11
182 R2-18
" R3- 7
199 83-17
224 10- 5
" 108(j)-4
" 108(j)-5
226 41-25
239 7- 8
259 76-20
262 63-10

1923 Nag.

13 R3- 7
15 3-34
" 41-23
" 41-25
17 53-16
" 53-19
" 58-34
20 R3-12
24 91- 5
31 108(o)-2
37 55- 5
45 3-11
" 3-16
49 60- 5
55 5- 4
60 60-39
" 105-58
" 105-67
67 3-22
" 6-16
88 1- 4
91 109- 2
103 53- 6
" 58-19
115 60-28
124 53-22
129 106-23
" 112- 4
" 118- 3
130 R3- 7

1923 Nag.con

137 76- 7
144 118- 4
161 58-28
163 105-69
" 111-22
177 53A- 3
181 58-17
193 114- 7
" 114- 8
195 53- 9
" 123- 2
225 R1-19
230 7- 7
234 59- 8
" R1-19
243 111- 6
273 91-12
" R1-15
" R1-19
274 58-31
" 60-22
301 92-17
" 92-23
311 91-25
" R1- 6
320 R3- 7
" R5-11
327 8-15
330 54-12
334 7- 7
" 53- 6
" 53-12

1924 Nag.

53 68- 2
65 8-31
67 105-16
97 58-29
" 68- 2
124 53- 6
" 54-16
132 7- 7
142 51- 8
145 3-22
" 6-22
146 54-13
155 63- 1
191 91- 5
" R1- 6
" R1-10
198 67-20
" 91- 5
" 91- 7
" 91-41
" R1-19
199 107- 7
200 53- 9
208 60- 5
210 51-10
211 52-39
214 123- 1
216 107- 5
220 106- 2
222 2- 6
" 10-12
" 123-10
226 52-39
" 65A- 4
236 122-17
238 82-14
" 92-15
254 9- 9
" 122-5a

1924 Nag.con

266 60-41
" 101- 1
284 6-21
285 84-19
318 53-20
327 54-23
337 44- 6
346 67-19
" 101- 3
360 100- 3
" 100- 6
" 100-16
363 53-34
" 65- 4
367 59- 8
373 53A- 6
393 52-19
401 60-13
" 130-18

1925 Nag.

11 60- 5
" 60-37
15 92-27
" R5-29
21 52-35
" 92- 2
" 92-19
26 101- 4
29 127- 3
48 106- 3
49 R5-14
68 44- 7
73 92-17
82 52-12
90 92-24
" 105-57
" 105-68
121 107-10
132 52-18
" 52-27
134 7- 7
164 116-18
196 38- 8
199 123- 2
258 R2-18
259 43- 9
274 52-16
281 105-35
" 105-36
" 108(l)-5
302 6-29
341 52-35
366 R1-21
398 3-34
406 111- 7
421 52-27
427 53-34
452 111-14
455 5- 4
459 111- 9
460 53-34

1926 Nag.

9 9- 7
" 117- 4
21 9-12
" 52-18
" 60-54
" 67-20
" 91- 7
" 91-10
" 92- 7
" 92-23

1926 Nag.con

21 92-29
" R1-19
48 122- 5
62 108(j)-1
" 111- 1
" 111- 8
" 115- 1
67 91-25
" R1- 5
79 53A- 3
81 7- 7
93 54-22
95 48- 3
" 54- 1
135 67-20
" 91- 7
" R1-10
147 106-12
" 107- 8
152 R5-10
160 51- 6
168 2- 5
" R6- 1
174 105-13
" 105-59
" 105-61
184 108(j)-1
201 106- 3
" 106-24
" 111- 2
206 130- 4
" 137- 4
214 92-24
" 92-25
" R1-19
253 111- 1
255 107- 7
262 100-16
" 100-22
280 R2-18
293 53-19
314 108(l)-5
321 92-10
" 101- 1
332 7- 7
355 53- 5
357 5- 1
" 6- 1
" 6-21
384 51-11
389 105- 9
" 107-10
396 6-16
" 6-21
416 51-22
449 58-25
466 53A- 3
469 5- 1
" 5- 3
" 122-5a
" 130-11
494 53-12
" 53-16
" 53-34
495 109- 2
" 109- 4
" R1-15
" R1-19
496 91- 4
" 91-12
" R1- 6

1927 Nag.

38 R1-10
41 41-21
" 41-23
" 41-25
44 5- 4
" 9-12
50 111-14
" 111-25
65 38- 1
" 38- 8
83 58- 7
" 59- 8
" 101- 4
86 41-19
138 83-17
" 84- 8
147 3- 2
" 105-49
150 92- 7
" 92-10
157 53-20
166 53- 6
" 53-19
" 53-20
" 53-34
177 8-19
" 53A-12
" 54-23
180 51-22
" 51-24
200 105-49
205 53- 3
" 53-20
216 58-10
226 19- 6
" 19- 8
237 50- 2
273 8- 5
" 8- 6
289 54-17
290 7- 7
295 52-39
" 53-12
299 52-39
" R1- 6
302 R7- 4
312 6- 4
316 52-39
332 55-12
342 54-17
345 60-26
" 92- 2
348 51-10
353 53A- 3
" 107- 3
363 53-20
365 53- 9
370 51- 1
376 105-49
377 6-21
383 38-12
400 51-10
402 53A- 3
" 53A- 7

1928 Nag.

1 53-34
" 59- 6
27 105-70
" 107- 5
44 11- 3
70 3-11
97 52- 7

1928 Nag.con

97 91-25
" R1- 6
98 67-20
128 7- 7
" 65A- 4
145 92-27
" R2-15
147 76- 8
" 108(j)-5
" 108(l)-1
153 105- 9
" 105-48
" 105-52
182 58-33
198 52-19
211 53A- 3
223 Pre- 2
" 58- 5
" 60- 5
" 60-13
" 62- 5
" 76-15
230 92-10
244 59- 8
246 48- 3
" 92-17
" 95- 3
" 95- 4
262 6- 3
" 6- 7
275 123- 4
301 58-33
" R2-18
303 65A- 4
306 R1- 5
308 41-24
" 122-17
328 108(b)-3
333 R2- 5

1929 Nag.

13 105- 7
" 105-12
23 8- 7
" 105- 6
" 105-47
" 105-72
" 111- 6
27 19- 6
" 19- 8
" 91- 4
" 91-16
30 55-20
60 38-12
" 44- 6
65 54-17
81 3- 2
" 6- 6
110 53-20
115 59-14
117 7- 7
123 105-65
135 91- 7
" 92-12
" R1-10
169 106-49
194 53A- 3
225 70- 3
246 1- 6
" 67-20
" 91- 8
" R1-19
254 58-29

Remarks in foot-notes amplify principles in the Commentary and state the special features of the case.

1929 Nag.con
254 58-31
" 67-18
257 7- 7
263 R2-18
282 2- 5
318 53-20
332 106-39

1930 Nag.
12 R2-18
17 100-16
" R15- 2
21 7- 7
22 6-16
32 55-11
51 53-11
" 53-32
55 R2-18
" R3- 3
89 R1- 5
" R1-16
134 6-24
136 R3- 7
" R5-11
139 58-29
" 59A- 3
" 68- 4
" 68- 8
" 73- 1
166 58-18
" 92-23
" 101- 1
173 91- 4
" 91-24
178 R2-18
" R3- 3
188 R6-22
204 43- 8
207 84- 5
220 38-11
237 7- 7
240 R2-23
" R4-16
273 41- 8
300 92-15
" 95- 1

1931 Nag.
1 R2-23
14 55- 9
20 R1- 5
25 8-20
40 44- 4
44 60-43
" 82-19
" R1- 6
51 6- 7
60 3-34
" 8-20
" 114- 1
69 51- 8
" 126-10
89 6-16
" 55-12
91 56- 1
" 56-14
" 60-34
" 84- 5
" R4-10
95 3-11
105 111-14
116 2- 6
" 55- 9
128 105-29

1931 Nag.con
128 105-47
138 52- 8
" 92-22
144 41- 8
147 38-12
158 51-23
159 111- 8
161 R1- 5
" R1- 6
" R11- 2
166 54- 4
" 55- 9
172 82- 7
194 41-10

1932 Nag.
3 55- 9
5 55- 9
23 137- 4
33 53-20
39 R11-2
51 123- 5
107 111- 1
" 115- 1
" 115- 4
144 R1- 6
148 55- 2
" 55- 4
154 92- 5
" 92- 9
163 8-20
165 41- 8
" 41-23
169 83-17
" 84- 7
171 91-37
" 92- 6
" 92-14
" 100-29
177 R2-18

1933 Nag.
6 6-16
22 R11- 2
44 60-41
" 91-12
" 91-21
" R1-12
104 70- 2
155 92- 2
" 92-22
" 101- 1
163 92-27
164 R2-18
169 53-24
171 67A- 1
" 67A- 2
" 91-10
" 92- 2
211 R2-17
" R14- 2
236 R5- 6
241 101- 4
" 101-10
255 115- 1
333 91-25
" R1- 6
364 55- 9
379 55-14

1934 Nag.
1 3-11
" 3-19
13 7- 7

1934 Nag.con
13 54-19
" 54-22
16 55- 9
18 58-33
29 78- 1
" 78- 3
" 78- 4
" 78- 8
" 78-11
36 52- 7
" 52-31
61 119-10
78 6-16
83 R14- 3
84 92- 3
" 92- 6
97 82-17
" 92-15
132 44- 6
147 R14- 3
149 65- 4
" 100-22
222 38-12
264 R2-11
" R11- 2
268 6-17
280 8-20
285 7- 7

1935 Nag.
2 3-22
" 6-16
14 R1-12
35 8-20
68 R1- 5
129 R14- 3
" R14- 6
" R14-14
" R15- 2
133 6-13
135 6-16
" 58-18
179 8-13
208 108(e)-6
226 67A- 1
" 67A- 2
249 68-14

1936 Nag.
4 55- 2
32 92- 1
" 92-22
34 44- 7
" R6- 3
" R10- 3
37 3-24
125 52-19
" 52-35
" 56-10
" 58- 4
" 73- 1
" 100-13
128 83-17
" R1-19
166 5- 4
" 53- 5
" 53- 6
" 58-14
168 8-20
171 3-19
" 111- 8
174 53A- 3
" 53A-13
" 107- 1
" 107- 7

1936 Nag.con
174 107- 9
" 107-11
184 R4-12
207 53-2a
" 53- 5
" 53- 8
" 53- 9
" 91- 8
" 92-13
" 92-17
209 91- 2
" 91- 9
" 91-25
" 91-37
" R1- 6
214 41- 8
" 41-21
217 3- 2
" 132- 2
254 53A- 5
268 53- 8
" 53- 9
282 53A- 3
" 53A- 5
" 53A- 9
293 76- 5
295 107- 7

1937 Nag.
1 53-20
" 54- 5
" 123- 6
9 53-20
36 57- 2
" 57- 4
" 100-24
54 51- 9
" 61- 5
74 53A- 5
" 53A-13
" 53A-17
" 107-14
99 67A- 4
106 11- 2
116 3- 2
121 R1-12
139 106-40
" 110- 1
143 48- 8
179 8-18
" 8-16
196 60-26
" 92- 7
" R5-13
205 8-19
" 91- 5
" 91- 8
225 65-10
" 65-11
" 72- 9
246 55-14
262 60-44
" 67-27
281 8-20
289 3- 4
" 117- 3
" 117- 4
321 105-31
" 105-72
" 106-12
" 108(c)-6
330 7- 7
" 92-17

1937 Nag.con
372 92-19
" 92-20
" 92-22
376 R1- 5
400 52-12
" 52-31
" 53-20
" 91-10
" 91-25
402 53A- 9
" 92- 3
" 92-13

1938 Nag.
30 52-35
54 R11- 2
79 67-20
80 68- 8
93 8-20
112 67-18
" R4- 9
129 100-28
142 1-3a
" 41-21
" 123- 2
185 8-20
237 R6-15
249 53- 3
" 53- 5
" 53-15
" 53-20
253 7- 7
" 54- 5
257 55- 9
298 Pre- 1
377 3- 2
" 3- 3
" 3- 4
" 3- 9
" 53A- 5
" 53A-15
" 105-14
" 111-10
499 108(c)-1
" 108(c)-3
" 108(c)-8
441 55- 2
459 65-10
" 72- 9
506 51-22
" 105-32
" 106- 6
" 116- 4
" 116-13
546 53-29

1939 Nag.
1 39- 2
35 54-23
65 40- 8
97 6-16
118 100- 5
" 100-13
" 100-16
128 52-39
" 52-40
132 3-33
" 3-41
" 100- 1
" 100-15
" 100-17
" 100-22
" 100-25
196 60-41

1939 Nag.con
137 60-44
" 67-27
166 105-67
197 8-20
209 55-20
210 55-12
215 92-23
217 92-13
256 59A- 3
" 68- 4
" 68- 8
287 58-31

1940 Nag.
7 3-34
" 41- 3
8 52-13
" 52-14
" 100-17
" 100-25
84 58-33
140 106-32
143 105- 9
" 107-10
149 67-29
" 73- 1
156 58-40
" 67-18
" 92- 6
" 100-12
" 100-21
" R4- 9
163 Pre- 2
" 3-48
" 39- 2
" 100- 1
" 100-22
" 100-28
175 5- 4
" 53A- 6
185 52-10
241 41-21
285 65-10
" 72- 9
305 6-35
396 53A- 5
" 53A-14

1941 Nag.
1 8-20
3 67A- 1
" 67A- 8
5 9- 5
" 54-19
" R1-10
12 7- 7
72 R1-15
" R1-19
102 8-20
" 100- 5
" 100-13
133 R1- 5
" R1-22
162 8-20
245 100-29
311 8-20

1942 Nag.
33 101- 1
" R1- 5
39 91-21
58 R15-10a
59 51-22

Any case in the "Table of Cases" will show where to get the entire case-law on the point.

1942 Nag. con.
59 51-24
60 R1- 5
88 58-31
" 67-14
103 108(a)-2
111 82- 2
" 92- 1
" 92- 3
" 92-24
" 95- 1
113 53A-18
115 8-20
" 58-33
" 58-44
119 105-64

1943 Nag.
4 40- 8
81 8-20
92 8-11
101 52-34
113 41-21
" 41-22
" 53- 5
" 53- 9
129 53-2a
" 53- 5
" 53- 6
" 53- 8
" 53- 9
" 53-15
" 53-20
" 53-22
178 R4-12
" R6- 4
" R6-12
266 6-17
271 60-26
332 6-16
" 130- 4

1944 Nag.
1 100-22
" 100-28
20 41-10
25 56- 6
" 56-12
" R4-10
" R15-10a
33 122-5a
44 53- 5
" 53- 6
" 53-13
" 53-20
" 53-22
" 53-29
" 53-30
57 R1-19
94 8-20
" 117- 2
98 132- 2
" 132- 7
133 53- 5
" 53- 8
" 53-10a
" 53-18
" 53-24
141 105- 7
" 108(j)- 5
" 116- 1
163 101- 3
" 101-10
181 R3- 7
185 126-2a
" 130- 3

1944 Nag. con.
185 130-23
187 10- 6
" 14-10
225 60-42
" 128- 4
" 128- 5
229 114- 1
" 114- 5
" 115- 7
" 117- 2
280 105-47
289 58-29
" 58-31
" 68- 2
298 R5-10

1945 Nag.
53 R1- 5
69 117- 4
86 41-16
" 52-31
" 54-23
102 107- 5
255 106-37
" 112- 2
277 3-13
289 101- 1
" R4-15
" R5- 5
" R5-19
" R6- 8
" R6-10
" R6-21

1946 Nag.
226 59A- 3
264 58-33
367 52-21
419 115- 1
" 115- 4

1947 Nag.
43 92- 3
" 92- 6
" 100-17
48 108(c)-1
" 108(c)-3
" 108(c)-8
" 117- 2
188 53A-9a
" 53A-11
" 53A-12
" 111-10
210 8-20
" 60-44
" 65A- 7
" 91- 4
" 91-12
254 54-23

1948 Nag.
44 67-28
56 R1- 4
" R1-18
" R1-19
" R2-18
" R3- 5
67 53A- 3
" 53A- 9
97 52-18
" 52-27
" 52-40
" R1- 6
" R1-19
110 3-31

1948 Nag. con.
110 41- 1
" 41-13
" 41-21
" 41-23
" 53- 6
" 53-20
" 53-22
122 43- 7
123 R1- 6
" R6- 6
155 3-14
256 95- 4
279 60-14
283 52- 9
286 40-15
316 52-35
" 60- 4
" 60-23
" 60-44
" 92- 6
" 92- 7
" 101- 6
324 1-12
328 123- 5
367 41-21
369 91- 4
" R1- 5
382 55- 9
404 117- 4

1949 Nag.
12 60-32
81 67-4a
114 52-14
" 52-31
149 3-11a
" 3-19
" 59- 8
155 60-44
" 81- 2
" 82-4a
" 82-10
186 137- 5
206 65- 4
218 112- 5
243 58-33
265 106-18
282 105-37
" 105-40
" 106-32
" 116-13
296 60-41
319 68- 4
" 68- 8
" 68-16
336 108(j)-5
" 116- 6
346 60-43
354 58-29
" 60-22

A. I. R.
OUDH

1914 Oudh
23 60-28
" 61- 5
" 62-12
107 83-16
" 103- 2
137 58-17
" R11- 2
140 60-10
" 84- 5
160 60- 5
" 62- 5
167 123- 4
184 R1- 5
209 R2-18
" R3- 3
" R5-13
212 108(h)-2
213 11- 2
" 11-10a
220 105-32
" 108(h)-1
234 95- 1
" 95- 7
245 R6- 3
255 8-20
" 18- 4
" 122-5a
272 105-14
" 105-59
289 104- 1
" R11- 2
304 60-28
330 76-19
333 R6- 3
335 58-33
348 126-10
349 100- 7
" 100-13
" 100-16
" 100-22
352 52-21
360 54-11
" 105-42
366 8-20
" 58-33
369 3-31
" 6-38
376 62- 2
" 62-12
379 60- 5
" 60-28
" 60-32
392 53- 6
" 53-20
426 43-11
" 44- 7
" 65- 4
" 73- 1
507 8-20

1915 Oudh
1 52-31
16 58-17
" 58-40
" 98- 1
29 60-15
31 58-17
" 67- 5
" R11- 2
65 6-24
" 7- 7
" 59- 8
75 3- 3
" 123- 4
109 60-29
122 R6-21
124 48- 9
147 68- 2
149 54-19
" 118- 3

1915 Oudh con.
149 118- 7
151 60-32
155 7- 8
157 52-14
160 53- 9
165 65A- 4
" 105-19
" 107- 7
177 9- 1
" 72- 3
" 91-16
190 58-22
195 3- 3
200 52-40
" 65A- 1
" 65A- 7
211 60-44
" 67-20
" 91- 5
218 111-18
226 R7-13
" R8- 7

1916 Oudh
10 126-10
25 R1- 5
59 61- 2
74 R1-19
79 R6- 3
110 60-10
129 100- 5
" 100-32
138 R8- 7
143 55-12
" 55-14
151 R1-19
169 92-10
176 100-32
184 58- 6
185 3-16
" 59- 8
" 68-13
197 58-18
199 R11- 2
211 3- 3
219 136- 3
228 67-22
232 52-18
264 105-68
279 83-17
" 83-20
" 84- 7
" 84-16
288 56-12
290 100-22
292 83-15
" 84-10
313 R11- 2
319 41-23
329 8- 20
" 61- 5
" 100- 5
" 100- 6
332 68- 5
339 8-20

1917 Oudh
50 95- 1
64 122-17
106 60-32
111 52-31
123 60-40
124 60-50
128 55-14
141 76- 7
" R7- 4
159 R1- 5
161 48- 9
177 67- 5
186 60-10
" 76- 8
190 76- 7
193 52-27
200 76-12
" 76-13
203 59- 5
210 35- 9
" 35-19
212 76- 8
230 6- 7
" 68- 2
" 68-13
233 68- 3
" 73- 10
" 73- 14
237 60-28
241 R6-6
257 51- 1
" 51- 8
292 54-21
320 R3- 7
345 54-21
" 54-22
388 60-28
" 61- 5
415 60- 4
" 60-41
" 91- 8

1918 Oudh
1 51- 8
" 51- 11
" 51-22
5 53-20
22 59- 8
" 68-13
27 61- 5
29 53-29
62 126-10
91 60-14
166 50- 2
184 R1-19
191 19- 6
" 19- 8
" 122-17
214 41- 1
" 41- 8
" 41-10
" 41-14
224 R11- 2
279 58-12
" 105-67
286 76- 8
288 44- 4
300 111-13
317 7- 7
318 52-35
" 60-44
331 58-18
345 7- 7

"Table of Cases" indicates first reference in foot-notes and reference to Official Reports.

1918 Oudh *con*
348 6- 4
356 11- 3
" 41- 7
374 6-21
398 55-11
404 60-44
432 8-20
" 60- 5
" 62- 5
" 77- 1
445 R2-11
" R4-12
" R10-5

1919 Oudh
23 59- 7
34 38-11
" 38-12
36 60-17
39 82-17
" 95- 1
49 92-11
50 72- 2
" 72- 3
" 76- 1
" 76- 8
69 R11- 2
70 10- 6
82 76-12
89 101- 4
95 53- 6
104 58-18
114 48- 2
" 48- 5
" 48- 6
124 106- 3
125 76-10
" 76-22
126 6- 6
132 8- 8
" 8-17
" 8-18
134 108(b)-3
150 92- 9
199 51-22
201 54-20a
207 54-21
217 91- 4
" 91-16
" 91-32
228 R11- 2
240 61- 5
241 9- 7
" 48- 6
" 82- 4
251 58-18
267 58-18
" 82-17
" 95- 7
270 68- 2
278 111- 5
" 116-13
303 44- 4
317 52-38
329 44- 7
" 73- 1
338 61- 5
340 3-11
352 67A- 1
" 67A- 5
370 72- 3
" 92-29
374 58-33

1919 Oudh *con*
379 92- 29
381 R8- 7
384 3-31
385 60- 5
" 60-40
394 60-32
398 41-12
" 41-14
" 108(b)-3
" 108(c)-2
403 100-32
418 58-40
" 98- 1
420 122-16
432 8- 3

1920 Oudh
5 100-13
24 60-17
" 76-22
" R8- 4
29 54-14
44 41-10
53 7- 7
" 60-32
61 63A- 1
80 38- 1
" 38- 8
84 R1-12
87 3-11a
" 3-12
109 54- 5
114 60-34
125 108(l)-14
144 38- 8
" 38-11
147 105-82
180 40-14
182 53-16
" 53-33
" 53-34
" 118- 2
" 118- 4
" 118- 5
" 118- 9
187 R11-2
204 60-26
" 82-17
" 92- 9
" 92-15
" R2- 4
" R5-13
219 6-21
228 60-32
234 60-44
244 7- 7
251 68-16
" R6- 3
" R6-10
253 60-26
" 92- 7
253 R5-13
265 6- 4
311 60-51
" 83- 5

1921 Oudh
13 111-13
45 60-32
47 68- 4
" 68- 5
55 72- 3
105 6- 4
124 3- 2
" 54-19

1921 Oudh *con*
124 60-27
132 119- 7
138 R2-18
" R3- 7
150 100-31
160 7- 7
172 61- 5
176 7- 7
" R4- 9
196 60-32
203 59- 4
" 59-14
209 8- 5
" 8-20
" 123- 4
214 38-12
216 58-41
231 51-22
240 8- 4
" 8-20
" 105-42
248 54-12
254 8-20

1922 Oudh
17 83-18
33 R5-12
42 8- 4
" 8-20
46 44- 7
48 68- 9
58 61- 5
59 126- 9
81 54-11
" 105-42
91 72- 3
" 76- 8
93 19- 2
" 123- 4
103 68- 6
122 R11- 2
123 59- 5
133 53A- 3
" 60- 1
135 59- 5
175 38-11
201 105-57
" 105-58
" 105-61
217 53A- 3
221 60-28
" 60-32
" 60-37
229 54-11
" 105-42
236 10- 3
" 10- 8
249 108(b)-2
" 117- 2
257 68-13
268 R11- 2
283 60-32
289 6-12
" 8-19

1923 Oudh
1 52-39
" 65A- 1
24 60-28
" 61- 5
" 100- 5
42 48- 6
47 108(j)-1
80 53- 6

1923 Oudh *con*
80 53-17
" 123- 4
114 4- 6
" 40-25
" 107-12
121 101- 1
143 58-17
" 60-28
" 61- 5
147 38-12
156 2- 5
209 60-28
214 123- 4
236 R8- 7
237 4- 5
" 4- 6
" 105- 4
" 107-15
241 84- 7
" R11-2
265 43-11

1924 Oudh
1 101- 1
17 R1-12
19 R1- 5
33 R1-21
40 60 44
49 38-12
56 60-26
" 91- 5
62 6-16
" 6-20
85 82-17
" 92- 7
" 92-19
" 95- 1
" R5-13
92 76-12
" 76-15
" 77- 1
97 107- 7
" 108(l)-12
99 55- 9
40 R7- 3
147 68-13
161 60-12
162 38-12
164 126-16
193 60-28
203 54-11
" 105-42
209 5- 4
" 5- 5
" 43- 9
" 58- 5
" 95- 1
" 100-13
234 6- 3
273 5- 4
302 7- 7
" 92-16
" 92-17
305 111- 1
307 73- 1
309 105-85
" 106- 2
321 53- 9
374 92-19
382 40-10
417 58-33
425 58-18

1924 Oudh *con*
426 54-11
" 105-42

1925 Oudh
11 8-20
" 58-33
" 60- 5
" 60-28
16 6- 7
" 43- 7
30 52-31
" 68- 6
" 68-14
" 91-16
37 7- 8
45 51- 5
73 5- 4
108 3- 3
114 77- 1
120 53- 9
" 53A- 3
125 8- 5
" 10- 9
132 58-18
150 60-44
" 60-51
171 100-31
173 106- 2
" 116-12
189 106-32
" 108(c)-8
215 82- 4
235 60-51
250 60-50
255 R7-13
" R7-17
" R8- 4
258 51-22
" 51-23
" 51-24
264 8-20
267 53-20
270 91-12
" 105-47
273 65- 4
299 6-16
308 58-44
351 R2-11
369 45- 7
379 67A- 1
" 67A- 5
383 129- 4
386 60-28
399 54-19
" R5-21
406 60-32
407 54-12
429 72- 8
440 38-12
458 48- 9
" 61- 5
462 R6- 3
496 2- 6
" 52-18
" 52-31
506 48- 9
" 61- 5
" 100- 5
533 58-32
542 65A- 1
545 7- 3
550 100- 5
557 38- 8

1925 Oudh *con*
557 38-11
568 123- 4
593 60-28
" 61- 5
" 68- 8
" 100- 5
609 60-44
613 3-42
" 82-17
" 95- 1
" 95- 4
624 54-11
628 59- 4
" 59-14
" 68- 2
" 68-13
629 95- 1
649 R8- 7
654 76-22
678 72-11
" 76- 8
685 63A- 1
694 108(q)-1
714 54- 5
" 54-11
" 105-42
720 60-28
" 60-32
737 3-11
" 3-17
" 3-18
740 38- 8
749 8- 6

1926 Oudh
27 R4-12
" R6- 8
38 60-32
44 48-14
59 61- 5
69 5- 4
72 105-47
79 106-32
81 55-12
98 123- 5
" 123-10
113 83-17
" R1- 1
" R7- 4
" R9- 3
119 6- 4
131 3-31
" 41-10
" 41-13
" 59- 9
136 3- 3
138 59- 6
169 7- 7
180 R2-18
186 8-20
" 54- 4
" 54-12
196 54-12
207 65-10
209 3-15
" 3-17
" 100- 9
224 68- 6
228 60-28
230 100- 5
" 100- 6
260 105-47
266 59- 8

1926 Oudh con

270 68-13
281 60- 5
" 62- 5
" 72- 3
" 72- 5
306 R7- 8
330 3-39
338 39- 5
346 R7-19
349 100- 5
356 60-32
357 60-51
358 8-19
368 54-12
371 123- 5
" 123-10
378 58-17
" R11- 2
385 R4-15
408 60-34
431 11- 2
" 11- 8
469 53-16
470 7- 7
" 58-25
474 54-12
" 123- 4
487 R4- 9
501 53-22
" 53-34
502 60-34
509 73- 1
514 76-12
517 65- 4
546 60-50
552 60- 5
561 8- 4
" 8- 5
" 28- 2
594 60-22
606 101- 2
609 105-13
" 107- 9

1927 Oudh

12 60- 5
27 R1-12
49 R3- 7
55 58- 6
66 51-22
74 8- 2
87 68- 6
103 84-13
135 51-22
148 65A- 1
159 55- 5
161 54-11
" 105-42
162 53-10
" 53A- 3
170 76- 7
" 76-15
" R2- 6
176 53-18
" 128- 6
177 43- 7
199 60- 5
" 60-37
" 76-12
" 76-15
204 54- 5
" 54-12
208 76-12

1927 Oudh con

208 R7- 4
214 59- 6
" 68-13
224 60-32
237 60-28
" 60-37
261 52-11
" 52-31
275 R5-14
278 122-20
" 129- 1
297 6- 1
315 68-13
" 68-14
339 111- 1
341 101- 1
347 82-17
" 92-15
" 95- 1
486 6-10
448 41-23
455 55-14
467 44- 4
482 53A-13
" 54-17
485 53A- 3
510 3-12
" 61- 5
" 100- 5
527 17-19
512 60-41
" 60-44
" 82-18
544 111-16
" 111-17
552 82-17
" 92-15
" 95- 1
535 3-11
566 38-12
570 53A- 3
572 5- 4
581 54-17
586 R8- 7
594 68- 6
595 60-10
603 52-39
605 36- 2
607 R1- 5
609 108(g)-2
" 108(g)-3
617 53-20

1928 Oudh

1 58-35
25 54- 5
35 6-27
" 126-16
41 65- 4
49 11- 2
" 32- 9
67 8- 4
" 8-16
" 28- 2
" 35- 2
" 35-10
99 105-17
" 105-59
103 58-33
148 58-14
146 52-13
148 55-14
153 43- 4

1928 Oudh con

209 58- 8
273 58-17
" 61- 2
" 61- 5
" 62-12
289 67- 5
298 91- 9
330 60-34
336 65- 4
342 3-31
344 11- 2
" 11-10a
" 43- 4
365 11-13
384 45- 7
405 58-35
414 53- 5
" 123- 4
439 54-14
" 59- 6
442 73- 1
465 58-25
" 68-13
475 55- 3
479 53A- 3
" 107- 7
490 R6- 8
500 65- 4

1929 Oudh

22 6- 6
30 60-28
" 60-32
" 60-34
40 61- 5
54 60- 5
" 60-32
80 100- 5
93 3- 3
97 123-12
121 76-10
" 76-22
134 5- 4
" 123-12
160 41-23
185 6- 7
193 5- 4
" 10- 3
" 41-23
" 54- 5
204 8-20
254 55-20
282 R4- 9
286 108(c)-8
" 108(q)-1
290 92-15
" 95- 4
292 51-23
316 39- 2
" 100-24
334 5- 4
373 53A- 6
378 50- 2
415 8- 4
422 38-12
485 7- 7
" 123- 4
441 7- 7
455 68- 3
463 R12- 3
491 14-14
520 53-20
529 106-24

1929 Oudh con

529 111-13
" 117- 3
" 117- 4
539 100- 5
" 100- 6
" 100-13

1930 Oudh

6 58-33
10 R6- 3
" R15- 2
20 R6-16
32 18- 5
71 123- 4
88 3-22
" 6-16
93 52-14
" 53-20
" R6-23
97 R1- 5
129 21-11
" 48- 7
" 67-19
167 R2-11
173 60-34
178 92- 2
184 41- 8
" 41-23
203 105-14
235 51-22
260 82- 2
" 82-13
" 82-15
" 82-16
" 82-17
" 82-25
268 128- 6
" 129- 2
270 60-48
292 68- 3
" 73-10
294 91- 4
" 91-16
300 54- 5
" 54-11
" 105-42
328 R6-11
" R10-4
337 63A-1
" 72- 3
362 52-11
377 R6- 3
378 R6- 3
397 92-17
465 60-48
475 44- 1
481 54-12

1931 Oudh

5 65-10
" 68- 4
7 123- 4
12 108(l)14
14 5- 3
" 122-51
19 123- 4
34 126- 9
47 R11-2
63 52- 1
" 52-14
" 100-31
69 60-26
103 58-22
110 3- 2

1931 Oudh con

121 60-26
" R2-18
" R3- 3
134 53-11
144 92-24
146 3-11
" 3-14
" 3-19
157 52-35
" 67-19
" 67-20
177 8-12
" 123- 4
253 41- 8
" 41-23
256 53-34
" 65A-4
285 3-17
" 67-22
288 53A-3
295 92- 7
333 3-43
" 53-11
" 53-34
344 53-34
358 67-10
" 91-15
" R1-19
378 60-50
" R7- 3
405 53-34
410 R1- 6
" R1-22
419 41- 7
" 41-25
422 R6- 8
424 122-16

1932 Oudh

40 39- 1
" 39- 2
" 39- 5
" 53-10
" 53-20
" 128- 4
54 58- 6
" 92- 1
" 92-19
" 100- 5
57 68- 6
79 111- 9
82 55-15
88 55-12
123 58-22
" 76- 4
" 76-12
" 76-15
" 76-20
" R7- 6
" R10-3
135 118- 9
161 27- 2
168 100- 5
" 100-26
178 67- 4
" 68-12
" 98- 3
255 72- 7
" 76-12
" 76-15
" 92-19
" R7- 4
" R11- 2

1932 Oudh con

268 92-23
314 92-19
" 101- 3
" 101-10
336 58- 4
" 100- 5
" 100- 7
" 100-13
" 100-17
" 100-22
" 100-24
342 91-18

1933 Oudh

1 R5-23
" R6-10
6 53- 9
9 92- 1
" 92-20
" 101-10
28 95- 1
33 55-11
" 55-12
35 58-35
" 67-18
" 68- 5
" 68-17
40 R8A- 1
66 67- 5
76 39- 2
" 100-16
81 67- 5
99 123- 4
128 R11- 2
161 105-41
" 105-47
166 41-23
170 38-11
" 38-12
" 58-25
182 8-20
190 R11-2
214 R6- 8
229 R5-16
237 67- 5
291 31- 6
329 54-11
" 105-42
352 R6- 3
365 3-11
" 3-14
" 3-19
" 58-22
439 19- 2
" 19- 3
" 19- 4
460 60-28
" 60-32
465 106-32
466 R6- 3
520 R6- 8
" R6- 8
529 R6- 3
535 38-12

1934 Oudh

27 123- 4
35 13- 2
" 16- 3
44 R2-18
45 R5- 8
50 R1- 5
59 19- 6
" 19- 8

In the foot-notes to the Commentary ‡ indicates either a leading case or a case giving fuller reasons.

1934 Oudh con

97	108(l)–14
98	60–21
104	76–12
"	76–15
"	76–19
112	43– 7
129	92–10
137	122–12
163	54– 4
"	123– 4
165	41–23
"	41–25
178	51–23
209	R5–16
213	92– 1
"	92– 5
"	92–19
220	77– 1
"	R1–19
233	41– 3
"	41–21
240	3–22
"	6–16
"	55–12
246	59A– 3
"	60–22
"	61– 3
"	61– 5
"	91– 5
255	58–30
"	58–41
"	98– 5
283	3–38
"	41– 8
"	48– 1
"	78–10
303	52–21
307	100–31
329	25– 3
"	126– 2
337	8–20
348	60–46
415	68– 3
437	100–31
454	19– 6
"	19– 8
460	41– 2
473	67– 5
"	R11– 2
492	55– 8

1935 Oudh

11	R6– 3
27	54– 5
49	52–14
"	52–18
90	106–13
"	107– 4
"	117– 3
93	83– 4
"	83– 9
96	8– 4
121	7– 7
139	91– 4
"	91– 5
142	55– 8
"	55–19
156	7– 7
183	R14– 2
"	R14– 7
198	8– 6
209	8–20
"	105–60

1935 Oudh con

213	8–20
"	58–17
"	59A– 3
"	61– 3
"	61– 5
"	R11– 2
217	54–11
"	105–42
245	82–13
"	82–17
"	92–15
"	92–23
"	95– 1
257	3–31
260	R6– 3
"	R6–10
263	R11– 2
309	100– 5
"	100–13
313	R5–14
373	38–11
399	92– 5
"	92–22
411	67–19
"	101–10
432	128– 5
"	128– 6
437	41–10
"	41–23
445	101– 9
452	R4–12
"	R10– 5
462	52–12
"	52–39
501	4– 4

1936 Oudh

47	59a– 2
"	59a– 3
"	92– 9
"	92–15
"	95– 7
"	127– 5
50	R6– 3
52	100– 5
"	100–17
"	100–26
61	R6– 3
"	R6–8a
76	6–13
81	R6– 3
87	41–10
"	41–23
102	33A– 3
"	53A– 5
"	106– 6
"	106–18
"	106–25
105	130–19
121	6– 1
"	8– 4
130	60– 5
141	55– 9
143	R6– 3
152	R5–14
169	82– 2
173	R5– 5
174	68– 5
183	R4– 6
196	58– 4
"	100–13
"	100–15
"	100–16

1936 Oudh con

202	61– 3
242	67–27
"	R9– 3
259	R6– 8
263	68– 5
"	68– 7
270	8–20
"	59– 8
275	130–17
"	136– 2
280	7– 7
"	92– 1
"	92–17
306	53A– 5
"	106–41
"	110– 1
313	43– 7
"	55–15
"	68– 8
316	108(o)–8
410	54– 5

1937 Oudh

1	3–34
15	6– 6
20	68– 8
"	68–17
"	68–18
"	R6– 4
20	R6–10
31	100–11
"	100–21
"	100–24
33	67–20
"	R1–19
35	58– 4
"	100–13
"	100–22
75	51– 1
87	7– 7
"	68– 2
99	5– 4
127	43– 7
"	52–11
138	46– 2
"	58–18
146	58–36
"	65A– 1
"	65A– 2
"	91–12
"	105–67
151	107–10
"	117– 3
159	52–31
"	55–18
165	106– 2
178	41–23
189	5– 4
217	100– 1
"	100– 6
"	100–13
"	100–22
"	100–24
"	100–28
226	51–22
252	R6– 3
"	R6–10
263	51–22
284	82–18
295	8–20
301	3–28
"	3–29
"	3–32

1937 Oudh con

301	3–34
"	56– 6
"	100–22
321	61– 2
"	61– 5
347	5– 4
349	53–16
"	53–34
365	R5–10
405	137– 4
406	60–51
410	4– 4
"	7– 7
"	68–13
420	6–13
"	100– 5
"	100–17
"	100–22
433	5– 4
446	51– 8
"	51– 9
453	R4–15
"	R5–20
473	11–10a
478	67–20
"	101–10
"	R1–19
490	8–20
492	54–11
493	54– 5
"	59– 6
"	91– 8
"	92–13
517	58–29
"	68– 2
"	68– 8
"	68–13
"	127– 4
"	127– 5
521	7– 3

1938 Oudh

10	91–28
"	R1– 6
"	R1–10
16	60–50
17	11– 9
"	54–11
22	92–23
26	122– 7
33	53–24
44	53–20
51	19– 2
57	58–33
64	41–23
65	5– 4
"	53– 5
"	53– 6
69	14–14
84	5– 3
"	100–24
"	100–32
90	101– 3
94	6– 4
97	5– 4
"	123– 5
127	92– 5
"	92–15
140	8–20
156	R10–3
165	53– 5
190	6– 4
210	59A– 3

1938 Oudh con

210	68– 4
230	53– 6
"	53–34

1939 Oudh

55	2– 6
"	54– 3
85	53A– 6
96	59– 7
122	3–21
"	6–20
126	R14–6
"	R14–11
131	Pre– 1
145	35–28
161	52–27
"	128– 3
"	R1– 7
178	52–12
196	6–16
213	3–19
230	53–20
"	53–22
257	8–20
"	111–10
"	111–14
"	112– 2

1940 Oudh

1	53A– 9
"	53A–10
"	53A–13
90	R4–15
"	R6– 8
"	R6–17
92	111–16
97	60–44
"	92– 5
"	92–15
118	8–20
138	Pre– 1
184	19–10a
200	53–11
"	53–24
230	R1–11
235	67A– 2
"	67A– 5
"	R1– 4
"	R1–19
266	51– 8
"	51–12
401	106– 3
"	106– 6
"	116–13
409	53A– 9
"	53A–13
415	8–20
425	107–10
435	R1– 3
437	R1– 3
"	R1– 6

1941 Oudh

12	8–20
"	54–11
"	105–42
41	3–20
"	53A– 5
"	53A–10
84	76– 5
"	76–12
"	76–15
95	53– 5
123	43– 7

1941 Oudh con

123	43–11
178	53– 6
"	53–34
185	5– 4
198	8–20
"	10–13
"	105–67
203	82–20
205	53– 5
"	53– 6
"	53–34
"	128– 4
226	92–16
"	92–17
"	92–22
305	3–29
"	100–11
"	100–21
"	100–24
369	8–20
380	76–19
"	77– 3
395	8–15
457	53– 5
"	53– 6
"	53–14
"	53–18
"	53–20
"	53–24
479	8–20
"	58–31
"	58–33
"	58–35
498	58–17
"	72– 5
"	76–19
"	R2–12
"	R7– 4
506	111–16
507	8–20
582	58–33

1942 Oudh

93	105–19
"	107– 7
"	107– 8
"	116–13
151	54–11
"	105–42
172	48– 8
"	58–35
"	58–40
"	58–41
"	68– 5
"	68–12
189	76–12
"	77– 1
197	R1– 2
"	R1–12
"	R1–19
201	59– 8
"	59–13
203	76–12
"	77– 1
231	51– 9
"	53A–13
"	53A–16
"	107– 7
"	107–10
"	108(f)–2
260	91– 5
"	92– 1
"	92–22

In the foot-notes to the Commentary † indicates a case which is most appropriate for the proposition.

1942 Oudh con
806 51-22
813 41-23
825 111- 6
827 45- 4
858 R5-14
874 10-13
" 105-79
" 111-12
891 R9- 1
908 107- 7
" 107- 9
910 6-13
924 2- 6
" 54- 3
949 82-13
" 82-16
" 82-17
" 92- 1
" 92- 5
" 92-15
" 92-24
" 95- 1
" 95-10
960 108(o)-4
" 117- 2
965 92- 9
999 76-12
" 77- 1

1943 Oudh
38 76-12
" 77- 1
105 50- 2
" 111-11
125 54-11
164 R1- 6
" R1-19
196 5- 4
" 6- 4
" 6- 7
" 43- 7
218 R1- 3
" R1- 4
" R1-19
284 101-1
" 101- 2
338 100-10
" 100-13
354 52-14
" 100-11
" 100-13
" 100-28
392 116- 6
" 116-10
" 116-13
398 41- 1
" 41-10
" 41-23
407 65a- 4
" 92-23
" 101- 1
" 101-10
433 76- 8
" 77- 1
" R7- 3

1944 Oudh
35 40- 1
" 40-14
65 5- 3
" 5- 4
" 8- 5
" 8-20
" 14- 6
106 R2- 5
" R3- 7
" R4-15
111 R1- 1
" R2- 5
" R3- 7
" R4-15
114 92-15
" 95- 1
208 68-14
" 72- 3
212 53A- 4
" 53A- 9
" 53A-10
" 53A-13
238 76-12
" 77- 1
305 58-33
314 53- 5

1945 Oudh
65 R6- 4
87 R1- 6
113 60-32
120 53A-16

1946 Oudh
83 77- 1
99 52-13
" 52-19
" 100- 5
101 72- 3
" 76-10
106 3- 3
" 76-10
129 105-42
" 107-10
144 106- 6
213 41- 3
256 5- 3

1947 Oudh
71 11- 2
77 R6-10
122 60-41
" 67-28
" 82-19
" 100-17
135 R14-12

1948 Oudh
7 105-42
54 105-48
127 113- 3
147 100-22
238 R8- 1
247 41- 8
263 76-12
349 6-37

A. I. R.
ORISSA

1949 Orissa
14 54-14
" 55-15

A. I. R.
PATNA

1916 Pat.
1 R4-12
" R5-26
" R6-11
8 8-20
10 6-18
" 6-19
11 58- 4
" 58-30
" 65A- 1
" 66- 7
61 R14- 4
64 67-19
" R1-19
" R5-13
69 8-10
96 72- 3
" 76- 9
104 111-14
113 57- 2
" 67A- 1
" 67A- 5
" R1-10
141 8- 6
161 10- 5
" 10-13
" 10-17
" 105-67
178 8- 9
194 2- 5
" 108(j)-1
210 3-11
" 3-18
212 54-23
222 55- 7
226 40- 1
" 54-23
249 82-18
252 39- 1
" 100-30
" R14- 2
" R14- 3
" R14- 6
259 44- 5
279 53-30
310 R1-12
" R1-19
325 59-11
337 8- 4
350 82-12
" R6- 3
364 54- 4
375 91- 3
" 91-21
401 R1-19
409 112- 4
411 R1- 6
417 111-12

1917 Pat.
14 58-35
" 58-36
18 54-12
34 108(l)-14
46 105-47
" 106- 2
" 107- 4
52 108(l)-14
80 54-21
82 60-14
104 R1-12
117 54- 5
200 68- 2
204 39- 1
" 39- 5
214 R1-19
234 51-22
268 Pre- 2
" 58- 9
" 58-39
" 70- 1
325 71- 3
330 R6-20
345 105- 7
352 R1-12
375 R1-12
417 92- 2
" 92-19
" 101- 1
447 123- 4
448 53- 1
" 53- 6
" 53-16
451 68- 7
469 106-23
" 106-24
" 113- 3
471 108(d)-3
477 8-10
" 108(o)-6
478 3-39
489 R14- 4
" R14-15
510 R11- 2
514 4- 4
" 54-14
" 58-18
526 68- 6
538 6- 4
549 108(c)-1
" 108(o)-2
" 108(o)-8
551 123- 2
555 R6-10
577 R5-14
582 R2- 9
" R5-20
" R11-2
585 54-23
596 R14-4
" R14-15
608 R14-7
627 8- 6
674 R1-12

1918 Pat.
41 R5- 4
79 41-23
154 R1-19
174 111-14
" 111-16
175 44- 4
230 38-12
240 R1- 5
262 R6- 8
291 123- 4
299 52-35
" 92-19
315 R6- 3
316 68- 5
322 60- 4
" 95- 1
" 95- 2
355 108(l)-14
356 3-11a
" 126-10
" R1- 5
380 R14-3
385 58-36
398 Pre- 1
421 76- 4
469 10- 1
" 38-12
522 82-23
" R5-19
534 43- 7
548 38-11
626 7- 8
" 105-22
632 53-34
637 54-17
651 101- 1
668 92-23

1919 Pat.
13 111- 9
47 R14-12
53 101- 1
68 43- 2
108 106-39
125 5- 4
129 67A- 1
" 67A-5
146 52-13
181 53- 6
" 53-34
195 3-11
224 7- 7
227 68- 6
236 53- 6
252 8-20
254 106- 3
" 106-13
" 116-12
" 117- 2
281 R4-10
" R5-17
313 53- 9
325 R1-15
345 53- 5
365 R4- 5
" R6- 3
390 111- 7
392 76- 6
399 60-44
409 43- 9
411 3-18
" 59- 8
414 54-15
420 R2- 3
430 R5-29
469 54-14
482 6- 6
497 R2-18
" R2-19
" R3- 7
533 82- 9
" 82-24
539 53- 9
561 7- 8
" 58-26
" 105-22
572 59- 6
574 60-22
583 55-15

1920 Pat.
1 41- 1
" 41- 8
" 41-21
" 41-22
" 41-23
21 60-48
" 91-30
66 60-48
" 76- 8
67 60-41
" 61- 3
" 91-20
106 R9- 3
109 51-25
144 60-28
" 60-38
170 58-17
" 60-44
251 79- 2
" 79- 6
" 79- 7
" 92- 2
" 92-19
" 101- 1
" R1-12
258 108(c)-2
" 108(l)-14
275 45- 6
330 108(d)-2
383 3-32
" 40- 1
" 40-25
" 108(j)-5
425 105-69
433 43-11
454 7- 7
462 R6-23
464 60-14
" 60-15
485 76- 5
521 72- 8
" 100-25
" 100-29
" R14-3
538 6-18
542 8-10
611 108(l)-14
630 91- 7
" R1- 5
" R1-10
636 R14-3
644 8-20
647 53A-3
678 92-23
723 R14-12
727 55- 2
731 R4-15
" R5-14
772 3-11a
774 54-14
787 60-28
803 106-26
" 107- 7

1921 Pat.
27 60-14
43 58-12
" 105-67
49 R6- 3
" R6-10
53 53- 6
" 53-24
59 63- 5
76 108(j)-4
99 38-11
150 52-29
" 67-20
" R1-19
183 66- 7
188 70- 4

1921 Pat.con
260 6- 4
301 108(l)-2
307 106-15
" 106-19
" 107- 4
320 R4-15
" R5-20
326 53A- 3
334 106-19
" 106-20
" 106-32
" 106-39
" 111-23
341 106-32
" 111- 8
351 108(l)-7
352 R11- 2
357 R6- 7
372 73-10
377 R1-12
379 8-10
395 53-20
397 38-12
" 58-25
403 98- 5
" R11- 2
463 116- 1
" 116-13
482 3- 3
491 R6-22

1922 Pat.
4 105-62
9 8-19
22 38- 5
" 38- 8
36 3- 2
" 58-11
" 58-12
49 3-11
70 59- 8
" R1- 6
75 108(g)-4
92 92- 7
" 92-19
" R5-13
122 8-20
" 28- 1
" 38- 8
" 38- 9
" 58-25
154 68- 2
161 105-47
165 7- 7
167 58-35
" 58-40
" 67-18
" 84-17
178 7- 7
181 92-19
" 101- 1
" R5-13
243 7- 7
" 38-12
252 R1-12
258 105-50
299 48- 7
" 58-18
339 50- 3
347 43-11
362 8-20
386 R11- 2
394 52- 1

1922 Pat.con
394 52-15
402 3-19
411 8- 4
429 105- 7
" 105-20
" 105-21
450 38- 8
" 38-12
" R1-19
" R6- 3
499 92- 3
" 92-17
514 3-11
" 6-20
" 123- 1
" 123- 8
" 126-14
528 2- 5
" 111-13
529 58- 4
" 58-30
" 100-13
" R6-18
542 52-31
" 52-32
572 53- 6
619 8-20
" 54-14
651 R1-19

1923 Pat.
33 6-38
44 56-10
" 82-12
72 100-31
95 8-10
111 51-22
" 105-43
122 58-25
" 58-36
130 105-37
" 111- 5
143 38-11
" 38-12
153 6-38
162 44- 5
165 3-22
" 123- 1
" 123-12
" 130-12
197 38- 8
199 82-12
" 92-19
" R1- 5
201 111-14
" 116- 1
" 116-12
203 65- 4
205 55-11
" 55-12
236 105-39
242 67-28
" 82-12
268 38- 5
" 38- 8
290 R1-10
" R1-12
295 108(o)-4
305 67-30
340 106-24
" 116-12
355 8- 8
" 8-15

1923 Pat.con
375 R4-15
" R5- 5
481 123- 4
490 60-44
" 82-18
492 53A- 3
564 53- 5
581 101- 1

1924 Pat.
20 R14- 2
" R14-11
41 83-20
" 83-23
77 67A- 1
81 54-23
88 105-47
91 58-29
" 68- 5
118 130-17
147 108(o)-4
174 82- 2
" 82-12
185 5- 1
" 5- 4
" 9- 5
" 54- 1
200 8-20
226 8-20
231 100-28
234 R1- 5
235 72-10
262 R6- 3
263 R5- 5
298 8- 4
302 58-17
324 2- 5
" 108(j)-1
355 7- 7
359 3-34
" 48- 1
372 72- 3
392 54-12
433 53A- 3
" 54-23
451 36- 2
452 67-20
" 91- 7
" R1-19
458 R1- 8
459 56-10
" 81- 7
" 81- 8
" 81-13
" R4-10
484 67-20
" 91- 7
" 91-41
" R1-19
530 60-26
" 60-43
551 3-22
" 3-24
" 6-16
" 6-18
" 8-14
" 130- 2
560 105-35
" 105-38
" 105-47
" 105-53
" 116- 1
572 105-84

1924 Pat.con
672 105-37
" 105-47
" 105-80
" 116-13
580 58-12
" 58-36
" 105-67
586 73- 1
611 7- 7
613 R1- 5
641 107- 7
" 117- 4
" 123-10
655 108- 4
657 123- 1
" 123- 6
679 39- 5
700 R4-10
721 8- 5
736 3-31
" 6- 3
802 56-12
" R4-10
822 55- 1
" 55- 8

1925 Pat.
17 108(q)-1
" 116-13
31 60-44
57 60-44
" 91-13
" 105-42
" R1-19
59 61- 2
" R1-19
" R2- 6
68 108(j)-1
118 58-36
" 105-67
151 123- 8
198 76- 6
201 92- 3
210 6-26a
216 105-38
" 105-47
" 105-80
" 107- 7
" 108(j)-1
" 116- 4
" 116-13
228 105-47
" 111- 6
256 105-31
" 105-32
" 106- 2
" 106- 6
" 106-15
" 107- 6
" 111-24
288 58-13
" 58-35
" 100- 9
310 3-22
" 8-13
" 136- 3
" 136- 4
319 58-36
" 105-67
336 63- 5
346 6-26a
357 105-80a
" 116- 1

1925 Pat.con
357 116- 4
" 116-13
421 117- 2
" 117- 3
438 R6-16
455 R11- 2
462 52-13
" 52-31
470 43- 7
484 56- 1
" 56-12
499 105-38
517 105-70
530 111- 7
605 92- 2
625 2-10
732 54-23

1926 Pat.
23 92- 7
" 92-23
31 R14- 3
77 58-36
" 105-67
80 105-42
" 105-60
89 54-23
94 48-12
" 52-34
" 60-41
" 67-19
" 81-13
103 8-10
" 108(o)-6
125 3- 3
" 123- 5
130 107- 8
184 53A-3
207 R1-12
" R1-22
241 105-80a
" 116- 4
257 8-20
337 R1-19
404 100-31
465 105- 8
474 55-15
" 68- 8
478 101- 1
487 105- 3
498 111-17
508 108(b)-3
" 108(j)-3
" 108(j)-5
512 60- 4
513 108(l)-14
539 54-14
572 63- 7
582 6-35
605 76- 6

1927 Pat.
1 8- 3
2 136- 3
7 3- 2
" 9- 7
" 54-19
20 6-38
" 123- 4
25 60-41
" 91- 8
41 58-39
45 R1- 5
105 R5-29

1927 Pat.con
117 60-41
" 67A- 1
" 82-12
" 92-11
" 92-24
" 95- 5
" R1- 5
131 59- 8
172 111- 7
215 R3-12
" R5- 6
230 68- 5
254 54-11
" 105-42
271 R4-15
" R5- 5
285 62- 6
305 113- 1
" 113- 3
" 116- 4
319 Pre- 4
" 107-12
379 92-24
388 58-18
411 R1-15
" R1-19
412 14- 2
" 14-10

1928 Pat.
44 53A- 3
" 54-15
63 108(l)-13
89 117- 3
183 123- 4
195 92- 2
" 101- 1
199 58- 6
" 53-16
" 53-19
" 53-22
225 8-20
238 65A- 4
273 111- 7
284 105-79
304 58-39
" R1- 6
354 106-49
" 108(o)-4
" 117- 2
372 65A- 1
" 66- 7
398 58-17
410 58-36
" 105-67
428 108(l)-14
431 2- 5
" 105-43
" 105-79
482 108(o)-6
582 61- 5
587 5- 5
" 100- 9
" 100-22
637 14-10
" 60-30
" 62- 8
641 100-29
652 3- 3

1929 Pat.
18 116-13
37 76- 8
" 77- 1

1929 Pat. con
49 8-20
68 105-47
94 67-20
" 82-20
" R1-19
117 7- 7
127 53- 9
130 58-25
208 44- 7
209 68- 7
" 73- 1
222 R1-16
245 6-16
284 3-39
300 3-39
305 41- 1
" 41-23
" 41-24
323 60-26
325 92-19
" 101- 1
349 11- 2
" 11-11
" 40- 1
" 40-23
375 68-13
376 105-47
" 105-52
388 55- 9
397 84- 5
" 84- 8
" 84-16
" R10- 3
417 123- 4
" 129- 5
422 38-11
" 38-12
439 R14- 2
" R14- 6
440 108(l)-1
444 106- 2
" 106- 3
444 106-16
" 106-19
537 58-31
550 54-14
571 76-12
" 76-18
" 77- 1
577 67-30
591 122- 2
" 123- 2
605 58-29
" 58-35
" 68- 2
620 54-21
630 106-49
664 56-14
" 82- 4
" 82- 7
" 82- 8
678 R1- 5
704 60-14
717 108(l)-8
"108(l)-14
730 63- 5

1930 Pat.
7 8-18
20 51-22
" 53A- 3
46 55-14
53 53A- 3
61 53A- 3
" 53A-12
110 107- 7
121 60-28
" 60-30
137 14-13
143 106-49
152 58-40
" 68- 2
181 40-18
227 R3- 5
293 R1-12
305 128- 5
356 105- 4
380 R11- 2
382 8-19
442 81-13
451 R5-13
452 40-17
479 58-39
530 54-17
" 105- 4
" 107- 7
570 91- 2
" 92-11
579 60-41
" 91-41
607 82- 6
610 5- 3
" 9- 9
" 122-5a
" 123- 5

1931 Pat.
33 79- 5
" 92-16
" R1-10
64 52-18
" R1- 5
76 19- 4
164 60-43
" R1-19
193 65A- 1
210 65A- 1
" 65A- 2
236 54-14
240 12- 1
268 Pre- 4
" 54- 2
" 108(q)-1
285 67- 5
295 60-50
325 72- 3
" 72-10
394 82-14
" 95- 3
" 95- 4
426 2- 5
" 101- 1
434 60-41
" 67-20
" R1-19

1932 Pat.
80 R1-12
97 105-42
" 107- 7
" 107-18
259 113- 3
270 52- 1
" 52-28
" 52-36
" R1-19
278 59A- 2
273 59A- 3
" 68- 4
" 68- 8
332 101- 1
" R2- 6
" R11-2
344 8-15
360 58-27
" 58-38

1933 Pat.
33 91- 8
" 92-13
60 8-20
117 1-26a
129 59- 7
161 R5-17
165 6- 4
" 53A-12
257 73- 9
" 100- 9
264 9- 5
281 53-20
306 6-2a
" R14-3
428 54-17
446 111- 9
485 53A- 3
" 53A- 4
" 107- 8
" 116-14
561 105-32
" 106- 6
" 111-24
664 105-43
678 108(l)-14
685 105-65
708 38- 8

1934 Pat.
1 55-14
" 68- 8
67 41-23
" 41-25
68 48- 7
" 48- 8
" 54-14
70 92- 6
" 100-12
" 101- 1
75 108(l)-14
93 8-31
97 R7-20
9. 39- 5
127 83- 7
" 92- 5
" 92-17
134 8-20
" 101- 1
" 101- 2
209 73- 1
" 73-12
215 67-20
217 58-33
" 58-35
" 100-15
" 105-67
225 R5- 6
" R5-24
270 52-13
301 54-22
" 60-22
307 60-23
329 58-12
369 107- 8
" 116-14
382 137- 4
397 60-28
433 68- 2
" 72- 3
" R6- 5
495 54-23
" 58- 4
" 100- 5
544 8- 9
546 53A- 3
" 53A- 4
" 53A- 5
612 82-15
" 95- 1
" 95- 4
" 122-5a
615 60-50
622 83-15
624 58-12
" 68- 2
648 60-44
" 67-20
" 100-11
" R1-19
653 50- 3
" 108(l)-14
681 92-17

1935 Pat.
33 8-10
88 108(l)-14
45 54-14
98 R11-2
125 58-18
148 76- 1
" 76-12
" 76-16
" 77- 1
149 8-10
" 8-19
" 108(o)-6
157 72- 8
174 60-17
178 38-11
184 105-17
188 108(o)-4
230 52-13
237 40- 8
271 116- 9
" 116-13
291 4- 5
" 4- 6
" 53A- 3
" 53A- 5
" 107-10
306 6-26a
349 6-2a
" 7- 7
358 60-28
360 58-36
" 63- 5
" 105-67
365 67A- 1
" 67A- 4
385 R1- 1
" R4-15
" R5- 5
" R5-14
" R5-29
401 28- 2
" 28- 8
401 28- 5
" 32- 9
472 108(o)-4
492 54-19
497 59- 7
499 38-11
508 117- 2
" 117- 3
554 108(l)-14

1936 Pat.
3 R1-12
11 108(o)-2
60 92- 5
" 92-11
63 111- 7
66 3- 3
80 3- 2
111 108(o)-6
" 117- 2
133 105- 4
153 7- 8
" R1-19
" R10-8
211 58-35
" 58-38
" 58-40
" 67-18
" 76- 5
275 8-20
" 105-32
" 105-47
" 111-14
287 8-20
289 R14-3
" R14-4
" R14-6
306 R1- 3
312 76- 8
" 77- 1
862 105-14
372 4- 5
" 53A-10
" 53A-13
" 105-14
" 107- 9
" 111-13
404 101- 4
420 60-26
422 44- 5
434 60-23
439 67-27
" 68-17
" R1- 8
450 8-20
" 111-13
493 108(j)-4
" 112- 6
" 114-11
527 3-22
" 5- 5
" 6-13
" 6-14
" 130- 2
" 130-12
568 R6- 3
" R6- 8
571 52-14
" 52-35
583 2- 5
" 58-35
" 76- 1
" 76-12
583 77- 1
629 60-14

1937 Pat.
13 52-18
36 53A-.5
44 108(c)-5
94 58-35
" 67-15
" 68- 2
100 137- 4
141 7- 7
156 61- 2
" 61-10
163 19- 8
" 19-12
178 54-19
" 54-22
232 5- 4
" 118- 5
237 36- 2
247 19- 6
" 19- 8
" 24- 2
253 83-13
261 58-40
" 98- 1
" R6- 5
280 6- 4
307 73-11
" 73-12
345 73- 1
" 98-3a
353 3-31
" 41- 8
" 41-21
" 41-25
374 105-55
391 105- 1
" 105-25
" 105-49
" 105-50
" 105-51
" 105-59
" 106-47
" 111-23
399 105-50
" 106-47
414 R1-19
444 105-49
" 106-47
453 53- 9
469 43- 7
483 54-23
525 44- 5
546 6-2a
" 43-11
563 43-11
" 73- 1
609 53-20
616 8-20
628 82- 2
" 82- 7
" 82- 8
640 54- 1
642 R1- 6
654 R14-3

1938 Pat.
7 105-48
18 44- 9
" 44-10
16 8- 2
35 58-36

Remarks in foot-notes amplify principles in the Commentary and state the special features of the case.

1933 Pat.con
35 105-67
179 73- 1
" 73-12
189 65A- 1
" 66- 7
196 76- 8
199 73- 1
236 108(q)-1
337 53A- 5
379 108(l)-14
388 58-35
" 58-36
479 59-14
" 60-48
487 52-37
502 6-34
505 54-14
525 R6-10
532 92-19
" 92-22
539 58-38
569 108(j)-1
585 8-20
" 68- 2
" 68-17
607 Pre- 1

1939 Pat.
5 53- 5
" 53-24
7 91- 2
" 91-25
" 91-37
" R1- 6
47 65- 4
49 60-43
" R1-19
97 38- 5
113 R5-20
116 6- 7
138 53-24
167 106-19
" 111-23
218 54-21
258 123- 5
265 58-36
" 105-67
296 53A- 4
" 105-44
" 106-12
" 107- 3
350 105-50
356 108(l)-14
358 63- 5
375 92- 1
" 92- 2
" 92-19
" 92-23
" 92-24
" 92-30
382 60-23
406 19- 2
415 83-15
427 76-12
428 106-24
" 108(p)-1
448 105-43
" 105-48
" 105-49
488 53A- 5
506 6-13
540 50- 2
" 58-41

1939 Pat.con
540 98- 5
598 111-10

1940 Pat.
18 83- 8
" 83-13
" 83-20
24 105-50
45 60-23
64 92-20
" 101- 1
65 67A- 2
" 101- 3
119 82- 8
" 82-22
170 130- 8
283 100- 5
" 100-25
" R14- 3
" R14-11
" R14-13
" R15- 2
376 R11- 2
385 53A- 5
" 92- 2
" 92- 5
" 92-27
420 82-18
478 112- 1
" 112- 2
" 112- 4
480 41-23
512 8-20
" 58-17
516 8- 2
" 105- 5
" 108(j)-2
" 108(j)-4
" 108(l)-14
555 116- 9
573 6-27
579 76- 8
" 76-22
609 36- 7
616 R6-10
620 41-24
" 92-15
" 92-20
627 76- 1
633 8-20
" 54-11
" 105- 5
661 7- 7
683 53-20
" 130- 3
" 130-17

1941 Pat.
4 44- 9
" 44-10
13 108(o)-2
95 100- 9
" 100-24
" 100-28
147 92-15
219 7- 4
" 123-10
228 105-27
" 105-48
243 R1- 5
244 107- 8
247 48- 8
276 92-24
296 58-36

1941 Pat.con
296 76- 5
" 105-67
301 58-35
" 68- 5
354 123- 2
378 R11- 2
394 53- 5
399 73- 1
416 R6- 6
417 108(l)-14
452 76- 5
472 8-20
486 68- 2
488 106-15
495 106-23
536 107-13
577 52-11
" 52-39
" 107- 9
" 117- 4

1942 Pat.
50 R14- 6
86 105-59
" 105-65
" 105-70
102 R11- 2
120 3- 1
" 3- 2
" 109-10
" 123- 8
166 92-19
" 92-27
185 73-14
" R4- 7
" R5- 8
" R5-17
210 6-38
" 100-31
" 130- 2
213 R1- 4
226 R1- 5
266 108(l)-14
269 108(l)-13
307 130-15
340 R5-24
343 R5- 4
348 R5- 6
397 105-32
" 105-48
" 105-50
" 107- 7
408 60-12

1943 Pat.
31 8-10
" 108(o)-6
218 2- 6
" 130-10
282 R14- 2
" R14-12
301 79-4a
305 92- 7
" 92-24
" 92-27
327 105-64
363 53A- 5

1944 Pat.
5 R14- 2
" R14- 6
" R14-12
30 51-22
" 105-79

1944 Pat.con
30 106- 5
" 107- 8
" 108(h)-4
35 107-10
77 2- 5
" 51-10
" 51-22
" 111-16
" 111-23
87 117- 2
" 117- 3
109 105-45
" 105-49
" 105-81
119 R1-19
129 3-22
" 108(j)-4
" 109-10
163 58- 8
179 82-18
" 82-23
261 53A- 6
" 54- 7
" 54-11b
" 105- 5
293 105-11
" 105-59
341 44- 4
" 44- 5
371 122- 1

1945 Pat.
106 60-41
" 60-44
" 65A- 1
" 91-12
" R4-15
" R1-19
124 53A-13
162 10- 6
" 10-13
" 12- 1
" 14-10
" 105-25
" 105-68
" 108(i)-2
192 82-17
" 92-15
" 95- 1
" 95- 3
" 95- 4
" 100-11
200 105-14
211 15- 2
260 111-16
" 112- 1
" 112- 2
" 112- 4
278 60-44
" 100-28
289 91- 4
" 91- 8
300 108(e)-7
385 105-31
" 106-17
" 106-39
" 106-40
" 110- 1
400 8- 3
" 8-15
" 67-29
" 73- 1
414 108(j)-6

1945 Pat.con
426 100-22
434 100- 5
" 100-22
" 100-28
463 106-40

1946 Pat.
22 105- 9
" 117- 4
36 77- 1
55 6-11
" 10- 3
" 10- 4
81 54-22
99 R7-12
" R7-13
" R8- 5
216 100- 5
" R14- 3
225 R1- 6
" R1-19
306 52-19

1947 Pat.
1 54-14
7 19- 4
78 58-36
" 105- 9
" 107-10
" 117- 3
110 59- 4
" 60-48
122 8-13
225 R5- 6
257 53-35
263 111- 7
345 58-33
404 6-11
" 6-13
" 6-14
424 53A-13
" 53A-14
" 53A-14a
" 54-17
449 3-14
471 53-29
" 53-30
447 55- 9

1948 Pat.
12 105-48
" 105-49
36 137- 4
" 137- 5
60 52-29
111 52-27
" 52-31
" R1-10
" R1-19
127 R2-11
" R4-12
" R5-26
" R10- 5
130 122- 7
" 126- 9
192 R14-11
199 100-28
208 60-26
" 82-12
" R5-13
247 54-12
322 108(l)-14
362 6- 4
407 111-10

1948 Pat.con
446 110- 1
" 117- 2
" 117- 4

1949 Pat.
68 R3- 7
" R5-11
85 105-69
99 63- 1
" 63- 5
137 113- 3
166 68- 5
197 60-27
237 54- 4
" 54-12
265 105-31
" 106-16
" 106-18
304 52-11

A. I. R. PESHAWAR

1933 Pesh.
35 58-39
67 123-15
97 60-44
" 60-46

1934 Pesh.
17 53A-18
30 2- 5
38 R1-19
81 107- 9
" 107-10
84 R6- 3
101 1- 4
" 108- 1
" 108(b)-1
" 108(l)-14

1935 Pesh.
10 58-29
" 68- 2
126 44- 4
161 44- 7
" 67-20
168 53- 6

1936 Pesh.
15 53-24
38 68- 5
43 1- 4
" 58- 3
" 67-18
" 68- 2
" 68-17
" 68-19
" R4- 3
48 58-35
" 67-15
71 R6- 3
103 48- 8
158 1- 4
" 53-24
216 53- 6
" 53-15

1937 Pesh.
5 1- 4
" 92- 1
" 92- 4
" 92- 6

1937 Pesh.con
8 55- 1
" 55-20
28 54-17
31 R4- 5
39 54-17
58 1- 4
" 41-10
" 41-11
" 53A-13
" 53A-15
" 53A-18
69 3-31
74 3-34
" 48- 1
76 5- 7
" 100- 9
" 100-23

1938 Pesh.
12 R5-14
73 58- 5
" 67-21

1939 Pesh.
27 54- 5
34 92- 4
" R1-19
" R4- 4
" R5- 7
41 58-29

1940 Pesh.
25 58- 5
" 67-21
" R1- 9

1941 Pesh.
45 137- 4
49 56- 1
" 56-10
" 70- 2
56 R6-21
59 41- 5
" 41- 8
" 41-24

1942 Pesh.
43 1- 4
" 52- 2
" 52-21
66 58-35
68 1- 2
" 1- 4
" 41- 5
" 41- 8
74 105-82
" 106- 6
" 108(b)-4
83 54-20a
85 R6- 3
88 1- 2
" 1- 4
" 8-15
96 R7-12
" R8- 6

1943 Pesh.
1 60-14
" 68- 5
15 58-12
" 58-36
" 105-67
17 58-21
24 58- 4
31 R5-11
32 1- 2

1944 Pesh.
9 55- 1
" 55-12
15 118- 2

1945 Pesh.
16 111-25
" 116- 1

1946 Pesh.
12 10- 3

1947 Pesh.
33 58-33
45 60-41

A. I. R.
LOWER
BURMA

1914
Low. Bur.
42 41-23
45 108(j)-5
53 54-17
" 55-20
62 9- 2
" 123- 1
135 53- 9
" 59- 8
141 41-23
152 123- 4
178 67-19
180 53- 6
" 53-20
" 53-24
194 108(d)-3
200 109- 2
" 130- 7
207 2- 5
" 59- 5
208 123- 4
225 3-41
" 41-23
241 105- 4
" 105-35
" 111- 3
243 58-33
262 53- 6
265 58-11
276 50- 3
278 126- 9

1915
Low. Bur.
10 108(l)-9
" 130-17
" 131- 3
47 105-37
" 105-40
" 105-70
49 R1-19
75 108(l)-9
77 43-10
86 42- 1
" 126-15
94 60- 1
95 54-17
" 60- 5
" 60-28
100 R7-12
" R8- 6
104 41-23

1915
Low. Bur.con
112 43- 8
122 129- 4
127 60-28
134 67-22
136 8-18
142 123- 3
147 58-31

1916
Low. Bur.
11 123- 3
" 123- 5
19 54-14
20 58-39
" 67-17
" R6-19
26 58-33
27 41- 4
29 7- 3
34 106-18
38 3-39
" 53A- 3
" 55-20
67 55-20
" 100-13
73 54-17
79 54-23
81 51-25
" 108(b)-4
89 53- 2
91 7- 7
" 7- 8
94 100-14
99 R1-19
103 58-38
" 65A- 1
104 54-17
113 92-17

1917
Low. Bur.
9 68-14
16 3-39
23 123- 3
37 116- 1
39 58-31
" 60-28
54 59- 6
67 106-49
71 60-50
72 58-33
99 60-26
110 6- 9
" 54- 7
122 76- 1
" 76-21
" 84- 5
124 53- 6
" 53-16
128 59- 4
133 107- 6
139 3-18
161 58-38
166 55- 3
" 55-14
168 92-19
178 58-31
" 60- 1

1918
Low. Bur.
6 9- 2
11 123- 3
26 55-12

1918
Low. Bur.con
26 58-33
44 78- 5
" 78-12
52 58-39
62 3-11
64 58-17
" 69- 9
122 137- 4
" 137- 5

1919
Low. Bur.
20 54-14
47 129- 4
103 52-35
" 52-38
119 73- 6
121 6- 4
136 72- 2
" 72-10
" 100-29
" R10- 6
140 54-14
" 58-33
143 91-43

1920
Low. Bur.
22 58-39
42 137- 4
97 53A- 3
160 67A- 1
173 3-18

1921
Low. Bur.
16 53A- 3
" 55- 5
34 59- 8
" 59-14
" 59-15
" 68- 2
58 53- 9
" 53-34
61 91-39
" R1-19
63 53- 9
92 137- 4

1922
Low. Bur.
25 54-23
" 55-20
" 100-14

A. I. R.
UPPER
BURMA

1914 UppBur
2 108(h)-4
45 91- 4

1915 UppBur
16 48- 9

1916 UppBur
5 58- 4
" 58- 5
" 60-19

1917 UppBur
18 8-20
" 63- 5

1918 UppBur
19 60-14
32 60- 3
" 60-28
" 60-29
" 84- 5
40 123- 3

1920 UppBur
43 R7- 3
" R8- 7
47 123- 3
56 51- 9
" 51-21
" 60-17
" 108(i)-1

1921 UppBur
1 3-11
" 3-18
3 59- 5
5 R2- 3
" R2- 9
" R11- 2
10 53A- 3

A. I. R.
RANGOON

1923 Rang.
1 137- 4
" 137- 5
6 49- 2
" 49- 4
" 76-11
" 135- 2
13 106-13
" 111-23
15 59-14
24 60-50
41 3-34
51 59- 4
52 58-33
" 59- 4
60 58-11
61 60-34
" 60-44
69 52-17
107 67-20
" 101-10
" R1-19
119 60-41
125 53A- 3
" 54-17
127 63- 5
151 111- 8
222 53- 3
" 100-18
" 100-22
230 54-17
332 60- 1
242 54-23
" 58-29
254 59- 8

1924 Rang.
131 63- 5
139 3-18
" 59- 8
143 68- 5
155 2- 4
200 123- 9
204 92- 7
" 92-23
" 100-29
214 53A-13
221 52-17
240 R1- 5
260 123- 3
267 54-19
" 54-21
278 105- 8
" 105-25
283 8-20
288 7- 3
309 123- 3
353 123- 3
365 2- 6
" 36- 2

1925 Rang.
1 53A- 3
" 59- 4
" 59-15
" 100-14
7 60-50
13 1- 4
" 1- 5
" 76- 1
" 76-21
" 83-20
" R8- 3
55 59- 4
" 59-15
" 100- 5
" 100-14
61 59- 4
68 54- 1
" 54-17
89 92- 2
" 101- 4
102 53A- 3
" 58-12
118 53A- 3
119 53A- 3
130 65-10
140 58- 5
184 123- 9
206 108- 2
" 106-19
" 106-39
" 111-23
209 8-20
227 53- 6
" 53-34
250 8-16
" 58-39
" 63- 3
261 108(b)-3
273 105- 9
" 107-10
291 58- 6
" 59- 4
322 53A- 1
" 58-28
372 55- 2
" 55-21
377 58- 33

1925

Rang con
377 60-22
" 60-41
" 91- 3
382 55- 5

1926 Rang.
10 58-39
17 3-20
81 53A- 8
137 44- 4
145 3-18
" 59- 8
" 68- 8
" 68-13
172 45- 7
183 67-19
" 67-20
" 91- 8
" R1-19
186 6-11
" 6-15
" 68-13
195 3-34
" 78- 4
" 78- 5
197 55- 7
201 59- 4
" 60-48
205 2- 5
208 R1- 5

1927 Rang.
33 53A- 3
" 58-27
" 58-28
" 60-28
39 6-16
" 130-14
86 53- 9
90 55- 1
100 43- 9
128 53A- 7
" 123- 9
129 130-20
132 58-33
143 123- 5
145 52-10
157 6-15
165 19- 6
168 53-20
169 107-10
186 52-17
234 53A- 8
" 55- 5
242 13- 6
" 19- 2
276 113- 3
289 73- 3
" 73- 6
314 58-33
331 53-34
332 59- 4
335 123- 5

1928 Rang.
1 53- 6
" 53-24
16 58-40
" 67-17
" 68- 2
26 51-12
" 36- 2
28 58-11
30 58- 5
44 58-28
" 59- 4
" 60-22
" 60-48
47 5- 1
" 26- 2
" 54-14
" 54-15
53 53A- 3
" 59- 4
58 58-33
67 8- 3
" 36- 2
68 82-12
73 44- 5
85 108(o)-2
101 3-11
" 3-19
124 53A- 3
" 53-17
127 67-20
" R1-19
128 69- 3
" 69-10
" 69-19
136 6-36
" 78- 4
" 78- 5
141 51- 1
145 3- 6
162 108(q)-1
182 50A- 3
189 68- 8
" R1-19
194 R5-14
199 7- 7
237 53A- 3
" 54-17
242 59- 4
266 60-44
" 82- 5
" 82-18
278 100-29
287 101- 1
321 53A- 3

1929 Rang.
17 41-23
34 3-34
39 58-33
55 116-12
65 58-39
" 78- 6
71 69- 3
96 68-14
107 58-39
" 96- 1
110 53- 3
112 41-23
117 41- 8
164 105- 4
" 105- 7
175 52-32
179 59- 4
" 60-48
" 60-50
181 53A-12
183 R5-19
184 3- 2
" 105- 4
" 105-20
200 3- 3
225 6-27
226 10-14
" 126- 2
243 123- 4
251 53A- 3
259 54-21
271 76-21
" 84- 5
" 84-19
272 53A- 7
280 53A- 3
" 54-17
293 53A- 3
298 78- 1
" 78-11
" 101- 3
316 53A- 7
" 123- 9
318 130- 3
" 130-12
333 41-10
" 41-23
335 53A-12
354 2-11
" 6-36

1930 Rang.
27 53- 6
" 53-23
63 63- 9
132 2- 6
" 52-17
" 52-31
142 59-14
" 68-13
175 R1-19
184 19- 8
188 48- 9
" 54-21
246 78- 4
" 78- 5
255 84- 3
" 84- 5
257 R6-22
265 53-20

1931 Rang.
40 59-14
105 67-20
" R1-19
108 R1- 6
139 55-12
153 R4-12
" R6-11
" R6-15
" R13- 2
160 5- 7
178 7- 7
181 R6-15
208 67A- 2
" 67A- 4
210 49- 2
" 58-33
292 50- 3
310 53-23

1932 Rang.
13 53- 3
" 53-16
" 53-19
104 129- 4
113 65A- 1
113 65A- 4
153 72- 5
" R4-12
" R5-26
197 92- 5
" 101- 1
" 101-11

1933 Rang.
4 54-17
24 8-15
" 8-20
81 70- 2
" R4-12
83 7- 7
90 4- 4
92 101- 4
112 72- 8
" R2-12
196 53A- 4
153 3-34
155 123- 4
158 R14-13
162 53-20
169 53-19
" 53-33
191 53-15
" 53-20
" 53-34
195 63- 3
220 105- 4
" 105-35
" 107-15
252 53- 6
259 100-16
299 58-39
307 58-39
323 R5- 8
" R5-18
335 R4-12
361 41- 1
" 41-23
377 67A- 2
392 60-41
" 91- 8
401 55-11
" 55-12
403 7- 7
418 126-16

1934 Rang.
7 48- 1
" 101- 3
51 43- 2
" 58-39
" 71- 3
90 41- 8
127 53A- 4
129 123- 1
" 126- 2
139 41-23
159 58-40
" 68-14
" 98- 5
190 55-12
196 59- 4
200 53-24
227 68- 4
250 3- 2
284 53A-13
291 105-13
" 105-14
" 106-24
302 53-11
" 53-24
" 53-25
303 53A- 8
" 54-17
304 53A- 9
" 53A-10
308 53- 6
" 53-24
" 53-34
313 41-23
316 84- 8
321 8- 8
" 8-14
" 48-14
332 53-23
" 53-24
" 53-25
335 7- 7
349 7- 7
365 7- 7
372 48-16
" 60-44

1935 Rang.
12 53A-15
26 67-19
" 78- 5
" 82-12
84 53A- 3
" 54- 1
132 R14- 6
" R14-11
139 56-10
" 67-19
" R1- 4
" R1-19
149 54- 5
156 137- 4
212 58-33
230 53A- 3
" 59- 4
" 60-48
275 53-24
315 R1-19
318 10- 1
333 58-39
355 9-11
409 73- 1
" 73- 4
" 73- 5
" 73- 9
" 73-11
420 63- 3
" 65A- 4
423 41- 2
" 41-21
" 41-23
" 92- 5
438 72- 8
" R14-12
448 9-12
" 53A- 3
" 53A- 4
" 54- 1
473 72- 3
483 3- 2
" 58- 5
489 53-24
514 R4-12
" R5- 7
522 63- 3
522 70- 4
525 58-17

1936 Rang.
47 72- 8
" 100-29
" R14- 2
" R14-12
65 63- 3
68 3- 6
80 68- 4
117 53-24
127 63- 5
" R5-19
" R5-20
152 3- 2
" 60A- 2
" 78- 5
" 92- 5
" 92-19
" 101-11
198 R1- 5
266 56-10
" 60-43
" 81- 5
290 58- 4
" 58-39
" 67-17
303 59- 5
" 100- 8
340 R1-10
366 58- 5
" 58-39
400 58-39
" 67-17
405 53- 9
430 123- 4
" 129- 5
488 108(l)-3
497 54-22
522 123- 4
" 129- 5

1937 Rang.
12 R6- 3
27 53- 6
31 55- 7
39 55- 9
51 53- 6
" 53-16
56 59A- 3
" R1- 9
69 58- 5
" 58-39
71 R4-12
" R5-26
148 59- 4
151 58-29
" 58-40
154 58-39
180 107- 8
193 R11- 2
220 60-44
" 81- 2
" 81- 7
" R1-19
240 129- 5
287 54-14
" 55- 8
293 3-12
" 59- 6
351 R1- 5
359 60-44

1937
Rang. con
359 101- 4
" R1-19
402 53A- 5
" 54-23
" 58-33
471 53- 6
" 53-20
473 52-12
" 59- 4
494 R6- 3
508 67-22
531 53-20

1938 Rang.
1 3-27
" 130- 3
" 130- 4
" 130-17
49 53A- 9
65 92- 5
108 70- 2
134 R6-12
145 5- 7
" 100- 9
149 58-39
227 111-17
290 55- 7
303 123- 3
306 92- 5
353 R6-10
356 53A- 9
367 55-20
426 5- 7
" 130-17

1939 Rang.
8 5- 7
" 6- 6
46 55-12
76 5- 1
" 123- 1
175 53A- 5
185 58-39
" R1- 5
188 53A-13
" 59- 5
206 53A- 9
211 8-19
247 67A- 6
" 101- 3
" 101- 4
321 58-27
" 58-28
" 58-30
" 58-38
" 58-39
396 8-20

1940 Rang.
11 59- 4
58 44- 1
" 44-10
78 6-35
84 Pre- 1
102 8- 1
" 8- 2
" 59- 4
126 41-13
" 59- 9
184 8-18
172 51- 4
" 51- 9

1940
Rang. con
184 41- 1
" 41-15
" 41-25
186 54- 3

1941 Rang.
76 53- 6
" 53-24
79 52-17
" 73- 1
108 53-34
117 107- 7
122 59- 8
" 60A- 2
234 59-14
" 60-48
239 19- 9
" 19-10a
" 21- 3
244 8-20
261 58-14
305 14- 5
" 18- 2

1942 Rang.
11 105-15
" 105-50

A. I. R.
SIND

1914 Sind
75 108(e)-1
" 108(e)-4
131 52-31
" 101- 1
" R1-19
170 56- 1
" 67-19

1915 Sind
1 44- 6
9 52-18
" 91- 5
17 44-10
21 55- 2
" 55-21

1916 Sind
22 53- 1
" 53- 9
37 52-35
61 55- 9
71 55- 5
" 55-20

1918 Sind
26 R1-19

1919 Sind
68 55- 5
" 55-20
70 R11- 2

1920 Sind
31 51- 8
" 51-21
" 51-23
59 121-11

1921 Sind
109 8-15
" 108(o)-4
118 10- 6

1921
Sind con
118 14-10
121 3-43
177 6-38

1922 Sind
33 55- 3
39 58-33

1923 Sind
14 R5-10
50 3-28
" 3-34
" 55-14

1924 Sind
23 Pre- 2
" 59- 2
140 18- 4

1925 Sind
18 6-16
36 105-79
" 105-80a
72 3-24
" 6-16
" 6-22
156 R14- 2
" R14-14
159 6-16
167 R1- 6
193 R1-19
220 55- 3
275 108(q)-1
296 108(j)-6

1926 Sind
18 99- 1
20 R5-29
22 38- 8
" 38-11
58 3- 1
71 105-32
" 105-79
" 111-16
" 111-17
" 111-25
78 130-10
88 59- 8
" 100-14
98 105-82
109 53- 6
135 39- 5
143 10-12
145 60-18
" 76- 4
" 76- 5
" R1-13

1927 Sind
24 3-41
" 106-10
" 106-38
" 106-46
46 58-31
49 55- 3
" 55- 5
62 8-20
" 47- 1
66 58- 4
" 100-14
" 100-15
78 8-22
" 8-24
" 6- 8

1927
Sind con
103 R5- 5
118 3-11
" 3-17
" 3-18
120 55- 9
206 5- 2
" 9-13
" 54-17
" 107- 7
" 123- 5
248 106-25
" 111-14
251 R4-16
265 R1- 5

1928 Sind
17 58-39
" 96- 1
45 8-20
61 53A- 3
" 55- 1
" 55- 9
93 3-11
" 3-19
95 50- 3
101 60-41
" 82-12
137 108(j)-1
179 58-39
" 78- 1
" 78- 4
" 78- 5

1929 Sind
13 108(l)-5
94 53-20
" 53-29
" 53-30
102 39- 5
" 52-20
217 3-18
" 3-19
285 3-11
" 58-41
" 59- 8
" 98- 5

1930 Sind
12 55- 9
25 126- 9
34 44- 4
77 3-21
" 130- 2
159 58-39
" 100- 8
178 107- 5
182 7- 7
284 53- 6
" 53-17

1931 Sind
17 123- 4
74 48- 8
107 9-18
" 67-10
141 55- 9
186 123- 2

1932 Sind
42 51-19
" 53A- 8
" 53A-10

1932
Sind con
50 53-29
60 105-19
" 107- 7
67 6-38
73 58-39
162 39- 5
217 8-20
" 105-29
" 107- 3
" 107-10
" 107-11

1933 Sind
144 55- 2
257 3-18
" 59- 8

1934 Sind
14 39- 2
" 39- 3

1935 Sind
131 R1-19
182 10- 9
235 10-15
" 14-13

1936 Sind
14 67- 5
16 100- 5
" 100-22
65 5- 5
" 21- 4
87 R1-12
" R1-19
108 Pre- 4
158 15- 3
209 58-33
213 108(q)-1

1937 Sind
47 3-14
177 41- 8
181 3-27
" 5- 5
" 130-13
" 130-23
198 55-11
" 55-12
237 6-2a
273 R5-11
" R5-16
306 19- 8

1938 Sind
24 3-21
" 130- 2
" 130-12
" 132- 2
" 137- 4
215 53- 6
" 53-16
" 53-20
" 53-22
" 53-30

1939 Sind
97 53- 6
" 53-14
" 53-20
" 53-22
100 100-10
288 5- 4

1939
Sind con
288 130-10
" 130-13

1940 Sind
77 51- 1
" 51- 4
" 51- 8
" 51-10
103 R1- 5
195 R1-19
204 58-39
212 41- 9
251 R1-19

1941 Sind
73 130- 4
158 60- 5

1942 Sind
37 55-20
81 55- 2
" 55- 7
83 100-25
" R15-2
" R15-10
120 55-20
145 27- 2
" 27- 3
" 45- 6

1943 Sind
36 58-39
59 58-35
" 67-15
" 68-12
" 68-17
" 98- 5
" R11-2
67 137- 4
81 53A- 3
" 53A- 4
" 53A- 5
92 55-20
100 8-4
177 122- 1
" 123- 2
" 123- 5
" 123-12
" 130-13
236 55-20

1944 Sind
16 122-5a
49 105-70

1946 Sind
78 53- 5
" 53-24
99 43- 7
137 53- 6
" 53-11
" 53-13
" 53-14

1947 Sind
12 R5-10
163 108(j)-5
179 41- 8
181 52-37

1949 Sind
1 105-14
9 R1- 4
" R5- 5
28 54-23

*In the foot-notes to the Commentary * indicates either a leading case or a case giving fuller reasons.*

PRIVY COUNCIL

L. R. Indian Appeals

I.A Sup Vol

34 40-15
40 3-28
" 41- 1
" 41- 8
" 41-20
40 41-25
47 2-10
" 5- 6
" 8-20
" 11- 2
" 13- 4
" 13- 5
" 14- 7
47 15- 2
" 27- 2
" 28- 2
" 30- 2
" 32- 5
175 3-41
181 105-47
" 105-69

1 I. A.

34 3- 2
76 105- 5
106 44- 7
" 73- 1
144 78- 3
157 5- 4
" 6- 4
" 8-20
192 126-10
321 38-10
387 29- 2
" 29- 4
" 31- 2

2 I. A.

7 8- 6
" 92-17
7 101-10
28 108(d)-2
87 123- 4
131 55- 9
" 92-16
145 5- 3
" 7- 7
" 38- 5
210 3-38
241 58-31
256 8-20
" 11- 9
275 100-30

3 I. A.

85 60-50
92 8- 4
" 105- 6
" 105- 8
" 105-42
" 105-47
" 105-68
253 122-12
259 9- 1
291 123- 4

4 I. A.

52 7- 7
" 8-20
" 38- 5

4 I. A. *con*

52 38- 9
223 8- 7
" 105-32
" 105-72
" 111- 6

5 I. A.

18 58-31
" 60-41
" 67-14
61 8-20
116 55- 9
138 10- 4
" 10- 5
" 28- 3
" 32- 5
164 105-35
" 105-39
178 1- 2
211 52-14
" 100-31

6 I. A.

54 8- 4
" 8-20
88 7- 7
" 38-10
" 100-11
145 63- 1
" 69-22
" 69-27
" 71- 2
170 107- 1
182 11- 2
" 100- 5

7 I. A.

51 76-12
55 8-20
83 8-20
" 58-13
" 119- 8
115 7- 7
181 6-2a
" 7- 7

8 I. A.

8 38- 8
" 38-11
39 126-10
65 2- 6
248 6-2a

9 I. A.

21 R 7-14
33 105-47
" 105-72
104 6-26a
174 3-25

10 I. A.

45 100- 5
51 30- 2
62 92- 2
" 92-22
" 101- 1
129 58-12

11 I. A.

1 16- 3
10 53- 1
" 53- 5
" 53-11
44 6-34
" 28- 6
" 28-11

11 I. A. *con*

44 32- 8
" 32-11
" 122- 1
64 15- 2
83 58-29
" 68- 2
126 92- 2
" 92-10
" 92-13
" 92-19
" 92-23
" 101- 1
164 2-10
" 15- 2
" 53- 6
186 58-31
218 8- 2
" 8-20
" 122-14
" 123- 2

12 I. A.

1 8-20
" 98- 1
12 58-29
" R6-12
" R6-17
72 122-12
91 19- 2
103 11- 2
" 14-13
159 8- 5
171 52-31
" 91- 4
" R1- 5
188 105-79
" 105-80
205 8- 4
" 105-47

13 I. A.

32 105-52
66 60-26
113 2- 5
" 60- 1
116 R2-11
160 9- 1
294 8-20

14 I. A.

.7 8- 4
89 Pre- 2
" 58-11
111 53-34
127 53- 7
137 100- 5
247 105-47

15 I. A.

12 52-42
18 6-26a
37 11- 2
51 6-2a
81 123- 4
" 126- 9
97 52-18
149 2-10
" 10- 1
" 13- 5
" 14-13

16 I. A.

6 105-43
" 105-49
12 58-18

16 I. A. *con*

29 13- 5
" 28- 3
" 30- 2
44 122- 5
" 125- 1
85 2- 5
" 58-31
107 60-23
" R2- 6
" R6-10
" R9- 3
" R14- 7
115 100-30

17 I. A.

10 8- 3
28 18- 5
98 58-33
110 44- 4
181 6-24
194 7- 7
201 5- 5
" 19- 2
" 19-10a
" 52-18
" 60-54
" 91-41
" R1-19
" R5-13
" R5-19
" R11- 2

18 I. A.

22 8- 4
121 Pre- 2
144 126- 9
" 126-10
158 55-20

19 I. A.

95 100- 5
101 122-12
108 122-12
170 18- 5
184 7- 7
196 38-11
203 41-12
" 41-14
" 43- 7
221 43- 7

20 I. A.

80 51-18
108 100- 1
116 6-2a
" 7- 7
" R11- 2
144 53-18
160 100-29
165 67-20
" R1-19

21 I. A.

1 67-19
" R11- 2
96 58-33
148 126-10
241 580-31

22 I. A.

60 105-49
68 58-29
76 13- 6
" 14-14
" 18- 5
129 41- 1

22 I. A. *con*

183 58-31
" 63A- 7
" 67- 5
" 72-11
199 R11- 2

23 I. A.

1 8- 9
32 58-27
" 58-30
" 67-13
" 76- 4
" R2- 4
" R5-23
37 45- 6
57 38- 5
" 38-11
92 R2- 7
106 58-39
138 8-20
" 58-17
" R11- 2
158 58-36
" 105-67

24 I. A.

76 8-20
" 10- 4
" 11- 2
93 13- 5
137 1- 1
164 35-28
" 105-20
170 52-31
" 91-25
196 123- 4

25 I. A.

9 58-17
" R11- 2
54 91-21
137 54-15
179 1- 5
" 2- 5
" R11- 2
183 6- 4
" 38- 5
" 38-11
210 111- 9
241 1- 4
" 63A- 1
" 76- 1
" 76-19
" R7- 4

26 I. A.

45 55-14
58 51-22
" 105-55
" 108(b)-2
" 108(b)-4
" 108(g)-1
71 122-5a
83 6-2a
" 122-12
97 58-25
107 63- 2
216 8- 4
" 105- 8
" 105-20
" 105-47
" 105-68
" 105-79
" 111- 5

27 I. A.

17 60-23
51 91-35
" R1- 6
58 58-29
" 58-31
" 58-33
" 60- 1
" R6- 5
69 14-13
86 91-20
93 54-15
98 67- 5
162 8-20
" 122-12
216 R3- 7

28 I. A.

1 8- 5
15 3-20
" 18- 5
35 8-20
" R11- 2
46 5- 1
" 53A- 3
" 54- 1
" R10- 3
65 8- 5
71 58-22
111 10-16
121 51- 1
148 R11- 2
152 11- 2
" 13- 5
" 105-34
159 19- 5
" 20- 1
169 Pre- 4
198 8- 5
" 105-68
211 51-22
" 53A- 3

29 I. A.

1 6- 4
9 92- 2
" 93-13
" 101- 1
" 101- 4
118 R 1-10
127 126-10
138 105- 3
" 105-59
148 58-35
" 60-10
" 62- 6
196 Pre- 2
203 3-41
" 105-47

30 I. A.

14 105-68
54 58-12
" 58-36
" 62- 2
" 62- 5
" 105-58
" 105-67
66 76- 7
" R2-13
71 8- 8
" 8-14
94 18- 5
114 8-41
" 7- 8

In the foot notes to the Commentary † indicates a case which is most appropriate for the proposition.

30 I. A. *con*
114 58–24
" 68–13
" 122– 3
139 8–20
190 95– 9
238 5– 6
" 48–10
" 54–23
" 55–12
" 55–22
" 58–39

31 I. A.
1 8– 3
17 108(l)–5
24 48–15
83 105–47
" 105–52
144 105–51
" 111–10
149 105–43
" 105–51
" 111–10
176 137– 5
203 5– 3

32 I. A.
1 52–14
" 52–17
" 53–24
23 60–23
" 64– 5
" 67–10
" R 1–11
" R14– 2
" R14– 7
" R14–12
86 18– 5
105 26– 3
123 91– 5
" 92–27
" R 2–15
135 8–20
177 24– 3
185 8–14
" 108(o)–6
203 Pre– 4
229 60–41

33 I. A.
1 1– 1
30 105–60
42 58–41
46 105–69
68 123– 4
81 82–17
" 95– 1
86 122–16
97 122–12
106 105– 4
107 58–32
" 60–17
" 67–14

34 I. A.
9 104– 1
" R 2– 3
" R11– 2
87 105–20
" 111– 5
102 52– 1
" 52–13
" 60–26
139 108(o)–3
" 117– 3
160 405–49
" 105–51
179 3–43
" 69–18
" 69–21

35 I. A.
17 8– 6
28 R11– 2
48 6–16
" 6–20
" 6–35
" 38–11
73 108(l)–6
98 53– 5
" 53– 9
118 27– 2
139 3–32
" 8– 9

36 I. A.
1 31– 2
44 55–20
71 9–10
85 83–20
148 7– 7
" 105–42
" 105–82
" 111–12
176 6–2a
" 6–13
203 55–18
" 68– 8
" R12– 5

37 I. A.
19 67–20
" 78– 5
" R 1– 9
" R 1–19
27 100–20
136 8–10
" 108(o)–6
152 55–15
182 60–44
" 76– 8
" 82–23
198 44– 5
" 105–47

38 I. A.
45 R 1–12
54 15– 2
" 19– 6
65 118– 6
85 122–16
87 5– 4
112 14– 2

39 I. A.
7 55–15
" 65–11
" 68– 8
" R6– 4
49 7– 7
68 92– 2
" 92–13
" 101– 1
" 101– 3
" 101–10
" R1–10
" R1–19
109 6–2a
" 58–24
133 6–26a
133 8–10
156 126–10
202 Pre– 4
" 8– 4
218 3–11
228 8– 3
" 52–18
" 52–32
" 101– 1
" 101– 6
" R5–19

40 I. A.
24 3–27
" 130– 3
" 130–12
31 2– 5
" 65– 3
68 R11– 2
74 60– 5
105 101– 3
223 108(l)–14

41 I. A.
23 7– 3
" 122– 3
" 126– 9
" 126–10
45 73– 1
84 58–31
" 60– 5
" 62– 5
110 3–38
" 59– 6
176 15– 2
189 8–20
216 R1– 2
" R1–12
221 108(d)–2

42 I. A.
1 9– 1
" 53A– 3
" 59– 2
" 60–22
22 3–38
64 3–31
" 38– 5
" 38–11
72 53–34
88 R4–15
135 53–33
163 3–11a
" 78–10a
192 6–2a
202 111–17
" 116–13
" 123–12
229 105–35
" 111– 2
589 111–14

43 I. A.
12 23– 2
104 53– 2
" 53–20
" 53–30
122 58–39
188 53A– 3
164 137– 5
187 R1– 5
207 6– 4
212 35– 4
" 123– 4
249 3–31
249 38– 7
" 38–11
" 38–12
" 41–13
" 59– 9
264 2– 5
" 9– 1
" 59– 2
284 58–33
" 60–37
294 100–31

44 I. A.
15 54–23
" 55–11
21 18– 5
30 60–23
46 8–10
" 108(o)–6
60 58– 7
" 101– 4
72 53– 7
" 53–33
87 58–29
" 68– 1
98 7– 7
126 7– 7
" 38– 5
147 7– 7
163 6–2a
" 7– 7
" 58–21
172 53–20
236 58–33
" 111– 9
246 2– 5
" 8–10
" 108(o)–6
" 114– 1
" 114– 7

45 I. A.
35 6– 4
" 91–16
73 7– 7
94 3–11
95 6– 4
118 6– 4
130 60–26
" 67–13
" 67–19
" 69– 3
" R 1–19
" R 5–13
134 11– 5
219 7– 7
" 43– 4
222 106–19
" 106–37
" 106–38
" 106–44
" 106–45
233 55–11
257 21– 9
275 111– 9

46 I. A.
1 6– 4
" 67–22
" 91–30
" R 1– 8
52 119– 9
64 14– 3
" 100– 5
72 6– 4
" 35 28
" 38– 5
" 91–17
88 8– 4
109 Pre– 2
" 2– 5
" 106–25
" 111–13
" 111–14
131 105–48
151 67– 5
" 67– 6
158 8–10
" 108(o)–6
172 60–47
228 5– 3
" 100– 8
" R14– 4
240 105– 4
" 107–13
" 107–15
250 3–47
259 91–17
272 58–22
" 67–27
" 126–10
" R 1– 6
285 54–17
" 54–21
" 59–14
" 60–27
" 123–10
302 Pre– 1

47 I. A.
6 38–11
11 48– 1
" R 1–10
" R12– 3
71 R 1–19
" R 5–13
76 105–43
" 105–44
91 60–26
" R 1–12
149 100– 5
177 59– 6
207 60–41
" 76–15
239 3–34
" 3–35
" 43– 2
265 58–22
" 69A– 2
" 76– 5
" 126–10
" R1– 5
275 53– 7
" 122–11

48 I. A.
56 8–10
127 3–20
" 54–22
" 59– 6
365 54–17
376 14–10
" 40– 1
881 122– 3
" 126–10
465 60–26
" 101– 1
" 101– 3
465 101–10
" R1–19
" R5–13
475 2– 9
" 54– 4
485 111– 7

49 I. A.
1 8– 6
16 3–31
" 41–13
" 59– 9
54 105–45
60 60–28
" 60–29
" 93– 1
129 8– 6
153 18– 5
195 123– 4
228 7– 7
286 105–43
" 105–48
" 105–79
" 105–84
358 7– 7

50 I. A.
14 7– 7
25 8–20
41 60–33
" 84– 5
49 8– 4
69 4– 4
" 6– 4
" 55– 1
" 68–13
77 58–39
162 6–36
" 69– 3
202 105–79
239 6– 3
255 105–79
276 36– 1
" 36– 2
" 36– 3
283 3–32
" 5– 6
" 48– 1
" 48–10
" 58–39
" 78– 1
" 78– 4
283 78– 9
" 78–12
" 79– 5
" 79– 6
" 79– 8
" 93– 4
" 93– 6

51 I. A.
37 6–26a
68 R1– 3
83 105–41
" 105–43
" 105–44
" 105–45
" 105–47
" 105–48
" 105–49
" 105–79
101 R11– 2
129 7– 7
140 92–10

References to Official Reports are invariably given in all cases found in the Official Reports.

51 I. A. con
140 92-13
" 92-19
" 92-24
" 101- 1
145 6- 4
" 38-11
157 72- 3
" 76- 1
" 76- 8
236 72- 3
293 44- 4
305 58-33
377 58-17
" R2- 8
381 117- 3

52 I. A.
95 21-13
109 8-10
" 108(o)-6
145 58- 8
" 58-35
160 105-83
" 108(l)-14
178 51-22
" 51-23
" 105-55
245 5- 3
286 122-11
" 123-12
310 14- 8
" 15- 2
342 58-22
" 122- 3
" 126- 9
" 126-10
362 3-11
" 59- 8
398 6- 4
" 10- 3
" 10-16
418 R11- 2

53 I. A.
24 24- 3
92 137- 3
134 R6-17
142 92-17
187 67- 5
197 R5- 6
214 54-23
" 55-20
" 100-16
220 54- 8
253 7- 7
" 38- 5

54 I. A.
1 R11- 2
23 1- 2
" 123- 4
" 123-11
" 129- 2
48 105-64
68 58-40
" 61- 2
" 62- 2
" 62-12
" 98- 5
" R14-12
79 7- 7
" 38- 8
89 52-29
" 122- 7

54 I. A. con
89 123- 6
122 R1-12
129 R6-17
136 7- 7
178 105-48
" 105-49
187 3- 7
" 3-10
190 R1-14
211 7- 7
" 38- 5
" 38-11
218 3- 6
" 8- 3
" 51- 1
265 84- 5
276 111-17
289 6-2a
317 8-20
372 18- 5
421 2- 5

55 I. A.
1 3-11
74 8-20
" 13- 2
" 15- 5
81 52-17
107 58- 6
135 55- 8
" 55- 9
171 123- 4
180 13- 5
" 30- 2
197 8- 6
207 R2-18
212 105-47
" 116- 4
" 116-13
235 122-11
243 3-24
" 6-17
249 6-26a
303 41-10
320 8-10
" 105-42
" 108(o)- 6
399 7- 7
423 105-35
" 111- 3

56 I. A.
51 8-20
112 45- 3
140 108(o)-3
146 8-20
213 8-20
" 19- 2
" 19- 4
" 123- 4
223 8-10
" 108(o)-6
248 105-43
" 105-48
" 105-49
" 105-51
254 100- 1
259 3- 6
" 51- 1
299 58-41
" 67-15
" 68-12
" 68-17
" 98- 5

56 I. A. con
339 52-18
" 72- 3
" 83- 9
" 83-17
" 84- 7
363 54-23
372 11- 2
379 53-20

57 I. A.
10 5- 5
" 21- 8
76 59-12
86 60-22
110 108(j)-5
117 6-35
125 105-44
" 105-45
" 105-48
168 Pre- 2
" 58-11
" 60- 3
" 60-28
" 60-38
173 58- 4
" 61- 5
" 62-12
" 100- 5
189 82- 2
" 82-4a
" 82- 7
" 82- 8
194 67- 5
282 8- 6
291 8- 6
" 8-20
305 51- 8
" 51-17

58 I. A.
29 8-10
50 R5-14
58 3-20
" 59- 6
68 58-39
75 111- 7
91 51-22
" 51-23
" 53A- 3
" 105- 4
" 105-13
" 105-19
" 105-39
" 107- 8
" 108(h)-2
125 8-10
141 108(l)-14
206 7- 7
" 41- 8
215 6-24
228 8-10
" 108(o)- 6
254 72- 4
270 30- 2
" 32- 5
279 5- 6
" 54-23
323 3-22
" 8-17
" 100-10
" 134- 3
333 58-39
341 48-11
" 72- 3

58 I. A. con
341 72-10
" 100-29
392 8-10
" 108(a)- 2
" 108(o)- 6
450 126-10

59 I. A.
1 123- 4
29 108(b)-1
" 108(l)-14
41 3-22
" 6-16
" 130- 4
106 82- 1
" 82- 6
138 52- 1
" 52-16
236 2- 5
" 10- 3
" 10- 6
" 10- 9
" 11- 9
318 12- 4
366 63- 5
376 67- 5
386 40- 8
405 73- 1
414 106-39
" 106-40
" 106-41
" 110- 1
" 110- 2
" 110- 3

60 I. A.
13 68-16
95 45- 6
167 1- 1
183 55-14
" 100-25
" 100-26
273 58-35
" 76- 5
297 53A- 3

61 I. A.
35 8-20
" 108(l)- 6
50 116-13
115 40-17
" 54-23
136 R1- 6
185 82- 4
286 59- 6
333 105-69
362 60-26
" 60-48
388 53A- 3
" 53A- 5
" 54-23
416 137- 5

62 I. A.
115 8-17
" 54-19
265 8-22
" 3-38
" 59- 6

63 I. A.
169 59- 6
224 19- 6
" 21- 3
" 23- 5
304 54-12
" 55-12
" 100-17
326 3-14
" 58-22
340 3- 2
" 54-19
384 7- 7
436 8-20

64 I. A.
5 14- 9
" 18- 6
77 130-13
126 58-44
" 60-41
302 R6-10

65 I. A.
45 111-13

66 I. A.
50 58-38
" 108(j)- 2
" 108(j)- 4
" 108(j)- 5
184 58-39
293 53A-13

67 I. A.
11 73- 1
" 100-30
82 61- 7
" 92- 5
" 92-19
" 92-21
" 92-23
" 92-27
309 5- 6
" 58-22
" 58-23
" R4- 6
318 58-33
" 59-11
377 58-22
386 6- 4

68 I. A.
34 100- 6
67 108(j)-4
" 108(j)-5
136 59- 4
144 6-35

69 I. A.
98 60-42
" 60-43
" 82-19
110 8-20
130 54- 1

70 I. A.
1 68-13
18 108(b)-3
" 108(c)-8
" 108(l)-14
180 105- 5

71 I. A.
93 21-12
" 21-13

72 I. A.
21 122- 1
39 92- 1
" 92-16
" 92-19
" 92-22
72 108(q)-1
165 68- 1
" 68- 4
" 68-16
" 68-20
277 R5-14
" R5-29

73 I. A.
208 89- 1
" 89- 2
" 89- 3
" 100- 5
" 100-22
271 Pre- 4

75 I. A.
115 53A-9a
" 53A-18
165 52- 1
" 52-10
" 52-13
" 52-24
" 52-38

FEDERAL COURT

Federal Court Report.

1940 F. C. R.
31 R11- 2

ALLAHABAD

Agra Full Bench Rulings

7 10-18
" 91- 5
71 100-30
148 54-17

1 Agra High Court Rulings (Civil)

15 64- 5
36 62- 3
" R1- 6
41 53- 1
79 53-34
85 54-14
" 54-23
" 55- 1
91 60- 5
125 60-41
132 76-16
" 76-19
" R7- 4
144 118- 3
160 54-15
" 55-12
288 123- 4

1 Agra HCR(Civ)con
281 63- 9
283 53A- 3
286 58-19

2 Agra HCR
42 39- 5
88 60-45
116 76-12
122 58-36
147 38- 8
150 8-20
160 54-12
176 58-31
187 63A- 1
" 72- 3
199 55- 9
300 3- 3
411 53-12

2AgraExOCJ
1 111-13
" 111-18
" 114- 2

3 Agra HCR
27 58-44
30 54-14
" 91- 8
" R7-16
39 62- 3
60 59-14
129 58-31
144 R1- 5
146 58-36
" 76- 7
158 76- 5
170 59-14
184 58-31
233 107- 1
270 58- 4
307 58-31
314 76-14
358 58-31
391 118-10
402 78- 3

NWPHCR

1 NWPHCR
21 58-20
41 111- 8
59 9- 1
81 58-31
84 55- 1
111 76-20
" R9- 1
142 59-14
149 111-10
159 58- 4
166 48-10
" 58-39
" 96- 1
254 117- 3
275 89- 8

2 NWPHCR
4 60-44
9 58-35
12 107- 1
50 38-11
72 R1- 6
129 65-10
" 76- 6
204 116-12
207 R7- 4

2 N W P H C Rcon
217 76-14
" 76-20
224 53-20
251 8-15
263 58- 9
311 48- 9
315 78- 3
444 58-31

3 NWPHCR
2 9- 1
" 38- 5
" 38-11
8 38-11
35 58-31
54 58-11
63 111- 8
" 115- 4
71 58-11
106 55- 9
153 53A- 3
176 58-31
205 58- 4
282 114A- 1
322 114A- 1
325 58-31

4 NWPHCR
11 43-12
36 107- 1
92 60-41
153 39- 5
161 61- 2
" 100- 5
164 107- 1

5 NWPHCR
5 31-2
" 126-1
29 58-31
42 108(i)-1
91 3-20
122 44- 4
128 60- 5
" 68- 2
145 91- 5
148 60-44
187 121- 2
215 82-22

6 NWPHCR
38 60-50
95 6-16
208 R1- 6
323 R1- 6
338 128- 4

7 NWPHCR
55 58-36
" 68- 5
57 62- 8
" R11- 2
88 109- 9
201 92-17
318 128- 4
336 55- 8

I. L. R. ALLAHABAD

ILR 1 All.
57 R1-11
89 51-22
126 10-18
" 65A- 7
236 67-11
240 58-27
" 58-43
" 67-11
" R14- 7
274 59- 3
275 58- 9
297 67-27
" R1- 6
303 78- 3
309 4- 4
" 58-18
403 53- 7
431 R7- 4
446 8-17
455 82- 3
" 82-22
478 6-34
499 58-31
524 R7- 3
588 52-31
603 R11- 2
610 65A- 7
611 58-44
" 67-13
710 58-24
732 130-17
" 132- 2
" 137- 4
734 8- 6

ILR 2 All.
40 59-.3
96 59- 3
141 39- 5
162 100-22
193 72- 3
" 72- 8
196 48-14
198 48- 9
216 59- 3
252 76-10
" 76-22
267 38- 1
313 58-31
320 R2- 5
342 R5-23
345 R5-23
411 6-37
431 48- 9
433 32- 7
437 114A- 1
449 58- 4
" 100- 5
455 76-12
" 77- 1
" 101- 4
481 59- 4
" 100-15
517 105-79
" 111-14
527 58-35
" R4- 8
565 60-44
593 76-12
604 R14- 4
617 R11- 2
621 R11- 2
638 58-31
639 R11- 2

ILR 2 All.con
711 48- 1
" 54-14
718 43- 7
807 82- 2
" 82- 3
826 52- 1
" 52- 7
838 R14-13
851 48- 9
854 54-12
891 53- 6
896 108.b)-3
898 6-2a
902 58-25
906 60-43
" R1- 6

ILR 3 All.
1 58-36
12 6- 6
77 54-14
157 59- 3
216 R5-23
239 R5-23
266 9- 1
" 123- 4
297 R14-13
313 76- 6
369 10-18
" 60-37
388 R5-23
408 7- 8
" 58-26
" 58-31
413 58-31
" 91-25
509 58-31
576 60- 1
610 R11- 2
653 60- 1
" 83- 2
682 82-18
" 101- 1
706 101- 3
787 6-34
805 43- 3
" 43-13

ILR 4 All.
3 59-14
" R6- 5
14 58-35
40 123- 2
58 82-17
" 95- 1
62 59-11
81 6-24
85 60-28
168 54-14
174 111-11
196 101- 1
245 58-35
" 67-15
" 68-14
276 58-31
281 58-35
" 67-15
296 39- 1
" 39- 2
" 39- 5
332 58-31
381 8-15
487 7- 7

ILR 4 All.con
518 10-18
" 65A- 7
" 101- 1

ILR 5 All.
11 100- 5
" 100- 6
40 108(i)-6
65 54-12
191 111- 6
207 6-16
257 60-44
" 6-28
276 60-44
285 10- 1
324 8-19
" 58-33
367 39- 2
" 39- 5
384 7- 7
419 76-12
447 59- 3
505 10- 1
542 7- 7
564 3- 1
599 3-20
616 108(o)-4

ILR 6 All.
37 58-33
39 6- 9
50 6-38
61 R11- 2
63 R11- 2
67 55- 8
262 2- 5
" 58-31
298 68- 1
" 68- 4
" 68- 5
303 76- 1
" 76-16
" 77- 1
" R2-13
" R9- 1
313 28- 6
" 28-11
" 32- 8
" 32-11
" 122- 1
335 60-20
344 58-31
399 60- 1
" 83- 2
" 83- 8
444 52-18
497 6- 9
508 52-11
" 52-40
560 2-10
" 15- 2
" 53- 6
581 59- 2
583 19-11
" 28- 2
" 28- 7
634 123- 1
" 123-12

ILR 7 All.
107 6-12
258 8-20
" 100-15

ILR 7 All.con
333 R11- 2
376 62- 3
" R1- 6
378 48- 9
482 9- 1
" 53A- 3
" 54- 4
490 7- 3
502 58-29
" R6-12
" R6-17
511 6-31
516 2- 5
" 10- 1
" 11- 2
568 48- 1
" 48- 6
" 92- 2
" 101- 1
" 101-10
577 48- 9
" 101- 1
" 101-10
590 3-20
596 106-40
626 118- 3
711 56- 1
" 56-13
716 R1-11
822 R1-11
864 43- 7
" 101- 1
878 6-31
899 106-19
" 106-20
" 106-40
" 111-23

ILR 8 All.
39 8- 5
86 48-10
95 60- 5
102 40-10
105 92- 2
" 101-10
178 53-20
" 53-34
" 54-12
182 58-17
" 83- 2
194 68- 6
198 105-27
" 105-29
" 105-32
" 107- 1
" 107- 3
267 126-10
279 38-11
295 60-50
" 82-17
324 41- 2
" 41-25
" 78- 1
" R1-19
384 72- 2
" 100-29
388 58-31
" 67-14
402 2- 5
" 62- 2
405 105-30
" 105-31

Remarks in foot-notes amplify principles in the Commentary and state the special features of the case.

I L R 8 All. *con.*

405 105-32
" 107- 1
409 41- 1
" 41- 2
" 48- 1
" 48- 6
438 60-44
440 108(c)-4
452 10-16
" 11- 2
" 11- 7
" 11-13
467 3- 1
" 108(o)-4
486 58- 9
" 58-17
" R11- 2
502 51-21
" 83-17
" 84- 7
" R7-14
540 48- 9
569 105-47
611 54-15

ILR 9 All.

20 2- 5
" 60- 1
23 R14-13
33 100-25
68 67-27
" R1- 6
97 41-23
108 60- 7
125 3-34
" 3-39
" R1-19
158 100- 6
205 60-14
213 R6-24
249 130-12
434 51-22
476 130-19
484 R6- 3
493 38-11
497 6-30
500 R2-23
591 100- 5

ILR 10 All.

1 R8- 7
20 54-19
" 130-17
47 68- 4
" 68-13
85 58-17
" R11- 2
127 R4-12
" R6- 3
" R10-8
133 5- 7
" 6- 3
166 52-42
179 R2-11
" R10- 8
272 6-2a
495 8- 6
520 91- 8
" R1-19
535 126- 9
570 60-44
577 6-30
602 60- 5

I L R 10 All. *con.*

611 72- 2
" 72- 3
" 91- 5
621 40-10
629 101-10
632 R6- 3

ILR 11 All.

1 123- 4
18 18- 4
27 119- 9
47 55- 5
136 58-13
164 58-31
244 54-14
" 54-23
" 55-12
257 40-10
262 Pre- 1
267 9- 2
296 8- 6
367 2- 5
" 67- 2
" 67-15
" R4- 3
416 58-17
" R11- 2
438 60-50
486 R6- 3

ILR 12 All.

61 R3-13
102 130-19
110 82-22
175 58- 9
189 58-31
" 60-50
192 12- 8
" 111-13
203 58-40
" 68- 5
" 68-12
" 98- 1
387 58-33
419 108(o)-3
" 108(o)-7
523 126- 9
537 R6- 3
539 R5-29
546 93- 6
548 R1-10

ILR 13 All.

28 48-10
" 58- 4
" 58-30
" 69- 3
" 100- 6
" 100-13
" 100-15
" 100-22
195 72- 9
" 83- 3
" 83-20
200 58-18
315 R1-19
330 58-17
" R11- 2
356 R6- 3
360 R6- 3
371 52- 1
" 52-18
400 R2-18

I L R 13 All. *con.*

400 R7-13
409 54-14
" 54-15
" 122-16
" 123- 4
432 2- 5
" 60-19
" 67- 2
" 91- 2
" 91- 4
" 91- 5
" 91-25
" 92- 2
" 94- 2
" 101-10
" R1- 3
" R1- 5
" N1-10
" R1-19
" R12- 2
571 108(o)-4
581 92-19
" 101- 1
" R1-10

ILR 14 All.

1 92-15
8 122- 3
" 126-10
162 58- 9
176 105-70
" 108(j)-4
195 58-33
238 58-39
273 100-29
350 R8- 7
362 3-39
" 41- 1
" 41-23
405 2- 5
420 38-11
509 R12- 3
513 58-29
" 68- 1
" 68- 2
" R6- 3
" R6-12
" R6-13
520 R2-23
529 R2-18

I L R 15 All.

75 R1-12
134 8-17
270 8-13
304 100- 1
331 R6- 3
" R6-12
334 R6- 3
339 6-2a
" 7- 7
" R11- 2
371 6-11

ILR 16 All.

59 58-31
65 R7-13
78 78-10
" 78-14
" R6-10
185 123- 2
254 62- 3

I L R 16 All. *con.*

254 92-15
259 R4-13
269 R2- 9
" R11- 2
270 R5-29
286 52-40
295 61- 1
" 61- 2
313 3-21
315 3-21
" 68-15
318 68- 4
" 68- 5
328 51-25
" 108(h)-4
" 108(p)-1
344 9- 1
" 53A- 3
" 54- 4
369 6-2a
" 7- 7
386 76-10
415 67- 5
" R14-12
478 3-34

ILR 17 All.

1 126-10
45 106-25
" 111-14
48 R1-10
55 58-14
63 60-43
87 6- 9
99 R14- 4
125 6- 4
" 38- 5
" 126-10
252 2- 5
" 59- 2
280 41-24
282 63- 9
" 72- 3
" 76-19
428 R2- 7
434 56- 1
" 67-28
" R4-10
451 58-33
511 R11- 2
520 R14- 2
537 R1-12
581 58-17
" R11- 2

ILR 18 All.

1 123- 4
31 82-18
" R5-19
" R6-10
69 R1- 8
83 60-19
" 91- 5
109 R1-19
113 67-21
" R1- 9
146 8- 9
168 54-15
189 67-28
" 92-24
253 91-35
265 8-21
" 130- 2

I L R 18 All. *con.*

290 111-10
316 58-17
" R11- 2
320 91- 8
322 55- 2
325 R14- 2
" R14- 7
354 111- 8
" 115- 4
361 55- 4
368 8-20
403 60-50
419 100-25
" R14-11
432 53-24
455 R3- 5

ILR 19 All.

35 6-27
39 8-20
" 58-17
" R11- 2
76 58-39
145 48- 9
180 R2-18
" R8- 7
186 R10- 4
191 68- 4
" 68- 5
196 60-44
" 67-28
" 82-18
205 60-26
" R4- 8
" R5-18
" R8- 7
211 18- 5
332 52-40
379 R1- 3
" R1-19
430 58-33
489 55-20
496 58-35
" 76- 5
504 52-14
520 R5-29
524 9- 1
527 R1-19
541 R1- 6
" R1-19
543 R1-10
545 82- 2
" 82- 6
" 82-23

ILR 20 All.

23 60-23
" 60-44
" 67-28
" 82-18
110 R1-10
171 58-17
" R11- 2
188 R1-19
252 48- 9
262 6-38
267 91-21
315 R3- 7
322 67A- 1
325 6-2a
" 7- 7
327. 130-19
349 52-37
" 52-39

I L R 20 All. *con.*

354 60-26
358 R3- 7
375 R3- 3
" R3- 7
392 123- 6
397 R4- 5
401 58-35
" 62- 7
" 67-15
" 72- 8
" 76- 8
" R2-12
446 R3- 3
" R8- 7
447 54-15
468 3-21
469 108(o)-3
" 108(o)-7
523 72- 5
" R2-11
" R4-12
" R5-26
" R6-11
" R10- 8
532 3-18
537 6-2a

ILR 21 All.

4 58-41
" 58-44
" 67-15
" 67-18
" 68-17
" 72- 5
71 38- 5
" 38-11
137 73-11
149 52-40
" R1- 6
165 123- 4
193 R1- 2
195n R1- 2
223 55-14
235 R1-19
251 62- 9
272 R1-10
297 108(o)-4
301 R1-12
356 R1-12
361 R11- 2
380 67-22
" R1- 8
386 108(o)-7
408 52-13
454 55-20
496 51-22
" 105-55
" 108(h)-2
" 108(h)-4
" 108(q)-1

ILR 22 All.

1 40-10
83 63- 9
96 Pre- 4
" 8- 9
149 58-29
" 58-31
" 58-33
" 60- 1
" R6- 5
191 91-35
" R1- 6

Any case in the "Table of Cases" will show where to get the entire case-law on the point.

I L R 22 All. con.
212 R 1-10
" R 12- 2
238 60-28
" 60-30
" 60-33
243 52-18
" 52-40
284 60-23
" 60-44
" 67-28
" 82-18
321 73- 3
326 39- 1
" 100-30
338 40- 8
343 54- 4
370 54-15
394 R 1-19
404 R 6- 3
" R 6-10
408 R 6- 6
442 R 5-20
" R 5-23
453 68- 2
" 91- 5

ILR 23 All.
1 67-14
" 94- 2
" R 1-19
25 91- 5
" R 1-19
60 2- 6
" 52- 1
" 52-11
" 52-31
" 52-41
88 R 3- 7
" R 7-13
126 108(o)-4
164 6-13
175 9- 7
" 54- 1
" 54-17
181 8-20
" R 11- 2
194 8- 5
211 108(h)-2
233 3-20
" 18- 5
263 R 1-11
309 8- 6
324 8- 5
331 52- 8
" 52-15
" 52-18
" 52-40
" 91-10
338 58-35
355 82- 2
" 82- 3
383 10-16
429 79-10
" 91- 8
" 93- 5
432 58- 8
" 67-15
439 R 6- 6
" R 6-15
442 41-23
467 91-25
" 100-11
" R 1- 6

I L R 24 All.
1 Pre- 4
85 84- 5
94 6- 4
157 5- 5
" 123- 2
160 39- 1
" 39- 5
179 92-27
" R 1-20
185 92-24
" R 1-19
" R 7- 4
190 18- 5
195 122-12
211 R 1-12
226 R 1- 6
257 18- 5
319 123- 7
402 48- 8
429 R 1-10
456 R 4- 4
459 R 1-12
461 60- 7
" 83-17
" 84- 7
479 R 3- 3
" R 4- 8
" R 5- 4
" R 7-13
" R 8- 7
483 44- 7
" 73- 1
487 111- 7
517 132-19
521 58-35
" 60-10
" 62- 6
" 68- 6
" R 11- 2
538 71- 3
" 71- 5
542 R 5-29
547 38- 8
549 R 14-11

ILR 25 All.
1 3-41
" 105-47
42 R 4-10
46 63- 1
" R 1- 9
77 111- 9
79 60-43
" 67-28
" R 1- 6
" R 6-10
115 58-12
" 58-36
" 62- 2
" 62- 5
" 105-58
" 105-67
155 60-14
162 R 1-12
179 83-13
" 83-20
195 7- 3
212 R 5- 6
214 R 1-12
231 60-26
" R 2-18
" R 3- 3
" R 8- 7

I L R 25 All. con.
236 18- 5
264 R 5- 6
287 76- 7
" R 2-13
296 3-31
" 7- 7
351 8- 6
358 7- 3
" 122- 4
" 123- 2
" 126- 9
366 3-39
" 48- 9
371 73- 6
388 R 1-19
418 18- 5
431 6-30
446 60-18
" 60-44
" 67-28
" 82-23
" 91-25
" R 1-19
618 55- 5

ILR 26 All.
14 67-15
" 67A- 1
" 67A- 5
" R 12- 4
25 R 6-10
28 52-14
" 100-31
57 59- 6
69 3-11
72 60-44
" 67-28
" 82- 5
" 82-18
" 91- 5
" 91-25
82 43- 3
93 65-10
" R 6-11
185 92-24
" 92-27
223 R 14-11
227 82-17
" 95- 1
266 53A- 3
" 54-23
291 83- 2
" 83-15
318 60-14
" R 5-30
337 58-32
342 7- 3
368 105- 9
" 107-10
407 82- 2
" 82-4a
" 82-13
" 82-15
" 82-16
" 82-17
" 95- 1
447 52-40
464 91- 8
" R 1-19
479 60-32
" 60-37

I L R 26 All. con.
490 41- 1
" 41-22
" 41-23
504 R 1-19
" R 4- 6
507 R 6- 6
" R 6-15
559 60-28
" 100- 5
588 44- 4
611 R 1- 9
617 6-24

ILR 27 All.
12 40-10
62 R 5-19
71 R 2- 7
75 R 1-19
88 44- 4
136 107-10
153 44- 4
169 5- 5
" 123- 2
178 60-28
" 60-41
" 83- 7
" 83-17
" 83-20
" 91- 8
" 95- 1
" 100- 5
183 105-60
190 105-19
" 107-10
305 60- 7
308 92-27
" R 7- 4
310 Pre- 4
" 45- 6
313 60-10
" 61- 2
" 62- 6
" 62- 7
" 68- 6
" R 7- 6
320 18- 5
325 91- 5
" 92-27
" R 2-15
338 51-22
" 51-23
351 76-12
" R 2-13
" R 9- 1
364 8- 6
" R 1- 9
383 8-20
392 R 8- 4
403 72- 3
" 92-24
462 107- 7
472 91- 6
" R 1- 9
488 68- 5
501 R 3- 3
" R 3- 8
511 67-21
" R 1- 9
517 R 1-19
" R 14- 7
544 52-21
549 82- 5

I L R 27 All. con.
561 55- 2
564 54-19
612 122- 2
" 122-16
619 R 6- 3
625 R 5-29
634 Pre- 4
696 105-35
" 111- 3

ILR 28 All.
1 60-41
19 R 6-10
28 60-26
38 45- 6
39 44- 6
44 R 1- 8
58 67-31
" R 14-11
104 Pre- 4
147 123- 4
155 60-44
157 58-35
" 67-15
" 68-17
174 60-43
" 67-28
" R 1- 6
185 11-13
193 R 3- 7
" R 5-20
196 52-13
223 R 11- 2
225 58-41
252 60-14
256 63- 2
277 3- 3
279 60-41
" R 1-19
295 R 6- 3
315 48- 9
342 10- 1
" 21- 2
365 100-25
" R 6- 3
384 18- 3
400 11- 2
" 108(j)-1
" 111-13
439 123- 4
482 82-17
" 95- 1
488 122-12
496 58-32
" 60-17
" 67-14
508 7- 3
" 38- 5
" 38-11
" 58-24
593 60-44
" 63A- 4
" 72- 2
" 82-23
627 44- 5
633 18- 5
638 58- 5
" 91- 3
" R 1- 9
" R 7- 4
647 108(d)-2
655 39- 2

I L R 28 All. con.
655 100- 9
" 100-22
" 100-28
660 R 6-10
681 R 14- 7
696 108(j)-8
712 60-37
743 82-17
778 92- 7
" 92-27
" R 5-13

ILR 29 All.
12 R 6- 3
50 59- 4
" 59- 5
52 5- 5
76 52- 1
" 52-18
" 91-10
145 58-31
163 6- 3
" 43- 2
205 R 1-10
" R 12- 2
215 60-41
233 67A- 1
" 82-23
260 R 6-10
262 60-44
267 9- 2
292 41- 9
308 44-10
311 R 1-12
322 R 11- 2
339 52- 1
" 52-13
" 60-26
369 68-18
" R 6-10
385 5- 5
" 60-19
" 67-21
" R 1- 9
471 60- 5
" 67- 5
484 108(o)-4
537 48-14
640 6-38
652 51-22
" 105-61
679 91- 4
" 91-12
" R 1-15

ILR 30 All.
30 67-22
" 91- 5
" R 1- 8
36 R 7- 4
" R 9- 3
38 43- 4
82 3-34
" 50- 3
84 8- 6
95 52-13
125 54-14
" 55-12
130 48- 9
134 108(o)-4
146 R 14-7
" R 14-11

I L R 30 All. con
162 58-41
" 67-18
" 68-17
172 55- 8
225 R 9- 3
231 52-40
238 48- 9
240 R 1- 5
246 6-21
248 R 5-14
252 58-18
256 R 1-12
282 37- 7
324 44- 8
" 44-10
389 108(l)-10
" 109- 4
388 58-29
" 68- 2
" R 6- 5
400 68- 5
467 52-13
" 52-21
488 105-42
497 6- 4
" 91- 4
" 91-16
" R 1- 6

ILR 31 All.
3 11-13
5 122-12
11 65- 4
" R 1- 5
19 R 14-13
53 6- 4
" 43- 5
" 43- 7
58 6-34
" 108(l)-12
65 82- 2
" 82-15
68 55-20
82 54- 5
114 R 14-12
136 18- 5
166 82-17
" 92- 1
" 95- 1
176 38- 1
" 38-11
" 58-21
276 105-70
" 107- 7
" 108(l)-12
300 60- 5
318 58-35
" 67-15
" 111- 2
" 116-13
325 60-10
" 68- 6
" R 11- 2
328 R 7-13
" R 8- 7
335 60-44
339 122-12
346 60-26
" 104- 1
352 R 6- 4
373 R 6- 8
382 6-24

I L R 31 All. con
412 9-10
443 55-12
454 38-11
" 38-12
482 61- 2
" 61- 5
" 62-12
" 100- 5
507 6-2a
" 7- 7
514 105-37
" 116-13
523 54- 1
539 118- 3
583 55-18
" 68- 8
" R 12- 5
612 6- 9
" 9- 8
" 54- 7

ILR 32 All.
1 101- 1
25 7- 3
" 92-17
88 6- 4
" 14- 4
119 R 1-19
138 92- 2
" 101-10
142 83-20
160 92-15
164 60-14
" R 5-30
213 108(l)-9
377 R 14-14
383 68-13
410 55-15
448 R 11- 2
503 18- 3
575 38- 5
612 60-44
" 76- 8
" 82-23
651 61- 5

ILR 33 All.
41 45- 6
71 R 1- 2
97 60- 4
101 92-10
" 101- 1
104 54-11
" 105-42
107 58-17
111 91-13
" 105-42
122 58-33
166 55-20
230 40- 1
242 38- 8
253 122-5a
272 R 1-12
308 50- 2
335 111- 8
337 58-33
340 118- 6
" 122- 2
" 122-16
356 5- 4
368 101- 3
370 R 1-19
382 48- 9

I L R 33 All. con
387 82- 6
393 61- 3
" 61- 5
400 18- 5
421 58- 8
434 60-44
" 82-18
443 7- 7
457 6- 4
558 19- 6
580 6-24
654 6-2a
" 7- 7
657 7- 8
" 105-22
665 45- 6
708 82- 2
" 82-13
" 82-14
" 82-15
" 82-17
723 54- 1
" 59- 4
" 118- 9
" 123- 1
735 5- 3
752 51- 8
779 105-22
783 6-2a
793 5- 3
" 122-5a

ILR 34 All.
22 41- 8
63 55-15
" 65-11
" 68- 8
" R 6- 4
72 R 5-30
102 92-27
" 101- 1
106 R 6-16
113 44- 4
126 R 11- 2
150 44- 4
155 65- 4
213 7- 7
261 76-12
268 101- 2
273 4- 4
" 58- 4
" 58-18
289 60-53
296 6-2a
" 58-24
323 67-19
" R 1-10
331 59- 6
388 R 7-13
" R 8- 7
416 61- 8
429 55-14
446 58-30
455 126-10
465 123- 4
474 67-28
478 11- 3
" 11- 9
" 39- 8
549 R 1-12
572 R 1-12
606 60-43

I L R 34 All. con
606 R 1- 6
615 59- 8
620 60-28
631 48- 9
640 65- 4
" 67-13
" 67-30
659 60- 5
" 62- 5

ILR 35 All.
3 123- 6
19 105-60
" 105-61
34 59- 6
48 2- 5
" 65- 3
116 R 2-18
145 111-14
" 111-16
164 58-29
" 59- 8
" 100-14
178 R 5-14
211 101- 3
227 60- 5
247 R 1- 6
" R 1-19
250 R 3-12
254 3-18
280 117- 3
302 R 11- 2
353 3-11
364 59- 8
405 68-13
441 60-43
" 67-28
" R 1- 6
484 R 1-19
502 5- 4
518 R 14-12
524 3- 2
534 R 11- 2
582 R 2-23

ILR 36 All.
36 83- 2
60 52-21
81 7- 3
" 122- 8
" 126- 9
" 126-10
123 R 1-19
" R 7- 4
139 84- 5
" 84- 7
141 43-12
176 107- 1
" 107- 8
" 107-12
187 38-11
" 38-12
195 58-31
" 60- 5
" 62- 5
201 5- 4
" 58- 4
" 100- 5
220 R 11- 2
264 R 11- 2
" R 14-13
272 82- 2
" 82- 5

I L R 36 All con
308 41- 8
" 41-23
318 6-24
327 67-10
333 126-10
350 R 3- 7
" R 3-12
376 R 3- 7
383 R 1- 2
" R 1-12
387 51-11
478 R 2- 7
507 130-11
" 130-15
516 R 14- 7
537 54-15
551 60-28
" 60-32
" 60-37
567 67-30

ILR 37 All
49 3-38
81 63- 9
" 72- 3
91 105-13
" 105-19
101 82-17
113 67-22
144 105-14
" 108(j)-1
165 60-22
" R 14- 7
226 91-10
309 70- 2
" 92- 9
" 101- 1
350 59- 9
369 8-20
414 R 5-10
423 R 5-22
474 3-11a
" 78-10a
557 111-17
" 116- 3
" 123-12
631 54-13
634 61- 6

ILR 38 All.
7 R 6- 3
" R 6-19
62 7- 8
" 105-22
92 82-16
103 60-44
107 6- 4
138 92-15
" 95- 1
148 60- 4
154 7- 8
" 54-14
" 54-23
" 105-22
178 105-18
" 105-19
" 107- 7
184 40-17
" 54-23
209 55-15
" R 6- 4
212 123- 1
" 123- 4

I L R 38 All. con
230 40-14
232 6-29
240 52-42
254 100-22
286 105-60
327 R 14- 4
361 58-30
" 100-15
398 R 5- 7
461 59- 8
" 100-14
488 R 1- 5
494 2- 5
" 9- 1
" 59- 2
502 92-23
" 101- 1
530 72- 2
570 58-33
" 60-37
581 100-21
627 35- 4
" 123- 4

ILR 39 All.
36 R 14- 6
51 6-35
" 25- 9
58 6-35
74 60-44
" 101- 1
95 53-30
109 59- 8
112 59- 8
166 40-14
178 58- 7
" 101- 4
196 6- 6
225 100- 8
241 59- 8
244 58- 4
311 100- 5
396 R 7-13
" R 8- 7
437 7- 7
" 38- 5
463 51-11
" 51-15
500 6-2a
" 7- 7
" 58-21
506 R 2- 8
536 91- 2
" 91-25
539 6-29
551 R 5-29
618 60-44
621 105-13
641 R 5- 6
672 44- 8
719 60-41
" 83- 7

ILR 40 All.
109 72- 5
" R 2-11
" R 4-12
" R 5-26
" R 6-11
" R 10- 8
171 7- 7
" 38- 1
" 38- 5

I L R 40 All.con
171 38- 8
187 Pre- 6
" 53A- 3
" 59- 8
235 R5-16
384 6- 4
407 60-26
" 67-13
" 67-19
" 69- 3
" R1-19
" R5-13
470 11- 5
487 6- 4
553 R6-21
558 58-24
575 8- 6
579 R2-18
584 R1- 5
692 6- 6
" 19- 8

ILR 41 All.
1 18- 5
22 59- 6
217 40- 1
250 59- 8
372 92-19
384 R6-21
399 R14-12
417 40- 5
443 53A- 3
478 7- 7
" 72- 5
" R2-11
" R4-12
" R5-26
" R6-11
" R10- 5
526 R11- 2
534 52-14
611 6- 3
631 60-14
" 67-27
666 122-12

ILR 42 All.
30 11-13
70 67- 5
" 92-14
158 5- 3
" 100- 8
" R14- 4
319 52-13
336 56- 1
" 56-14
364 R1-19
" R5-13
420 60- 4
" 84- 5
437 58-33
487 59- 6
517 60-26
" R5-13
519 R6- 3
544 60-44
" 67-28
" 82-18
566 R14- 6
575 60-50
596 6- 7
" 73- 1

ILR 43 All.
1 9-11
" 53A- 3
25 R8- 7
42 82-23
81 4- 4
" 68-13
95 60- 4
" 83- 2
" 83-11
127 6-38
204 3-34
" 67-20
" R1-19
263 41-23
268 73- 1
" R4- 6
314 55-12
320 R7- 9
330 106-20
" 106-32
" 106-40
423 60- 4
424 60- 4
" 83-11
469 60-26
" 101- 1
" 101- 3
" 101-10
" R1-19
" R5-13
484 68- 5
503 123- 2
525 122- 3
" 126-10
539 60-23
" 82- 3
544 55-12
589 56- 7
" 82- 3
" 82-23
600 45- 6
606 117- 3
638 60- 4
" 63- 9
" 83-11
655 38- 7
677 R14- 6

ILR 44 All.
9 92-24
37 58- 4
" 61- 3
" 61- 5
" 62-12
64 83-16
" 84-10
" 103- 2
" 103- 4
67 65-10
" 92- 3
" 92-11
" 92-27
" 95- 1
71 53-29
77 68- 5
" 68- 6
102 83-16
" 84-10
" 84-11
" 103- 2
" 103- 6
146 60-43
" 67-28

I L R 44 All.con
146 82-23
185 60-28
" 60-29
" 98- 1
198 84-13
301 123- 4
350 R10- 7
354 6-24
368 7- 7
418 63A- 2
" 67-20
" R1-19
428 6- 4
462 67-20
" 91-41
" R1-19
486 4- 4
" 68-13
488 82-23
" R5-19
580 123- 4
583 116-13
633 10- 1
659 101- 1
" 101-10
665 51-11
668 R4-15
" R5- 5
" R5-14
674 41- 8
" 41-23
708 60-44
" 63A- 1
" 82-18
730 60- 4
" 83-11
748 7- 3
" 53- 6
772 58-17
" R11- 2

ILR 45 All.
46 60-44
" 67-27
72 58-33
77 38- 8
115 123- 1
" 123- 2
149 92- 7
154 R3- 1
157 44- 4
162 5- 4
179 4- 4
" 6- 4
" 55- 1
" 68-13
189 R1-19
273 83-16
" 84-10
" 84-11
" 103- 2
" 103- 6
361 108(o)-4
384 100-31
388 53A- 3
" 68- 3
" 72- 3
" 76- 8
396 59- 9
419 105-79
478 14-10
" 54-23

I L R 45 All.con
492 14-10
497 7- 5
520 41-23
524 60-43
559 54-16
576 38-11
581 8-20
" 58-12
" 58-33
592 60-22
" 67- 9
" 83-20
630 R5-26
" R10- 5
653 73- 1
692 38-11

ILR 46 All.
32 R6-10
38 92-17
95 7- 7
115 76-10
130 122-5a
152 60-17
173 58-33
260 123- 4
269 72- 3
" 76- 1
" 76- 8
286 3-10
" 82- 5
303 107-10
310 43- 9
" 126-10
333 10- 6
" 14-10
" 40-10
" 54-23
359 118- 2
" 118- 3
" 120- 2
377 41-23
414 R12- 3
514 14-10
" 40-10
525 32- 5
575 5- 5
" 29- 5
" 30- 3
622 6-27
" 68-13
633 62- 6
" 76-12
" 77- 1
637 41- 8
" 41-10
656 38-12
709 R1-12
759 53A- 3
831 117- 3
847 53A- 3
864 R7-13
897 72-11
" 76- 1
" 76-20

ILR 47 All.
55 6- 1
60 100-24
63 108 l)-14
90 100-28
250 58- 8
" 58-35

I L R 47 All.con
310 58- 4
338 48- 9
348 111-16
355 38- 5
424 53-10
430 51- 9
" 51-11
466 R1-11
470 8-15
496 19- 6
" 19- 8
546 R5-16
582 40-13
" 60-28
" 63- 9
589 111- 1
619 6-34
" 32-11
" 126-14
625 52-21
703 58-22
" 122- 3
" 126- 9
" 126-10
751 67-20
" 91-41
780 68-13
803 91-20
" R7- 3
883 6- 4
" 10- 3
" 10-16
923 52-21

ILR 48 All.
12 40-10
70 63- 9
78 60-16
150 43- 7
171 60-44
" R1- 6
213 5- 4
221 52-21
251 60-50
292 61- 5
302 58-31
" 67-14
353 51-22
385 108(j)-1
" 117- 2
" 117- 3
404 108(e)-5
414 53- 5
" 53- 8
425 72- 5
" R5-26
" R7- 6
443 92-17
457 67- 5
529 54- 8
554 R1-10
560 6- 9
611 60-40
" 83-16
" 84-10
" 103- 2
" 103- 7
637 6- 4
643 58-81
682 R10- 4
705 60-20
787 58-81

I L R 48 All.con
787 58-83
828 R3- 7

ILR 49 All.
25 3-11
78 R7-10
149 7- 7
" 38- 8
162 92- 7
233 92- 2
" 101- 1
297 R4-15
" R5- 5
330 3- 3
405 58-33
430 68- 5
" 101-10
488 54- 5
" 54-12
503 123- 4
506 R6-10
516 52-21
527 10- 6
" 14-10
" 40-10
592 R5-16
606 8-19
636 R13- 4
640 92-23
658 58-35
" 76- 6
779 8- 6
806 54-23
809 R5- 3
873 5- 4
923 R1-13

ILR 50 All.
18 36- 4
22 52- 9
" 52-19
36 60-23
59 118- 6
63 7- 7
82 6-16
111 R5-14
137 53- 6
202 2- 5
" 52-39
" 117- 3
218 92- 2
" 101- 1
227 137- 5
290 52-35
" 52-37
" 52-38
321 68-16
" R6-10
328 3-28
" 3-34
371 55- 8
" 55- 9
375 13- 5
" 30- 2
394 6- 6
" 6-26
428 82-14
" 82-27
454 54- 3
479 111- 7
507 3-26
569 82- 6
" 82- 7

In the foot-notes to the Commentary & indicates either a leading case or a case giving fuller reasons.

ILR 50 All.con
569 82-17
" 92- 1
" 95- 1
" 95- 6
655 83- 2
" 83-15
" 83-16
" 84-10
" 103- 2
" 103- 6
742 67 A- 1
" 122- 2
818 128- 4
" 128- 7
823 38- 8
" 38-12
882 R 7-13
" R 8- 7
986 4- 5
" 54- 1
" 54-19
" 54-21
" 54-22
" 60- 1
" 107- 9

ILR 51 All.
79 5- 4
" 9-11
" 53 A- 3
" 118- 4
285 106-18
411 52-16
454 Pre- 2
" 51- 1
" 51- 8
" 51-15
" 51-23
494 3- 1
" 3- 2
" 54-19
" 60 A- 2
495 53- 5
506 6-30
550 53-29
589 60-15
595 2- 6
" 53- 5
606 56- 7
" 82-23
" R 5-13
612 3- 2
" 6-10
" 58- 4
" 100-13
629 123- 5
634 R 3- 7
640 R 5- 6
651 40-24
" 55- 9
686 52-18
" 72- 3
" 83- 9
" 83-17
" 84- 7
771 54-23
780 67-14
802 65- 4
920 92-23
974 R 14-13
1016 83-15
1039 38- 8
1053 55- 8

ILR 52 All.
134 R 1-19
139 41-11
" 41-15
" 41-16
" 52- 1
" 52- 3
" 52-13
" 52-27
" 92- 2
248 41-23
" 41-25
281 59- 5
" 60-28
" 61- 2
" 61- 5
" 62- 2
" 62- 4
" 62-12
" 65- 4
" 100-15
331 R 1-19
338 4- 4
" 6-27
" 6-29
" 54-23
" 68-13
358 82- 2
" 82-4a
" 82- 7
" 82- 8
363 R 6- 3
368 18- 5
391 38-11
426 R 1-10
434 3-11
435 3-18
471 R 1-19
539 61- 5
" 61- 6
" 61-12
604 55- 9
619 6- 6
705 6-10
" 6-18
710 2- 9
" 53- 4
" 53- 5
716 2-10
" 5- 4
" 6- 4
748 8-20
" 14-14
761 55-14
" 58-18
831 51- 8
839 R 6-22
886 2- 5
901 55-14
" 100-13
" 100-26
964 R 14-11
985 3-34
" 8- 3
" 100- 5
" 100-13
1037 58-18
" 92- 1
" 92- 9
" 92-16

ILR 53 All.
1 3-12
" 3-19

ILR 53 All.con
100 54- 3
283 R 5- 6
" R 5-29
290 7- 7
" 41- 8
334 2- 6
" 3-34
" 51- 1
" 51- 6
" 51- 9
" 51-15
" 59 A- 3
" 63- 3
" 63- 6
" 63- 9
" 63 A- 2
" 70- 3
" 70- 5
391 56- 7
" 56-10
" 56-12
" 60-41
" R 4-10
" R 5-24
580 60-28
631 67 A- 1
633 123- 1
" 123-12
695 R 6- 6
742 40- 1
" 40- 5
" 40-12
764 8-19
786 2- 6
" 54- 3
" 54-12
946 55-14
1023 52- 7
" 52-18
" 52-31
" 92-11
" R 1-19
" R 5-19

ILR 54 All.
17 11-11
" 40-20
22 54-12
140 100-29
189 52- 1
" 52-16
199 82- 1
" 82- 6
205 76- 1
" 76-12
" 77- 1
344 R 5- 6
366 6-11
428 R 6-16
" R 6-21
437 3- 2
" 3- 3
" 59- 2
448 R 6-10
472 39- 5
482 67-32
499 3-21
" 136- 2
" 136- 3
" 136- 4
534 122- 7
628 44- 1

ILR 54 All.con
763 R 4-15
" R 14- 3
" R 14-14
774 55- 9
840 44- 9
897 92- 5
" 92-22
" 101- 1
" 101-11
948 55- 9
966 40- 8
975 60-50
" 92-15
1041 Pra- 2
" 60-28
" 60-32
" 60-34
" R 11- 2
1051 3-19
" 59- 8
1067 68-16

ILR 55 All.
235 52-18
359 60-44
" 61- 5
" 62-12
490 55-14
503 43- 4
554 41- 9
728 44- 4
735 52-35
810 3-41
814 3-22
" 6-16
874 105- 2
" 105-13
" 105-14

ILR 56 All.
111 116-13
134 7- 7
142 54-23
468 59- 6
561 60-26
" 60-48
582 41- 2
" 41-11
" 41-15
" 41-23
" 44- 4
624 3-25
" 53-14
766 55-14
975 105-13
997 55- 9

ILR 57 All.
314 8-17
" 54-19
474 6- 3
" 6- 7
797 100-25
" R 6- 3
861 10- 6
" 10- 7
" 10- 9

ILR 58 All.
1 53-9
63 2- 5
98 65- 4
842 53-34
457 6-26

ILR 58 All.con
467 30- 2
548 82- 7
" 82- 8
565 R 5-14
594 R 1-11
602 92- 2
" 92- 5
" 92- 7
" 92-28
687 25- 3
" 122- 1
834 6- 3
842 53- 9
912 98-11
1056 92-29
" 92-30
" R 1-10
1064 3-12

ILR 1937 All.
3 14- 9
" 18- 6
82 R 5-10
153 53-19
" 53-20
" 120- 3
225 92-17
" 92-24
269 100-30
285 123- 4
312 53 A- 5
" 53 A- 6
" 105- 3
" 105-19
580 92- 1
584 R 11- 2
588 117- 3
609 123- 4
666 3-22
706 100-29
723 3-13
" 59- 8
" R 1- 6
" R 1-19
817 5- 4
" 53 A- 6
823 R 5-10
860 7- 3
" 43- 4
880 92- 1
" 92- 2
" 92- 3
" 92- 5
" 92-19
" 92-20
" 92-22
" 92-23
" 92-24

ILR 1938 All.
53 2- 5
" 106-12
63 43- 7
" 58-19
" 60-44
" 100- 4
148 R 6- 3
218 68- 4
" 68-17
288 108(j)-5
" 108(j)-6
466 R 14- 6
513 73- 1

ILR 1938 All.con
513 73- 2
" 73- 7
" 73-10
" 73-11
" 73-14
" R 4- 7
638 123- 1
714 58- 7
" 58-30
" 58-35
" 67-15
" 68-17
" 101- 4
767 83-15
" 84- 4
" 84-10
" 84-11
896 100-10
904 3- 2
" 58-35
1001 Pre- 1

ILR 1939 All.
24 92- 2
150 56- 1
" 56-10
" 56-12
" R 4-10
" R 5-17
185 59 A- 3
" 92-18
" 92-27
194 R 9- 1
275 Pre- 1
" 3- 2
" 3-24
" 54-19
298 10-14
" 126- 2
313 68- 2
" 68- 4
492 R 6-16
518 8-15
607 5- 3
" 5- 5
" 8- 3
" 8- 8
809 52-35
" 53 A-13
885 2- 6
" 5- 3
" 100-22
" 100-24
943 58- 5
950 6- 4
962 53- 4
990 2- 5
" 60- 5

ILR 1940 All.
79 84-13
141 92- 5
" 92-22
153 R 5- 8
340 55-14
" 55-18
344 41- 3
371 6-34
542 53- 5
" 53-24
568 5- 4
" 54-19
580 60-26

In the foot-notes to the Commentary † indicates a case which is most appropriate for the proposition.

I L R 1940 All. *con*

580 92- 7
599 8- 3
" 8-15
625 58-33
" 59-11
667 8- 9
669 2- 6
" 3-29
" 100- 6
" 100-11
" 100-13
" 100-21
" 100-22
" 100-24
674 43- 9
719 6- 4

ILR1941 All.

17 8-20
" 58-36
" 105- 3
" 105- 6
27 105-50
220 60-44
" 101- 3
240 58-34
" 58-40
" 67-18
" R4- 9
691 14- 3
" 58- 4
" 100-10
" 100-13
" 100-17

ILR1942 All.

120 54- 3
" 55- 9
169 54-12
242 100-10
259 41- 9
" 101- 1
368 58-35
" 67-15
" 68-17
478 122-11
608 60-42
" 60-43
" 82-19
660 54- 1
745 3-31
817 6-31
" 68-13
848 53- 5
871 8-20
908 R11- 2

ILR1943 All.

193 122-17
411 5- 4
" 9-11
444 56-10
" 101- 1
453 2- 6
" 3-29
" 100- 6
" 100-11
" 100-13
" 100-21
" 100-22
" 100-24
669 82- 2
884 R1- 1

I L R 1943 All. *con*

684 R2- 5
" R2-17
" R4-15
" R5- 5
" R5-10
802 8-20
" 58- 4
" 58-12
" 58-41
892 8- 5
" 41- 3

ILR1944 All.

20 41- 1
" 41- 8
76 60-50
" R7- 3
141 6- 3
186 3-12
216 6-13
277 65- 4
" 65-10
299 6-13
302 60-33
" 63- 3
" 63A- 4
325 53- 5
" 53- 6
" 53-24
346 58-35
" 105- 9
" 105-70
" 107-10
349 60-41
" 76-12
" 77- 1
588 58-35
612 55- 9
737 53-16

ILR1945 All.

42 76-15
183 55-12
" 55-14
186 101-10
222 111-12
248 111-11
" 111-14
" 112- 4
301 60-28
315 123-12
" 130- 4
412 108(c)-1
" 108(c)-8
637 60-44
676 68- 6
733 92- 5
" 92-20
" 92-28
910 53A-13
914 60- 4

ILR1946 All.

1 128- 5
341 5- 4
" 53- 5
375 101- 1
" 101- 2
" 101- 4
756 39- 1
" 39- 2
" 39- 3
" 100- 5

I L R 1946 All. *con*

756 100-22
883 58- 4

ILR1947 All.

8 124- 1
11 101- 3
" 101-10
25 84- 5
40 R5- 6
" R5-20
" R5-29
321 6-16
" 54- 5
" 54-12
624 53-11
642 122-11
791 R6-22

ILR1948 All.

155 2- 5
207 55-14
269 58-35

BOMBAY

Bom. H.C.R.

1 B.H.C.R.

5 9- 1
19 9- 1
22 64- 4
" 71- 3
27 38- 5
" 38- 8
" 38-11
39 6-2a
" 7- 7
77 55-20
135 92-14
157 123- 4
177 60-16
182 6-2a
199 58-31
" 63A- 1
" 72- 3

1 B.H.C.R. (App.)

9 18- 3
51 38- 5

2 B.H.C.R.

66 112- 7
" 114- 2
" 114- 7
163 53A- 3
194 R1- 6
198 101- 4
211 76- 6
214 51- 8
" 58-31
" R2-12
220 72- 3
" 76-19
225 60- 5
301 85-28
345 108(d)-2
348 38-11
406 55- 3

3 B.H.C.R. (A. C.)

11 72- 2
" 76- 1
27 105-38

3 B.H.C.R. (A. C.) *con*

27 116- 1
66 7- 7
102 55-12
124 105-49

4 B.H.C.R. (O. C.)

125 55- 5

4 B.H.C.R. (A. C.)

1 Pre- 4
" 8- 4
31 9- 1
" 123- 2
68 3-34
" 59- 5
69 59- 5
73 39- 5
155 116-13
169 38- 8

5 B.H.C.R. (O. C.)

76 R1- 6
83 123- 2
152 60B- 1

5 B.H.C.R. (A. C.)

85 105-79
92 105- 9
" 105-29
" 107- 1
" 107- 3
109 58-31
" 63A- 1
" 72- 3
" 76- 1
116 63A- 1
" 72- 3
" 76- 1
159 R7- 3
179 106-12

6 B.H.C.R. (O. C.)

59 3-28
134 58-39
" 59-14

6 B.H.C.R. (A. C.)

9 R7- 3
31 106-49
80 51-22
90 61- 2
97 R9- 3
137 3- 2
166 2- 5
191 Pre- 4
" 8- 4
211 38-11
247 6-2a
" 7- 7
270 8- 9

7 B.H.C.R. (O. C.)

27 123- 4
" 126- 9
45 48- 9
" 48-10
" 58-39

7 B.H.C.R. (A. C.)

1 59-14
24 58- 2
69 10-17
" 108(j)- 1
111 106-12
116 68- 3
118 92-14
146 67-11

8 B.H.C.R. (O. C.)

1 R1- 6
96 R1-19
169 130- 7
181 8-13

8 B.H.C.R. (A. C.)

1 Pre- 4
" 126-16
55 52- 1
142 69- 4
175 108(q)-1
" 111-17
236 60-28

9 B.H.C.R.

60 48- 9
69 58-31
79 58-31
99 3- 2
121 3-39
" 9- 1
147 3-39
" 48- 9
151 3-39
151n 48- 9
222 3- 2
275 58- 2
304 58- 2

10 B.H.C.R.

7 14-14
" 18- 5
34 51-18
98 59- 6
139 6-2a
" 7- 7
162 6-2a
262 7- 7
324 105-49
" 105-79
369 63- 5
491 9- 1

11 B.H.C.R.

1 3- 2
24 3-48
" 52- 1
32 63- 1
" 63- 2
41 3-34
" 3-39
" 58- 2
" 92- 2
" 101- 1
64 3-48
" 52- 1
" 52-18
72 44- 6
" 44- 7
" 58-21
76 6-2a
" 7- 7

11 B.H.C.R. *con*

76 44- 6
" 44- 7
" 58-21
87 3-17
106 108(l)- 6
139 52- 1
" 52-18
283 60- 5

12 B.H.C.R.

10 55- 9
69 39- 5
79 38- 5
85 106-34
88 76-18
175 54-23
214 18- 3
229 6-2a
" 7- 7
262 3-47

Bombay Printed Judgments

1872 Bom.PJ
7 105-79
33 10- 4
104 3-39

1873 Bom.PJ
66 106-49

1874 Bom.PJ
7 R7- 3
" R7- 6
" R7- 9
" R7-12
18 60-50
44 3-39
82 111-14
125 8- 9
189 52- 1
" 52-18
279 105-27
" 111- 6
304 R7- 3
343 107- 1
409 107- 1

1875 Bom.PJ
85 123- 4
36 105-79
61 88- 5
135 117- 2
140 44- 6
181 111-14
273 108(j)-4
308 108(j)-4
312 7- 7
325 8- 4
" 8-20
364 111-14

1876 Bom.PJ
11 108(l)-9
36 105- 9
77 41- 6
155 105-79
191 76-15
227 105-47
272 123- 4

1877 Bom PJ
26 3-34
81 52- 1

1877
Bom. P.J.con
81 52-29
171 108(g)-1
177 105-27
" 106-26
" 111- 6
182 106-12
261 6-24
309 59-14
362 3-34

1879 Bom PJ
407 72- 3
487 68- 7

1880 Bom.PJ
1 58-33
10 106-19
" 106-49
57 9- 1
209 106-49
215 101- 4
300 95 -1

1881 Bom PJ
44 108(h)-2
57 60-41
" 82-17
" 84- 5
" 95- 1
117 48- 1
180 106-24
182 58-33
195 72- 3
" 76- 8
198 105-79
293 38-11
" 58-25

1882 Bom.PJ
99 48- 9
148 44- 6
157 43- 9
167 108(j)-14
" 108(n)-1
183 52-31
385 68-14

1883 Bom.PJ
83 3-31
" 48- 9
104 114- 1
" 114- 2
121 43- 9
258 58-33
310 111- 6
360 106-25

1884 Bom.PJ
33 108(i)-9
44 72- 5
82 105-79
120 60-41
174 6- 3
254 60-28
" 60-49
286 108(i)-9

1885 Bom.PJ
20 8-13
130 3- 2
151 3- 4
157 44- 6
160 105-27
" 105-43
" 105-60

1885
Bom. P.J.con
175 44- 6
205 105-47
237 44- 6

1886 Bom.PJ
33 9- 1
61 105-49
68 72- 3
78 108(g)-1
106 7- 7
" 44- 6
130 3- 3
238 108(i)-6
247 60-50
" R7- 3
252 39- 5
314 108(g)-1
" 111-14

1887 Bom.PJ
12 76- 7
118 123- 4
154 112- 2
" 114- 1
" 114- 7
209 91- 8

1888 Bom.PJ
19 60-41
57 44- 6
75 55- 5
91 R7-16
125 3- 9
" 8- 2
131 60-50
139 41- 1
236 60-41
253 48- 9
304 114- 1
" 114- 7

1889 Bom.PJ
18 77- 1
30 8- 4
37 53-22
42 9- 1
79 106-16
99 52- 8
160 60-23
246 60-41
249 111-13
321 105-47
" 106-16
323 44- 6

1890 Bom.PJ
65 54-14
101 48- 9
164 100- 5
211 60-28
" 76- 8
" 105-47

1891 Bom.PJ
16 58-33
107 112- 5
133 111-14
147 54-14
234 Pre- 4
" 6-26a
241 60-28
248 105-47
284 58- 4

1892 Bom. PJ
5 52-12
39 105-20
135 51- 8
284 53- 9
294 106-25
353 112- 4
" 112- 6
405 111-23
406 105- 9
412 82-17
" 95- 1

1893 Bom.PJ
44 106-24
82 58-18
107 48- 9
292 106-24
" 106-25
" 111-14
" 111-23
297 38- 5
" 38-11
349 55-11

1894 Bom.PJ
76 109- 5
81 48- 9
133 48- 9
173 100-31

1895 Bom PJ
165 106-24
" 111-14
206 114- 1
" 114- 7
310 68- 2
321 106-24
545 115- 4

1896 Bom.PJ
355 105-69
381 44- 7
451 106-25
" 111-14
518 116- 1
561 60-49
629 56- 1
" 92-19
633 124- 3
710 72- 3
717 10-16

1897 Bom.PJ
182 112- 2
" 117-2
188 106-37
315 53-16
372 108(c)-8
407 48- 8
416 68-17
461 53-10

1898 Bom.PJ
38 52-11
" 52-18
49 105-58
" 105-67
206 106-25
" 106-40
" 106-45
213 82-12
239 58-33
292 6-27
339 114- 7
355 111-14
357 116- 4

1898
Bom. P.J.con
388 109- 7
386 52- 8
402 123- 4

I.L R.
BOMBAY

ILR 1 Bom.
7 Pre- 4
" 48-14
91 8- 4
" 9- 1
95 44- 6
190 54-23
197 60-20
237 48-10
" 58-39
267 3- 2
314 59- 5
333 58-33
513 8-20
523 3- 4
" 8- 9
547 3-13

ILR 2 Bom.
1 69- 4
19 3- 2
113 58-33
148 2- 5
231 58-31
" 58-33
252 52- 7
" 69- 4
273 123- 5
299 9- 1
" 48- 8
" 58- 2
" 123- 2
353 5- 7
" 59- 8
489 60-20
494 39- 1
" 39- 5
" 100-30
547 54-14
" 55-12
662 48- 1
666 38- 5
676 44- 6

ILR 3 Bom.
21 105-29
" 107- 3
23 106-34
84 18- 5
131 R11-2
159 54-15
172 54-28
" 55-12
186 8- 4
" 8-20
202 R2-11
" R10- 3
214 52-11
242 78- 3
312 58-39
" 60A- 2
340 105-44
382 3-12

ILR 4 Bom.
34 43- 3
" 43- 7

ILR 4 Bom.
con
34 52-18
57 R14- 7
70 4- 4
235 60-20
264 8- 4
" 8-20
424 105-27
" 111- 6
432 6-24
459 59- 5
515 R5-20
584 60-50
" 76- 1
" R2-12
594 58-33
643 8- 9

ILR 5 Bom.
2 48- 1
" 67-20
5 48- 1
" 67-20
8 67-11
" 91-20
14 91-20
22 60- 5
48 6-2a
" 7- 7
99 6-13
" 39- 2
" 100-30
127 76- 9
143 9- 1
181 60-20
208 8-20
268 137- 4
450 51-22
593 44- 6
496 44- 6
" 44- 7
499 44- 6
" 44- 8
506 Pre- 2
554 2- 6
" 54- 1
604 76-13
" R2- 5
" R7- 8
614 76-13
" R7- 3
630 52-27
" 126-16

ILR 6 Bom.
24 18- 4
42 18- 2
" 18- 3
42 18- 4
" 18- 5
64 92- 2
67 106-26
70 106-26
" 111- 1
79 105- 7
" 105-70
139 91-34
" R7-16
168 3-34
" 3-39
" 9- 1
" 48- 8
" 52- 1
" 58- 2

ILR 6 Bom.
con
168 59- 2
" 123- 2
" 128- 4
193 8-39
" 9- 1
" 48- 9
" 58- 2
" 59- 2
404 67-20
" 94- 2
" 101- 1
490 58- 2
" 59- 5
495 3-34
512 3- 2
515 8-39
" 48- 9
" 59- 5
528 40-26
588 58- 2
" 91- 8
543 3- 2
561 101- 1
567 52-31
596 6-26a
598 8- 4
645 123- 1
650 128- 4
669 76-14
" R2- 7
674 58-33
" 58-36
" 105-67
703 52-13
734 60- 5

ILR 7 Bom.
34 105-79
40 105-79
" 116-13
78 58-33
78 58-33
96 105-84
101 128- 5
109 105-35
" 108(i)-6
" 111- 8
123 60-20
181 123- 2
139 3-28
" 58-31
185 76-20
" R9- 1
225 39- 5
256 10-13
" 111-12
262 10-12
" 10 17
" 12- 8
" 111-12
282 39- 5
310 54-23
332 R2- 5
336 66- 3
377 76-13
418 59-11
452 123 2
467 60-41
474 106-44
526 48- 1
" 61- 2
" 79- 1
" R2-15

Topical Index and Synopsis for each Section show where exactly to look for the point required.

I L R 7 Bom.con

532 58–31
„ 67–10
538 11–18

ILR 8 Bom.

160 108(l)–1
164 108(l)–1
„ 111–23
168 67–20
„ 91– 5
„ R1– 6
182 3–39
„ 48– 8
190 60–49
„ 72– 5
„ R2–11
„ R7– 6
228 106–25
„ 111–14
323 52–40
„ R1–19
432 18– 4
481 60–41
„ 91–21
493 105–29
„ 107– 5
497 60–41
„ 82–17
„ 92–15
„ 95– 1
501 137– 5
548 60–50
571 52– 9
610 59– 3
828 111–14

ILR 9 Bom.

10 R1– 6
35 92–17
115 122–15
128 R1– 6
137 60–50
141 52–18
„ 60–44
„ 60–54
146 123– 4
158 2– 9
„ 13– 5
„ 13– 6
169 18– 4
283 60–28
„ 61– 5
236n 61– 5
419 64– 5
„ 105–47
„ 105–79
„ 106–16
„ 111–14
427 3–34
„ 3–39
„ 48– 9
429 91 20
435 65– 5
„ 72– 4
„ R2–12
491 19– 6
524 60–28
527 106–25
„ 111–14
561 8– 4
„ 10– 2

ILR 10 Bom.

34 7– 7
49 60–25
„ 69–29
88 101– 3
„ R1– 6
101 105– 4
105 48– 9
152 6–35
186 1– 1
224 67–11
„ R1–19
400 52–31
435 114– 9
461 60–26
487 59–11
634 58–39
648 60–41
„ 60–54
„ R1– 6
656n 60–41
„ 60–44
658n 60–44
669 106–24
„ 111–14

ILR 11 Bom.

37 38– 5
112 67A– 1
„ R3– 9
174 60–22
272 55– 3
313 72– 3
„ 100–29
348 10–19
425 R1– 6
„ R1–11
441 18– 2
„ 18– 3
462 105–58
„ 105–67
475 58–35
„ 68– 2
485 8–19
„ 55–10
492 6–2a
517 123– 4
528 6–13
537 R6– 3
551 Pre– 2
„ 58–11
609 38– 5
„ 38–11
„ 38–12
620 53–34
644 106–34
„ 111–26
666 53– 1
„ 53– 3
„ 53– 4
„ 53– 6
„ 53–16
„ 53–20
708 52–13
„ 53– 9
„ 76– 7

ILR 12 Bom.

33 78– 3
„ 79–10
101 R1–11
137 21–13
„ 29– 3
217 52– 8
221 3– 2

I L R 12 Bom.con

231 61– 5
242 58– 6
247 18– 4
„ 122–5a
352 111–14
366 6–2a
411 R14–4
422 6–30
534 8– 4
„ 8–20
569 3–39
„ 48– 9
658 55– 5
678 3–49
„ 106–25
„ 111–14

ILR 13 Bom.

45 60–44
„ 67A– 1
„ 82–18
51 R1– 6
„ R1–12
87 3– 1
„ 105–14
90 58–12
„ 58–41
„ 67–15
106 R3– 5
„ R7–18
126 6–35
131n 6–35
150 6–34
156 123– 4
229 78– 4
264 14–14
„ 18– 5
„ 19– 2
„ 123– 4
294 108(b)–3
297 53– 2
„ 53– 6
323 108(l)–9
„ 114– 7
348 101– 3
352 123– 4
373 10– 4
„ 105– 1
„ 105–47
434 53–16
463 19– 9
567 R7– 9

ILR 14 Bom.

1 18– 4
19 58–81
„ R7– 4
„ R9– 1
28 63A– 4
„ 72– 3
78 58–31
113 R2–13
„ R7– 5
213 Pre– 4
269 58–39
„ 67–17
„ 96– 1
„ R2– 4
319 105–31
„ 105–32
„ 107– 6
377 58– 4
384 108(j)–1

I L R 14 Bom.con.

384 115– 4
404 65– 4
438 35– 3
„ 35–26
482 122–5a
506 3–34
„ 78– 3
577 58– 4
„ 100–15

ILR 15 Bom.

24 60–45
27 60–45
32 41– 1
44 59–11
71 51–22
183 58– 4
„ 100–15
222 8– 4
247 3– 2
279 51–18
326 13– 5
407 105–47
„ 106–25
„ 106–39
„ 111–14
„ 111–23
414n 106–24
415 111–23
415n 106–19
„ 106–49
443 13– 5
553 35–10
„ 15– 3
549 126– 9
625 65– 4
„ 72– 4
„ R2–12
„ R10– 6
644 R7– 6
„ R7–13
647 105–49
652 15– 2
657 55– 3
673 6–2a
„ 7– 7
692 58– 5
„ R1– 9
„ R2–14
„ R7– 4
704 105–47

ILR 16 Bom.

1 53– 6
„ 53–24
141 69– 4
„ 76–20
„ 84– 7
„ 84– 8
172 58–35
„ 67–15
217 18– 3
303 67–15
441 130– 7
486 67–11
„ 91– 8
„ R1– 6
„ R1–19
492 13– 5
„ 16– 3
537 6–24
568 105– 1
„ 105–70

I L R 16 Bom con

568 108(l)–7
599 10–18
„ 60– 7
„ 60–37
„ 84– 5
„ R1– 6
705 60–28
„ 91– 8

ILR 17 Bom.

1 18– 5
32 R7– 6
„ R9– 2
232 6– 3
351 18– 4
365 60–50
425 58–35
„ 58–41
„ 67–15
„ 68– 2
„ 68–17
„ R4– 3
„ R11– 2
486 123– 2
503 8– 6
547 R3– 5
631 106–25
711 69– 4
786 51–22
„ 51–25
741 3–34
„ 48– 1
„ 92–17
771 51–10

ILR 18 Bom.

7 15– 2
66 51–25
86 92–17
„ 100– 1
107 106–24
„ 111–23
109 105–34
„ 107– 1
„ 107– 5
110 106–24
„ 111–14
„ 111–23
136 122–5a
160 1– 4
„ 56–13
„ 81–13
175 R12– 5
250 105–79
256 106– 4
„ 106–24
„ 106–25
„ 116–13
283 8–20
348 101– 1
372 53– 9
444 3–34
„ 78– 9
507 105–47
„ 105–80
„ 105–82
„ 116–13
591 61– 4
603 108(j)–1
670 126–16
684 48– 9
„ R13– 4
688 123– 2

I L R 18 Bom.con

739 3– 2
745 107– 1
755 60–35

ILR 19 Bom.

80 2– 5
133 111–17
133n 105– 7
„ 105– 9
138 105–83
150 105–31
„ 105–32
207 3– 3
271 7– 7
273 R1–11
290 130–19
391 3–89
626 6–39
647 13– 5
663 3– 2
697 7– 3
803 7– 7

ILR 20 Bom.

1 51–25
„ 108(b)–4
78 106–12
116 7– 7
150 7– 7
158 48– 9
„ 58– 2
279 2– 5
„ R8– 7
290 3–34
„ 3–49
296 67–15
„ R4– 3
298 51–22
310 12– 2
„ 12–12
316 35–14
338 R1–11
346 60–28
354 111–14
„ 117– 2
390 67–20
„ R5–19
439 108(b)–3
„ 108(j)–4
„ 108(j)–5
„ 112– 2
450 14– 5
„ 30– 2
467 44– 4
469 76–13
492 60–23
511 14– 4
522 55– 2
„ 55–13
549 58– 5
„ 60–19
553 59–14
565 2– 5
571 15– 2
615 82– 3
„ 82–23
636 6–31
677 60–32
718 10– 5
721 65– 4
744 R11– 2
759 2– 5
„ 106–49

Remarks in foot-notes amplify principles in the Commentary and state the special features of the case.

I L R 20 Bom. *con*
759 111-14
" 111-23
" 116-12

ILR 21 Bom.
60 130-17
" 131- 1
154 106-34
175 55- 9
" 108(c)-8
195 108(j)-1
" 111-13
198 58-24
226 3- 2
267 58-28
" 67-13
311 106-29
" 108(j)-5
319 6- 4
349 35-14
387 3- 2
394 105-79
396 60-23
509 105-79
" 105-82
528 58-33
544 60-44
572 132-19
619 60-44
" 60-45
704 58-33
709 13- 5
749 51-23
793 60-28
797 44- 7
808 38- 7
827 3-41
" 55-20

ILR 22 Bom.
1 38- 1
" 38- 5
" 51- 9
" 51-22
" 51-25
107 R11- 2
164 67-17
176 4- 4
" 54-14
" 55- 1
213 3-34
" 48- 9
235 3- 1
241 106-20
245 58-33
255 53- 5
" 53-19
271 60-28
304 56- 1
" 56-13
" 81-13
" 82-18
348 106-22
" 106-32
" 108(q)-1
375 60-28
389 115- 4
409 19- 6
" 19- 8
422 105-69
428 111-17
440 60-49
" 72- 2

I L R 22 Bom. *con*
440 72- 3
" 84- 5
" R2-12
489 124- 3
533 15- 2
" 15- 3
610 8- 4
" 8-15
624 R14- 7
658 6-35
672 R1- 8
686 3-49
701 R1-10
" R1-19
754 106-46
761 83- 8
" 132-19
771 R2-18
" R3- 3
" R7- 3
794 108(l)-6
820 R1- 8
893 105-37
" 105-38
" 116-13
939 52- 8
" 52-11
" 52-18
945 48- 9
" 67-20
984 6- 4

ILR 23 Bom.
1 3- 2
" 53- 5
" 53- 6
15 108(e)-3
" 108(e)-4
" 108(e)-6
22 3- 2
56 55-20
73 44-10
80 45- 6
119 2- 5
" R14- 2
131 6-2a
" 123- 2
" 126-16
181 54-23
184 44- 6
234 123- 2
271 10- 5
287 7- 7
" 58-25
" R1- 6
342 39- 1
" 39- 4
" 39- 5
348 69-11
" 69-23
" 69-26
385 44- 7
" 58-21
" R5-17
397 6- 9
510 108(o)-2
518 126-16
525 54-14
592 R7- 9
602 105-63
" 105-69
" 105-79

I L R 23 Bom. *con*
644 R5-27
659 18- 4
682 123- 4
725 122-5a
759 R12- 5
781 67-13

ILR 24 Bom.
31 3- 3
128 44- 6
170 6-2a
300 R4- 8
" R5-18
343 38- 5
400 53A- 3
" 54-23
" 55-20
420 19- 6
426 106-25
" 111-14
482 60-27
" 64- 5
502 3-23
" 130-17
504 105-37
" 116-13
556 91-20
619 60- 7
622 6-27

ILR 25 Bom.
52 6-30
101 2- 5
" R7-12
" R8- 6
104 60-26
" 104- 1
" R5-13
115 R9- 1
" R9- 3
126 4- 4
161 R14-13
202 53- 1
" 53- 2
" 53- 6
" 53-20
" 53-22
" 53-34
269 108(o)-1
" 108(o)-3
337 R3- 7
433 105-14
556 105-59
563 8- 5
" 105-68
606 R1-20
616 59-11
659 3- 7
696 118- 2
702 121- 1
" 121- 2
750 55- 9

ILR 26 Bom.
1 51- 1
33 58- 9
82 69-29
88 60-23
" 82- 5
" 82-18
" R14- 2
121 R2-18
" R2-23

I L R 26 Bom. *con*
121 R7-12
" R7-13
" R8- 7
140 40-22
159 48- 3
198 8- 9
241 67- 5
252 58-12
" 58-33
" 58-35
" 58-40
" 98- 1
" 105-67
271 Pre- 4
" 3-46
" 51-22
305 8-17
312 83- 5
" 84- 5
319 19- 9
326 38- 5
" 38- 6
" 38-11
360 106-24
363 76-12
" 76-14
" R2- 7
" R2-13
" R7- 4
379 43- 9
" 82-17
433 38- 5
" 41- 8
" R1-19
437 100-29
445 45- 6
449 15- 2
" 123- 2
500 82-17
" 92-15
" 95- 1
519 55- 9
538 3-34
" 81-13
543 53- 6
577 53- 5
" 130-17
632 122-5a
643 60-13
" 60-18
" 84- 8
661 R9- 1
" R9- 3
750 55- 9

ILR 27 Bom.
23 83- 7
" 83-16
" 84- 2
" 84-10
" 103- 1
" 103- 5
31 123- 2
91 3-11
146 53- 1
" 53-12
" 53-24
154 60-28
157 R1-19
262 116- 1
266 2- 6
" 52- 1

I L R 27 Bom. *con*
266 52-31
271 60-50
" R7- 3
292 60-15
297 60-28
" R14-12
322 53- 1
" 53- 6
" 53-19
330 8-18
408 3-39
" 48- 9
452 3-34
" 3-39
" 48- 9
500 10- 1
515 51-24
" 105-20
" 105-79
" 105-82
" 106-25
600 58-41
" 98- 5

ILR 28 Bom.
11 R1-19
102 R2-18
" R8- 7
153 67-19
" 67-20
" 91- 5
" 91- 7
" 91-41
153 R1-19
181 3- 2
" 72- 5
" R2-12
201 44- 7
215 5- 3
305 105-69
349 60-35
361 2- 5
" 52-18
371 60-34
" R11- 2
393 R11- 2
466 53A- 3
" 54-23
" 55-20
630 R 4-13
" R 6-12
" R 6-18
639 53-20

ILR 29 Bom.
19 8-20
42 48- 8
46 48- 7
" 48- 8
" 59-13
183 15- 2
199 3-34
" 58- 5
" 130-17
213 105-37
" 108(q)-1
267 123- 2
" 123- 4
275 123- 4
306 122-11
" 123-12
323 3- 6
391 76- 8

I L R 29 Bom. *con*
391 108(j)-5
415 8- 4
428 53- 6
" 123- 4
435 52- 1
" 52-42
468 123- 4
480 Pre- 4
" 8- 4
580 2- 5
" 51-23
" 105- 4
" 105-12
" 105-19
" 105-25
" 105-26
" 105-31
" 106-23

ILR 30 Bom.
119 58-33
137 106-36
156 67A- 1
" R1-10
" R1-19
167 84- 5
250 3- 2
" 63- 3
" 65A- 1
" 116-10
304 6- 4
" 21- 5
426 58-33
466 111-11
477 14-13
" R1-12
558 3- 1
578 126- 9

ILR 31 Bom.
15 114- 9
112 R1-19
159 108(l)-1
165 6- 8
" 6- 7
" 6-38
" 21- 5
183 3- 3
" 105-49
244 R6- 3
250 18- 5
271 92-17
393 52-13
" 52-38
405 53- 9
462 R14- 9
" R14-10
527 76-21
" 83-20
" 9- 3
552 6-29
" 58-18
566 8-43
" 69-18
" 69-21

ILR 32 Bom.
32 63A- 5
165 55- 9
172 5- 5
" 19- 2
181 40-22
205 R14- 9

Any case in the "Table of Cases" will show where to get the entire case-law on the point.

ILR 32 Bom. con
386 8-20
" 62-12
" 100- 5
432 Pre- 4
441 123- 6
449 6-29
" 6-35
521 60-10
" 84- 5
" 102- 3
569 58-35
" 105-67
581 6-34

ILR 33 Bom
1 3-32
" 8- 9
44 3-11
" 59- 2
" 59- 8
53 3-28
" 8-10
" 55-12
96 50- 1
" 50- 2
122 18- 2
" 18- 3
216 R2- 6
273 R5-29
" R8- 3
311 55-18
373 3- 2
610 107- 7
" 107- 8
" 130- 3
" 134- 5

ILR 34 Bom.
59 58-33
128 2- 5
" 67-15
139 5- 4
" 54- 5
175 43- 7
" 65- 4
202 3-38
" 59- 6
287 3- 2
" 54-12
" 118- 2
" 122- 2
" 122-16
" 123- 5
329 111-17
349 3- 2
354 R1-12
462 58-41
" 67-15
540 R6-12
604 19- 2
" 126- 8

ILR 35 Bom.
1 134- 5
93 58-33
169 6-2a
182 51-22
204 76- 4
231 58-33
239 114- 9
248 R14- 2
258 14-10
" 58-33
269 3-28
" 3-39

ILR 35 Bom. con
269 41-23
288 58-35
" 67-15
327 58-17
333 108(e)-4
" 108(e)-6
" 116-12
342 3-39
" 41-21
395 56- 1
" 58-18
" 81-13
403 5- 8
412 3- 1
438 54-17
" 92-17
452 R6- 3
507 65- 4

ILR 36 Bom.
68 R4-10
139 6-12
185 65- 4
189 52-15
214 10- 1
" 19- 2
" 21- 2
" 123- 4
488 Pre- 4
446 40-17
500 105-19
" 105-70
" 107-71
510 7- 7
" 43- 4
515 3-31
539 60-27
" 64- 5
564 3-47
" 100- 5
624 R1- 6
639 Pre- 4
" 8- 4

ILR 37 Bom.
53 54- 5
" 54-14
152 1- 1
198 3-27
" 130- 3
" 130-12
284 105-79
326 R11- 2
427 52-27
" 52-35
471 130-23
621 52- 8
" 52-11
" 100-28
644 23- 4

ILR 38 Bom.
10 53- 9
24 67-20
" 101- 1
" R1-10
" R1-19
177 68-13
240 106-16
" 106-30
249 68-13
255 4- 3
" 187- 5

ILR 38 Bom. con
272 6-26a
369 101- 1
372 58-39
631 132- 2
" 132- 7
659 137- 5
680 137- 4
709 54-23
" 58-33
716 108(b)-2

ILR 39 Bom.
26 6-2a
41 60-26
" R2-18
55 60-22
119 58-33
138 67A- 1
316 105-47
358 65- 4
" 68-13
" R6- 3
434 105-60
441 53-33
472 53A- 3
" 54-23
507 53- 5
" 53- 9
" 53-10
" 53-32
563 18- 5
625 105-35
" 111- 2
729 R1-11

ILR 40 Bom.
69 8- 9
74 8-20
" 58-33
248 R1-12
313 51-18
" 91-13
321 R4-16
378 58-33
483 60-23
" 76- 8
492 R5-27
498 40- 8
630 137- 5
646 92-16

ILR 41 Bom.
347 7- 7
" 44- 6
" 44- 7
357 R14- 7
372 40- 9
384 3-11
" 3-16
" 3-18
" 59- 7
438 53A- 3
" 55- 1
458 105-32
" 107- 5
550 4- 5
" 54-21

ILR 42 Bom.
87 44- 5
103 108(j)-3
136 51-11
159 72- 3
170 22- 3

ILR 42 Bom con
195 111-16
215 2- 6
" 52-18
" 52-34
309 R5-10
734 111-14

ILR 43 Bom.
17 44- 6
28 6- 8
" 109- 5
" 111-19
37 6-26a
" 105-69
69 63A- 1
" 72- 3
88 21- 9
181 55-11
240 52-18
334 60-26
412 R1-11
472 7- 7
" 44- 6
487 60-15
531 105-37
" 116-13
575 R1- 3
" R1-11
" R1-19
631 R14- 3
703 2- 5
707 53-15

ILR 44 Bom.
139 3-47
223 82-20
" R1- 6
231 3-11
304 10- 4
" 11- 4
" 11- 9
341 7- 7
366 R14-10
" R14-12
405 3-11
" 3-18
" 59- 8
488 6- 4
542 6-34
950 51-25
" 108(h)-3
" 108(b)-4
961 58-33
981 R 5-23
" R14-11

ILR 45 Bom.
8 105- 4
55 67A- 1
87 41- 6
105 91-11
" 91-18
117 60-28
164 123- 5
170 3-34
" 8-38
" 40-17
174 R14- 7
" R14-12
234 3- 2
300 114- 8
303 111-14
350 105-43

ILR 45 Bom. con
350 103-12
508 105-79
523 58-35
" 68- 6
" R2- 8
535 111-16
" 112- 6
910 3-39
989 59- 7
1009 R1-19
1038 28- 3
" 30- 2
" 32- 5
1056 2- 9
" 54- 4
1112 92- 2
1167 6- 4
1170 53A- 3
1179 10-17
" 108(j)-1
" 108(j)-6
1296 123- 4
1301 63A- 1
1335 60-26

ILR 46 Bom.
28 44- 6
153 8- 6
162 8- 6
195 55-11
213 82-17
" 95- 1
218 60-17
" R1- 6
302 54- 4
348 R7- 3
" R8- 3
409 60-28
" 60-30
481 105-45
651 6-30
816 105-72
848 R6-12
" R14-13
993 R1- 9
1009 101- 1
" 101- 2

ILR 47 Bom
1 105-43
4 105-49
65 127-12
137 59-8
191 14-10
" 54-23
327 8- 4
335 8-20
369 55- 3
529 6-2a
597 5- 4
" 6-10
" 6-11
" 10- 3
621 3- 2
" 53A- 1
" 53A- 3
" 58-33
652 61- 6
696 63A- 5
712 R1-11
719 3-22
" 6-16
790 36- 1
" 36- 2

ILR 47 Bom. con
790 36-3
798 105-79
956 R8- 9

ILR 48 Bom.
38 106-13
" 106-19
" 116-12
172 R5-27
341 116- 1
" 116- 2
391 123- 4
404 72- 3
435 52-27
" 123- 6
541 105-50
" 111-14
" 112- 4

ILR 49 Bom.
99 Pre- 4
" 3- 4
" 8-10
" 8-20
167 21-13
208 R14-12
245 55- 3
" 60-14
" 108(l)- 6
325 55- 2
" 55-21
339 R14- 4
" R14-11
388 52-29
" 123- 6
596 95- 4
662 53-38
821 38- 8
832 67-22
842 111-14
847 60-22
862 54-23
" 58-33

ILR 50 Bom.
204 44- 6
331 60-41
" 60-44
360 137- 3
450 114A-1
547 100-10
566 14-10
" 58-33
650 53A- 3
692 76-10
730 R7-13
" R8- 7

ILR 51 Bom.
16 R1- 7
37 52- 1
" 52-40
125 R3- 7
" R5- 4
133 126-14
149 106- 3
" 106-34
" 116-13
231 54-23
247 54-23
" 55- 3
" 55- 4
" 55-20
274 105-14

"Table of Cases" indicates first reference in foot-notes and reference to Official Reports.

I L R
51 Bom *con*
274 108(f)-1
„ 108(m)-1
450 R1-12
771 R1- 6
1040 51- 4
„ 51- 8
„ 51-16

ILR 52 Bom.
142 108(e)-3
176 8-20
„ 13- 2
„ 15- 5
208 52- 1
„ 52-19
„ 52-40
219 3-11
„ 3-18
„ 3-19
„ 59- 8
307 51- 8
„ 63A- 1
313 123- 6
316 123- 4
459 104- 1
„ R2-11
693 53A- 3
875 59-14
883 3-32
„ 55-21

ILR 53 Bom.
230 8-20
321 6-27
„ 53- 9
„ 54-14
„ 54-15
353 60-41
„ 91- 4
„ 91- 8
„ 92-16
„ 95- 1
360 60-28
444 R1-12
453 52-11
589 3- 6
„ 51- 1
676 65- 4
773 3- 2
777 108(c)-4
819 8-17

ILR 54 Bom.
30 58-33
352 R6- 8
358 18- 5
„ 21- 3
487 111-17
495 67- 5
625 60-41

ILR 55 Bom.
525 84- 5

ILR 56 Bom.
36 R5- 8
374 12- 4
403 6-18
462 130-12
„ 130-13
556 54- 5
„ 54-14
„ 55-12
595 53- 24

ILR 57 Bom
194 91-12
„ 91-13
„ 105-42
„ 105-50
„ 111-12
234 Pre- 6
„ 5- 1
„ 58-39
346 R1- 1
„ R14-13
593 58-31
709 3-31
737 19- 2

ILR 58 Bom.
75 91- 4
254 123- 4
327 108(j)-2
„ 108(j)-4
„ 108(j)-5
419 105-79
472 76- 3
650 53A- 3
„ 53A- 5
„ 54-23

ILR 59 Bom.
83 55- 2
„ 55- 3
194 2- 5
„ 111-14
„ 111-25
„ 114A-1
573 137- 4
582 55- 5
681 100-11

ILR 60 Bom.
34 5- 4
„ 53- 5
220 54-19
226 53-10a
326 3-42
„ 5- 3
394 108(j)-6
„ 109- 5
736 53A- 3

I L R
1937 Bom.
1 7- 7
„ 38- 5
18 8-12
„ 8-20
140 54-23
„ 55-20
432 7- 7
724 8-20
763 58-39
895 6- 4
„ 52- 9

I L R
1938 Bom.
155 6- 7
445 53-20
„ 53-24

I L R
1939 Bom.
36 21- 4
71 53A- 5
„ 54-19
„ 54-22
144 115- 1
„ 115- 2

I L R 1939
Bom. *con.*
320 105-30
454 8-20
713 91-12
763 58-39

I L R
1940 Bom.
50 53A- 5
328 108(j)-4
453 8-20
„ 58-12
480 53A-13
605 R5-13
640 R4- 5
„ R15-10a
645 76- 5
„ 76- 6
„ 76-13

I L R
1941 Bom.
1 52-20
55 55-10
107 105-43
„ 105-49
136 100-19
„ R6- 8
„ R15-10a
290 55-12
299 101- 1
„ R6- 8
„ R15-10a
415 6-23
506 69- 7
„ 69-13
„ 69-26
521 108(l)-5
529 53A- 4
„ 53A-11
„ 53A-13

I L R
1942 Bom.
83 69- 4
„ 69-26
„ 69-26a
„ 69-27
„ 69-28
169 59A- 4
„ 91- 3
„ 92-13
„ 92-22
357 105-43
„ 105-50
441 16- 3
„ 27- 4
608 R14- 2
„ R14-12

I L R
1943 Bom.
71 R7- 3
292 R15-10a
480 108(q)-2
553 105-25
„ 105-31
„ 106- 2
„ 106-19
„ 106-41
„ 110- 1
646 39- 1
„ 39- 2
„ 39- 5

I L R
1944 Bom.
274 52-6a
„ 52-14
„ 52-20
„ 52-31
„ 52-38
361 106-40
„ 108(q)-2
388 3-16
„ 59- 8
549 60-22
„ 69-3
„ 69-22

I L R
1945 Bom.
68 113-1
„ 113-3
„ 116-6
82 108(q)-2
294 70- 2
„ 70- 4
„ R5-17
310 108(q)-2
343 108(j)-1
390 67-27
393 13- 2
440 122- 1
493 13- 2
„ 15- 2
649 39- 1
„ 39- 2
656 7- 7
885 52-12
„ 52-20

I L R
1946 Bom.
462 52-38
984 3-30
„ 3-34
„ 41- 1
„ 41- 7
„ 41-23
„ 122-17
„ 126-16
997 10- 1
„ 14-10

I L R
1947 Bom.
94 51- 8
„ 51- 9
„ 105-14
206 6-34
„ 122-13
228 59- 4
„ 60-48
372 123- 4
457 3-19
636 5- 5
„ 6- 6
„ 13- 6
„ 19- 2
„ 19- 8
789 6-2a
„ 6-23
807 53-11
„ 53-12
„ 53-35

I L R
1948 Bom.
158 R1- 6
„ R1-19

I L R 1948
Bom. *con*
189 60-26
342 106-17

CALCUTTA

Beng. L. R.
Sup. Vol.
559 51- 1
„ 105-69
598 83- 2
„ 83- 8
613 76-17
901 76- 6

1 Beng. L R.
(FB)
14 58-31

1 Beng. L.R.
(A C)
7 105-35
95 4- 4

1 Beng. L.R.
(O C)
28 58-22
„ 126-10
31n 58-22
„ 126-10

1 Beng. L.R.
(S N)
3a 58-31
7 6-26a

2 Beng. L.R.
(P C)
44 76- 7
„ 76-12

2 Beng. L.R.
(A C)
126 7- 7
230 58-11

2 Beng. L.R.
(O C)
11 14-13
148 18- 3

2 Beng. L.R.
(App)
27 108(l)-4
45 79- 1

3 Beng. L.R.
(A C)
103 53-34
119 108(l)-14
141 60- 1
172 58-31
310 59-14

3 Beng. L.R.
(OC)
14 40-15
70 6- 4
113 129- 3
130 137- 4

3 Beng. L.R.
(App)
120 44- 5

4 Beng L.R.
(A C)
15 38- 8
118 38-11
„ 38-12
134 2- 9

4 Beng. L.R.
(O C)
83 60-23
103 14-13
„ 122- 4
231 13- 5
„ 14-13
265n 10- 1
„ 11- 2

4 Beng. L.R.
(App)
48 58-29
„ 68- 2
97 44- 7

5 Beng. L.R.
389 58-31
„ 58-38
401 108(c)-2
450 R14- 7
460n 60-23
463 92- 2
508 38- 8
„ 38-11

5 Beng. L.R.
(App)
25 44- 4

6 Beng. L.R.
(A C)
54 58- 8
563n 58-36
727 6-2a

6 Beng. L.R.
(App)
14 58- 4
44 108(b)-3
53 60- 1
69 59- 2
„ 68-13

7 Beng. L.R.
55 58-39
152 51-22
„ 108(j)-1
„ 108(j)-6
341 6- 3
621 7- 7
693 8- 6
720 53- 7

8 Beng. L.R.
60 10-16
„ 11-13
69 108(o)-3
208 14- 5
„ 14- 9
„ 16- 3
225 39- 1
237 51- 1
400 14-13
„ 15- 2
474 3-48
„ 52-38

8 Beng. L.R.
(App)
51 51-22

9 Beng. L.R.
377 11- 2
400 14-13

9 Beng. L.R.
(App)
37 108(l)-12

10 Beng.L.R
364 7- 7
368n 7- 7
386 76-16

11 Beng. L.R (App)
29 38-11
40 108(j)-5
86 10- 4
230 51-18
366n 7- 7
405 58-39

12 Beng.L.R
82 105-75
90 6-2a
" 38- 5
263 106-10
" 106-49
" 116- 1
451 R11- 2

13 Beng.L R
124 105-47
205 58-31
254 3- 2
312 5- 4
" 8-20
417n 51-22

13 Beng.L.R. (App)
42 6-33

14 Beng.L.R.
21 38- 1
" 100-30
201 108(h)-2
307 123- 4
315 58-31
442 18- 2
" 18- 3

15 Beng.L.R.
28 58-31
" 69- 4
34n 58-31
303 60-44
" 82-18
350 7- 7

I. L. R. CALCUTTA

ILR 1 Cal.
104 11- 9
" 17- 3
133 100-30
150 3-19
297 108(b)-1
337 52-11
" R14- 7
365 39- 2
" 39- 5
391 8- 4
" 91-19
" 105- 6
" 105- 8
" 105-42
" 105-47
" 105-68
470 89- 2

ILR 2 Cal.
41 R11- 2
68 48-11
148 106-24

ILR 2 Cal. con
184 123- 4
213 R6- 3
262 15- 2
311 58-31
341 7- 7
" 8-20
" 38- 5
" 38- 9
395 R1-11
438 38- 5
" 38-11
" 58-25

ILR 3 Cal
210 8- 7
" 105-32
" 105-72
" 111- 6
307 101- 1
" 101- 3
322 105- 4
" 105-11
324 126-10
336 58- 4
363 R14-13
379 118- 2
" 121- 1
397 58-31
" 60-41
" 67-14
468 84- 5
508 67-10
696 105-25
" 105-32
" 105-41
" 105-43
" 105-49
" 105-50
" 106-10
" 106-12
786 108(o)-3
806 55- 9

ILR 4 Cal.
23 10- 4
" 10- 5
" 28- 3
" 32- 5
56 2- 4
61 59- 3
67 111-22
96 37- 3
" 106-34
142 R1-11
172 1- 2
283 67- 5
304 19- 5
" 19-11
314 105-71
" 108(l)-13
" 111-10
327 105-42
389 106-24
" 106-43
" 106-49
" 111-25
350 60- 2
" 60-14
369 82- 8
" 95- 8
402 52-14
" 100-31
448 18- 4

ILR 4 Cal. con
455 15- 2
" 38- 5
475 82-18
" R3- 9
483 3- 1
510 44- 7
536 48- 9
539 65-10
" 72- 3
" 100-29
576 105-60
677 43-12
742 R7- 6
" R9- 2
778 105- 1
" 105-42
789 52- 1
" 52-31
814 8-15
817 58-43
897 3-41

ILR 5 Cal.
59 19-11
" 24- 2
113 6-2a
148 7- 7
" 38-10
" 100-11
198 63- 1
" 69-22
" 69-27
" 71- 2
253 43- 7
265 R1-19
300 58-33
333 76-12
336 3-39
" 48- 9
363 34 3
" 38-11
" 58-12
438 11- 2
" 100- 5
543 105-47
684 8- 6
688 51- 1
" 51-22
" 108(h)-4
738 3-16
776 7- 7
792 58-25
811 108(j)-7
855 58-25
864 105- 7
902 37- 3
" 108(l)-6
" 109- 2
" 109- 5
" 109-10
941 37- 3

ILR 6 Cal.
17 3-19
106 11-13
" 40-15
" 122-5a
142 56- 7
" 73- 1
" 73-12
" 81- 6
268 R2- 7
311 105-79

ILR 6 Cal. con
317 10-18
" 65A- 7
" 91-12
" R1-15
377 76-16
" R2- 6
" R9- 1
389 100-29
421 21- 3
436 111-14
513 R3- 7
549 100-29
663 91- 4
" 91-25
744 18- 5
843 38- 8
" 38-11

ILR 7 Cal.
78 R14-13
107 2- 6
150 106-34
196 3-20
" 58- 4
" 58- 9
" 100- 5
199 3-34
" 41- 1
218 21-11
" 22- 2
" 22- 3
245 126-10
269 11- 2
394 58-38
" R3- 7
" R6- 5
414 106-34
461 6-2a
470 106-34
" 111-11
" 111-26
479 108(d)-3
566 114- 2
570 48- 9
616 59-11
677 R14- 7
703 105- 9
710 116- 1
714 R14-13
753 9- 1
" 48- 9

ILR 8 Cal
79 52-38
" 60-41
" 91-12
" R1-15
118 105-59
" 105-70
138 6- 4
199 6-2a
357 R5- 7
370 R1-11
378 11- 9
" 13- 5
" 17- 3
402 100-29
528 R5-14
530 101- 4
582 51- 1
597 3-39
" 4- 2
" 48- 9

ILR 8 Cal. con
637 Pre- 1
" 13- 5
664 105-47
" 105-72
690 52- 1
706 108(d)-3
730 105-59
" 105-60
782 6-2a
956 8-13
960 105-50
963 108(b)-3
" 108(c)-8

ILR 9 Cal.
48 106-49
138 9- 1
" 123- 4
176 18- 5
187 6-26a
234 68- 4
295 3-25
309 R11- 2
377 100-29
388 6-26a
406 52-14
" 82-12
" R4-10
463 3-31
511 58- 4
513 2- 5
520 59-14
528 58-33
535 39- 5
" 100-30
571 108(l)-14
609 108(o)-7
" 108(o)-8
643 91-12
" R1-15
651 R14-13
671 111- 9
695 3-24
" 6-18
843 112- 2
854 123- 2
864 106-34
898 41- 1
" 58-33
908 105-38
" 105-41
" 105-59
" 105-70
945 100- 5
952 30- 2
961 92- 2
" 92-22
" 101- 1

ILR 10 Cal.
30 58-12
41 111-14
50 3- 2
82 48- 9
92 55-14
97 44- 5
" 58-38
448 76- 8
" 108(j)- 5
482 16- 3
521 6-13
544 108(l)-14
616 53- 1

ILR 10 Cal. con
616 53- 5
" 53-11
677 6-26a
713 R1- 7
740 58-29
" 68- 2
820 108(d)-3
1035 92- 2
" 92-10
" 92-13
" 92-19
" 92-23
" 101- 1
1054 6-35
1073 3-39
" 48- 9
1076 108(c)-4
1112 123- 4

ILR 11 Cal.
1 45- 6
45 R1-19
102 39- 2
111 58-31
121 8- 2
" 8-20
" 122-14
" 123- 2
158 48-10
164 3-10
" 8-16
221 105-60
" 108(l)-1
237 8-20
" 98- 1
258 56-10
341 58-31
429 3-12
" 3-19
434 105- 8
463 122-12
519 111-17
533 106-19
" 106-20
582 2- 5
597 19- 2
625 108(l)-14
667 48- 9
684 11- 2
" 14-13
718 R6-10

ILR 12 Cal.
60 35-21
82 106-49
" 111-25
93 106-49
117 8- 4
" 105-47
138 58-31
185 76- 8
" 108(j)-4
213 108(g)-2
" 108(g)-3
299 52-31
313 59-11
389 58-25
" 58-29
" R6-12
" R6-17
414 52-31
" 91- 4
" R1- 5

In the foot-notes to the Commentary indicates either a leading case or a case giving fuller reasons.

ILR 12 Cal. con
430 3- 1
„ 73- 3
436 2- 5
„ R14-11
470 3-21
484 105-79
„ 105-80
„ 105-82
505 2- 5
„ 3-21
„ 130-17
522 10-19
546 3-21
569 R11- 2
583 2- 5
„ 58-31
„ 67-14
610 3-23
614 58-31
„ 58-38
„ 69- 4
„ R1-19
663 13- 5
„ 15- 2

ILR 13 Cal.
3 106-49
„ 111-14
50 58-31
70 48- 9
„ 59- 5
75 106-34
98 111-14
113 105-29
„ 107- 9
145 130-19
221 1- 1
248 111-14
262 3- 4
„ 5- 7
„ 6- 3
„ 58-10
„ 100- 3
297 3-21
„ 54- 5
322 58-39
„ 67-17
„ 96- 1
336 100-30
346 R2- 4

ILR 14 Cal.
33 112- 4
99 R2-11
109 9- 1
176 6- 8
„ 109- 2
„ 111-19
„ 112- 4
185 R2-11
„ R6-11
„ R10- 8
241 5- 5
296 8- 4
446 9- 1
„ 123- 1
„ 123- 2
449 3-20
451 2- 5
„ 58-31
„ 67-14
464 67-16
„ R1-11

ILR 14 Cal. con
518 55- 3
599 2- 5
„ 58-31
636 2- 5
687 5- 7
„ 58- 4
„ 100- 9
730 100-13

ILR 15 Cal.
20 53- 7
35 R1- 6
40 106-34
66 100- 5
94 2- 6
„ 52-11
„ 52-31
214 44- 4
282 27- 2
292 39- 5
342 105-72
367 2- 5
„ 58-31
„ 67-14
376 2- 5
409 11- 2
436 130-19
471 6-26a
492 68-20
„ 100-12
497 R14- 4
542 100-29
546 52-32
„ 73- 1
„ R5-13
647 52-13
681 106-45
684 123- 4
„ 126- 9
756 52-18

ILR 16 Cal.
19 3-14
71 2-10
„ 10- 1
„ 13- 5
„ 14-13
132 R6-10
137 41- 8
148 41-14
223 105-43
„ 105-49
246 60-26
„ R2-18
„ R3- 3
307 60-10
„ 83-17
330 55- 9
355 52-18
„ 52-40
364 R1—8
383 13- 5
„ 28- 3
„ 30- 2
414 3-39
423 R6- 8
436 6-30
523 101- 3
540 58-29
„ 68- 2
„ R6- 5
622 4- 2
652 105-50

ILR 16 Cal. con
677 122- 5
„ 125- 1
682 60-23
„ R2- 6
„ R6-10
„ R9- 3
„ R14- 7
693 2- 5
„ 58-31
758 100-30

ILR 17 Cal.
45 105-21
115 6-17
144 105-49
196 111-14
432 58- 6
„ 68- 5
498 18- 5
548 105-29
„ 105-35
„ 107- 3
584 8- 3
686 105-72
826 10-12
„ 10-13
„ 10-17
„ 12- 8
„ 111-13
„ 126- 2

ILR 18 Cal.
10 44- 4
139 60-26
„ R5- 4
157 7- 7
164 5- 5
„ 19- 2
„ 19-10a
„ 52-18
„ 60-54
„ 91-41
„ R1-19
„ R5-13
„ R5-19
„ R11- 2
188 52-38
216 6-24
259 7- 3
320 82-12
„ R1- 6
399 18- 5
477 106-36
510 130-19
545 126- 9
„ 126-10
556 3-20
„ 59- 6
620 Pre- 2

ILR 19 Cal.
4 R6-10
„ R14- 7
8 3- 2
19 R11- 2
123 55-20
139 R14- 3
336 R4-13
401 100- 1
„ R1-19
412 18- 5
452 122-12
513 122-12

ILR 19 Cal. con
544 3- 2
584 100- 5
623 4- 2
„ 54-21
735 108(l)- 6
760 2- 5
774 10-13

ILR 20 Cal.
1 43- 7
15 29- 5
„ 32- 4
107 108(l)- 6
116 18- 5
236 2- 6
241 73- 1
269 58-31
„ 67- 5
„ 67-14
273 10-12
„ 12- 8
„ 111-13
279 R11- 2
296 41-12
„ 41-14
„ 43- 7
360 60-34
„ R11- 2
366n R11- 2
379 44- 5
446 3- 2
„ 106-11
464 123- 2
533 44- 7
„ 73- 1
„ R5-17
708 105-21

ILR 21 Cal.
26 R6- 3
34 R14-12
70 67-20
„ R1-19
116 3-39
„ 91-12
„ R1- 6
„ R1-15
„ R1-19
132 105-60
135 53-18
142 100-29
177 1- 1
190 38- 8
241 58-11
274 R11- 2
275 58-17
311 R1-11
366 67-19
„ R11- 2
383 2- 6
„ 36- 2
568 3-21
612 53-34
792 3-21
818 R5-29
882 58-33
1005 108(l)-14

ILR 22 Cal.
25 R14- 4
33 3- 2
„ 48- 1
„ 48- 6

ILR 22 Cal. con
33 58- 9
„ 67-19
„ 91- 5
„ R1-10
„ R12- 2
143 R4-13
179 54-21
185 3-29
„ 3-34
„ 5- 1
„ 53- 5
„ 53-31
309 65- 4
434 58-29
494 108(j)-6
533 105-49
619 13- 6
„ 14-14
„ 18- 5
658 108(l)-8
680 105-60
742 3- 3
„ 108(o)-4
752 3- 2
„ 105-70
„ 107- 8
813 R2- 3
„ R14- 9
„ R14-10
820 108(h)-7
859 R14- 3
903 R14- 3
909 41- 1
931 R3- 3
„ R4- 5
„ R5-29
938 105-69
„ 111-22

ILR 23 Cal.
200 105-32
„ 106-24
209 108(o)-4
228 58-31
„ 63A- 7
„ 67- 5
„ 72-11
450 3- 2
460 53- 9
592 58-10
„ 58-11
645 6-2a
670 45- 6
682 R5-13
713 130-19
766 38- 5
„ 38-11
790 3-34
„ 81- 8
„ 81-13
795 R12- 2
950 R2- 7
962 53- 9

ILR 24 Cal.
20 105-11
27 73- 3
34 R1- 8
44 19- 9
62 52-31
„ 52-40
83 6-2a
152 111-13

ILR 24 Cal. con
190 R1-19
272 58-36
„ 105-67
296 108(c)-2
„ 108(l)-14
348 58-39
„ 67-17
„ 96- 1
„ R4- 3
382 67- 5
406 11- 2
440 2- 5
„ 105-41
„ 105-42
„ 105-43
„ 106-12
„ 111-12
449 3- 2
473 R4- 5
„ R14-13
575 44- 5
589 16- 4
644 67-22
„ R1- 8
646 8- 6
„ 15- 2
„ 28- 2
„ 32- 4
„ 45- 6
662 16- 4
677 58-35
„ 67-15
„ 68- 2
„ R4- 3
682 R5-13
699 58-17
„ R11- 2
720 105-26
„ 106-49
„ 111-25
746 56- 1
„ 73- 1
766 R11- 2
825 53- 6
„ 53-14
„ 53-19
834 8-20
„ 10- 4
„ 11- 2
897 55-20

ILR 25 Cal.
1 35-28
„ 105-20
9 123- 4
20 1- 1
36 106-19
98 R1- 8
103 38- 5
112 18- 4
„ 122-5a
133 R5-29
179 52-31
„ 91-25
210 2- 4
„ 5- 4
„ 9-10
„ 118- 5
246 58-17
„ R11- 2
262 R14- 9
298 55- 9

In the foot-notes to the Commentary † indicates a case which is most appropriate for the proposition.

ILR 25 Cal. *con*

302 108(d)-3
305 72- 9
324 108(l)-6
371 58-24
405 122-5a
450 68- 3
565 100-29
571n 105-66
580 R4- 5
" R14-11
603 58-33
611 58-39
616 58-24
662 16- 4
703 60-26
" 104- 1
" R5-13
778 6- 4
869 10-16
896 105-48
" 105-49
" 108(j)-1
"108(j)-10
909 2- 5
911 59- 7

ILR 26 Cal.

1 1- 4
" 63A- 1
" 76- 1
" 76-19
" R7- 4
29 111- 9
39 1- 5
" 2- 5
" R11- 2
78 3-11
" 59- 8
" 68-13
" 100-14
127 52-19
160 58-33
164 R14- 7
" R14-11
166 R4- 5
" R6- 3
" R14-11
204 105-47
222 59-14
" 68-13
246 3-11
" 58-13
" 59- 8
" R14- 4
338 105-40
" 111-27
381 3-41
" 58-24
395 58- 9
434 73- 1
" R5-17
441 R14- 3
553 44- 4
707 58-25
734 60-26
739 105-70
" 108(d)-3
761 106-49
820 38- 5
889 R4-18
966 52-18
" 52-32

ILR 26 Cal. *con*

966 78- 1
" 91-10
" 91-34

ILR 27 Cal.

7 54-14
38 3-22
67 105-60
77 52-13
" 52-19
156 8- 4
" 105- 8
" 105-20
" 105-47
" 105-68
" 105-79
" 111- 5
169 3-19
180 73- 1
" 73-14
185 58-31
190 3-11
194 39- 2
" 100-15
" 100-28
205 105- 1
" 117- 2
" 117- 3
231 53- 9
239 105- 1
" 105- 7
" 105-70
242 123- 2
358 3-34
468 48- 3
479 108(i)-6
570 51- 9
" 51-22
" 51-25
" 105-44
" 105-47
" 105-52
" 106-40
" 108(b)-4
705 60-26
" R3-3
" R8-7
724 R1-12
762 38-11
" 58-25
827 130- 5
938 67- 5

ILR 28 Cal.

12 73- 1
" 101- 6
" R6- 3
23 52- 1
" 52-11
" 52-31
" 52-38
" 52-40
70 122-16
73 R5- 4
118 106-39
" 106-45
135 111-14
" 117- 2
139 48- 9
142 51-10
184 108(l)-14
228 44- 4
" 111-14

ILR 28 Cal. *con*

227 116- 1
" 117- 2
235 55- 9
246 68-22
256 58-33
" 111- 9
289 58-33
293 2- 4
344 6-23
370 53- 9
483 6-26
492 52-40
517 R1- 3
" R1-12
532 105-20
" 111- 5
546 58-22
621 19- 5
" 20- 1
693 51-22
" 53A- 3
720 11- 2
" 13- 5
" 105-34
738 105-48
" 105-51
744 2- 2
" 2- 6
" 111- 7
" 117- 3
769 11-13

ILR 29 Cal.

1 58- 4
25 92-19
" 101- 1
43 R11- 2
154 92- 2
" 92-13
" 101- 1
" 101- 4
203 106-24
" 106-49
227 6-26a
260 5- 3
" 10- 1
" 11- 2
" 15- 2
" 122-5a
355 6- 4
" 6- 7
" 43-13
400 1- 1
428 52-31
" 91-25
470 6- 6
537 67-24
" R14-11
644 R3- 7
651 R4- 8
" R5-14
" R5-24
654 3-20
" 59- 6
707 Pre- 2
749 126-10
803 63- 3
871 51- 9
" 51-25

ILR 30 Cal.

20 8- 4
" 8- 6

ILR 30 Cal. *con*

20 105-47
142 R1-19
213 108(l)-2
265 5- 7
" R1- 8
463 67-31
" R14- 7
" R14-12
521 122-5a
539 3-41
" 7- 3
" 58-24
" 68-13
" 105-22
" 122- 3
556 8- 8
" 8-14
599 3-34
" 67-19
" R1-19
666 18- 5
738 8-20
755 60-43
" R1- 6
794 72- 2
" 72- 3
" 100-29
831 105-35
843 35- 9
883 8- 4
" 105-47
" 106-27
921 118- 2
953 R11- 2
" R13- 2
1060 58-60
" R14- 4

ILR 31 Cal.

57 5- 6
" 48-10
" 54-23
" 55-12
" 55-22
" 58-39
95 3-34
" 56- 1
" 56-14
" 82- 6
111 11- 2
136 18- 5
138 R11- 2
146 59- 6
174 106-13
" 108(c)-3
" 117- 3
183 84- 5
195 8-20
233 R11- 2
305 48-15
319 123- 4
340 3- 9
370 101- 1
" R5- 4
373 104- 1
428 R1-10
433 6-20
647 108(c)-8
658 52-13
" 52-40
667 5- 7
" 6- 3

ILR 31 Cal. *con*

667 48-11
703 105-21
707 108(l)-6
737 3-35
" R1-19
745 52-13
" 73- 1
" 73-14
786 106-34
792 R4- 5
" R6- 3
798 6-30
834 105-60
863 60-26
922 67- 6
" R14-11
" R14-14
" R14-15
937 117- 3
975 72- 2
" 72- 3
1021 115- 1

ILR 32 Cal.

27 137- 5
41 105-51
" 111-10
51 105-43
" 105-51
" 111-10
123 116-11
" 116-12
129 5- 3
158 6-2a
" 98- 8
169 105-60
198 52-14
" 52-17
" 53-24
243 105-63
" 106-12
253 R3- 7
" R5-11
283 71- 5
296 60-23
" 64- 5
" 67-10
" R1-11
" R14- 2
" R14- 7
" R14-12
343 51-18
494 58-13
" R14- 4
550 59- 7
567 105- 7
" 105-59
" 108(l)-1
576 62- 7
648 105-47
683 6-13
729 100-14
746 R1- 6
832 48- 7
837 44- 4
861 21-11
" 28- 8
" 29- 3
" 38- 5
891 52- 7
" 52- 8
" 52-18

ILR 32 Cal. *con*

891 52-31
" R1-19
992 13- 5
" 15- 2
1023 2- 5
" 108(j)-1

ILR 33 Cal.

54 8-10
" 108(o)-6
" 117- 2
92 73- 1
" 73-14
" R4- 6
113 67-31
" R14- 7
140 105-60
173 24- 3
203 8-14
" 108(o)-6
219 1- 1
283 R14- 7
339 106-25
" 111-14
" 111-16
" 117- 3
400 18- 5
410 48-10
" 58-39
425 R1- 5
462 108(o)-6
502 105- 4
" 105- 8
" 105- 9
511 105-47
" 105-82
" 108(o)-6
584 123- 6
590 R1-19
613 3-31
" 9-12
" 60-43
" R1- 6
" R5-17
657 48-10
702 3-24
" 6-17
" 6-28
" 130- 7
773 122-16
786 2- 6
" 36- 2
793 5- 3
812 59-11
846 R11- 2
849 R14-13
861 3-11
" 3-12
867 R6-22
878 73-11
" 73-12
890 R6- 3
" R6-10
898 105- 4
967 5- 4
" 53- 9
" 54- 1
985 58- 4
" 100-12
" 100-13
" 100-14
" 100-15

References to Official Reports are invariably given in all cases found in the Official Reports.

I L R 33 Cal.con
982 100–22
1040 48–14
„ R14–11
1065 14–10
1079 38– 8
1119 51–10
„ 51–22
„ 100–17
1133 58– 4
„ 92–19
„ 100– 5
„ 101– 1
1158 6–13
1175 48–12

ILR 34 Cal.
5 18– 1
„ 18– 4
13 82–12
„ R4–10
36 .7– 7
57 105– 3
„ 105– 7
„ 105–32
„ 106–24
„ 106–43
„ 111–24
65 7– 7
92 72– 8
150 104– 1
„ R2– 3
„ R11– 2
184 58–25
191 108(l)–14
207 54–22
223 Pre– 2
„ 76–21
„ 83–20
„ 84– 8
„ R7– 4
„ R9– 1
„ R9– 3
289 3–24
„ 6–28
„ 6–31
305 84– 5
„ 84– 8
329 105–20
„ 111– 5
358 2– 5
„ 105–47
„ 108(o)–6
„ 114– 1
„ 114– 7
396 116– 6
427 48–11
„ 48–12
599 51–18
718 108(o)–3
„ 117– 3
724 73– 9
753 105–69
„ 108(o)–6
853 123– 2
886 R4–15
„ R5– 5
902 105–49
„ 105–51
922 111–27
999 53– 1
„ 53– 6
„ 53–16

I L R 34 Cal.con
999 53–19
„ 53–20
„ 53–24
„ 53–30
1026 44– 5

ILR 35 Cal.
25 24– 3
34 84– 8
61 R14– 7
82 105–14
„ 105–17
221 R11– 2
331 108(l)–6
388 48–13
„ 73– 1
420 6–16
„ 6–20
„ 6–35
„ 38–11
431 R5–26
„ R6– 3
„ R6–11
„ R10– 8
470 105–11
„ 105–84
519 R1–19
551 53– 5
„ 53– 9
575 54– 4
614 2– 6
683 108(g)–4
744 108(l)–6
767 R6–18
„ R6–22
777 6– 3
„ 21– 4
807 106–34
„ 111–14
„ 111–26
837 5– 4
„ 58– 4
„ 100–13
„ 100–14
„ 100–15
„ 100–16
845 3–38
„ 100–16
889 8–13
896 27– 2
1010 105–11
1051 53–14
„ 53–15
„ 58–18
1069 10– 5

ILR 36 Cal.
122 60–26
„ R2–18
„ R3– 3
„ R8– 7
193 92–16
„ 92–19
„ 92–23
„ R1–10
311 31– 2
345 3–22
„ 6–16
431 2– 9
„ 13– 6
„ 14– 9
481 6–2a
489 111–18

I L R 36 Cal con
493 137– 4
665 58– 4
675 40– 1
„ 52–40
„ 106–26
„ 108(l)–1
„ 111–23
745 10– 5
„ 10–17
„ 108(j)–1
„ 111–13
753 38–11
802 2– 1
„ 111– 7
840 83–20
856 108(l)–14
920 53A– 3
„ 54– 1
„ 54–17
„ 54–23
927 105–32
„ 106–49
936 3–22
943 6–2a
„ 6–13
1003 7– 7
„ 105–42
„ 105–47
„ 105–82
„ 108(o)–6
„ 111–12

ILR 37 Cal.
57 55– 7
103 24– 3
128 5– 3
„ 10– 1
„ 11– 2
„ 15– 2
„ 122–5a
179 6–2a
„ 7– 7
229 100–20
239 67–20
„ 78– 5
„ R1– 9
„ R1–19
282 67–20
„ 91– 7
293 8–20
„ 105–11
„ 107– 7
„ 108(l)–14
377 Pre– 2
„ 105–72
526 3–11
„ 3–17
„ 58–22
„ 121–10
589 67A– 1
„ 92–11
626 105–62
662 105–50
674 105–37
„ 105–68
„ 116– 1
„ 116–13
723 8–10
„ 108(o)–6
808 105– 4
815 2– 5
„ 8–16

I L R 37 Cal con
815 108(h)–2
897 104– 1
907 R1– 1
„ R2–11
„ R4– 6
„ R10– 3
918 44– 5
„ 105–47

ILR 38 Cal.
13 6–13
60 67A– 1
127 137– 5
188 15– 2
278 105–60
„ 105–68
342 60–14
468 15– 2
„ 19– 6
518 123– 4
603 14– 2
721 38–11
845 108(o)–6
913 R1– 1
923 73– 1
„ 101– 6

ILR 39 Cal.
220 52–11
„ 52–40
227 2– 5
„ 3– 2
„ 58–11
284 105–11
„ 107– 7
513 65– 4
527 92– 2
„ 92–13
„ 101– 1
„ 101– 3
„ 101–10
„ R1–10
„ R1–19
663 53A– 3
696 6–26a
„ 8–10
„ 108(o)–6
810 100–14
828 60– 5
„ 67– 5
845 8–10
903 111–14
925 R1–19
933 122– 3
„ 126–10
1016 107– 1
„ 107–10
„108(l)–14

ILR 40 Cal.
89 8– 3
„ 52–18
„ 52–32
„ 101– 1
„ 101– 6
„ R5–19
113 6–35
173 43–12
„ 105–79
192 18– 2
„ 18– 3
342 R1–12
378 41– 8

I L R 40 Cal.con
378 58–25
514 58–17
„ 100–13
„ R11– 2
555 51–19
565 3–39
„ 40–17
650 3–22
„ 134– 4
„ 136– 2
„ 136– 3
721 38– 5
858 106–49

ILR 41 Cal.
57 122–5a
69 R1– 5
137 55–15
148 54–12
„ 54–23
418 52–40
„ 56–10
„ 81–13
„ R4–10
493 108(l)–14
654 73– 1
670 137– 5
727 67A– 5
„ R1–12
852 51– 8
„ 55– 3
943 54– 4
972 3–38
„ 59– 6
1007 15– 2

ILR 42 Cal.
56 8–20
172 10–12
„ 105–67
286 6–35
305 8– 4
346 8–10
455 58–11
„ 65– 4
„ 67–14
„ R2–20
489 108(d)–2
561 8– 6
625 3–28
„ 58– 4
„ 100–11
„ 100–13
„ 100–21
„ 100–22
„ 100–23
652 R11– 2
751 117– 2
776 R4–15
780 R14–12
801 9– 1
„ 53A– 3
„ 59– 2
„ 60–22
849 55–12
„ 100–19
876 3–31
„ 38– 5
„ 38–11
1146 60– 5
„ 68– 3
„ 73–11
1179 6–2a

ILR 43 Cal.
28 6– 6
„ 6–25
34 7– 7
59 58–18
69 92–10
„ 100–13
„ 101– 1
217 100–28
332 105–47
417 38–11
432 23– 2
504 5– 4
521 53– 2
„ 53–20
„ 53–30
554 108(l)–14
574 38–12
790 54– 1
895 58–39
1052 3–34
„ 78– 1
„ 78– 3
„ 78– 4
„ 78– 5
1100 25– 3
1118 44– 5

ILR 44 Cal.
186 3–31
„ 38– 7
„ 38–11
„ 38–12
„ 41–13
„ 59– 9
214 106–15
„ 107– 9
345 59– 8
388 58–29
„ 68– 1
403 105–26
„ 105–72
„ 106–15
„ 107– 8
425 58–27
„ 60–53
„ 67–30
„ R1– 5
448 R7– 7
„ R10– 6
542 54–23
„ 55–11
573 60–23
585 8–10
„ 108(o)–6
662 53– 7
„ 53–20
„ 53–33
„ 53–34

ILR 45 Cal.
87 2– 5
„ 8–10
„ 108(o)–6
„ 114– 1
„ 114– 7
320 58–33
„ 111– 9
343 Pre– 1
434 122– 6
„ 126– 5
„ 126–16
469 111–16
530 100–25
„ 100–28

ILR 45 Cal. con
530 R14- 3
" R14- 7
" R14-11
590 6- 4
" 91-16
653 8- 8
" 48-14
" 58-38
702 R6-10
733 7- 7
" 8- 2
748 3-11
878 7-7
940 10-13
" 10-17

ILR 46 Cal.
111 92-15
" 100-13
160 105-44
183 7- 7
" 43- 4
448 58-17
" 68- 5
" 68-17
" 72- 3
455 3- 2
458 106-19
" 106-37
" 106-38
" 106-44
" 106-45
485 18- 2
522 3-17
552 111- 9
566 6- 4
" 67-22
" 91-30
" R1- 8
670 119- 9
683 8- 4
887 54- 3
951 122-5a
956 108(l)-14
959 108(l)-14

ILR 47 Cal.
1 105-48
95 8-10
" 108(o)-6
175 58-22
" 60-47
" 67-27
" 126-10
" R1- 6
182 44- 4
370 R6- 3
377 R14- 7
" R14-12
466 91-17
485 105- 4
" 107-13
" 107-15
662 48- 1
" R1-10
" R11- 3
" R12- 3
907 115- 1
924 60-26
" R1-12
932 100- 5
979 10-17
" 105-26

ILR 47 Cal. con
979 105-47
" 111-13
990 3- 2
1108 2- 5

ILR 48 Cal.
1 3-34
" 3-35
" 43- 2
22 60-41
" 76-15
61 3-18
69 60-26
124 18- 2
" 26- 2
260 53- 7
" 122-11
359 8-20
" 108(j)-1
448 60-10
509 3-20
" 54-22
" 59- 6
536 6- 3
" 6- 4
" 6- 7
605 115- 4
625 58-14
986 122-15
1059 6- 6

ILR 49 Cal.
37 44- 5
68 123- 4
220 52-13
" 52-38
257 105-83
" 108(n)-2
334 3-31
" 41-13
" 59- 9
345 53A- 3
" 106-31
438 3-17
" 68-13
495 52-24
" 109- 4
507 53A- 3
" 105-30
626 91- 8
" 91-12
" R1-19
" R5-13
820 18- 5
911 7- 7
948 108(c)-1
" 108(l)-14
1019 108(l)-14
1048 R1-19

ILR 50 Cal
68 108(c)-1
84 7- 7
146 109- 2
" 109- 4
180 54-17
266 14-13
" 100- 5
388 58-39
394 8-20
419 115- 1
491 6-31
615 55-21

ILR 50 Cal. con
650 R4-15
" R5- 5
667 2- 5
" 108(q)-1
" 116-13
694 108(o)-7
718 82-19
" R6-10
929 6- 3

ILR 51 Cal
86 3-32
" 5- 6
" 48- 1
" 48-10
" 58-39
" 78- 1
" 78- 4
" 78- 9
" 78-12
" 79- 5
" 79- 6
" 79- 8
" 93- 4
" 93- 6
150 R14- 4
550 53-29
566 60-14
631 44- 4
647 123- 1
935 60- 5
943 105-62
972 5- 1
" 6-16
" 6-21
" 8-20
" 54-22
1033 52-17

ILR 52 Cal.
41 105-83
43 105-44
" 105-48
" 105-49
" 105-50
" 107- 1
100 55-15
121 54-23
417 108(l)-14
425 53A- 3
655 2- 3
687 53- 6
695 105- 4
" 105-24
809 5- 3
862 8- 3
914 55- 2
" 55-17

ILR 53 Cal
51 6-35
95 105-26
" 105-47
" 108-15
" 111- 6
251 30- 2
" 32-11
270 10-17
" 105-47
590 105-35
" 105-39
" 111- 3
694 52-19

ILR 53 Cal. con
816 32- 5
" 105-42
" 105-72

ILR 54 Cal.
1 R14-4
161 R11- 2
166 105-64
333 2- 5
" 108(j)- 1
424 68-18
" 92- 3
485 114- 7
500 R6-17
513 100-10
582 3- 7
" 3-10
595 R1-14
669 3- 6
" 8- 3
" 51- 1
687 7- 7
" 53- 6
" 53-14
" 53-20
" 58-40
" 98- 1
754 123- 4
813 58-38
" 76- 8
" 105-36
" 105-38
" 105-39
" 105-59
" 106-41
" 116- 4
" 116-10
948 111-13
955 6-2a

ILR 55 Cal.
1 8-20
35 5- 1
" 54-23
67 Pre- 1
" 2- 5
" 3-11
104 R14-12
201 108(d)-1
285 54-12
355 105-48
" 105-50
435 105-24
" 105-47
" 106-40
" 107-10
" 110- 1
448 13- 6
532 52-17
574 105-62
602 91- 5
689 108(l)-14
701 52-14
821 R2-18
841 40-25
" 105-35
" 111- 8
944 122-11
1018 108(c)-8
" 108(l)-14
" 111-17
1029 105-44
" 105-48

ILR 55 Cal. con
1090 51-23
" 53A- 3
1193 82- 4
" 82-27
" 95- 1
" 95- 7
1328 105-17
1355 2- 5

ILR 56 Cal.
1 8-10
" 105-42
" 108(o)-6
15 111-17
180 105-47
252 105-20
" 105-58
275 105-49
" 105-50
367 3-47
427 105-11
487 14-10
" 54-23
598 3-11
" 3-16
" 3-18
" 3-19
616 44- 1
738 105-43
" 105-44
" 105-48
" 105-49
" 105-50
" 105-51
862 105-63
868 48- 1
" 78- 1
" 78- 2
" 78- 4
" 78- 5
" 78- 8
960 60-34
1130 52-40

ILR 57 Cal.
10 106-19
" 106-37
" 106-38
" 106-45
39 7- 7
82 65A- 3
" 101- 1
114 108(b)-3
137 108(l)-14
148 2- 5
170 53A- 3
274 54-23
298 48-11
" 72- 2
" 72-10
" 100-29
328 100-10
344 108(o)-4
473 101- 1
538 116- 1
597 52-19
" 52-35
655 105-17
683 55- 8
704 91- 5
715 44- 5
" 54-17
" 106-17

ILR 57 Cal. con
775 105-47
" 107-13
872 60-44
953 40- 6
" 40-12
1101 130-15
1176 108(j)-5
1189 55- 2
" 55- 9
" 108(a)-2
" 108(c)-2
" 108(o)-6
1293 105-44
" 105-45
" 105-48
1302 6-35

ILR 58 Cal.
12 R1- 5
72 105-62
128 7- 7
136 8- 2
" 8-17
" 9-10
" 9-12
" 58- 4
" 100-10
" 100-13
" 100-16
" 137- 2
" 137- 4
311 114- 1
" 114- 5
" 114- 6
" 114- 7
449 54-23
598 52- 9
" 57- 6
" 91-25
" R1- 6
686 8-20
752 137- 4
768 14- 5
" 15- 2
" 19- 5
" 19- 7
" 21-15
1167 82-17
" 92-15
" 95- 1
" 95- 3
" 95- 6
" 95- 8
1187 8-10
1235 51-22
" 51-23
" 53A- 3
" 53A-35
" 105- 4
" 105-13
" 105-19
" 105-39
" 107- 8
" 108(b)-2
1281 108(l)14
1353 111-16
" 111-22
1371 41-25

ILR 59 Cal.
1 6-24
76 60-44
" 67-28

Remarks in foot-notes amplify principles in the Commentary and state the special features of the case.

I L R 59 Cal. con
76 82-18
80 8-10
„ 108(o)-6
102 32- 5
„ 32- 6
117 60-28
„ 67-19
„ 92- 1
„ 92-11
„ 92-13
„ R1-19
„ R4- 6
„ R5-19
142 30- 2
„ 32- 5
155 108(l)14
180 53-34
377 3-22
„ 8-17
„ 100-10
„ 134- 3
396 107- 7
„ 105-19
439 58-39
463 48-11
„ 72- 3
„ 72-10
„ 100-29
548 R1- 5
557 123- 4
586 55-20
„ 58-39
667 5- 7
„ 58-11
„ R1- 1
„ R4-12
699 8-10
„ 108(a)-2
„ 108(o)-6
722 R11- 2
739 106-29
„ 111-17
„ 115- 1
781 5- 6
„ 58-39
„ 78- 1
„ 78- 4
„ 78- 6
827 R1- 6
859 5- 4
„ 6- 4
„ 19- 4
„ 19- 6
„ 21- 3
„ 21- 8
1012 108(b)-1
„ 108(l)-14
1135 53-29
1176 123- 6
1282 105-47
1314 58-38
„ 100-25
„ R4-15
„ R6- 3
„ R6- 6
„ R6-15
„ R15- 2
„ R15-10a
1372 Pre- 2
„ 5- 7
„ 60-41
„ 60-43

I L R 59 Cal. con
1372 67-27
„ 100- 3
„ 100-10
„ 100-16
1464 60-26
„ R5-13
„ R5-19

ILR 60 Cal.
47 111-13
„ 112- 5
87 R1- 4
„ R1- 5
„ R1-19
167 8-20
„ 58-33
225 78- 4
„ 78- 5
247 108(l)-14
379 5- 1
„ 5- 4
380 106-40
„ 106-41
„ 110- 1
„ 110- 2
„ 110- 3
384 54-22
394 3-32
452 3- 2
681 106- 2
701 8-20
706 122- 4
771 117- 2
777 R1- 6
„ R1-19
926 12- 8
948 91- 8
980 53A- 3
1042 108(h)-3
„ 108(h)-4
1047 67A- 3
1110 111-11
1158 38-11
„ 38-12
1197 68- 1
„ 68- 2
„ R14-13
1298 R14- 4
1372 53A- 3
„ 53A-10
1388 51-17
1467 R14- 3
1470 67A- 1
„ 67A- 2
„ 67A- 3
„ 100-11
„ 100-17

ILR 61 Cal.
32 105-48
„ 105-50
„ 105-51
106 8-20
„ 11- 7
„ 15- 4
313 8-20
„ 108(l)- 6
425 137- 4
494 48- 1
„ 52- 4
525 3-19
„ 123- 1
„ 123- 8

I L R 61 Cal. con
556 105-57
„ 105-58
„ 105-59
„ 105-60
711 2- 6
„ 36- 2
894 60-43
„ 60-56
956 R12- 3
991 8- 3
„ 8-15
1047 Pre- 1
„ 67A- 1
„ 67A- 6
„ 67A- 7
„ 100- 1
„ 100-11
„ 100-17
1056 R1-19

ILR 62 Cal.
1 130-19
„ 134- 2
„ 134- 6
75 60- 1
„ 91-39
„ R1-19
294 53A-13
„ 107- 7
„108(l)-12
„108(l)-14
346 8-10
„ 40-25
„ 105-59
„ 108(j)-4
„108(l)-14
„ 108(o)-6
483 R1-14
492 51-25
„ 53A- 3
„ 53A- 5
510 3-21
„ 6-17
„ 130- 8
568 R6-21
655 44- 6
677 92- 9
„ 92-10
733 38- 8
„ 38-11
979 54-17
998 58-39
1046 58-11

ILR 63 Cal.
1 3-22
„ 3-38
31 107- 8
„ 107-15
68 65- 4
194 130- 9
209 10- 1
„ 10-16
„ 14- 2
523 52- 5
578 3-22
„ 6-23
„ 130- 3
„ 136- 3
691 R1-12
720 67A- 6
804 55-20
880 78- 1

I L R 63 Cal. con
880 78- 4
„ 78- 5
„ 78- 9
„ 78-11
1098 8-20
„ 18- 4
„ 122-5a
1117 52-14
„ 54-17
1123 111-15

1937-1 Cal.
65 53A-10
„ 91-25
„ 91-27
65 R1- 6
203 51-10
„ 100-17
„ 100-24
„ 100-25
„ 111-16
„ R15- 2
300 R11- 2
359 58-38
„ 69A- 3
400 13- 5
583 5- 5
„ 19- 8
679 111- 1
690 8-20

1937-2 Cal.
54 2- 5
181 8- 2
„ 52-39
„ 76- 6
586 58-39

1938-1 Cal.
21 76- 1
„ 76- 8
66 R6-10
187 58-39
607 53A- 2
„ 53A- 3
„ 53A- 4
„ 53A- 5
626 Pre- 1

1938-2 Cal.
134 110- 1
„ 110- 3
250 6- 4
261 106- 2
312 2- 6
328 53A- 3
„ 53A-13
„ 53A-19
434 114A- 2
„ 117- 3
492 35-28
„ 38-11
„ 38-12
559 108(l)-14
590 60-44
„ 67-28
„ 82- 8
643 R1-19
„ R5-13

1939-1 Cal.
63 28- 3
„ 31- 2
„ 32- 5

1939-1 Cal. con
63 32- 8
„ 32- 9
241 6-35
283 58-38
„ 108(j)-2
„ 108(j)-4
„ 108(j)-5
477 R5- 6
493 R1-19

1939-2 Cal.
243 58-39
254 105- 3
„ 105-17
„ 105-25
„ 105-31
„ 105-32
„ 105-72
„ 106-12
„ 106-17
„ 106-37
„ 107- 8
„ 111- 6
„ 111-24
341 3-22
„ 3-23
„ 5- 7
„ 6- 3
455 R4-10
„ R5-17
551 70- 2
„ 111- 7
„ R1- 5

1940-1 Cal.
133 58-32
161 51- 1
197 58-38
250 53A-13
255 73- 1
„ 100-30
291 61- 7
„ 92- 5
„ 92-19
„ 92-21
„ 92-23
„ 92-27
544 R8- 3

1940-2 Cal.
189 8-20
436 5- 6
„ 58-22
„ 58-23
„ R4- 6
520 R5-17
573 58-31
„ 58-35

1941-1 Cal.
155 48-12
197 58-38
468 100- 6
514 91-39
„ R1-19
536 53-15
„ 53-16
„ 53-20

1941-2 Cal.
209 R1-19
551 91-39

1942-1 Cal.
326 73- 1
„ 92-31
395 R2- 3
„ R11- 2
414 R2- 3
„ R11- 2

1942-2 Cal.
28 58-35
378 8-20
406 108(l)-14
546 109- 2
„ 109- 5

1943-1 Cal.
34 106-15
„ 107- 5
„ 107- 6
„ 107- 8
„ 116-14
56 53A-14
59 67-27
„ R6- 3
324 R5-13
372 108(b)-3
„ 108(c)-8
„ 103(l)-14

1943-2 Cal.
180 92-15
272 108(q)-2
925 3-22
„ 3-24
„ 130-12
„ 130-13
364 R11- 2
417 R4(Cal)
„ R6- 3
„ R6-22
485 R4- 5
„ R5-13
605 5- 6
„ 14-10

1944-1 Cal.
321 83-20
690 108(q)-2

1944-2 Cal.
90 108- 4
150 105-16
542 6-16

1945-1 Cal.
210 R11- 2
532 14- 2
556 111- 7

1945-2 Cal
375 5- 7
„ 6- 3
473 68- 4
585 108(q)-2
591 112- 2
642 117- 3
651 5- 4

1946-1 Cal.
176 108(q)-2
211 108(q)-2
537 106-13

1946-2 Cal.
80 105-35
„ 111- 3

Any case in the "Table of Cases" will show where to get the entire case-law on the point.

1946-2Cal.con
157 108(b)-2
599 110- 3

1947-1 Cal.
313 92- 2
" 92- 5
" 92- 7
" 92-24
" 92-27
" 92-28
" 95- 1
365 108(j)-5

JAIPUR

Jaipur Law Reports

1946 J L R
97 R7- 6
" R10- 6
413 113- 3

LAHORE

Punjab Records

1866 Pun Re
48 51-25
" 108(h)-4
14 R11- 2

1868 Pun Re
14 108(f)-3
107 123- 4

1869 Pun Re
95 60-41
99 76-12

1870 Pun Re
15 58-35
" 68- 2
81 58-35
" 67-15

1871 Pun Re
7 100-30
47 59- 5

1872 Pun Re
7 51- 8
42 R11- 2

1873 Pun Re
27 111- 2
45 54-14
57 67-15
" 68- 2
61 108(o)-4
63 130- 4

1874 Pun Re
40 59-14
70 58-11
79 108(o)-4

1875 Pun Re
4 108(o)- 4
21 54-14
38 108(a)-1
66 69-25
68 69- 4
76 123- 4
82 67-31
87 41- 1

1876 Pun Re
64 6-34
90 55- 9
119 63A- 3

1877 Pun Re
22 6-34
26 6-34
87 6-24

1878 Pun Re
27 6-24
53 51-10
73 121- 1
76 60-41

1879 Pun Re
21 6-2a
" 7- 7
86 53- 6
132 54-14

1880 Pun Re
58 7- 7
60 59-14
88 59-14
89 59-14
96 100-31
113 52-14
" 52-35
" 58-39

1881 Pun Re
19 123- 4
61 108(o)-4
80 59-14
90 58-35
" 58-37a
94 70- 3
127 68- 2

1882 Pun Re
10 53-12
34 105-50
39 7- 7
40 R11- 2
86 123- 4
87 54-12
135 6-35
173 101- 4
192 54-14

1883 Pun Re
6 6-2a
10 59-14
51 123- 4
66 55-12
81 44- 7
" 78- 1
84 89- 5
93 48-18
102 3-39
" 48- 9
153 7- 7
159 3-39
165 7- 3

1884 Pun Re
16 58-18
18 7- 3
52 100- 1
60 130- 4
60 130-13
" 130-15
67 38- 8
112 3- 3

1885 Pun Re
2 48- 9
14 48- 9
90 48- 9

1886 Pun Re
3 123- 4
32 60-28
68 105-19
" 105-29
128 6-35

1887 Pun Re
46 6-35

1888 Pun Re
18 111-14
" 111-16
23 7- 3
50 8-16
57 58-17
" R11- 2
60 8- 2
" 8-13
96 7- 3
102 52-27
112 39- 5
122 108(q)-1
123 63A- 1
131 10- 1
" 10- 6
152 38-11
191 1- 1
193 68-13

1889 Pun Re
6 112- 1
100 58-18
135 R11- 2
143 3-39
144 6-30
152 38- 8
" 38-11
192 7- 7
194 8-20
195 48- 9
201 60- 5

1890 Pun Re
2 61- 5
55 72- 3
56 38- 5
83 121- 1
92 48- 9
107 83- 2
" 83- 3
115 48- 9
117 122-16
147 R11- 2

1891 Pun Re
26 118- 9
27 45- 6
30 52-13
99 60-34
101 91-42

1892 Pun Re
28 58-17
" R11- 2
38 53- 9
42 60-41
73 R11- 2
91 63A- 1
112 6-35
137 38-11

1893 Pun Re
6 6-2a
" 7- 7
29 118- 3
60 60-14
65 7- 7
67 63A- 7
" R11- 2

1894 Pun Re
4 3- 2
12 1- 4
" 130- 2
" 130-17
" 130-25
19 10-16
38 92- 2
58 6- 3
101 73- 1
103 6-2a
114 65- 4
" R11- 2
121 R11- 2
131 60-28
" 60-31
139 6-12

1895 Pun Re
12 58- 5
15 123- 4
65 81-13
75 82-12
99 60-28
100 58-33

1896 Pun Re
67 63A- 1
84 14-14
" 18- 5

1897 Pun Re (Civil)
43 130-15
52 54- 1
" 54-23
66 6- 4

1897 Pun Re (Criminal)
6 1- 1

1898 Pun Re
2 6-34
11 3- 2
14 108(q)-1
16 44- 4
18 63A- 1
32 48- 9
33 106-12
65 1- 4
" 54-23
77 R11- 2

1899 Pun Re
13 6- 8
20 58-33
32 52-13
33 61- 5
38 53- 6
58 3- 2
67 92-26
77 54-14

1900 Pun Re
2 3- 2
3 R11- 2
8 6-10
" 6-13
12 2- 5
15 6-35
23 58-41
31 58- 5
" R1- 9
32 43- 9
" 44- 7
" 58-19
" 73- 1
37 51-10
56 3-39
" 48- 9
65 98-11
66 3- 4
71 60-50
91 59-11
97 118- 3
" 118- 6

1901 Pun Re
6 1- 4
" 53- 1
" 53- 2
" 53- 3
" 53- 6
" 53-16
" 53-19
45 123- 2
95 6-12

1902 Pun Re
15 R1-12
57 5- 7
85 1- 4
" 65A- 1
" 66- 2
" 66- 7
86 54-12
95 R11- 2

1903 Pun Re
2 54-12
67 35- 9
72 50- 2
" 108(l)-6
75 123- 2
80 1- 4
" 52- 2
89 73- 1

1904 Pun Re
2 60- 3
" 60-41
5 106-20
" 106-32
30 93- 3
74 122-17
78 58-33

1905 Pun Re
91 60-44
" 82-18
92 R11- 2

1906 Pun Re
2 73- 1
7 52- 1
7 52-27
45 123- 2
65 58-31
98 101- 2
103 58-18
119 58-31
141 108(l)-9
144 137- 4

1907 Pun Re
2 1- 4
" R14- 2
" R14-12
9 1- 4
" 130- 2
" 130- 3
" 130-25
17 73-10
36 39- 5
39 60-32
46 58-31
59 58-18
70 58-31
105 58-31
122 51-12
136 54- 5
" 54-11
" 105-42
148 1- 4
" 55- 1
" 55-12
" 57- 2

1908 Pun Re
26 52- 7
" 52-21
52 123- 2
53 111-13
64 1- 4
" R1- 6
65 60-22
81 53- 2
" 53-20
" 53-22
100 45- 5
110 R11- 2

1909 Pun Re
39 45- 6
59 101- 1
67 6- 4
" 6-20

1910 Pun Re
7 52-21
20 Pre- 4
93 61- 6
94 106-22
" 111-23
102 39- 5

1911 Pun Re
15 R14- 2
18 55- 7
30 52-21
31 58-18
53 52-21
55 54-14
61 8- 6
62 60-44
76 106-25
" 111-14
96 6- 6

— t"*Table of Cases*" *indicates first reference in foot-notes and reference to Official Reports.*

1912 Pun Re (Civil)
6 114- 1
21 7- 7
31 58-31
50 60-41
54 63A-1a
59 58-31
74 1- 4
" 53- 2
" 53- 6
" 53-24
78 122-5a
97 76-15
105 48- 7
" 48- 8
" 54-14
106 123- 4
121 105-51
" 105-64

1912 Pun Re (Rev.)
6 1- 4

1913 Pun Re
7 60-13
12 R2-16
" R5-14
15 7- 7
18 7- 7
30 7- 7
39 55- 1
" 55-12
45 58-17
45n 62- 6
63 51-22
68 R7- 9
77 51-19
83 123-15
87 91-18
91 58-31

1914 Pun Re
33 108(j)-1
" 111-13
57 58-31
67 58-18
86 6-24
94 R11- 2
102 91- 8
106 3-22
" 6-16
107 108(l)-7

1915 Pun Re
3 58-18
4 3-34
22 R11- 2
29 R4- 5
82 118- 3
83 60- 1
" 60-41
" 83- 2
" 83- 7
87 44- 5
97 105-31
" 105-79
" 107- 2
" 111-14
" 116-13
109 1- 4
" 60- 3

1916 Pun Re
5 R11- 2
18 R14- 7

1916 Pun Re con
18 R14-12
21 53- 9
30 48-10
31 48-10
" 58-39
32 9- 2
" 100- 3
53 54- 1
" 54-14
" 58- 3
" 58-18
60 7- 3
86 67-19
" 81-13
" R1- 6
" R1-19
98 54-23
99 76-15

1917 Pun Re
1 92-27
9 6-2a
51 119- 2
" 119- 5
" 119- 8
68 60-14
" 101- 4
92 123- 4
98 60-10
" 68- 8

1917 Pun Re (Revenue)
5 108(o)-4

1918 Pun Re
3 58- 5
19 108(b)-1
" 108(b)-2
31 R11- 2
32 111-25
36 7- 7
46 3-39
" 41-23
56 58-17
63 63- 5
73 41-23
88 R14- 2
101 60-34
104 118- 2
108 7- 7
111 48- 9

1919 Pun Re
24 137- 4
34 106-20
" 106-34
" 108(j)-6
58 63A- 1
78 63A- 1
81 105-48
94 60-36
125 R1- 6
" R1-12
132 48-10
162 7- 3

I. L. R.
LAHORE

ILR 1 Lah.
89 58-35
" 58-37a
105 61- 5

ILR 1 Lah con
210 108(b)-2
241 106-33
" 106-35
" 109- 4
292 67-14
415 8- 6
567 3- 2

ILR 2 Lah.
53 60- 1
" R2-18
95 R6-16
175 32- 3
194 54- 2
202 100-15
258 51-22
282 6-12
300 107- 5

ILR 3 Lah.
55 39- 1
99 101- 1
200 58-17
" R11- 2
264 52-27
389 54-14
414 132- 7

ILR 4 Lah.
160 111-14
211 53-15
" 53-19
249 54-17
" 60 27
284 6-36
" 69- 3
346 58-17
406 58-17
" 63A- 7
" 84- 5
" R11- 2
439 1- 4
" 60- 3
467 7- 7

ILR 5 Lah.
317 7- 8
" 105-22
368 3-34
375 100-30
425 58-17
" R2- 8
465 122- 3
" 126-10
511 38- 7
" 38-11
527 108(b)-3

ILR 6 Lah.
87 6- 4
283 55- 9
308 55- 2
" 55- 9
319 107- 6
" 107- 7
344 3-34
487 1- 4
" 137- 4

ILR 7 Lah.
12 53-16
" 53-24
35 7- 7
" 51- 1
212 63A- 2

ILR 7 Lah. con
212 92-24
" 101- 1
273 3- 2
297 61- 5
" 61- 6
" 62-12
399 91- 5
423 108(n)-1
" 108(c)-8
" 111- 1
463 6-35
559 58-17

ILR 8 Lah.
181 11- 2
" 19- 9
219 45- 6
257 55- 1
" 55-12
544 53- 2
" 53- 6
" 53-11
" 53-34
573 105-48
" 105-49
597 7- 7
" 38- 5
" 38-11
632 38- 8
721 R6- 3
" R11- 2

ILR 9 Lah.
67 55- 3
" 55- 5
88 101- 1
" 101- 3
140 58-17
203 18- 5
224 3-31
260 Pre- 1
284 2- 5
567 8-20
" 123- 4
576 105-50
" 106-32
" 116-13
659 40-24
" 55- 9

ILR 10 Lah.
132 R5- 6
165 2- 5
263 39- 2
381 8-20
385 7- 7
447 53-19
" 53-21
558 122-12
613 6- 3
685 105-11
" 107- 7
706 39- 2
" 39- 5

ILR 11 Lah.
199 60-22
251 Pre- 2
" 58-11
251 60- 3
" 60-28
" 60-38
258 1- 4
" 52- 2

ILR 11 Lah. con
258 52-21
427 45- 5
" 108(j)-4
564 1- 2
" 1- 4
" 48-10
" 48-18
" 58-39
" 59- 2
" 78- 1
" 78- 6
" 78-13
587 55-11
" 55-12
645 8- 6
694 56-10
" 58-39

ILR 12 Lah.
172 8-20
194 53-15
" 53-16
" 53-19
" 53-20
239 54-17
488 58-33
546 38- 5
" 38- 8
590 6-2a
763 53-15

ILR 13 Lah.
41 39- 2
" 39- 5
70 54- 5
143 R14- 2
216 108(q)-1
" 116-13
259 58-29
" 58-35
" 68- 2
" 68- 9
" R6- 5
432 105-79
" 111-14
" 117- 2
508 58-28
" 68- 2
" 68-19
660 58- 3
" 58- 4
" 100-13
" 100-15
687 40- 8
702 73- 1
713 6-27
" 53- 9
796 111-12
" 111-14

ILR 14 Lah.
137 107- 2
" 108(q)-1
" 111- 2
" 116-13
218 R1- 1
" R1-19
243 R5- 5
325 130-15
353 10- 8
" 11- 2
" 11- 9
369 3-31

ILR 14 Lah. con
369 59- 9
466 58-35
" 76- 5
473 123- 4
584 6-2a
596 91- 5
635 53A- 6
640 58-31
749 63- 3
" 73- 1
827 122-5a

ILR 15 Lah.
9 39- 2
" 100-30
270 8-20
294 53-34
607 R6-10
683 111-14
746 92-15
" 92-27
751 68- 5
" 68-19
849 2- 6
" 53- 5

ILR 16 Lah.
137 10- 9
177 54-17
313 41-23
392 43- 4
" 73- 1
440 60- 5
608 105-18
" 105-20
612 58-35
" 58-41
" 68- 2
" 68-12
" 68-17
" 98- 3
" 98- 5
616 67-15
629 123- 4
640 58-29
" R14- 2
" R14-11
680 53-15
" 53-19
" 53-20
881 1- 4
" 63- 3
" 101- 3
921 52-21
1065 92-16
1113 58-39

ILR 17 Lah.
67 R6-10
270 58- 6
520 R4-12
612 58-39
644 7- 7
659 48- 3
" 58- 4
686 38- 5
" 58-25
" 58-39
" 59- 2
824 38- 8

ILR 1937 Lah.
87 68-14
149 100-31

ILR 1937 Lah
con
171 54- 1
202 105-42
245 58-44
" 60-41
350 51-10
649 108- 1
783 41-12
" 41-14

ILR 1938 Lah.
103 82-17
" 92-15
148 R10- 8
155 92- 2
296 51-22
403 R13- 2
439 53-21
" 53-34

ILR 1939 Lah.
261 3-39
" 48- 9
313 R2-16
" R5-14

ILR 1940 Lah.
70 4- 5
" 105- 9
" 105-19
" 107- 2
" 107-10
84 187- 4
231 R5-20
363 105-52
658 76- 2
" 76- 7
" R11- 2

ILR 1941 Lah.
1 82-12
71 58- 3
" 58-35
568 55- 1
" 55-12
601 58-27
" 58-29
" 59-14
740 R13- 2

ILR 1942 Lah.
79 9- 2
" 53A- 3
" 53A-18
" 54-22
" 55- 1
" 55-20
" 59-15
155 52-21
" 52-35
190 52-21
686 54- 1

ILR 1943 Lah.
17 55- 1
" 55-14
" 55-15
161 6- 4
195 107- 1
" 107- 2
695 105- 9
" 107- 9
" 107-10
" 107-15
746 58- 6
" 58-18

ILR 1943 Lah
con
780 6- 6
" 6-26

ILR 1944 Lah.
24 R11- 2

ILR 1945 Lah.
355 R6-17
411 68- 1
" 68- 4
" 68-16
" 68-20

ILR 1946 Lah
467 52- 1
" 52-21
" 52-40
805 58-30
" 58-35
" 58-40
" 98- 5

ILR 1947 Lah
213 52-21
" 52-31
" 54-23
235 111-14
" 112- 1
" 112- 7
" 114A-1
399 43- 2
449 1- 4
" 53A-18
749 3-34
" 41- 5
" 41- 7
" 41-10
" 41-23
828 59- 2

MADRAS
Mad. H.C.R
1 M.H.C.R.
31 111-14
15 112- 6
24 108(j)-6
81 60-34
100 9- 1
" 118- 9
" 123- 2
112 58-37
" 98- 7
113n 58-37
" 98- 7
114 67-13
" 68- 2
122 60- 5
" 98- 8
153 105- 4
" 110- 2
261 60- 5
" 98- 8
296 58-37
298 3-28
" 7- 7
856 98- 8
893 126-11
898 38-11
445 58-37
" 98- 7
" 111-14

1 M.H.C.R.
con
460 58-33
471 6-2a
" 7- 7

2 M.H.C.R.
26 9- 1
37 9- 1
51 58-12
108 58-12
109 58-37
" 98- 7
" 111-14
161 58-37
" 98- 7
" 98- 8
174 43- 2
187 6-35
270 7- 7
289 58-33
" 77- 1
315 68- 5
" 108(b)-3
382 58-35
407 32-11
416 6-2a
" 7- 7
420 58-31
" 60-28
450 58-31

3 M.H.C R.
1 105-49
38 48- 1
116 7- 7
172 6-35
187 82-22
231 53- 9
241 58-27
247 59-11
294 3-28
363 58-35
" 60- 5

4 M.H.C.R.
60 6- 4
84 53- 1
" 53- 6
98 9- 1
153 105-47
174 59-14
277 6-24
312 51-22
345 10- 1
" 10-16
359 60-50
369 78- 5
378 59-14
434 58-12
" 100-22
460 123- 2

5 M.H C.R.
114 123- 4
120 111- 8
166 6-2a
" 7- 7
227 108(j)-1
368 58-16
371 6-24
457 100-22

6 M.H C.R.
71 3- 2
75 52- 1

6 M.H.C.R.
con
145 109- 2
164 106-16
194 123- 2
234 52- 1
248 10- 6
258 114 1
" 114- 2
" 114- 4
270 123- 2
" 129- 3
" 129- 4
356 10- 1
371 38- 5
" 38- 8
" 38-11
455 123- 4

7 M.H.C.R.
1 60- 7
6 58-31
104 52- 1
" 52-31
226 38- 5
229 92- 2
" 101- 1
296 59- 4
348 59-14
395 60-28

8 M.H C R.
6 6-2a
31 58-33
" 60- 5
100 3- 6
" 3- 9
189 100- 5

I. L. R.
MADRAS

ILR 1 Mad.
1 58-31
57 98- 9
312 8-20
331 106-24

ILR 2 Mad
5 3- 1
45 60- 5
" 98- 7
" 98- 8
46 8-13
67 107- 1
79 58- 6
108 59- 4
" R1-19
" R5-19
" R14- 7
187 58-36
" 68- 3
" 76-10
193 58-37
" 60- 5
" 98- 7
212 130-18
223 60-41
" 82-17
" 91- 8
" 95- 1
226 60-53
" 111-17
239 8-20
" 58-18
" 119- 8

ILR 2 Mad.
con
314 60- 5
" 62- 5
339 38-11
346 106- 6
" 106-24
" 106-49
" 111-23

ILR 3 Mad.
26 58-31
35 58- 9
" 100- 6
46 48- 9
74 98- 8
118 105-71
" 105-79
145 38- 8
215 6-27
" 126-10
230 60-41
" 60-43
246 98- 8
358 105-31
" 107- 4
382 58-37
" 98- 7

ILR 4 Mad.
1 R14- 7
113 60- 5
" 98- 8
" 98-10
124 19- 6
" 19- 8
179 8-20
" 58-31
193 8- 5
200 10- 1
" 11- 9
" 14-13
" 18- 4
" 126- 2
218 91- 5
" 101-10
" R1-19
371 8- 5
" 105-68
381 105-27
" 105-29
391 6-2a

ILR 5 Mad.
6 9- 1
" 54-15
73 48- 9
115 54-23
119 59-14
139 48- 9
178 126- 3
184 10-18
" 67-20
196 44- 6
198 98- 8
272 6-24
310 60- 5
" 98- 7
371 52-32
" 73- 1
385 56-10
" 60-41
" 82-12
387 56-10

ILR 6 Mad.
61 60-45
83 39- 5
88 48- 9
130 39- 1
" 39- 5
140 98- 7
" 98- 8
159 10-12
" 12- 8
" 114- 1
263 108(m)-2
322 111-10
325 58-37
327 2- 5
" 114- 1
339 58-31
344 73-10
400 58-25
404 9- 1

ILR 7 Mad.
23 100- 5
31 52-32
" 73- 1
96 52-11
" 52-39
111 60-23
" 60-27
127 92- 2
" 101- 1
191 6-24
203 58-36
" 105-67
248 48- 9
268 105-69
315 11- 4
357 6-2a
" 7- 7
387 8- 4
423 91- 8
442 98- 8
545 98- 7
" 130-21
588 44- 7

ILR 8 Mad.
72 105-69
75 38-11
104 58- 9
130 100-29
167 48- 9
185 58-31
" 76-12
200 78- 4
" 78-10
246 3-34
" 92- 2
249 6-26a
388 R1-12
415 63A- 1
424 105-37
" 116- 4
" 116-13

ILR 9 Mad.
89 55- 2
" 55- 9
" 55-21
92 52- 1
130 52-11
" 52-42
141 118- 2
218 2- 5
278 6-2a

In the foot-notes to the Commentary ‡ indicates either a leading case or a case giving fuller reasons.

I L R 9 Mad. *con*

273 7- 7
307 105-52
„ 106- 5
371 98- 8
399 Pre- 2
„ 59-11
453 60-43
495 48- 9

ILR 10 Mad.

112 51-25
„ 108(h)-5
129 2- 5
„ R14- 2
„ R14-11
192 58-37
„ 60- 5
„ 98- 7
266 73- 1
283 100-30
289 130-17
351 108(o)-3
367 63A- 8
509 2- 5

ILR 11 Mad.

39 58- 9
56 2- 5
„ 130-19
„ 136- 2
„ 136- 3
77 105-38
„ 105-43
„ 105-47
„ 105-49
„ 105-52
„ 105-53
88 R4- 3
„ R4- 9
200 105-59
201 69-12
„ 69-19
„ 69-23
„ 69-30
234 76- 8
258 45- 6
288 7- 7
290 137- 4
304 60-44
345 92-24
371 67- 9
403 60-22
416 92-15
„ 95- 1
419 3-43
„ 3-49
445 3-21
452 82- 2
„ 100-29
459 120- 1
498 136- 2
„ 136- 3

ILR 12 Mad.

69 100- 9
„ 100-22
109 58-35
„ 67-15
„ R4- 3
180 52-13
203 3- 2
255 81- 6
260 39- 5

I L R 12 Mad. *con*

320 51-23
„ 108(o)-3
320*n* 51-25
323 51-22
325 2- 5
„ R14- 7
334 3-39
„ 39- 1
353 106-25
„ 111-14
„ 111-23
380 126-10
383 15- 2
424 3-34
„ 78- 4
„ 78- 5
429 3-34
„ 78- 1
„ 78- 4
„ 78- 5
439 52- 1
„ 52-13
505 54-23

ILR 13 Mad.

1 R14- 4
15 8- 3
„ 8-15
„ 51-21
„ 108(i)-1
„ 108(i)-2
„ 108(i)-3
46 123- 4
54 3- 2
60 106-12
„ 108(j)-1
66 18- 5
83 6-35
124 111- 9
158 55- 9
„ 55-12
192 65-10
„ 68- 4
197 6-2a
„ R1- 7
225 130-17
„ 130-19
249 105-43
„ 116- 6
„ 116-13
267 R7-13
„ R8- 7
275 44- 6
316 83- 3
„ 83-19
319 100-29
321 68- 3
„ 73-10
335 111-17
369 108(d)-2
379 32- 8
383 3-34
„ 78- 5
„ 78- 9
„ 101- 2
447 6-22
490 98- 8
494 58-33
518 3-10
„ 8-16

ILR 14 Mad.

1 18- 3
49 83- 8
55 54-23
74 2- 5
„ R14- 7
„ R14-12
76 58-37
„ 98- 7
98 105-13
170 58-33
232 58-35
„ 58-40
„ 67-15
„ 68-17
269 108(b)-3
271 107- 5
284 68-17
408 6-2a
„ 44- 7
459 7- 7
„ 43- 7
„ 43-11
467 3-10
„ 8-16
491 52-31

ILR 15 Mad.

50 55- 9
54 91- 5
„ 91-42
„ R1- 6
65 68- 5
67 111- 9
70 59-11
123 111-14
125 6- 8
„ 114- 1
174 67-15
„ 68-17
199 8- 4
„ 105-47
230 2- 5
„ 58-31
234 44- 6
253 59-14
261 3-12
267 R1- 9
268 3-34
„ 78- 4
„ 78- 5
„ 78- 8
„ 78- 9
„ 101- 2
290 2- 5
„ 76- 9
„ 76-10
„ 76-22
304 68- 4
„ 68- 5
331 92-15
366 98- 5
„ 98- 7
382 2- 6
„ 132-19
389 6-2a
424 14- 2
„ 18- 2
„ 18- 3
448 14- 2
„ 15- 3
487 R1- 6

ILR 16 Mad.

1 7- 7
43 123- 4
64 2- 5
„ 58-31
„ 67-14
80 58-33
94 92-24
„ 92-25
„ 92-27
97 105-13
„ 105-14
„ 105-16
„ 105-69
121 67-20
„ 91- 7
„ 91-41
„ R5-19
131 105-49
148 3-39
„ 48- 9
194 108(b)-3
207 R12- 5
214 R3- 3
„ R7-13
280 105-14
301 3-32
319 R1-19
328 60-41
335 2- 5
355 122-12
369 51-18
397 53-16
407 108(o)-3
„ 108(q)-1
429 5- 7
436 R14- 7
464 53A- 3
486 60- 5
„ 62- 5

ILR 17 Mad.

9 6-35
12 67-27
17 91- 5
„ R1-19
62 91- 5
„ 92-10
85 58-39
„ 137- 4
98 108(e)-6
„ 117- 3
131 58-41
„ 67-15
„ 68- 2
„ 68-17
„ R4- 3
146 54-14
150 32- 8
168 6-17
216 114- 7
218 105-31
„ 105-47
„ 106-25
„ 111-14
247 72- 2
„ 100-29
267 83- 8
268 39- 5
275 107- 9
296 76- 8
„ 108(j)-4
„ 108(j)-6
461 137- 4

I L R 17 Mad. *con*

469 68- 5
„ 68-14

ILR 18 Mad.

29 58-39
„ 59- 8
32 105-58
33 R1-19
43 48- 3
53 105-20
61 55- 1
73 7- 7
126 4- 4
„ 58-18
173 55- 9
248 R11-2
252 11-10
257 58-17
„ 126-10
„ R11-2
287 6-2a
316 44- 7
„ 73- 1
331 R11-2
338*n* R11-2
342 67-30
359 7- 7
„ 38- 5
„ 38-11
364 59- 6
368 60-28
„ 100- 5
454 3-21
„ 8-17
„ 54- 6
„ 54-19
492 43-11
„ R6-19
500 R1-19

ILR 19 Mad.

40 R7-13
105 92-19
151 91- 4
„ 91-12
160 59-15
„ 101- 4
176 6-38
200 85- 4
249 58-27
„ 58-30
„ 67-13
„ 76- 4
„ R2- 4
„ R5-23
257 52- 9
271 52-20
288 60-20
327 63A- 1
„ 72- 3
343 123- 4
382 2- 5
„ R14-2
411 58-41
„ 67-15
„ 68- 2
„ 68-17
433 123- 6
437 116-13
471 60-14
„ 108(l)-7
485 105-47

I L R 19 Mad. *con*

485 105-52
501 14-13

ILR 20 Mad.

23 82-15
35 5- 5
„ 67-21
„ 91- 5
35 R1- 9
„ R2-14
58 3- 3
„ 3- 5
„ 105- 5
78 R4- 5
„ R14-11
82 R1-19
84 6-35
107 R6- 3
120 163A- 2
„ 67-20
„ 91- 7
„ R1-19
124 63A- 8
147 127- 4
149 R11-2
167 122-12
243 44- 6
269 3-31
274 101- 3
295 60-45
299 105- 5
„ 105-75
326 53- 9
333 53- 9
371 58-17
„ R11-2
461 60-14
465 53- 2
„ 53- 6
„ 53-19
486 92- 7
„ 92-27
„ 101- 1

ILR 21 Mad.

1 58-40
„ 68-12
„ 98- 3
8 55- 9
18 91- 8
28 58-25
32 72- 4
„ 76-19
„ R2-12
56 54-14
64 91- 8
„ R1-19
69 119- 8
105 6-24
109 4- 6
110 60-28
138 98- 7
139 2- 5
143 52-35
„ 92-17
153 116-13
222 R1-12
253 130-19
288 108(o)-4
364 R11- 2
369 60-41

In the foot-notes to the Commentary † indicates a case which is most appropriate for the proposition.

ILR 21 Mad.

con.
369 82-12
411 98- 7
476 68-17

ILR 22 Mad.

20 67- 5
24 55- 7
39 108(o)-3
133 R2-18
„ R3- 3
„ R3- 7
„ R5-11
139 3-22
207 R1-12
209 60-41
217 105-11
241 R14- 7
261 105-64
„ 108(l)-14
264 105-43
„ 105-47
286 60-26
„ 104- 1
„ R5-13
289 7- 7
„ 35- 3
„ 58-25
301 132-19
332 68-17
„ 72- 2
„ 72- 3
„ 92-24
„ 95- 1
339 58-17
„ R11- 2
347 R14- 7
350 58-37
„ 67-15
„ 98- 7
372 R14- 2
„ R14- 7
383 6-2a
„ 122-12
453 108(l)-8
464 63- 2

ILR 23 Mad.

33 60- 5
70 123- 4
86 130-21
105 59- 3
114 2- 5
„ 58-31
137 59-11
184 53-20
„ 53-34
227 60-23
271 14-13
318 106-12
„ 117- 2
377 60-23
„ R14-12
441 55-14
449 3-23
510 83-15
521 R3- 7
„ R5- 9
„ R8- 6
534 58-17
„ R11- 2
613 25- 8
637 R5-13
„ R11- 2

ILR 24 Mad.

47 1- 5
„ 2- 5
„ 108(h)-2
„ 108(o)-4
„ 117- 2
65 108(p)-1
„ 108(o)-3
85 82- 7
96 60-23
„ 60-24
„ 81-13
„ 82- 2
„ 82-16
„ 82-18
„ R14-12
214 8-20
„ 122-12
246 111-16
265 114- 9
296 91-29
299 8- 4
377 5- 1
„ 53A- 3
„ 54- 1
„ R10- 3
397 59- 8
408 60- 4
„ 60-48
„ R7- 3
412 57- 2
421 105-27
„ 117- 3
„ 117- 4
449 8-17
„ 14-10
„ 40-10
„ 40-25
„ 53A- 3
„ 54- 6
„ 54-19
„ 54-23
„ 60-30
513 123- 4
„ 129- 5
654 137- 4
657*n* 137- 4
689 100- 6
„ R14- 3

ILR 25 Mad.

1 48- 9
„ 59- 5
3 105- 4
„ 105-35
„ 105-36
7 58-33
26 60-14
„ 60-15
42 58-9
50 58-14
55 54-15
108 61- 2
„ 67A- 1
„ 67A- 5
„ R1- 6
220 58-38
„ 100-13
244 2- 2
„ 2- 3
„ 2- 6
„ 60-26
„ 104- 1
„ 104- 2

con.
244 R2-18
„ R3- 3
„ R5-13
„ R5-24
„ R6- 3
300 60-26
„ R2-18
„ R3- 3
396 8-17
„ 59-14
406 52-30
„ R1-14
„ R1-19
452 58-37
„ 60- 5
506 R3- 7
„ R5-11
507 105-41
„ 105-43
„ 105-79
„ 105-80
„ 105-82
537 R5- 4
568 R1-17
585 11-13
587 108(b)-1
„ 103(b)-3
„108(l)-14
„ 111-16
603 105- 3
„ 105-59
627 117- 3
658 58- 8
„ 100-31
669 8-10
„ 108(o)-2
672 123- 6
690 6-2a
„ 44- 6
„ 44- 7
697*n* 44- 7

ILR 26 Mad.

69 6-24
156 6-37
157 2- 5
„ 10- 5
„ 10-13
„ 10-17
„ 111-13
„ 111-25
„ 117- 2
195108(l)-14
202 105-68
230 52-30
„ 52-32
„ 52-36
237 R4-16
252 105-75
„ 108(b)-2
268 7- 5
332 R1-19
334 7- 7
„ 8- 9
403 54- 5
„ 105-69
445 2- 5
461 R1- 6
484 67-20
„ R1-19
509 41-23
535 105-80

con.
535 116- 6
„ 116-13
537 67-19
„ 67-20
„ R1-19
540 36- 2
649 91-29
„ R1- 7
662 2-10
„ 58-35
„ 68- 2
„ 68-17
686 82- 2
„ 82- 3
„ 82-15
„ 82-16
„ 82-17
„ 100-11
„ 100-29
727 58-37
„ 60- 5
„ 98- 7
792 100-30

ILR 27 Mad.

23 106-25
„ 111-14
26 58-37
„ 60- 5
„ 98- 7
28 55-12
40 R3- 7
43 105- 9
„ 105-27
45 39- 2
„ 39- 5
„ 100-30
86 68-14
„ 77- 1
131 8- 3
143 108(l)-5
162 6-2a
202 105-69
211 2- 5
„ 51- 1
„ 51-25
„ 108(b)-2
„ 108(b)-4
291 105-47
„ 105-52
332 105-25
348 59- 6
361 44- 5
401 105-75
„ 115- 1
„ 115- 4
428 60-23
„ 91- 3
„ R14-12
435 6-2a
498 8- 6
„ 45- 6
526 58-29
„ 58-30
„ 58-35
„ 58-41
„ 67-15
„ 67-18
„ 68-17
„ 98- 5
„ R 4- 3

ILR 28 Mad.

54 58- 6
„ 58-39
„ 59- 4
„ 100-14
122 41-24
124 26- 2
„ 54-14
173 26- 3
205 R1- 8
208 58- 4
„ 66- 1
„ 66- 8
211 R7- 9
238 108(c)-4
363 11- 2
„ 45- 6
389 114- 8
391 7- 7
„ 106- 2
„ 106-19
413 6-27
„ 122-13
420 48-14
„ 73- 3
473 57- 2
493 100-29
526 111-17
544 137- 4
555 60-41

ILR 29 Mad.

24 108(b)-2
29 37- 4
„ 37- 9
„ 106-34
„ 109- 2
„ 111-26
37 92- 7
„ 92-27
„ 101- 1
„ R5-13
42 105-79
52 105-69
65 R11- 2
72 53- 9
77 R4-13
84 R1-19
„ R12- 3
113 92- 9
„ 101- 1
120 6- 4
155 130-19
170 R11- 2
177 40-11
217 56- 1
„ 56-10
„ 82-12
„ R1- 5
„ R4-10
232 83-13
294 44- 6
307 6-17
„ 58-33
336 14-10
„ 53A- 3
353 3- 3
„ 105-14
362 48- 9
„ 68- 4
412 14- 2
„ 15- 2
„ 123- 1
421 2- 5

con.
421 R14- 2
424 R14-11
426 52-13
„ 52-38
491 58-29
„ R6- 5
501 60- 5
508 52-20
519 55-17
531 58- 2
„ 58- 4
„ 58-31

ILR 30 Mad.

6 53- 3
„ 53-15
„ 53-22
61 2- 5
„ 60-28
„ 60-29
„ 98- 7
67 59A- 3
„ 65-11
„ 92- 2
75 130-13
„ 130-15
109 106-41
„ 110- 1
153 6-24
155 105-75
„ 108(o)-4
169 126- 9
„ 126-17
197 2- 2
„ 7- 7
„ 51- 3
„ 51- 4
„ 51- 8
201 6- 3
203 105-47
235 3-21
„ 132- 3
245 R1- 8
251 59- 8
255 6- 3
„ 6- 7
284 55- 9
„ 59- 8
„ 59-14
300 60- 5
„ 60-29
„ 98- 7
„ 105-35
305 123- 4
313 R14- 7
316 119- 9
322 107-10
340 122-5a
353 67A- 1
„ R13- 4
356 8- 6
362 R14- 7
378 10-19
388 60-50
408 R12- 4
„ R14-11
410 108(j)-6
„ 108(j)-9
„ 117- 2
423 55-17
461 55-17
464 R4-12

References to Official Reports are invariably given in all cases found in the Official Reports.

ILR 30 Mad. con
464 R5-26
" R6- 3
" R6-11
" R10- 8
478 100- 1
486 6- 4
500 R1-19
519 123- 4
524 55-12
528 105-49

ILR 31 Mad.
7 3-34
" 78- 4
" 78- 5
33 R14-9
" R14-10
97 53- 9
114 54-20a
163 116- 1
" 116- 4
" 116-13
206 7- 7
" 53- 9
" 53-24
215 3-11
258 R1-19
261 106-25
" 106-49
" 111-14
" 111-25
268 52-11
310 13- 5
330 58-13
" 59- 4
333 60-43
" R1- 6
337 59- 8
" 100-14
354 60-26
" R5-13
" R8- 7
403 111-16
419 56- 1
" 56-10
" 56-12
" 82-18
419 R4-10
425 67-20
" 94- 3
" R1-10
" R1-19
" R12-3
439 92-16
" 92-17
" 101- 4
452 119- 9
485 53- 9
500 6-10
517 14-12
530 67A- 5

ILR 32 Mad.
10 59-14
72 54-14
185 6-32
276 7- 7
281 58-18
" 58-35
323 53- 9
325 42- 1
" 54-14
410 58-39
410 59- 8
" 68-13
429 91-25
485 R1-19
530 R51- 8
" R51-11
532 4- 6
" 105- 9
534 R6- 3

ILR 33 Mad.
71 76-22
" R7-11
100 84- 8
102 2- 6
" 107-13
" 108(b)-1
123 130-17
" 131- 3
" 131- 5
" 134- 2
205 53- 6
" 53-11
211 82- 5
" 82- 8
253 105- 1
" 105-47
" 108(h)-2
" 108(o)-4
" 117- 2
260 105-37
" 105-80
" 111-17
" 116-13
304 122-17
312 7- 8
" 58-26
" 105-22
334 53-15
" 53-16
" 53-20
" 53-34
" 92-17
375 55-20
429 73- 1
446 55-12
473 5- 4
499 108(b)-2
" 117- 2

ILR 34 Mad.
7 6- 1
12 18- 1
" 18- 2
" 18- 5
47 100- 6
53 134- 5
64 3- 2
" 59- 4
72 2- 4
" 9-10
80 45- 1
" 45- 6
108 8-20
" 108(b)-3
115 91- 3
119 92-10
159 43- 7
161 2- 5
" 111-14
" 111-16
" 112- 7
" 113- 3
175 73- 1
179 108(j)-6
188 38- 5
" 38-12
250 28- 2
" 28- 3
269 44- 6
320 84- 5
" 84- 8
406 91-29
" R1- 7
422 38- 5
" 38- 8
442 Pre- 2
" 5- 2
479 55-14
493 73- 1
527 6- 4
" 7- 7
535 7- 7
" 51-19
543 54-14
" 55-12

ILR 35 Mad.
42 91- 8
" 91-41
44 84-10
" 84-11
" 84-13
" 84-16
" R10- 3
47 44- 7
63 107-15
95 4- 5
" 4- 6
" 105-19
" 107- 1
" 107-10
108 38- 8
114 4- 4
" 58-18
120 123- 4
147 100-30
183 92-23
" 101-10
209 83- 5
" 83- 9
" 84- 5
607 3-11
618 105-81
" 108(d)-3
625 55-11
" 55-12
642 101- 3
685 60-14
" 108(l)- 6
" R1-12
744 60-28

ILR 36 Mad.
8 54-14
" 54-23
16 83- 3
29 53-16
" 53-20
" 58-18
32 R8- 6
68 8-20
194 51- 6
" 51- 7
" 51- 8
348 55-12
348 55-14
380 111-13
426 92- 16
" 100- 5
493 82- 2
" 100-29
544 60-14
557 105-27
564 9- 5
" 54- 1

ILR 37 Mad.
1 51- 9
" 51-25
" 105-43
" 105-69
" 105-79
" 105-80
" 108(h)-4
" 116-13
38 43- 7
51 8-17
227 53- 3
" 53-16
238 3-23
" 136- 2
" 136- 3
281 116-13
369n Pre- 4
390 7- 8
" 105-22
403 54-23
418 91-25
" R1- 6
423 5- 2
" 9- 7
" 54-17
" 101- 4
" 118- 6
" 118- 7
" 118- 9
480 54-23
483 118- 2
514 7- 7
545 60-27

ILR 38 Mad.
18 3-10
" 65-11
" 72- 3
" 72-10
" 76- 8
" 101- 1
" 101-1a
36 52-42
86 36- 2
" 108(j)-4
114 14-10
134 8-20
138 6-16
" 8-14
141 8-13
" 8-20
178 55-20
260 100-20
279 137- 5
297 130- 3
" 130-19
" 134- 5
" 137- 4
308 6-18
" 8-14
310 60-41
310 60-43
" 60-44
" 60-45
" 91-40
396 3-31
445 37- 4
" 37- 9
" 109- 5
" 111-16
" 111-26
" 117- 2
450 52-13
500 130-15
519 53A- 3
" 118- 9
" 120- 3
535 52-11
" 52-12
548 92-24
664 137- 5
667 58-31
" 58-41
" 60-28
" 60-29
" 98- 5
677 R6- 3
" R6-10
684 44- 6
" 44- 7
698 55- 7
710 51-25
" 108(h)-4
738 117- 3
783 41-25
791 55-14
850 6-2a
867 6- 1
" 6-11
887 55- 9
927 61- 1
" 61- 2
" 67A- 1
959 84- 5
1010 60-29
1071 53-11
1158 54-17
" 54-21
" 54-22
" 60-27
1171 55- 9

ILR 39 Mad.
509 53A- 3
554 6- 3
565 38-11
579 83-17
634 6- 4
795 55-17
" 55-18
" 82- 2
" 82-14
" 100-29
811 67-30
834 114- 1
" 114- 5
" 114- 8
" 117- 2
876 R2-23
" R7-13
" R8- 7
" R8- 9
882 R2-18
" R8- 7
930 6- 7
" 43- 4
959 65- 3
" 65-11
" 67-30
997 55-12
1010 58-31
" 60-28
" 60-29
" 98- 5
1035 3-18
1042 108(c)-4
1049 111-26

ILR 40 Mad.
77 52-31
" 67-20
" R1-19
93 100-29
116 18- 5
204 123- 6
268 Pre- 4
302 3-22
" 6- 1
" 6-13
" 6-15
308 7- 8
" 58-18
" 58-26
" 105-22
338 55- 9
365 54-23
402 7- 7
547 58-39
" 59-14
561 111-17
683 3-21
" 58- 5
" 130-18
" 132- 2
709 7- 7
767 48-14
" 69-30
778 91- 7
804 83- 8
" 83- 9
" 88-15
" 84- 2
" 84-12
" 84-13
871 7- 5

Topical Index and Synopsis for each Section show where exactly to look for the point required.

ILR 40 Mad. con
910 108- 1
„ 108(b)-3
„ 108(c)-2
„ 108(c)-6
„ 108(c)-7
955 52-31
„ 52-35
968 56-10
„ 60-43
„ 82-19
989 R6- 3
1083 108(d)-2
1111 40- 1
„ 76- 8
„ 108(j)-5
„ 108(j)-6
1134 51- 4
„ 51-22
„ 53A- 3

ILR 41 Mad.
33 126- 6
113 R5-13
259 67-15
„ 68-17
365 6-38
370 2- 6
„ 36- 2
„ 53- 5
418 6- 3
„ 6- 7
„ 6-30
„ 43- 4
„ 43- 7
435 67-22
458 52- 1
„ 52-31
„ 52-37
513 76- 5
„ 92-10
„ 92-13
„ 92-24
„ 101-1a
„ R1-19
535 3-18
612 53-13
„ 53-14
629 111-14
„ 111-25
„ 114A- 1
„ 117- 2
637 60-14
„ 60-15
650 92-15
691 100-11
749 6- 7
831 137- 5
871 137- 5
959 58- 6
„ 58-36
„ 77- 1
„ 105-67
1043 72- 8
„ 76- 7

ILR 42 Mad.
20 4- 4
„ 58-18
52 R5-24
59 58-11
61 R2-16
„ R5-14
90 R4- 6
114 100-12
143 53-24
154 7- 7
203 105- 1
„ 105- 3
„ 108(b)-3
283 8- 6
348 67-22
407 58-33
440 5- 3
„ 9- 9
„ 122-5a
465 R11- 2
523 6- 4
„ 35-28
„ 38- 5
„ 91-17
578 68- 4
„ 68- 5
581 14- 3
„ 100- 5
589 Pre- 2
„ 2- 5
„ 106-25
„ 111-13
„ 111-14
603 109- 5
654 114- 1
„ 114-11
„ 114A- 1
„ 117- 2
673 105-69
684 53-28
690 119- 9
„ 119-10
813 67- 5
„ 67- 6

ILR 43 Mad.
37 52- 1
„ 52-38
„ 52-40
132 108(c)-2
244 54-17
„ 54-21
„ 59-14
„ 60-27
„ 123- 5
„ 123-10
357 R7-13
„ R8- 7
372 60-23
„ 60-44
„ 82-18
393 91-23
405 59-11
421 R6- 3
„ R6-10
480 111-14
„ 111-22
503 10- 5
„ 108(j)-1
„ 111-13
„ 112- 4
529 Pre- 1
541 38-11
567 105-43
„ 105-44
589 58-31
„ 58-35
„ 58-41
„ 60-29
635 39- 5
696 52-31
„ 52-35
„ 91-25
„ R1- 6
712 54-14
„ 55-12
760 53-13
„ 53-14
786 100-12
„ R14- 3
800 100- 1
„ 100-30
803 60- 7
„ 60-13
„ 130-18
822 54-23
849 5- 2
„ 9- 7
„ 9-10
„ 118- 5

ILR 44 Mad.
55 4- 5
„ 107- 9
167 43- 9
„ 55- 9
196 3- 2
„ 3-22
„ 8-17
„ 54- 6
„ 122- 6
„ 123- 5
„ 123-14
„ 130-11
„ 130-14
„ 137- 4
230 5- 4
„ 11-11
„ 40-25
„ 105-35
„ 105-36
232 52- 8
„ 91-25
„ R1- 6
253 54-17
„ 60-27
301 58-35
„ 65-11
„ R14-13
329 6-27
344 59- 2
„ 98- 7
421 8-10
509 105-20
„ 105-35
589 6-18
„ 6-19
„ 8-14
629 114- 6
937 108(b)-3
946 43- 4
951 91-16
965 8- 2
„ 8-17
„ 54- 6

ILR 45 Mad.
90 53-20
320 8- 6
394 111-18
537 54- 1
586 105-48
586 105-48
„ 105-79
„ 105-84
612 9- 7
„ 54-12
„ 118- 2
„ 118- 4
„ 118- 6
„ 122- 2
626 6-26a
710 117- 3
774 52- 7
„ 69-20
„ 69-24
„ 69-25
778 6-28
873 44- 9

ILR 46 Mad.
54 44- 6
64 59- 8
104 51- 5
108 60-33
„ 84- 5
148 84- 5
190 5- 3
349 5- 4
435 59- 6
„ 59-15
478 53-19
„ 53-21
659 6-10
„ 6-13
815 44- 6
„ 44- 7
919 53A- 3

ILR 47 Mad.
1 105-49
7 60-10
„ 60-44
„ 60-45
„ 76- 1
„ 76-21
„ 83- 7
„ 83-13
„ 83-17
„ 91- 8
150 55- 7
181 6- 4
„ 38-11
190 92-10
„ 92-13
„ 92-19
„ 92-24
„ 101- 1
203 59-14
„ 62- 2
337 105-41
„ 105-43
„ 105-44
„ 105-45
„ 105-47
„ 105-48
„ 105-49
„ 105-79
384 2- 5
398 58-39
551 R1-19
„ R5-13
688 56-12
„ 67A- 1
„ R4-10
698 6-17
„ 58- 6
729 58-33

ILR 48 Mad.
368 105-14
454 58-39
605 122-11
„ 123-12
693 60-14
815 111-10
821 Pre- 2
„ 100- 1
„ 105-42
„ 105-58
„ 108(l)-3
906 14- 8
„ 15- 2

ILR 49 Mad.
98 45- 6
349 Pre- 4
„ 10- 2
387 6-17
„ 14-10
596 44- 6
609 83- 2
„ 83- 8
„ 84-13
691 60-26
„ R5-13

ILR 50 Mad.
135 2- 6
„ 43-12
„ 54- 3
180 58-40
„ 61- 2
„ 62- 2
„ 62-12
„ 98- 5
„ R1- 3
„ R14-12
193 52-29
„ 122- 7
„ 123- 6
217 7- 7
„ 58-25
320 44- 6
331 111-11
„ 111-13
421 7- 7
535 44- 7
548 55-12
595 40-25
„ 105-35
„ 105-36
„ 111- 3
687 5- 3
„ 122-5a
711 6-24
776 53-20
800 59- 6

ILR 51 Mad.
157 144- 5
219 53- 9
417 52-12
„ 52-27
„ 53- 5
449 105-60
533 3-24
„ 6-17
648 56- 1
648 56-10
„ 81- 2
„ 82-4a
681 3-23
688 2- 6
„ 14-10
„ 40-24
„ 55- 9
701 R5-29
770 105- 3
810 95- 1
„ 95- 7
885 105-35
„ 111- 3
994 108(e)-4
„108(m)-4

ILR 52 Mad.
101 52-20
123 3-11
„ 3-19
300 54-23
„ 60-30
322 84- 3
„ 84- 5
„ 84- 8
434 3-11
453 8-20
465 6-13
„ 130- 8
538 8-10
„ 108(o)-6
549 105-43
„ 105-48
„ 105-49
„ 105-51
563 6-22
787 55- 9
849 105-43

ILR 53 Mad.
54 108(h)-4
119 59- 8
„ R6- 3
188 92-10
270 55-15
300 60-30
417 44-10
581 R1-19
670 R14- 6
692 51- 8
„ 51-17
„ 51-19
750 6- 7
„ 88-11
771 6-30
805 60-28
881 91-25
„ 91-37
„ R1- 6
952 92-18

ILR 54 Mad.
59 81- 2
132 39- 2
„ 52-20
„ 52-31
„ 100-28
„ 100-30
163 3-14
„ 54-12a
„ 59- 8
„ 68-10

Remarks in foot-notes amplify principles in the Commentary and state the special features of the case.

ILR 54 Mad.con
163 68-13
„ 100- 5
„ 118- 7
212 52-35
257 58-39
269 8-20
565 67-13
708 55-20
„ 92-16
„ R5-14
„ R7-12
900 117- 3

ILR 55 Mad.
72 53A- 3
„ 53A- 5
316 50- 2
320 3-28
„ 3-35
„ 58- 5
„ 67-21
„ R1- 9
„ R5-14
332 R6-11
„ R10- 8
„ R13- 2
458 84- 8
468 100-12
„ 100-22
„ 100-29
519 3-28
„ 105-35
„ 105-36
„ 105-39
601 111-17

ILR 56 Mad.
115 52- 7
„ 52-31
„ R1-19
169 3- 2
„ 53A- 5
„ 53A-16
„ 59-14
177 4- 3
„ 137- 5
179 53A- 5
248 105-48
310 R5-16
339 R6-23
343 R15-10a
405 1- 1
517 92-19
534 44- 7
546 Pre- 2
„ 58-39
560 58-11
„ R4- 3
646 53- 9
724 55-14
846 67-20
„ 91- 5
„ R1-19
892 58-41
„ 67-15
„ 68- 2
„ 68-17
904 7- 3

ILR 57 Mad.
195 67- 9
„ 101- 1
„ 101- 4

ILR 57 Mad.con
218 100- 8
398 R7-13
426 52- 9
„ 52-11
„ 52-15
„ 52-31
437 R5-24
662 59- 8
760 105- 4
„ 107- 8
1016 55- 9
1062 7- 7
1074 6-21
„ 3-22
1082 130- 9
„ 137- 4

ILR 58 Mad.
75 116- 1
„ 116- 6
„ 116-12
166 54-17
„ 59-13
181 137- 5
204 18- 5
220 3-12
„ 3-19
371 9-12
378 12-11
„ 111-11
418 72- 5
„ R4-12
„ R10- 8
825 67-20

ILR 59 Mad.
1 55-12
44 101- 4
„ 101-10
101 52-20
„ 91-43
„ 100-13
121 56-12
„ 82- 7
„ 82- 8
„ 82-10
141 130-17
188 R6- 3
„ R6-23
289 53- 9
312 91- 8
„ R1-19
359 92- 1
„ 92- 5
„ 92-10
„ 92-19
„ 92-20
„ 92-22
„ 101- 1
539 59- 6
633 19- 6
„ 21- 3
„ 23- 5
779 107- 9
855 19- 6
910 54-12
„ 55-12
„ 100-17
942 7- 7
„ 108(f)-1
„ 108(f)-2
998 53- 9
1042 92-27

ILR 59 Mad.con
1042 101-10
„ R1- 6

ILR1937Mad
35 82-26
66 52-19
„ 52-39
335 8- 6
479 8-20
545 60-26
„ 60-48
589 36- 2
638 9- 2
„ 54- 1
„ 54-12
„ 105-42
„ 105-57
„ 105-58
„ 105-59
„ 105-68
„ 105-75
1004 53- 5

ILR1938Mad
335 39- 2
568 8-17
„ 137- 4
646 6-13
„ 6-14
„ 101- 4
829 52-20
„ 53A- 3
928 7- 3

ILR1939Mad
7 58- 6
„ 100- 5
199 4- 8
„ 58- 4
„ 100-16
„ 100-17
223 R6- 3
415 130- 3
600 82-18
„ 101- 4
622 8-20
891 92- 1
954 10- 9

ILR1940Mad
73 53- 8
„ 53-23
123 6-26a
306 4- 8
„ 100-16
808 53-24

ILR1941Mad
144 58-11
147 130-13
232 123- 1
378 130- 3
„ 130-12
419 137- 3
551 35- 2
„ 35- 6
„ 35- 7
567 6-13
720 8-20
767 60- 5
„ 84- 5
„ 84- 7
924 92-23

ILR1942Mad
1 53-28
33 8-20
60 R5-24
„ R5-29
82 59- 4
„ R1- 6
225 41- 4
287 69- 3
„ 69-4a
„ 69-30
„ 72-30
438 67-27
448 R6-16
550 84-16
640 6-23
775 54-12
844 122-11
851 58-38
862 53-28
„ 53-35

ILR1943Mad
1 8-20
47 2- 6
„ 5- 3
„ 53- 5
96 82- 3
„ 82-4a
„ 82-13
„ 82-16
115 137- 3
195 58- 5
„ 58-33
„ 76-12
„ 77- 1
„ 100-15
205 72- 5
„ 84-16
„ R 10-3
405 55-12
418 R14- 2
„ R14-12
430 76- 7
531 82- 2
„ 82- 3
„ 82- 5
„ 82- 7
„ 82- 8
„ 95- 3
„ 101- 1
„ 101- 2
587 130-17
794 100- 1
804 R5- 6
831 53A- 5
885 55-11
„ 55-12
„ 55-14
„ 55-18

ILR1944Mad
44 92-1a
„ 92-24
„ 100-29
104 67-21
„ R1- 9
133 53- 6
„ 53-24
254 76- 8
340 91-37
„ 92- 7
„ 92-14
„ 92-23
543 107-13

ILR 1944 Mad.con
543 108(b)-1
572 R6- 3
749 53A-13
„ 53A-14

ILR1945Mad
138 52- 6
„ 53- 5
165 R6-11
„ R10- 5
„ R10- 8
304 3-10
355 105- 4
„ 105-24
„ 105-59
„ 110- 1
412 53- 5
535 108(q)-1
578 52-31
„ R1-19
726 52-6a
„ 52-20
777 105-67
803 60-26
„ 60-51

ILR1946Mad
255 76-22
265 R5- 3
„ R5-13
299 R6-21
349 108(t)-2
486 53-24
„ 53-25
„ 53-28
739 60-40

ILR1947Mad
132 R5- 6
184 R5- 8
265 58-33
313 60-30
334 R8- 5
377 R5- 3
397 55-12
411 58-18
„ 60-10
„ 63A- 4
„ 77- 1
574 41- 1
„ 41- 7
„ 41-21
671 51- 9
„ 51-10
731 R6- 3
„ R6-10

ILR1948Mad
190 67-27
335 39- 1
„ 39- 5
415 52-12
454 73- 1
„ 100- 5
„ 100-22
734 R5-14
757 105- 1
„ 106-13
„ 116- 1
„ 117- 2
872 43- 4

ILR1949Mad
141 53A-9a
„ 53A-13

ILR 1949 Mad.con
276 60-48
657 108(l)-5

NAGPUR

C. P. L. R.

1 C. P. L. R.
1 60- 5
19 52- 1
„ 52-11
„ 52-39
33 39- 5
38 63- 3
41 123- 2
59 53- 1
„ 53-16
„ 53-34
63 53- 1
„ 53-16
66 72- 8
67 59- 9
145 117- 2
151 108(o)-4
154 83-17
„ 83-20
„ 84- 7
165 53- 8
„ 53- 9
178 2- 5
„ 55- 9
182 105-16

2 C. P. L. R.
1 130-17
„ 131- 1
9 60-13
„ 60-34
29 R2-18
57 67-13
63 53-31
90 43- 9
„ 60-44
„ 67-28
94 R2-11
„ R6-11
„ R10- 8
108 58-11
109n 58-11
125 28-33
130 2- 5
137 2- 6
„ 51- 3
173 91- 5
241 60- 5
243 68-13

3 C. P. L. R.
15 60-14
„ 67-31
18 108(o)-4
37 123- 2
64 7- 7
72 43- 7
„ 43-11
82 2- 5
„ 67-20
„ 91-41
86 7- 7
115 60-28
126 6-22
„ 7- 7

Any case in the "Table of Cases" will show where to get the entire case-law on the point.

3 C.P.L.R.con

147 130-17
151 48- 8
154 58-33
" 91-13
170 R14-13

4 C. P. L. R.

32 106-40
47 106-12
55 106-12
61 109- 2
90 8- 7
92 54-14
" 54-23
" 55-12
128 91-42
139 7- 7
164 67A- 1
179 53-34
193 65A- 1

5 C. P. L. R.

6 3- 4
13 130-19
44 126- 9
54 R2-18
63 123- 2
102 54-23
104 R2-18

6 C. P. L. R.

1 R3- 7
11 R11- 2
19 53-34
22 R11- 2
28 60- 4
" 62- 5
43 62- 5
60 6-2a
" 7- 7
" 100-13

7 C. P. L. R.

22 58-31
29 58-31
42 100-29
50 53- 9
73 53-34
147 67-27
150 106-39
" 106-41
153 7- 7

8 C. P. L. R.

1 54-21
33 105-42
" 108(j)- 1
45 111-10
65 2- 5
83 2- 5
109 48- 9
113 58-31
" 60-49

9 C. P. L. R.

5 R8- 7
" R5-11
22 52-15
35 186- 4
57 107- 6
75 R3- 3
113 108(j)-4
122 111- 8
130 66- 1

9 C.P.L.R.con

130 R3- 7
142 53-34

10 C.P.L.R.

10 59- 3
48 100-12
107 54-23

11 C.P.L.R.

5 115- 4
75 67-19
" 91-39
87 3- 4
89 3- 3
95 91- 4
" 91-14
103 62- 2
" 62- 5

12 C.P.L.R.

26 58-30
" 69- 3
" 100-17
" R14- 3
63 7- 7
70 92- 2
" 101-10
78 R6- 5
" R11- 2
82 R3- 7
96 58-36
" 105-67
103 R3- 7
109 6-30
" 40-22
134 111- 8
154 53A- 3
158 108(j)-1

13 C.P.L.R.

33 R1- 8
43 3-29
" 3-30
" 3-34
74 R7- 6
97 55- 9
163 53A- 3
" 54-23
172 40- 8
" 54-23
180 53- 1
" 53- 6
" 53-17
" 53-19
" 53-20
" 53-34

14 C.P.L.R.

17 100-12
" R14- 7
35 R14-10
42 59- 8
49 83-20
" R11- 2
57 54-14
65 50- 3
76 44- 4
84 8-13
" 36- 1
" 36- 4
" 36- 7
114 10- 1
" 10-12
117 54-12

14 C.P.L.R.con

169 63- 5
" 63- 6
177 60- 1
" 67-19

15 C.P.L.R.

1 5- 4
6 52-39
9 108(l)-1
" 111-14
24 R2- 7
42 105-16
78 67- 7
89 105-42
141 8-15
156 44- 6
163 8-20
175 91- 4
" 91- 9
" 91-13
" 91-42
" 105-42
188 67-19

16 C P L.R.

36 108(d)-3
45 59- 7
49 58-36
52 100-12
55 36- 2
59 60- 5
73 R3-12
92 R3- 7
95 48- 9
" 59- 5
111 R2-16
164 53-11
" 53-12

17 C.P L.R.

13 7- 3
19 53A- 3
24 53- 1
" 53- 6
" 53-12
62 R3-12
164 R11- 2

Nagpur Law Reports

1 N. L. R.

14 3-12
" 59- 7
24 60-14
39 R6- 3
43 R11- 2
47 59-14
49 8-19
66 7- 7
106 R11- 2
117 100-25
" R1- 1
" R1-19
" R14- 3
125 48- 9
143 R6-22
147 107- 7
158 78- 7
185 7- 8

2 N. L. R.

4 51-22
" 51-25
10 59- 8

2 N.L.R.con

17 6-16
29 111- 7
" 111- 8
34 51- 8
" 51-17
" 51-18
" 51-23
52 6-2a
57 8-20
62 84- 5
90 91-21
92 76- 5
113 58-31
116 60-41
137 R2-18
" R7-13
" R8- 7
150 52-21
162 58-17
" 58-28
174 55- 9

3 N. L. R.

19 58-33
55 R2-18
" R3- 7
72 1- 4
" 3- 2
" 9- 1
" 53A- 3
" 54-19
92 95- 1
" 95- 7
97 2- 4
" 8-20
" 58-31
" 58-33
" R2-11
" R10- 8
106 76- 7
138 118- 3
142 111- 7
146 R2-18
" R3- 3
" R3-13
164 100-12
171 7- 3
" 7- 7
185 105-16

4 N. L. R.

1 R11- 2
9 91- 4
" 91- 7
" 91- 8
14 55- 7
20 7- 7
26 53- 9
28 58-19
57 60-17
" 111- 8
90 59- 3
104 105-79
" 108(o)-4
" 117- 3

5 N. L. R.

3 3-11
" 3-16
15 6-26a
21 3- 2
" 3- 3
87 R11- 2

5 N. L. R.con

47 108(l)-14
70 9- 2
" 53A- 3
" 54-17
" 55- 1
" 55-20
82 48- 9
105 44- 4
117 91-21
" R1- 2
136 52-21
146 6-27
" 53- 9
" 53-13
172 38-11

6 N. L. R.

1 59-11
17 106-19
" 106-24
" 106-40
" 111-23
20 5- 5
" 58-30
" 58-41
" 67-15
" 67-18
" R14-12
27 R3- 9
65 105-58
" 105-67
95 116- 1
98 54-14
" 55- 1
" 55-12
109 76-18
140 52-13
" 52-18
" 52-39
152 3-11
" 3-18

7 N. L. R.

1 6- 9
2 67-29
14 R11- 2
72 53- 3
" 58-11
" R2-20
82 44- 4
85 59- 8
154 111- 7

8 N. L. R.

17 3-18
82 6-35
97 6-35
123 8- 8
" 67A- 1
136 2- 5
163 105-84

9 N. L. R.

1 R1-12
18 44- 6
74 7- 7
" 38-12
145 44- 6
155 52-27
191 67-30

10 N. L. R.

9 68-14
" 76- 8

10 N.L.R.con

9 77- 1
72 60-41
" R1-12
81 3-11
" 58- 4
" 58-27
" 58-30
" 59-15
" 100-13
" 100-14
" 100-15
93 111- 8
108 108(d)-2
111 9- 7
129 111- 8
150 R2-18
" R2-23
" R7- 3
166 63- 9
185 58-41

11 N. L. R.

16 R5-14
21 52-13
" 52-19
" 52-39
49 117- 3
122 117- 3
153 67- 5
" 67- 7
180 60-28
186 55- 9

12 N. L. R.

3 54-22
19 58-27
" 58-29
" 68- 2
50 91-10
" R5-29
90 73- 1
" 73-14
139 54-21
" 54-22
161 7- 7
177 55-20

13 N. L. R.

11 111-14
18 122- 7
" 127- 4
19 55-20
" 100-15
69 60-86
" 91-39
" R1- 5
" R1-19
76 R6- 3
121 59- 8
" 68- 2
130 6- 7
" 7- 3
" 7- 7
" 43- 2
" 43- 4
" 43- 7
165 2- 5
187 6- 4
213 R4-10
217 92-11

14 N. L. R.

3 111- 2
12 7- 7

14 N.L.R.*con*
18 52-19
35 3- 2
101 44- 1
" 44- 4
107 111- 8
" 115- 1
" 115- 3
117 65A- 1
" 91- 4
" 91-12
129 106- 3
133 52-39
176 52-11
" 55- 7
181 7- 7
" 43- 4
184 61- 2
" 91- 8
188 108(j)-9
" 117- 2

15 N. L. R.
31 107- 7
68 53- 6
" 53-20
75 59- 6
93 123- 1
101 62- 2
109 55-12
134 58-40
" 67-18
" 98- 1
154 7- 7

16 N. L. R.
3 53- 5
" 53-14
" 53-24
64 7- 7
94 76-12
114 100- 5
129 53- 9
131 7- 7
154 60-41
" 76-15
180 67-19
" 91-12
" R1-19
194 7- 7
196 3-11a
215 R1-19

17 N. L. R.
33 52-35
" 67-19
69 53-19
103 54-12
" 123- 4
176 R1- 5
" R1- 6
194 38- 8
200 92-24
202 60- 5
205 111-13

18 N. L. R.
1 3-31
" 41-13
" 59- 9
8 54-21
27 41-12
" 41-14
47 83-17
89 10- 5

18 N.L.R.*con*
89 108(j)-5
127 7- 7
145 58-27
" 58-29
" 68- 2
" R6- 5
" R6- 6

19 N. L. R.
1 60-39
" 105-58
" 105-67
18 91-12
" R1-15
" R1-19
50 114- 7
" 114- 8
67 58-29
" 68- 2
124 R3- 7
" R5-11

20 N. L. R.
46 58-29
" 68- 2
60 9- 9
" 122-5a
87 7- 7
115 60-41
" 101- 1
122 R5-14
126 54-12

21 N. L. R.
21 92-17
133 52-16
144 52-27
165 92-24
" 92-25
465 R1-19

22 N. L. R.
5 7- 7
13 108(l)-5
67 52-12
108 6-16
" 6-21
110 52-18
" 52-27
124 123- 2
136 6-29
169 5- 4
" 9-12

23 N. L. R.
16 3- 2
" 105-49
26 105-35
" 105-36
" 108(l)-5
86 9-12
" 52-18
" 60-54
" 67-20
" 91- 7
" 91-10
" 92- 7
" 92-23
" 92-29
" R1-19
128 91- 4
" 91-12
" R1- 6
143 53-34
" 59- 6

23 N.L.R.*con*
152 105-70
" 107- 5
164 52- 7
" 91-25
" R1- 6

24 N. L. R.
68 105- 9
" 107-10
119 92-27
" R2-15
186 68-10
189 55-20

25 N. L. R.
12 70- 3
19 1- 6
" 67-20
" 91- 8
" R1-19
28 38-12
" 44- 6
131 53A- 3
171 91- 7
" 92-12
" R1-10
175 R2- 5
187 58-29
" 58-31
" 67-18

26 N. L. R.
154 R6-22
163 106-49
208 91- 4
" 91-24
277 41- 8
300 84- 5
312 58-29
" 59A- 3
" 68- 4
" 68- 8
" 73- 1
345 44- 4
359 R1- 5

27 N. L. R.
1 43- 8
4 60-43
" 60-44
" 82-19
" R1- 6
24 3-34
" 8-20
" 114- 1
95 R5-14
116 111- 8
144 41- 8
152 92-15
" 95- 1
183 51-23
199 6- 7
207 55- 9
258 82- 7
283 41-10
288 6-16
" 55-12
312 R1- 5
" R1- 6
" R11- 2
318 2- 6
" 55- 9
327 137- 4
382 53-20

27 N.L.R.*con*
392 54- 4
" 55- 9

28 N. L. R.
1 R11- 2
20 123- 5
31 55- 9
69 R1- 6
93 111- 1
" 115- 1
" 115- 4
149 83-17
" 84- 7
184 55- 3
" 55- 4
214 91-37
" 92- 6
" 92-14
" 100-29
221 R2-18
227 41- 8
" 41-23
247 92- 5
" 92- 9
255 8-20
340 6-16
345 R11- 2

29 N. L. R.
77 60-41
" 91-12
" 91-21
" R1-12
130 R5- 6
142 70- 2
183 92-27
227 R2-18
246 53-24
298 55-14

30 N. L. R.
1 82-17
" 92-15
25 115- 1
29 44- 6
62 3-11
" 3-19
138 55- 9
142 101- 4
" 101-10
148 92- 3
" 92- 6
164 92- 2
" 92-22
" 101- 1
196 78- 1
" 78- 3
" 78- 4
" 78- 8
" 78-11
208 119-10
218 6-16
265 67A- 1
" 67A- 2
" 91-10
" 92- 2
284 52- 7
" 53-31
303 65- 4
" 100-22
325 R14- 3
331 R 2-11
" R11- 2

31 N. L. R.
113 38-12
129 7- 7
142 3-22
" 6-16
154 3-24
" 92-22
169 92- 1
188 8-20
203 6-17
235 6-16
" 58-18
239 6-13
352 R1-12
368 108(e)-6

31 N. L. R. (Sup.)
1 67A- 1
" 67A- 2
101 55- 2
124 44- 7
" R 6- 3
" R10- 3

I L R NAGPUR

ILR1936Nag
9 83-17
" R1-19
19 76- 5
22 52-19
" 52-35
" 56-10
" 58- 4
" 73- 1
" 100-13
60 8-20
69 5- 4
" 53- 5
" 53- 6
" 53-14
115 53A- 5
" 53A-13
" 53A-17
" 107-14
127 91- 2
" 91- 9
" 91-25
" 91-37
" R1- 6
177 41- 8
" 41-21
183 53-2a
" 53- 5
" 53- 8
" 53- 9
" 91- 8
" 92-13
" 92-17

ILR1937Nag
32 R4-12
94 53- 8
" 53- 9
111 7- 7
" 92-17
204 8-13
" 8-16
214 106-40
" 110- 1
242 53A- 3
" 53A- 5
" 53A- 9

I L R 1937 Nag *con*
291 53-20
" 54- 5
" 123- 6
349 67A- 4
366 R1-12
367 8-19
" 91- 5
" 91- 8
406 105-31
" 105-72
" 106-12
" 108(c)-6
436 11- 2
452 52-13
" 52-31
" 53-20
" 91-10
" 91-25
498 R1- 5
503 60-44
" 67-27

ILR1938Nag
31 3- 4
" 117- 3
" 117- 4
45 55-14
50 8-20
91 67-18
" R4- 9
160 51- 9
" 61- 5
183 57- 2
" 57- 4
" 100-24
206 92-13
" 92-20
" 92-22
268 68- 8
431 100-28
456 R11- 2

ILR1939Nag
246 65-10
" 72- 9
261 R6-15
266 48- 8
293 1-3a
" 41-21
" 123- 2
310 60-26
" 92-27
" R5-13
318 55- 9
432 3- 2
" 3- 3
" 3- 4
" 3- 9
" 53A- 5
" 53A-15
" 105-14
" 111-10
526 Pre- 1
580 8-20
636 55-12
652 7- 7
" 54- 5
690 92-13

ILR1940Nag
37 6-16
63 59A- 3
" 68- 4

The special features of this work are indicated in the Preface.

ILR 1940 Nag.con
63 68- 8
94 52-35
177 5- 4
" 53A- 6
269 51-22
" 105-32
" 106- 6
" 116- 4
" 116-13
293 53-29
316 53- 3
" 53- 5
" 53-20
385 67-28
573 6-35

ILR 1941 Nag
203 105-67
214 7- 7
256 100- 5
" 100-13
" 100-16
386 53A-13
434 95- 1
474 100-29
513 Pre- 2
" 3-48
" 39- 2
" 100- 1
" 100-22
" 100-28
607 58-40
" 67-18
" 100-12
" 100-21
" R4- 9
615 9- 5
" 54-19
" R1-19
652 52-10
677 67-29
" 73- 1
691 8-20

ILR 1942 Nag
24 41-21
126 8-20
145 R1-15
" R1-19
159 R15-10a
172 67A- 1
" 67A- 8
230 R4-10
232 51-22
" 51-24
263 8-20
" 100- 5
" 100-13
309 101- 1
" R1- 5
349 108(a)-2
357 58-31
" 67-14
393 82- 2
" 92- 1
" 92- 3
" 92-24
" 95- 1
543 91-21
592 8-20
" 58-33
" 58-44
701 R1- 5

ILR 1942 Nag.con
721 105-64
736 40- 8

ILR 1943 Nag
10 8-20
42 53-2a
" 53- 5
" 53- 6
" 53- 8
" 53- 9
" 53-15
" 53-20
" 53-22
390 52-34
422 R4-12
" R6- 4
" R6-12
643 6-17
713 100-22
" 100-28
726 41-10
762 6-16
" 130- 4
796 R1-19

ILR 1944 Nag
40 60-26
81 122-5a
125 53- 5
" 53- 8
" 53-10a
" 53-13
" 53-24
133 53- 5
141 8-20
" 117- 2
170 132- 2
" 132- 7
230 56- 6
" 56-12
" R15-10a
267 105- 7
" 108(j)-5
" 116- 1
335 9-11
342 53- 5
" 53- 6
" 53-13
" 53-20
" 53-22
" 53-29
" 53-30
381 67-28
383 101- 3
" 101-10
425 R3- 7
568 58-29
" 58-31
" 68- 2
577 R1- 5
597 R1- 5
704 117- 4
838 105-47
852 41-16
" 52-31
" 54-23
871 126-2a
" 130- 3
" 130-23
877 114- 1
" 114- 5
" 114- 7

ILR 1944 Nag.con
877 117- 2
885 R5-10

ILR 1945 Nag
174 8-16
" 10- 6
" 14-10
194 60-42
" 128- 4
" 128- 5
510 107- 5
629 106-37
" 112- 2
643 101- 1
" R4-15
" R5- 5
" R5-19
" R6- 8
" R6-10
" R6-21
704 117- 4
885 R3-13

ILR 1946 Nag
278 58-33
297 59A- 3
469 92- 3
" 92- 6
" 100-17
568 108(c)-1
" 108(c)-3
" 108(c)-8
" 117- 2
758 52-21
991 53A-9a
" 53A-11
" 53A-12
" 111-10

ILR 1947 Nag
328 54-23
412 R1- 4
" R1-18
" R1-19
" R2-18
" R3- 5
449 53A- 3
" 53A- 9
510 3-31
" 41- 1
" 41-13
" 41-21
" 41-23
" 53- 6
" 53-20
" 53-22
553 60-14
643 R1- 6
" R6- 6
649 R3-14
668 95- 4
719 52-18
" 52-27
" 52-40
" R1- 6
" R1-19
740 8-20
" 60-44
" 65A- 7
" 91- 4
" 91-12
912 52-35
" 60- 4

ILR 1947 Nag.con
912 60-23
" 60-44
" 92- 6
" 92- 7
" 101- 6

ILR 1948 Nag
50 55- 9
73 117- 4
133 52-31
" 1- 6
200 40-15
290 65- 4
" 67-4a
324 52- 9
393 R1-12
506 41-21
573 52-14
" 52-31
584 91- 4
" R1- 5
595 60-44
" 81- 2
" 82-4a
" 82-10
621 3-11a
" 3-19
" 59- 8
824 123- 5
843 137- 5
922 105-37
" 105-40
" 106-32
" 116-13
936 65- 4
978 106-18

ILR 1949 Nag
12 60-32
60 60-41
78 58-33
122 68- 4
" 68- 8
" 68-16
167 112- 5
284 58-29
" 60-22
376 60-43
432 108(j)-5

OUDH

Oudh Cases

1 Oudh Cas.
18 65A- 1
42 91- 4
" 91-13
49 R5-20
53 R1-12
91 R2-18
105 R1-10
163 100-32
170 6-24
280 52-13

2 Oudh Cas.
12 58-40
24 68- 5
37 R11- 2
74 54-18
103 R10- 8
115 18- 5

2 Oudh Cas. con
196 R7-12
330 52-35
337 R5- 4
344 60-43

3 Oudh Cas.
1 R5-20
8 45- 5
18 130-19
42 R5-20
129 R11- 2
170 2- 6
" 52-31
173 60-50
213 58-33
215 3-21
371 60-26

4 Oudh Cas.
61 100- 5
93 R11- 2
100 59A- 3
" 91- 5
" 91- 8
" 91-12
163 10- 1
" 10- 7
199 91- 5
210 3-21
231 2- 5
" 67-31
238 R3- 7
264 105-47
273 92- 7
" 95- 1
" 95- 6
301 R2-20
320 68- 5
355 83- 8
" 84- 5
387 83- 2
" 84- 2

5 Oudh Cas.
18 38-11
" 38-12
78 55- 9
82 R7-13
" R8- 7
89 123- 2
94 R1- 5
108 R5-20
113 106- 2
" 106-17
" 106-41
" 108(l)-1
127 60- 4
148 60- 5
155 R11- 2
222 117- 3
228 3- 3
251 R5-20
286 67-15
" R11- 2
336 43- 9
345 8- 6
" 123-10

6 Oudh Cas.
26 105- 5
59 R6- 3
135 83-17
" 84- 7
151 67-13

6 Oudh Cas. con
167 58-40
" 60-28
" 98- 1
184 40- 1
" 40-14
223 60- 4
" 60-41
230 58-11
279 59- 7
294 52-13
331 10-15
" 65- 4
339 68-13

7 Oudh Cas.
11 58-41
" 98- 3
90 8- 5
98 43- 7
108 100- 5
169 107-10
243 67-19
" R1-19
307 60-23
" R14-12
314 67-31
" R14-13
330 91-39
" 101- 1

8 Oudh Cas.
5 58- 6
" 58-18
13 51- 9
" 105-50
33 R2-18
61 8- 7
" 105-47
75 R5-20
" R5-23
132 60-28
" 61- 2
140 58- 5
197 107-10
227 61- 5
" 100- 5
270 8-20
302 R9- 3
317 Pre- 4
327 R14- 7
345 55- 9
349 91- 4
" 91-16

9 Oudh Cas.
18 63A- 4
55 6- 5
63 60-44
91 92-15
" 95- 1
97 7- 7
113 123- 5
144 68- 6
" R11- 2
156 44- 9
" 44-10
174 137- 4
196 123- 4
233 67-21
259 55-20
" 82-17
" 95- 1
" 95- 3

In the foot-notes to the Commentary ‡ indicates either a leading case or a case giving fuller reasons.

9 Oudh Cas. *con*

259 95– 7
284 55–12
288 R6-22
296 105– 9
„ 105–19
„ 105–70
„ 107– 7
„ 107–10
„ 116–12

10 Oudh Cas.

14 58-40
„ 67–18
„ 68– 2
„ 68–17
17 100–15
„ 100–17
29 68–14
31 111–11
49 51–12
69 58–18
81 60–44
136 10– 1
193 60–41
214 60–34
277 6– 7
289 6-2a
„ 7– 7
„ 68–13
314 52– 1
„ 52–13
321 7– 7
354 R3– 6
356 91– 7
„ 91–10

11 Oudh Cas.

1 7– 7
48 2– 9
„ 18– 5
73 60–44
89 58–18
95 58–33
197 53–16
„ 53–24
217 58– 6
231 R14–10
248 59– 5
„ 61– 5
285 60–50
301 6– 3
„ 54– 8
323 60–10
337 5– 5
377 R6–11

12 Oudh Cas.

37 91–35
„ 91–42
45 67–30
„ R5–19
74 53–34
84 8–20
133 67–20
140 105–19
„ 105–70
„ 107– 7
„ 107–10
„ 108(l)–1
197 91– 4
„ 91–13
201 91– 4
„ 91–13

12 Oudh Cas. *con*

236 51–10
257 59– 5
„ 59– 7
260 58– 5
271 91–12
275 58–29
„ 68– 2
„ 68–13
279 106– 2
„ 116–12
285 92–19

13 Oudh Cas.

32 R7– 4
50 52–18
„ 52–38
98 52– 1
„ 52–13
128 60–37
„ 62– 5
137 R5–14
155 68– 2
„ 68– 5
265 53–16
„ 53–34
„ 59– 6
347 123– 4

14 Oudh Cas.

10 R8– 7
41 105–42
45 60–14
62 R6–10
106 58–17
139 54–23
144 6–27
„ 10–15
147 R4– 8
„ R5–18
161 54–19
189 8–20
„ 10– 4
201 117– 2
214 54–12
217 R6–10
295 6–2a
„ 43–13
299 38– 8

15 Oudh Cas.

1 58–33
49 7– 7
67 3–31
„ 6– 1
„ 6–30
„ 6–37
„ 10–15
91 105–14
„ 111–13
122 6– 3
170 108(o)–7
211 91– 8
„ 93– 3
259 65A– 1
„ 65A– 7
„ 66– 1
271 126–10
285 60–28
295 105–71
„ 108(l)–1
„ 111–18
345 10– 1

16 Oudh Cas.

1 55–12
9 58–33
48 72– 3
„ 72– 8
56 58–35
90 58–41
„ 67–18
„ 98– 5
119 92–24
148 52– 1
„ 52–31
„ 52–35
„ 92– 1
157 2– 5
161 73– 1
163 62– 3
199 60–17
„ 60–41
„ 82–12
225 52–13
„ 52–42
238 R6– 3
261 83–16
„ 103– 2
267 60–28
„ 61– 5
„ 62–12
378 7– 3
„ 126– 9
„ 126–10

17 Oudh Cas.

47 76–19
60 123– 4
150 52–21
153 R6– 3
157 3–31
„ 6–38
173 53– 6
„ 53–20
218 60– 5
„ 62– 5
299 54–11
„ 105–42
303 60–28
313 60– 5
„ 60–28
„ 60–32
347 R2–18
„ R3– 3
„ R5–13
388 62– 6
„ 62–12

18 Oudh Cas.

10 58–17
„ 58–40
„ 98– 1
55 R6– 3
58 R7–13
„ R8– 7
105 60–29
109 54–19
„ 118– 3
„ 118– 7
115 7– 8
121 R6–21
122 3– 3
„ 123– 4
131 53– 9
147 58–22
154 60–15
168 6–24
„ 7– 7

18 Oudh Cas. *con*

168 59– 8
280 58–18
347 R1–19
363 67–22
369 52–18
380 100–32

19 Oudh Cas.

12 60–10
30 R8– 7
49 100– 5
„ 100–32
58 R1– 5
60 136– 3
75 8–20
145 83–15
„ 84–10
166 R11– 2
192 35– 4
„ 123– 4
328 76– 5

20 Oudh Cas.

13 52–27
25 76–12
„ 76–13
33 54–21
„ 54–22
72 43– 7
„ 43– 8
„ 95– 1
97 60–28
132 67– 5
155 6– 7
„ 68– 2
„ 68–13
243 35– 9
„ 35–19
256 68– 3
„ 73–10
„ 73–14
268 R3– 7
295 53–29
306 59– 8
„ 68–13

21 Oudh Cas.

70 R1–19
97 53–20
106 11– 5
156 7– 7
172 60–44
180 11–10a
214 44– 4
234 55–11
263 8– 3
312 19– 6
„ 19– 8
317 48– 2
„ 48– 5
„ 48– 6
327 100–32
341 58–40
„ 98– 1
360 9– 7
„ 48– 6
„ 82– 4
400 8– 8
„ 8–17
„ 8–18

22 Oudh Cas.

92 72– 3
„ 92–29

22 Oudh Cas. *con*

58 54–21
72 92– 9
112 58–18
„ 82–17
„ 95– 7
159 61– 5
171 52–38
191 60–32
212 5– 3
„ 100– 8
212 R14– 4
222 122–16
243 41–12
„ 41–14
258 38–11
„ 38–12
270 72– 2
„ 72– 3
„ 72– 8
„ 76– 1
„ 76– 8
278 82–17
„ 95– 1
349 101– 4
978 95– 1

23 Oudh Cas.

50 54– 5
108 60–32
118 40–14
145 68–16
„ R6– 3
„ R6–10
150 R11– 2
238 6– 4
320 38– 8
„ 38–11
334 60–26
„ 92– 7
„ R5–13
384 6–21

24 Oudh Cas.

151 6– 4
155 3– 2
„ 54–19
„ 60–27
240 61– 5
272 54–17
310 54–11
„ 105–42
321 19– 2
„ 123– 4
330 60–32
374 8– 5
„ 8–20
„ 123– 4
386 38–12

25 Oudh Cas.

2 72– 3
„ 76– 8
8 60–28
„ 60–29
„ 98– 1
36 R11– 2
39 105–57
„ 105–58
„ 105–61
83 53A– 3
83 60– 1
89 59– 5
95 123– 4

25 Oudh Cas. *con*

134 61– 5
164 68–13
181 108(b)–2
„ 117– 2
189 10– 3
„ 10– 8
291 53– 6
„ 53–17
„ 123– 4
319 6–12
„ 8–19
388 38–12

26 Oudh Cas.

59 84– 7
„ R11– 2
128 123– 4
176 11– 2
„ 11– 8
209 60–28
223 4– 4
„ 6– 4
„ 55– 1
„ 68–13
231 105–79
245 43–11
286 60–12
289 101– 1
306 R8– 7
308 60–44
317 R1–21
368 6– 3

27 Oudh Cas.

1 111– 1
4 60–28
56 7– 7
„ 92–16
„ 92–17
60 58–18
64 4– 6
„ 40–25
„ 107–12
72 72– 3
„ 76– 1
„ 76– 8
167 54–11
„ 105–42
175 53– 9
„ 53A– 3
214 7– 8
224 106– 2
„ 116–12
243 54–11
„ 105–42
250 76–12
„ 76–15
„ 77– 1
329 38– 8
„ 38–11
350 8– 5
„ 10– 9
357 58–44
360 60–44
378 5– 4

28 Oudh Cas.

46 R7–13
„ R7–17
„ R8– 4
77 106–32
„ 108(l)– 8
100 77– 1

In the foot-notes to the Commentary † indicates a case which is most appropriate for the proposition.

28 Oudh Cas *con*

114	51-22
„	51-23
„	51-24
221	72- 8
227	54-12
261	R 8- 7
265	123- 4
336	62- 5
338	58-22
„	126- 9
„	126-10
352	6- 4
„	10- 3
„	10-16
382	54-19
„	R 5-21
393	38-12

29 Oudh Cas.

15	48- 9
„	61- 5
26	R 4-15
34	R 2-11
37	2- 6
„	52-18
„	52-31
90	54-11
108	8-20
„	54- 4
„	54-12
118	60-28
253	60-34
316	54- 8
336	60- 5
„	72- 3
„	72- 5
378	123- 5
„	123-10

I.L.R. Lucknow

ILR 1 Luck.

7	55-12
33	123- 5
„	123-10
83	8-20
„	54- 4
„	54-12
92	60-28
176	100- 5
210	73- 1
273	123- 5
„	123-10
318	39- 5
354	60-34
367	60- 5
„	62- 5
„	72- 3
„	72- 5
389	54- 8
529	60-22
560	101- 2

ILR 2 Luck.

4	8- 2
213	60-51
221	R 7-19
226	7- 7
„	58-25
279	60- 5
288	R 1-12
299	58- 6
335	8- 4
„	8- 5
„	28- 2
388	R 4- 9
416	54- 5
470	58-33
496	52-11
„	52-31
507	11- 2
„	11- 8
553	58- 8
564	60- 5
„	60-37
„	76-12
„	76-15
575	54- 5
„	54-12
588	60-32
612	111- 1
618	82-17
„	92-15
„	95- 1
640	3-11
659	52-39
662	5- 4
676	68- 6
686	82-17
„	92-15
„	95- 1
731	55-14
740	44- 4

ILR 3 Luck.

1	58-35
19	11- 2
„	32- 9
107	53A-13
„	54-17
113	3-12
„	61- 5
„	100- 5
282	105-17
„	105-59
298	58-14
372	41-10
411	R 6- 8
439	67- 5
446	100- 5
459	58-17
„	61- 2
„	61- 5
„	62-12
521	123-12
636	11- 2
„	11-10a
„	43- 4
645	3-31
674	45- 7
719	73- 1

ILR 4 Luck.

13	54-14
„	59- 6
57	53A- 6
107	58-25
„	68-13
147	60-28
„	60-32
„	60-34
185	6- 6
203	60- 5
„	60-32
243	5- 4
250	R 12- 3
279	38-12
305	8-20
„	19- 2
„	19- 4
„	123- 4
343	53-20
363	58-41
„	67-15
„	68-12
„	68-17
„	98- 5
415	60-34
452	5- 4
„	10- 3
„	41-23
„	54- 5
483	11- 2
597	41-23
622	6- 7
549	106-24
„	111-13
„	117- 3
„	117- 4

ILR 5 Luck.

49	55-20
53	92- 2
128	59-12
172	39- 2
„	100-24
285	7- 7
305	14-14
365	58- 4
„	61- 5
„	62-12
„	100- 5
369	68- 3
384	7- 7
„	123- 4
504	3- 2
526	58-22
547	3-22
„	6-16
595	R 2-11
597	123- 4
625	52-14
„	53-20
„	R 6-23
658	R 1- 5
684	60-48
691	91- 4
„	91-16
702	68- 3
„	73-10
721	54- 5
„	54-11
„	105-42
727	82- 2
„	82-13
„	85-15
„	82-16
„	82-17
„	82-25

ILR 6 Luck.

132	R 6- 3
197	111- 7
202	R 6- 3
203	60-32
282	54-12
374	65-10
„	68- 4
397	53-11
403	123- 4
546	53-34
„	65A- 4
556	123- 4
610	60-26
„	R 2-18
„	R 3- 3
619	3-11
„	3-14
„	3-19
710	91-13
715	67-10
„	91-15
„	R 1-19

ILR 7 Luck.

16	53A- 3
26	92-19
„	101- 3
„	101-10
41	3-17
„	67-22
94	60-50
„	R 7- 3
131	3-43
„	53-11
„	53-34
237	58- 6
„	92- 1
„	92-19
„	100- 5
257	2- 5
„	10- 3
„	10- 6
„	10- 9
„	11- 9
292	55-15
405	55-12
411	39- 1
„	39- 2
„	39- 5
„	53-10
„	53-20
„	128- 4
425	111- 9
442	67- 5
454	58-22
„	76- 4
„	76-12
„	76-15
„	76-20
„	R 7- 6
„	R 10- 3
655	92- 1
„	92-20
„	101-10

ILR 8 Luck.

40	72- 7
„	76-12
„	76-15
„	92-19
„	R 7- 4
„	R 11- 2
103	92-23
121	45- 6
168	58- 4
„	100- 5
„	100- 7
„	100-13
„	100-17
„	100-22
168	100-24
185	55-11
„	55-12
190	58-35
„	67-18
„	68- 5
„	68-17
217	R 5-23
„	R 6-10
242	67- 5
315	R 11- 2
354	8-20
377	105-41
„	105-47
488	67- 5
496	R 5-16
538	38-11
„	38-12
„	58-25
602	19- 2
„	19- 3
„	19- 4
707	31- 6

ILR 9 Luck.

12	3-11
„	3-14
„	3-19
„	58-22
51	R 6- 3
90	R 6- 3
112	106-32
151	60-28
„	60-32
162	R 6- 3
173	19- 6
„	19- 8
211	R 6- 3
„	R 6- 8
237	38-12
291	R 1- 5
329	13- 2
„	16- 3
359	43- 7
378	19- 6
„	19- 8
387	R 2-18
456	76-12
„	76-15
„	76-19
475	52-21
530	122-12
538	51-23
571	41-23
„	41-25
657	59A- 3
„	60-22
„	61- 3
„	61- 5
„	91- 5
701	100-31
717	92- 5
„	92-19

ILR 10 Luck.

10	58-30
„	58-41
„	98- 5
26	3-22
„	6-16
„	55-12
70	77- 1
„	R 1-19
233	R 6- 3
274	55- 8
289	54- 5
293	R 14- 2
„	R 14- 7
307	8-20
„	105-60
350	83- 4
„	83- 9
361	7- 7
392	54-11
„	105-42
459	7- 7
481	8-20
„	58-17
„	59A- 3
„	61- 3
„	61- 5
490	106-13
„	107- 4
„	117- 3
531	91- 4
„	91- 5
606	8- 6
652	3-31
687	R 11-2
690	82-13
„	82-17
„	92-15

ILR 11 Luck

11	38-11
116	R 5-14
199	128- 5
„	128- 6
224	92- 5
„	92-22
270	67-19
„	101-10
283	52-12
„	52-39
302	101- 9
346	3-14
„	58-22
376	41-10
„	41-23
481	R 6- 3
500	R 5-14
519	R 6- 3
575	100- 5
„	100-17
„	100-26
583	6- 1
„	8- 4
697	82- 2
711	68- 5
725	55- 9
757	R 5- 5

ILR 12 Luck.

72	R 4- 6
82	67-27
„	R 9- 3
109	8-20
„	59- 8
133	51- 1
144	68- 5
„	68- 7
150	136- 2
161	58-36
„	65A- 1
„	65A- 2
„	91-12

References to Official Reports are invariably given in all cases found in the Official Reports.

I L R 12 Luck con

161 105-67
185 7- 7
" 92-17
207 R6- 8
215 43- 7
" 55-15
" 68- 8
241 106-41
" 110- 1
256 103(o)-3
313 68- 8
" 68-17
" 68-18
" R6- 4
" R6-10
339 54- 5
353 100-11
" 100-21
" 100-24
358 6- 6
435 7- 7
" 68- 2
514 107-10
" 117- 3
516 103- 2
540 52-31
" 55-18
563 3-34
639 5- 4
684 5- 4
690 67-20
" R1-19
731 41-23

ILR 13 Luck.

35 6-13
" 100- 5
" 100-17
" 100-22
101 100- 1
" 100- 6
" 100-13
" 100-22
" 100-24
" 100-28
122 82-18
129 R6- 3
" R6-10
192 51-22
215 61- 2
" 61- 5
237 R5-10
357 60-51
365 5- 4
373 137- 4
409 11-10a
450 51- 8
" 51- 9
481 R11- 2
484 54- 5
" 59- 6
" 91- 8
" 92-13
531 4- 4
" 7- 7
" 68-13
577 8-20
625 91-28
" R1- 6
" R1-10
655 53-20
662 11- 9

I L R 13 Luck con

662 54-11
669 60-50
680 58-33
697 122- 7
713 19- 2
723 14-14
746 5- 3
" 100-24
" 100-32
753 101- 3
761 92-15

ILR 14 Luck.

9 5- 4
" 123- 5
49 R10- 3
71 92- 5
89 8-20
393 59- 7
404 2- 6
" 54- 3
492 Pre- 1
543 52-12
548 52-27
" 128- 3
" R1- 7
595 35-28
621 53-20
" 53-22
723 8-20
" 111-10
" 111-14
" 112- 2

ILR 15 Luck.

43 53A- 9
" 53A-10
" 53A-13
95 R4-15
" R6- 8
" R6-17
175 60-44
" 92- 5
" 92-15
229 Pre- 1
288 8-20
399 67A- 2
" 67A- 5
" R1- 4
" R1-19
463 R1-11
503 53-11
" 53-24

ILR 16 Luck.

44 106- 3
" 106- 6
" 116-13
99 3-20
" 53A- 5
" 53A-10
110 R1- 3
168 R1- 3
" R1- 6
191 53A-13
484 43- 7
" 43-11
607 3-29
" 100-11
" 100-21
" 100-24
789 8-20
" 55-35

I L R 16 Luck con

789 58-31
" 58-33
812 58-17
" 72- 5
" 76-19
" R2-12
" R7- 4
832 53- 5
" 53- 6
" 53-14
" 53-18
" 53-20
" 53-24

ILR 17 Luck.

198 58-33
205 105-19
" 107- 7
" 107- 8
" 116-13
297 76-12
" 77- 1
362 48- 8
" 58-35
" 58-40
" 58-41
" 68- 5
" 68-12
401 105-42
482 R1- 2
" R1-12
" R1-19
530 107- 7
" 107-10
" 108(f)-2
610 51-22
636 41-23
701 54-11
712 111- 6
727 76-12
" 77- 1
755 91- 5
" 92- 1
" 92-22
805 10-13
" 105-79
" 111-12

ILR 18 Luck.

71 R5-14
92 45- 4
130 68-13
147 6-13
183 R9- 1
201 107- 7
" 107- 9
273 76-12
" 77- 1
303 54-11
366 92- 9
390 108(o)-4
" 117- 2
433 2- 6
" 54- 3
484 76-12
" 77- 1
601 R1- 6
" R1-19
683 100-10
" 100-13

ILR 19 Luck.

1 52-14
" 100-11

I L R 19 Luck con

1 100-13
" 100-28
17 101- 1
" 101- 2
37 5- 4
" 6- 4
" 6- 7
" 43- 7
183 R1- 3
" R1- 4
" R1-19
216 41- 1
" 41-10
" 41-23
260 92-23
" 101- 1
265 116- 6
" 116-10
" 116-13
286 76- 8
" 77- 1
" R7- 3
320 5- 3
" 5- 4
" 8- 5
" 8-20
" 14- 6
565 53A- 4
" 53A- 9
" 53A-10
" 53A-13

ILR 20 Luck.

53 R1- 6
85 60-32
179 R6- 4
226 53- 5
461 R5-14
" R5-29

ILR 21 Luck.

43 72- 3
" 76-10
48 3- 3
" 76-10
124 77- 1
185 52-13
" 52-19
" 100- 5
194 105-42
" 107-10
292 106- 6
577 R6-10

ILR 22 Luck.

19 11- 2
26 R14-12
37 60-41
" 67-28
" 82-19
" 100-17
93 105-48
325 R8- 1

ILR 23 Luck.

13 100-22

PATNA

Patna Law Journal

1 Pat L J

1 10-13
" 10-17

1 Pat L J con

1 105-67
16 8- 6
81 8- 9
109 8- 4
140 55- 7
157 111-12
174 54- 4
185 112- 4
228 82-18
238 54-23
253 2- 5
" 108(j)-1
261 67-19
" R1-19
" R5-13
275 8-10
441 44- 5
455 54-23
468 R1-12
" R1-19
562 58-30
563 58- 4
" 58-30
" 65A- 1
" 66- 7
581 8-20
589 72- 3
" 76- 9

2 Pat L J

51 R4-12
" R5-26
" R6-11
55 100-30
" R14- 2
" R14- 3
" R14- 6
101 53-30
118 57- 2
" R1-10
163 4- 4
" 58-18
180 105-47
" 106- 2
" 107- 4
197 R14- 4
" R14-15
293 Pre- 2
" 58- 9
" 58-39
" 70- 1
306 R1-12
490 68- 7
506 108(d)-3
513 3-39
520 60-14
533 R5-14
538 R6-10
546 53-16
587 R14-7
595 106-23
" 106-24
" 113- 3
600 51-22
713 108(o)-1
" 108(o)-2
" 108(o)-8

3 Pat L J

1 Pre- 1
162 68- 5
199 10- 1
" 38-12
426 44- 4

3 Pat L J con

490 60- 4
" 95- 1
" 95- 2
518 7- 8
" 105-22
649 R6- 8

4 Pat L J

207 R4-10
" R5-17
213 R5- 4
240 R5-29
306 R1- 3
347 R2-18
" R2-19
" R3- 7
433 59- 6
505 43- 9
511 3-18
" 59- 8
517 54-15
548 5- 4
580 52-13
682 58-26
" 105-22

5 Pat L J

1 108(d)-2
120 7- 7
151 60-14
" 60-15
248 72- 8
" 100-25
" 100-29
" R14- 3
273 8-10
342 R5-24
376 60-14
423 60-28
" 60-38
492 76- 5
521 41- 1
" 41- 8
" 41-21
" 41-22
" 41-23
563 8-10
595 R9- 3
598 R11- 2
605 43-11
644 60-41
" 61- 3
" 91-20
650 73-10
672 R4-15
" R5-14
715 52-29
" 67-20

6 Pat L J

37 58-12
" 105-67
48 53- 6
" 53-24
106 R6- 3
" R6-10
127 8-10
163 14-10
347 70- 4
451 38-11
465 59- 8
" R1- 6
473 3-11
604 6- 4

6 Pat. L J *con*
640 R1-12
650 R1-12
670 68- 2
676 R11- 2
687 105-47

I. L. R. PATNA

ILR 1 Pat.
5 52- 1
" 52-15
201 8- 4
266 38- 5
" 38- 8
281 48- 7
" 58-18
287 52-31
" 52-32
295 8-20
300 3-19
352 92-19
" 101- 1
" R5-13
350 58-35
" 58-40
" 67-18
" 84-17
363 2- 5
" 111-13
387 58- 4
" 58-30
" 100-13
" R6-18
475 7- 7
" 38-12
506 38- 8
" 38-12
" R1-19
" R6- 3
717 105-50
764 105- 7
" 105-20
" 105-21
780 92- 3
" 92-17

ILR 2 Pat.
52 3-11
" 6-20
" 123- 1
" 123- 8
" 126-14
75 100-31
84 6-38
171 105-37
" 111- 5
175 R1-19
217 58-25
" 58-36
285 7- 7
335 67-28
" 82-12
485 R1-10
" R1-12
452 105-47
538 R5- 5
607 53A- 3
715 60-44
" 82-18
749 100-28
754 130-17
777 R14- 2
" R14-11

I L R
2 Pat. *con*
796 R6- 3
805 R1-5
874 67A- 1
890 72-10

ILR 3 Pat.
81 R1- 8
114 67-20
" 91- 7
" R1-19
183 6-26a
221 R5- 5
244 R1- 5
266 58-36
" 105-67
279 R11- 2
349 107- 7
" 117- 4
" 123-10
367 36- 2
403 105-35
" 105-38
" 105-47
" 105-53
" 116- 1
435 67-20
" 91- 7
" 91-41
" R1-19
465 58-12
" 58-36
" 105-67
522 56-10
" 81- 7
" 81- 8
" 81-13
" R4-10
534 105-34
" 105-37
" 105-47
" 105-80
" 116-13
575 3-22
" 3-24
" 6-16
" 6-18
" 8-14
" 130- 2
581 73- 1
818 60-44
" 91-13
" 105-42
" R1-19
829 61- 2
" R1-19
" R2- 6
842 123- 1
" 123- 6
880 8- 5
915 6-26a
962 56-12
" R4-10

ILR 4 Pat.
43 3-22
" 8-14
" 136- 3
" 136- 4
73 39- 5
128 R6-16
139 105-38
" 105-47
" 105-80

I L R
4 Pat. *con*
139 107- 7
" 108(j)-1
" 116- 4
" 116-13
244 8-10
" 108(o)-6
272 6-26a
404 117- 2
" 117- 3
478 43- 7
510 2-10
619 52-13
" 52-31
693 R14- 3
707 51-22
" 51-23
" 105-55
723 R1-12
" R1-22
799 8-10
" 108(o)-6

ILR 5 Pat.
40 53A- 3
58 3-11
" 59- 8
80 107- 8
135 R11- 2
312 24- 3
415 105- 8
468 55-15
" 68- 8
513 R1-19
585 R6-17
646 6-35
765 3- 3

ILR 6 Pat.
24 R5- 6
94 108(b)-3
" 108(j)-3
" 108(j)-5
102 60- 4
129 76- 6
139 7- 2
" 38- 5
245 3- 2
" 9- 7
" 54-19
358 54-11
" 105-42
388 R4-15
" R5- 5
446 Pre- 4
" 107-12
780 R3-12
" R5- 6

ILR 7 Pat.
28 R4-15
44 76- 8
" 77- 1
95 53A- 3
" 54-15
118 123- 4
305 58- 6
341 2- 5
" 105-43
" 105-79
349 65A- 1
" 66- 7
496 106-49
" 108(c)-4
" 117- 2

I L R
7 Pat. *con*
500 8- 6
520 58-39
" R1- 6
584 5- 5
" 100- 9
" 100-22
613 100-29
646 3- 3
649 105-47
" 116- 4
" 116-13
675 116-13
690 58-33
" 105-67
744 6-26a
798 58-25

ILR 8 Pat.
16 58-29
" 58-35
" 68- 2
68 61- 5
190 108(o)-6
212 68-13
243 14-10
" 60-30
" 62- 8
258 44- 7
316 3-39
360 92-19
" 101- 1
432 55- 9
439 R1-16
450 38-11
" 38-12
549 7- 7
569 68- 7
" 73- 1
585 56-14
" 82- 4
" 82- 7
" 82- 8
776 6-16
860 55-14
926 100- 1
932 14-13

ILR 9 Pat.
401 8-19
417 40-17
487 108(l)-8
" 108(l)-14
539 R1- 5
816 79- 5
" 92-16
" R1-10
930 60-41
" 91-41

ILR 10 Pat.
63 81-13
197 91- 3
" 92-11
203 Pre- 4
" 54- 2
" 108(q)-1
210 72- 3
" 72-10
234 52-18
" R1- 5
264 54-14
332 65A- 1
" 65A- 2

I L R
10 Pat. *con*
341 60-43
" R1-19
407 8-10
417 60-50
481 3-20
" 59- 6
528 82-14
" 95- 3
" 95- 4
630 2- 5
" 101- 1
654 72- 4
670 R1-12
851 5- 6
" 54-23
877 8-10
" 108(o)-6

ILR 11 Pat.
98 105-42
" 107- 7
" 107-13
112 67- 5
227 126-10
266 3-22
" 6-16
" 130- 4
415 52- 1
" 52-28
" 52-36
" R1-19

ILR 12 Pat.
77 R5-17
297 53-20
359 6-2a
" R14-3
616 9- 5
769 67-20
869 39- 5

ILR 13 Pat.
111 83- 7
" 92- 5
" 92-17
200 8-20
" 101- 1
" 101- 2
242 40-17
" 54-23
310 82- 4
356 82-15
" 95- 1
" 95- 4
" 122-5a
364 60-44
" 67-20
" 100-11
" R1-19
379 R5- 6
" R5-24
396 50- 3
" 108(l)14
517 8-10
589 105-69
620 54-23
" 58- 4
" 100- 5
655 137- 4

ILR 14 Pat.
70 6-26a
323108(l)-14

I L R
14 Pat. *con*
400 R11- 2
488 R1- 1
" R4-15
" R5- 5
" R5-14
" R5-29
560 58-35
" 58-38
" 58-40
" 67-18
" 76- 5
595 38-11
640 28- 2
" 28- 3
" 28- 5
" 32- 9
672 4- 5
" 4- 6
" 53A- 3
" 53A- 5
" 107-10

ILR 15 Pat.
8 117- 2
" 117- 3
120 101- 4
127 31- 2
" 31- 7
210 R11- 2
345 R6- 3
" R6- 8
372 52-18
460 4- 5
" 53A-10
" 53A-13
" 105-14
" 107- 9
" 111-13
481 60-44
545 R14- 3
" R14- 4
" R14- 6
607 60-26
673 108(j)-4
" 112- 6
" 114-11
680 8-20
" 111-13
742 61- 2
" 61-10
772 54-19
" 54-22
786 53A- 5

ILR 16 Pat.
74 137- 4
184 36- 2
230 6-2a
" 43-11
299 73- 1
" 73-12
557 82- 2
" 82- 7
" 82- 8
622 43-11
" 73- 1

ILR 17 Pat.
69 111-13
154 92- 2
308 6-34
318 54-14

Remarks in foot-notes amplify principles in the Commentary and state the special features of the case.

I L R 17 Pat. con
358 108(j)-1
460 53A- 5
538 R6-10
549 38- 5
588 53-24
666 92-19
" 92-22
726 58-38
737 8-20
" 68- 2
" 68-17

ILR 18 Pat.
133 60-23
141 60-43
" R1-19
155 91- 2
" 91-25
" 91-37
" R1- 6
317 111-10
342 92- 1
" 92- 2
" 92-19
" 92-23
" 92-24
" 92-30
571 105-43
" 105-48
" 105-49
805 105-50
839 130- 8

ILR 19 Pat.
424 6-27
433 8- 2
" 105- 5
" 108(j)-2
" 108(j)-4
"108(l)-14
524 82-18
715 53-20
" 130- 3
" 130-17
752 53A- 5
" 92- 2
" 92- 5
" 92-27
938 92-15

ILR 20 Pat.
13 8-20
" 54-11
" 105- 5
86 100- 9
" 100-24
" 100-28
96 108(o)- 2
115 105-27
" 105-48
346 52-11
" 52-39
" 107- 9
" 117- 4
521 108(j)-4
" 108(j)-5
751 R14-6
798 6-38
" 100-31
" 130- 2
841 R1- 5
904 R1- 4

ILR 21 Pat.
167 R11- 2
243 53A-13

ILR 22 Pat.
114 2- 6
" 130-10
187 92- 7
" 92-24
" 92-27
207 R14- 2
" R14-12
213 79-4a
220 105-64
320 R14- 2
" R14- 6
" R14-12
332 53A- 5
513 2- 5
" 51-10
" 51-22
" 111-16
" 111-23
554 51- 22
" 105-79
" 106-.5
" 107- 8
" 108(h)-4
637 82-18
" 82-23
713 105- 5
761 R1-19

ILR 23 Pat.
115 53A- 6
" 54- 7
" 54-11b
" 105- 5
185 117- 2
" 117- 3
334 105-11
" 105-59
404 122- 1
645 53A-13
648 60-41
" 60-44
" 65A- 1
" 91-12
" R1-15
" R1-19
763 15- 2
871 10- 6
" 10-13
" 12- 1
" 14-10
" 105-25
" 105-68
" 108(i)-2
931 105-14
933 82-17
" 92-15
" 95- 1
" 95- 3
" 95- 4
" 100-11

ILR 24 Pat.
89 52- 8
" 52-11
" 92- 6
" 92-23
" 92-24
109 111-16
" 112- 1
" 112- 2

I L R 24 Pat. con
197 108(e)-7
245 60-44
" 100-28
260 100-22
263 91- 4
" 91- 8
268 8- 3
" 8-15
" 67-29
" 73- 1
345 100- 5
" 100-22
" 100-28
401 108(j)-6
429 105- 9
" 117- 4
449 105-31
" 106-17
" 106-39
" 106-40
" 110- 1
254 106-40
545 77- 1
575 R7-12
" R7-13
" R8- 5

ILR 25 Pat.
13 52-19
432 R5- 6
666 58-33
705 6-11
" 6-13
" 6-14
764 53A-13
" 53A-14
" 53A-14a
" 54-17

ILR 26 Pat.
97 60-26
" 82-12
" R5-13
253 53-29
" 53-30
321 117- 3
422 R2-11
" R4-12
" R5- 26
" R10- 5
561 54- 4
" 54-12
717 60-27

ILR 27 Pat.
202 54-22
313 105-69
395 113- 3

—

LOWER BURMA
Lower Burma Rulings
1872-92 LBR
151 48- 9
195 59-14
439 108(l)-8
570 R11- 2

1893-1900 L B R
36 111-23
124 59-14
" 68-13
174 R7-13
" R8- 7
189 44- 7
201 53- 5
457 R11- 2

1 L B R
82 106-32
160 41-25
186 R7-14
192 58-31
196 41-21
" 41-23
215 60-22
257 58-33
293 48- 8

2 L B R
1 58-33
138 R5-20
167 58-21

3 L B R
5 60-22
15 R1-6
42 6-35
90 108(j)-4
" 108(j)-5
" 108(j)-6
100 58-33
169 1- 4
188 53- 6
241 1- 4
245 53- 9

4 L B R
26 48-10
52 59-14
86 55- 5
" 55-14
88 59- 6
" 59-15
108 84- 8
211 53-34
222 1- 4
" 58-35
224 55- 1
" 55-14
369 54-12
371 58-39

5 L B R
6 54-17
" 54-23
8 58-11
40 60-22
93 2- 5
" 58- 5
" 58-39
" 137- 4
125 41-23
138 92-19
" 101- 1
148 2- 5
184 48-10
195 53-20
219 R3- 3

6 L B R
23 58-39
32 123- 3
77 123- 3
144 48-10

6 LBR con
144 R12- 3
170 9- 2
" 53- 2

7 L B R
42 105-70
95 109- 2
" 130- 7
123 123- 4
135 R1-19
262 54-17
" 55-20
268 50- 3
336 58-11

8 L B R
64 105- 4
" 105-35
" 111- 3
71 108(d)-3
185 42- 1
" 126-15
190 123- 3
205 67- 22
227 108(l)-9
233 53- 6
235 126- 9
266 R1-19
270 105-37
" 105-40
" 105-70
288 130-17
" 131- 3
334 59- 4
351 106-18
413 58-38
" 65A- 1
433 51-25
" 108(b)-4
450 R6-19
458 58-39
553 100-14

9 L B R
18 76- 1
" 76-21
" 84- 5
24 6- 9
" 54- 7
106 58-17
" 69- 9
114 58-33
" 111- 9
143 137- 4
" 137- 5
159 3-11
169 91-43
258 123- 3

10 L B R
43 52-35
" 52-38
96 137- 4
133 54-14
241 53A- 3
360 67A- 1

11 L B R
83 53- 9
89 53- 9
" 53-34
94 53A- 3
" 55- 5
119 91-39
" R1-19

11 LBR con
148 59- 8
" 59-14
" 59-15
" 68- 2
174 137- 4
294 49- 2
" 49- 4
" 76-11
" 135- 2
319 54-23
" 55-20
" 100-14
341 137- 4
" 137- 5
356 60-34
" 60-44
456 58-33
" 59- 4
462 53A- 3
" 54-17

—

UPPER BURMA
Upper Burma Rulings
1892-96
2 UBR
315 53- 2
" 53- 6
" 53-34
318 53-34
548 63A- 1
573 68- 5
586 R1- 6

1897-01
2 UBR
414 111-23
514 R7-12
518 68-17
582 R7-13

1902-03
2 U. B. R.
15 53-20

1907 U.B.R.
1 55- 1
" 55- 9

1908 U.B.R.
1 53- 9

1909 U.B.R.
5 1- 4
" 69- 3
" 69-23
" 69-24

1910-1U.B.R.
14 76- 6
22 108(e)-1

1911-2U.B.R.
86 108(h)-4

1912-1U.B.R
92 R1-19
125 58-35

1913-1U.B.R.
164 68- 3

Any case in the "Table of Cases" will show where to get the entire case-law on the point.

1914-2U.B.R.
11 108(h)-4
46 91- 4

1916-2U.B.R.
89 58- 4
" 58- 5
" 60-19

1917-2U.B.R.
110 8-20
" 63- 5

1918-2U.B.R.
141 60- 3
" 60-28
" 60-29
" 84- 5

1918-3U.B.R.
23 123- 3
42 60-14
141 51- 9
" 51-21
" 60-17
" 108(i)-1
183 R7- 3
" R8- 7
207 123- 3
228 123- 3

1921-4U B.R.
1 R2- 3
" R2- 9
" R11- 2
78 3-11
" 3-18
80 59- 5
179 53A- 3

1923-4U.B R.
114 60-50
132 60-41

I. L. R.
Rangoon

ILR 1 Rang.
19 111- 8
66 58-39
121 59- 8
261 53A- 3
" 100-18
" 100-22
351 122- 3
" 123- 3
405 2- 4
419 60- 3
" 60-28
" 60-29
" 98- 6
472 58-38
545 58-39
557 3-18
" 59- 8
637 3-32
" 5- 6
" 48- 1
" 48-10
" 58-39
" 78- 1
" 78- 4
" 78- 9
" 78-12
" 79- 5
" 79- 6
" 79- 8

I L R
1 Rang. con
637 93- 4
" 93- 6
651 123- 9
665 123- 9
714 92- 7
" 92-23
" 100-29

ILR 2 Rang.
4 52-17
106 R1- 5
131 123- 3
253 8-20
285 53A- 3
313 53A- 3
" 59- 4
" 59-15
" 100-14
382 1- 4
" 1- 5
" 76- 1
" 76-21
" 83-20
" R8- 3
397 60-50
429 59- 4
" 59-15
" 100- 5
" 100-14
441 59- 4
459 54- 1
" 54-17
479 53A- 3
561 58- 5
649 123- 9

ILR 3 Rang.
53 8-20
71 53- 6
" 53-34
106 58-33
" 60- 2
243 53A- 1
" 58-28
367 58-33
" 60-22
" 60-41
" 91- 3
379 105- 9
" 107-10
398 3-20
443 58-39
608 53A- 3

ILR 4 Rang.
1 58- 6
" 59- 4
96 67-19
" 67-20
" 91- 8
" R1-19
103 44- 4
110 45- 7
214 R1- 5
221 2- 5
238 3-34
" 78- 4
" 78- 5
368 53A- 3
" 58-27
" 58-28
" 60-28
429 53- 9
532 43- 9

ILR 5 Rang.
7 1- 2
" 123- 4
" 123-11
" 129- 2
95 107-10
101 52-10
125 123- 5
145 19- 6
252 13- 6
" 19- 2
266 52-17
427 111-17
451 84- 5
458 73- 3
" 73- 6
558 58-40
" 67-17
" 68- 2
588 53- 6
" 53-24
633 58-11
636 5- 1
" 26- 2
" 54-14
" 54-15
644 58-33
668 58-28
" 59- 4
" 60-22
" 60-48
679 53A- 3
" 59- 4
749 58- 5
764 82-12
772 3-11
" 3-19
785 44- 5
803 8- 3
" 36- 2
813 108(o)-2

ILR 6 Rang.
87 3- 6
122 67-20
" R1-19
125 53A- 3
" 54-17
134 69- 3
" 69-10
" 69-19
270 53A- 3
276 53A- 3
285 R5-14
297 68- 8
" R1-19
315 53A- 3
" 54-17
329 7- 7
417 60-44
" 82- 5
" 82-18
423 6-36
" 78- 4
" 78- 5
488 101- 1
500 100-29
643 41-23
691 116-12
743 68-14
771 69- 3

ILR 7 Rang.
28 58-39
" 78- 6

I L R
7 Rang. con
70 105- 4
" 105- 7
113 52-32
118 41- 8
140 59- 4
" 60-48
" 60-50
144 3- 2
" 105- 4
" 105-20
157 108(o)-3
234 100-16
271 53A- 3
" 54-17
276 41-10
288 53A- 3
306 10-14
" 126- 2
365 130- 3
" 130-12
414 53A- 3
477 53- 6
" 53-23
624 53-20
677 2-11
" 6-36
706 3- 3
734 2- 6
" 52-17
" 52-31

ILR 8 Rang.
8 5- 5
" 21- 8
223 53-20
233 63- 9
316 R6-22
566 59-14

ILR 9 Rang.
1 67-20
" R1-19
56 55-12
186 R4-12
" R6-11
" R6-15
" R13- 2
367 53-23
452 49- 2
" 58-33
470 50- 3
614 53- 3
" 53-16
" 53-19

ILR 10 Rang.
210 65A- 1
" 65A- 4
224 129- 4
308 72- 5
" R4-12
" R5-26
465 92- 5
" 101- 1
" 101-11
529 54-17

ILR 11 Rang.
109 123- 4
112 101- 4
186 55-14
" 100-25
" 100-26
193 7- 7

I L R
11 Rang con
239 58-39
322 63- 3
481 58-39

ILR 12 Rang.
47 7- 7
55 41- 8
238 123- 5
370 3- 2
437 8- 8
" 8-14
" 48-14
589 53A- 3
" 54- 1
656 7- 7
666 53-11
" 53-24
" 53-25

ILR 13 Rang
17 53A- 9
" 53A-10
22 84- 8
274 53A- 3
" 59- 4
" 60-48
292 R14- 6
" R14-11

ILR 14 Rang.
16 58-17
81 53-24
86 63- 3
198 56-10
" 60-43
" 81- 5
292 58- 4
" 58-39
" 67-17
400 54-19
439 123- 4
" 129- 5
485 123- 4
" 129- 5
494 3- 2
" 60A- 2
" 78- 5
" 92- 5
" 92-19
" 101-11
522 58- 5
" 58-39
538 R4-12
" R5-26
685 58-29
" 58-40
748 53- 6
766 54-14
" 55- 8

1937 R. L. R.
13 60-44
" 81- 2
" 81- 7
" R1-19
303 58-39
432 67-22
442 59-14

1938 R. L. R.
1938 R. L. R. con
216 54-23
" 58-33
316 58-39
430 92- 5
480 5- 7
542 5- 7
" 6- 6
678 5- 1
" 123- 1
692 53A- 9

1939 R. L. R.
39 59- 5
207 67A- 6
" 101- 3
" 101- 4
388 3-19
403 58-27
" 58-28
" 58-30
" 58-38
" 58-39
575 53A- 9
645 59- 4

1940 R. L. R.
7 3- 1
" 59- 4
180 41-13
" 59- 9
199 3-18
263 54- 3
325 Pre- 1
659 53-34
777 53- 6
" 53-24
826 52-17
" 73- 1

1941 R.L.R.
309 59-14
" 60-48
410 14- 5
" 18- 2
706 59-14

1947 R. L. R.
394 107-10
" 111-14
" 111-16
423 111-16
" 112- 1

SIND
Sind Law Reports

1 Sind L. R.
221 7- 7

2 Sind L. R.
1 108(d)-1
90 69- 4

3 Sind L. R.
17 R14- 7
120 R14- 6
130 60-30
" 60-33

4 Sind L. R.
82 67A- 1
224 81-10

4
Sind L R con
224 82-18
244 R6- 3
278 39- 1
" 39- 2
" 39- 5
5 Sind L. R.
42 108(c)-4
71 R4- 5
" R6- 3
" R14- 2
107 6-2a
" 8-20
192 8-20
6 Sind L. R.
178 58-31
245 58-33
268 7- 7
7 Sind L. R.
11 60-23
" R14-12
163 137- 5
8 Sind L. R.
222 108(e)-1
" 108(e)-4
257 56- 1
" 57-19
264 52-31
" 101- 1
" R1-19
9 Sind L. R.
84 44-10
86 52-18
" 91- 5
97 55- 2
" 55-21
108 53- 1
" 53- 9
137 55- 5
" 55-20
214 55- 9
10 Sind.L.R.
34 44- 6
72 52-35
12 Sind L.R.
1 R1-19
59 R11- 2
144 55- 5
" 55-20
14 Sind L.R.
12 51- 8
" 51-21
" 51-23
22 126-11
15 Sind L.R.
160 58-33
180 55- 3
16 Sind L.R.
25 6-38
87 8-15
" 108(o)-4

16
Sind L R con
235 3-43
278 3-28
" 3-34
" 55-14
17 Sind L.R.
1 10- 6
" 14-10
178 Pre- 2
" 59- 2
255 R5-10
281 R1-19
334 6-16
18 Sind L.R.
282 59- 8
" 100-14
19 Sind L.R.
41 55- 3
" 55- 5
202 R5- 5
268 R1- 6
286 6-16
322 3-11
" 3-17
" 3-18
337 55- 9
402 38- 8
" 38-11
20 Sind L.R
277 60-18
" 76- 4
" 76- 5
" R1-13
21 Sind L.R.
185 105-32
" 111-16
" 111-17
" 111-25
22 Sind L.R.
1 3-22
" 3-24
" 6- 3
117 8-20
222 58-39
" 98- 1
248 60-41
" 82-12
23 Sind L.R.
20 108(l)-5
97 58-39
" 78- 1
" 78- 4
" 78- 5
237 53A- 3
" 55- 1
" 55- 9
277 R4-16
325 108(j)-1
24 Sind L.R.
160 3-21
" 130- 2

24
Sind L R con
172 55- 9
208 44- 4
223 3-18
" 3-19
463 7- 7
25 Sind L.R.
72 123- 4
173 55- 9
345 3- 1
405 9-13
" 67-10
433 51-19
" 53A- 3
" 53A-10
451 105-19
" 107- 7
521 53-29
26 Sind L.R.
29 58-39
269 39- 5
377 8-20
" 105-29
" 107- 3
" 107-10
" 107-11
27 Sind L.R.
289 39- 2
" 39- 3
29 Sind L.R.
74 53A- 3
" 54-23
321 10- 9
361 67- 5
374 15- 3
382 Pre- 4
30 Sind L.R.
42 R1-12
" R1-19
50 5- 5
" 21- 4
196 58-33
31 Sind L.R.
98 3-27
" 5- 5
" 130-13
" 130-23
150 55-11
" 55-12
161 6-2a
180 R5-11
" R5-16
197 41- 8
271 58-44
" 60-41
506 19- 8
637 R6-10
652 52- 8
" 52-18
" 52-40
32 Sind L.R.
285 126- 9

32
Sind L R con
285 126-10
383 6-38
448 6-13
" 6-14
" 101- 4
640 3-21
" 130-12
" 132- 2
" 137- 4
726 111-13
963 21- 4

I. L. R.
KARACHI
1939 Kar PC
78 58-38
" 108(j)-1
" 108(j)-2
" 108(j)-4
" 108(j)-5
90 106- 2
" 106-15
" 106-44
" 106-45
222 3-11
" 3-14
" 3-19
274 6-11
" 10- 4
287 58-39
1939 Kar.
136 53- 6
" 53-16
" 53-20
" 53-22
" 53-30
269 53- 6
" 53-14
" 53-20
" 53-22
344 5- 4
" 130-10
" 130-13
1940 Kar PC
11 53A-13
33 100-30
82 61- 7
" 92- 5
" 92-19
" 92-21
" 92-23
" 92-27
271 5- 6
" 58-22
" 58-23
" R4- 6
287 58-33
341 58-22
366 6- 4
380 105-43
" 105-49

1940 Kar FC
33 R11- 2
45 R11- 2
1940 Kar.
33 73- 1
241 51- 1
" 51- 4
" 51- 8
" 51-10
287 59-11
302 R1- 5
403 41- 9
447 R1-19
1941 Kar PC
66 108(j)-4
" 108(j)-5
127 59- 4
" R1- 6
141 6-35
150 53A-13
1941 Kar
124 60- 5
495 55-20
1942 Kar. PC
99 60-42
" 60-43
" 82-19
111 8-20
133 54- 1
1942 Kar.
32 55- 2
" 55- 7
168 100-25
" R15- 2
"R15-10a
200 55-20
392 27- 2
" 27- 3
" 45- 6
452 58-35
" 67-15
" 68-12
" 68-17
" 98- 5
" R11- 2
479 58-39
513 53A- 3
" 53A- 4
" 53A- 5
516 137- 4
559 8- 4
1943 Kar PC
19 68-13
39 108(b)-3
" 108(c)-8
"108(l)-14
123 8-20
1943 Kar.
227 122- 1
" 123- 2
" 123- 5
" 123-12

1943 Kar con
227 130-13
342 55-20
382 105-70
397 122-5a
1944 Kar PC
73 3-29
" 58-39
98 105- 5
185 R1- 5
206 105-16
238 13- 2
" 21-12
" 21-13
1945 Kar PC
28 52- 8
" 52-11
" 92- 6
" 92-23
" 92-24
73 92- 1
" 92-16
" 92-19
" 92-22
115 122- 1
161 41-16
" 53- 5
" 53- 8
" 53- 9
197 108(q)-1
200 3-31
269 68- 1
" 68- 4
" 68-16
" 68-20
321 R5-14
" R5-29
1945 Kar.
455 43- 7
1946 Kar.
14 53- 6
" 53-11
" 53-13
" 53-14
98 53- 5
" 53-24
110 R5-10
454 108(j)-5
1947 Kar PC
20 58-33
25 39- 1
" 39- 2
" 39- 3
" 100- 5
" 100-22
60 Pre- 4
1947 Kar.
161 41- 8
240 54-23

The special features of this work are indicated in the Preface.

(III) INDIAN CASES

1 I. C.
45 73- 1
„ 73-10
62 52-18
66 106-12
„ 106-35
71 60-26
„ R7- 9
80 R1- 6
83 6-2a
„ 7- 7
117 67-27
139 R1-10
150 108(c)-4
200 60-12
212 130-13
213 52-18
219 60-14
260 122-5a
264 60-41
„ 60-44
„ 65- 4
„ 68- 3
„ 73-10
„ 82-12
„ 92-19
„ R1- 6
„ R5-17
345 61- 5
„ 100- 5
362 2- 5
„ 108(j)-1
„ 108(j)-10
442 58-25
„ 58-29
„ 68- 2
„ R6- 5
„ R6- 7
505 67-20
„ 91- 5
„ 91-41
522 67-22
525 41-23
560 R1- 3
573 35-10
590 6- 3
621 55-14
650 8-20
670 7- 7
677 R3- 7
„ R4-15
„ R5- 3
„ R5- 5
„ R5-24
683 92- 2
„ 101- 4
753 112- 4
„ 113- 3
795 53-34
802 105-50
821 51-22

2 I C
85 52-14
128 8-20
„ 108(l)-14
144 61- 5
„ 62-12
160 108(l)-14
207 92-10
„ 101- 1
265 R14-18
266 52-24
„ 52-41

2 I. C con
366 38- 8
413 54-21
429 54-14
433 R5-10
460 68- 8
466 R7-13
„ R8- 7
469 60- 7
„ 60-35
„ 72- 3
„ 76- 8
„ 84- 5
484 108(l)-14
495 48- 9
„ 59- 5
„ 67-19
„ 91- 7
511 R6-23
516 59- 5
„ 59-14
„ 68-13
523 53- 5
548 106-20
616 R8- 7
632 3- 1
633 111- 9
641 Pre- 4
„ 44- 5
645 67-21
„ R1- 9
654 111- 7
662 9- 1
„ 60-41
„ 60-49
„ R1-19
„ R10- 3
813 53- 6
846 123- 4
852 38- 8
865 6-38
„ 19- 2
930 58-33
953 54-15
980 67-31
992 111-22
993 106-13
„ 106-26
„ 111-22
994 105- 9
„ 107-10

3 I C
33 R6- 4
44 60-35
„ 79-10
93 38- 5
100 116- 6
104 6-29
„ 105-23
175 67A- 1
177 54-14
247 5- 4
„ 9-10
„ 9-11
„ 118- 5
289 R11- 2
291 R 1-19
„ R11- 2
311 3-11
„ 67-21
„ 68- 4
„ 82- 5
„ 137- 5

3 I. C.con
330 126-10
346 84- 8
„ 84-16
395 63- 1
„ 63- 6
„ R7-11
415 3-31
„ 51- 8
„ 51-11
443 R6- 8
464 108(g)-2
466 108(c)-4
537 R14-11
686 R1-10
696 52-11
„ 52-13
„ 52-24
„ 52-31
791 52-13
„ 52-18
„ R5-29
905 3-11
936 40-14
„ 40-23
„ 55- 8
978 58-17
999 R14-11

4 I. C.
30 105 83
42 R5-10
56 R11- 2
63 55- 7
„ 108(b)-2
92 73- 1
173 8-20
„ 105-51
256 R6- 3
324 108(l)-14
325 115- 4
357 63- 1
„ 76- 6
398 R4-10
407 60- 5
433 67-21
„ R1- 9
466 54-12
471 109- 3
511 108(d)-2
526 108(d)-3
535 111- 3
541 54-14
545 R2-11
„ R3- 9
546 R5- 8
632 38-11
652 3-47
731 52-18
„ 52-32
734 108(c)-3
743 40-10
755 1- 4
872 82- 3
„ 82-17
875 111-14
939 63A- 1
970 53- 6
999 6-35
1004 118- 9
1019 72- 3
1057 6-24
1096 R14- 7
1107 39- 1

4 I. C.con
1107 40- 9
1109 54-23
1119 108(b)-2
1121 55-14
1124 105- 1
„ 117- 2
1126 R14-12
1129 7- 7
„ 108(b)-6
1135 54-21
„ 54-22
1140 53-15
„ 76- 8
1142 108(c)-8

5 I. C.
38 105- 4
„ 105-24
„ 107-15
57 48-10
„ 54-21
61 R11- 2
70 73- 8
„ 73-12
82 2- 5
101 104- 1
105 108(l)-14
127 59- 6
130 68- 5
146 R6- 7
165 82-17
„ 84- 7
„ 85- 1
„ 95- 4
„ R3- 6
177 92- 2
179 53-16
„ 53-20
252 3-31
256 108(c)-4
277 106-34
„ 107- 8
„ 111-26
285 58-17
306 108(q)-1
334 58-18
„ 58-25
336 106-24
„ 106-25
„ 111-14
339 R1-19
343 60-14
350 105-82
„ 107-10
352 108(l)-14
373 6- 3
479 108- 1
487 14- 2
489 73- 1
490 101-10
519 59-14
524 73- 1
529 76-21
562 4- 5
„ 53A- 3
„ 107-15
581 6-27
592 38-11
654 58- 9
„ R1- 9
„ R11- 2
691 52- 9
„ 52-10

5 I. C.con
708 111-14
712 108(b)-3
779 82-14
783 105-51
„ 106-44
813 105-50
„ 106-24
826 107- 9
834 130- 2
„ 130- 3
852 54- 6
907 116-13
916 R11- 2
924 106-25
„ 111-14
935 58- 5
1010 111-14

6 I. C.
7 7- 7
37 43- 9
40 52-14
„ 52-18
„ 52-31
47 72- 3
„ R14- 7
113 100-11
117 54-14
131 108(f)-1
„ 108(f)-2
141 51- 1
„ 51- 8
„ 51-11
„ 51-19
„ 122-5a
153 58-41
„ 67-15
„ 67-18
158 7- 7
165 61- 5
„ 100- 5
168 52-38
183 58-33
191 38-11
196 73- 1
201 105-19
„ 107- 9
206 108(l)-14
264 111-16
„ 112- 7
286 108(c)-8
290 6-16
306 R3- 7
323 76-12
„ R3- 7
„ R5- 9
„ R5-14
336 76-21
„ R7- 4
„ R7-11
„ R9- 3
339 105-38
346 51- 5
„ 53A- 3
354 8- 6
357 108(l)-7
387 108(l)-7
438 114- 8
477 54-14
„ 54-15
478 108(l)-14
503 76-12
512 58-33

6 I. C.con
549 54-23
569 68- 3
581 123- 5
600 106-25
„ 111-14
632 53A- 3
„ 105-41
642 48- 1
664 R11- 2
670 67-20
„ 91- 7
685 10-13
689 58-22
„ 126-10
701 106-12
„ 108(q)-1
„ 111-23
707 60-28
760 38-11
763 54-22
764 101- 1
766 105-70
„ 108(j)-4
„ 108(q)-1
„ 111-10
„ 112- 1
781 92-10
792 38-11
795 58-41
„ 67-18
„ 98- 1
829 73- 1
837 91- 8
842 60-43
„ 60-44
„ 82-18
„ 82-19
„ R1- 6
890 55- 9
898 41- 2
„ 41-23
906 108(e)-4
„ 108(e)-6
1006 51-22
1010 111-12
„ 111-14

7 I. C.
4 56-10
„ 56-12
„ R4-10
8 106- 3
„ 111- 2
„ 116-13
36 R8- 7
50 60-26
„ R2-18
„ R3- 3
69 R1-13
80 6-13
166 R1- 8
167 67-21
„ 67-22
173 68- 4
189 54-12
198 108(j)-4
201 108(e)-3
202 111-17
218 3-32
251 65- 4
„ 65-10
„ 68- 4
252 3-34

In the foot-notes to the Commentary† indicates either a leading case or a case giving fuller reasons.

7 I. C.con
253 111-10
258 R5-14
264 54- 1
293 76-12
„ 77- 1
321 108(g)-2
346 40- 1
„ 111- 7
351 108(l)-6
408 54-23
436 44- 9
„ 44-10
442 41-24
468 101- 3
473 52-27
„ 101- 1
478 108(l)-14
492 105-40
„ 105-70
505 7- 7
537 60-41
565 114- 1
„ 117- 2
568 54- 5
574 8-20
582 8-18
625 R5-14
639 55-12
698 60-29
721 116- 1
„ 116-12
735 3-17
738 65- 4
750 105- 7
772 60-23
„ 76- 6
784 R6- 6
800 7- 7
810 78- 5
815 40- 1
„ 40- 6
840 108(l)-7
842 105-62
864 117- 3
„ 117- 4
871 76- 8
„ 76-16
„ 130-19
874 108(l)-9
902 R1-12
921 16- 4
„ R1- 5
924 108(c)-4
952 130- 3
957 53- 9
979 92- 2
980 92- 1
„ 92-19
982 2- 5
1001 105- 5

8 I. C.
4 84-11
„ R13- 3
30 108(l)-14
32 R6-11
33 130- 9
„ 130-13
38 123- 4
44 105- 4
91 55- 9
„ 55-22
130 58-35

8 I C.con
132 106-24
144 55-20
151 108(b)-2
153 60-44
225 R1- 5
227 111-14
302 58-29
309 111-13
„ 112- 4
362 106- 2
411 108(l)-4
431 123- 4
435 55- 8
443 9- 5
517 122-12
553 60-32
576 67- 5
„ 68- 3
592 R2-18
597 48-10
605 55- 1
„ 55- 7
„ 55- 9
610 60-22
633 3-34
„ 3-35
„ R1-12
657 92-19
660 111-14
674 54-14
„ 55-12
707 60- 5
716 108(e)-5
763 83-18
790 105-64
793 105-13
„ 105-14
796 137- 4
804 55-14
806 R5-13
826 8- 9
828 70- 2
844 108(n)-1
845 76- 8
864 100- 5
881 137- 4
885 R1- 5
887 3-11
896 105-62
945 105-62
981 58-33
985 59-14
1057 39- 1
„ 39- 5
1068 60-32
1089 55-20
1199 3-34
1200 123- 3
1205 53- 6
„ 53-34
1208 52-14

9 I. C.
1 3- 9
19 106-24
„ 111-23
26 6- 4
52 61- 5
55 48- 9
„ 54-17
56 38-12
67 44-.7
110 106-34

9 I. C.con
110 111-26
119 105-79
„ 111-14
139 101- 1
141 105-38
„ 105-43
„ 105-49
„ 105-75
158 60-26
„ 91- 5
„ R5-13
163 58-30
171 10- 6
„ 10-17
223 8-20
243 6- 3
248 73- 1
267 54- 5
287 130-12
309 58-39
431 60-22
478 3- 3
„ 59- 2
489 73-11
504 41- 7
513 60- 1
„ 67-20
„ 91- 5
„ 91-39
„ 94- 2
„ R1-19
524 39- 5
568 108(l)-14
623 53- 6
643 R1-10
652 6-35
660 58-29
„ 68- 2
662 43- 7
729 2- 6
„ 130-19
765 R1- 9
770 54-17
„ 58-33
771 R4- 8
„ R5-18
772 52-18
„ 52-31
789 92-17
„ 101- 4
828 58-30
„ 100-15
835 R5- 6
840 2- 1
„ 52- 8
„ 52-18
„ 52-31
923 105-35
939 R14-14
940 R1-17
951 11- 2
978 76-12
„ 77- 1
988 55-15
990 67-30
1013 58-33
1018 53- 6
„ 53-22
1026 60-44
1027 52-18
1034 R14- 2
1037 53-20

10 I. C.
7 60-50
14 60-34
16 52-35
49 52-18
„ 65- 4
64 54-17
83 67-20
98 55-12
113 60-48
„ 62- 6
„ 76- 8
„ 77- 1
137 R1-19
174 R2-15
„ R3- 9
190 58-35
„ 92- 2
222 61- 5
233 48- 9
235 60-44
„ 67-28
„ 82-18
243 60-28
258 4- 4
„ 58-18
272 58-28
„ 67-13
307 91-13
„ 111- 8
320 6-16
336 R6- 3
343 126-11
350 38- 8
374 10-13
382 105-60
392 108(l)-14
422 R1-19
443 43-11
455 108(o)-4
481 100- 1
489 2- 5
„ 10- 1
„ 10-17
„ 105-9
„ 107-1
„ 111-13
510 130-17
525 55-20
530 65- 4
536 R3- 7
„ R4-15
„ R5- 5
556 92-17
630 58-31
665 6-10
676 38- 9
748 59-14
„ 60-26
„ 60-33
„ 76-19
„ 94- 2
„ R3- 9
776 R1-19
779 41-23
842 52-21
885 108(j)-4
891 108(l)-6
906 53- 5
922 53- 2
„ 53-16
„ 53-34
925 91- 5
961 41-23

11 I. C.
4 4- 4
„ 58-18
23 107- 7
24 105-20
30 108(d)-3
32 105-16
74 R1-19
124 58-33
192 8-15
201 R1- 5
211 6- 4
225 59- 8
270 106-32
„ 108(q)-1
301 10- 8
„ 10-16
„ 11- 2
337 55- 9
381 105-19
382 111- 8
410 67- 9
422 3-22
429 60-22
443 68-13
461 52-13
„ 52-31
469 92- 2
„ 92-24
512 91- 5
519 60-34
534 10- 1
„ 123- 4
564 5- 8
629 5- 7
„ 58- 4
„ 58-27
„ 58-30
„ 61- 2
„ 67A- 1
„ 100- 9
„ 100-13
„ 100-15
634 28- 2
„ 29- 4
„ 32- 4
„ 122- 1
645 52-21
649 92-24
654 6-2a
685 8-20
695 111-22
„ 111-26
702 10- 1
„ 11- 3
„ 11- 9
713 62- 6
„ 76-12
„ 77- 1
736 R6-23
764 7- 7
„ 38- 5
778 130-18
781 53-34
783 58-39
„ 67-17
808 63- 5
817 76- 6
„ 111- 5
826 R1- 3
„ R1- 5
849 107- 9
850 59- 8
853 60-22

11 I. C.con
855 41-23
863 105-70
„ 107- 9
890 55-12
892 7- 7
964 3-27
„ 130-17
974 112- 6

12 I. C.
18 R11- 2
25 59- 2
37 105-60
78 55- 5
130 60-23
„ 60-44
„ 82-18
140 76- 8
146 100- 5
155 Pre- 2
„ R1-19
182 82- 6
199 R5-19
256 29- 3
334 114- 9
336 38-11
375 3- 3
401 53-16
428 105-70
439 R4-10
„ R6-10
456 114- 7
„ 114- 8
457 54-12
482 105-51
487 105-69
530 58-31
531 3-17
534 54-14
546 19- 6
591 35-26
626 98- 8
629 R1- 4
631 2- 5
689 R6- 3
805 101- 1
849 1- 4
„ 52- 8
„ 52-11
855 108(l)-1
858 41-23
„ 58-21
„ 123- 5
905 3-39

13 I. C.
7 38- 8
32 105-63
38 R1-19
59 105-37
„ 108- 3
„ 106-44
„ 106-45
„ 111- 2
„ 116-13
68 53-30
85 7- 7
138 6-21
142 38-12
156 60-10
„ 68- 6
174 68- 2
182 R1-10
190 6-26a

In the foot-notes to the Commentary † indicates a case which is most appropriate for the proposition.

13 I. C. con
194 6-24
234 R1- 7
261 69-21
336 68- 5
" 68-17
364 105- 1
" 105-39
" 105-47
" 117- 3
376 44- 4
377 111- 6
401 38-11
" R11- 2
434 123- 4
436 54- 8
" 123- 1
440 68- 2
455 5- 4
547 7- 7
556 38-11
594 7- 7
596 105-45
606 105-22
" 105-50
641 52-11
" 52-40
653 48- 6
" 48- 7
" 48- 8
" 58-13
" 58-18
686 7- 7
" 111- 5
688 111-14
689 10- 1
852 54-19
" 60-22
858 59- 4
939 92- 7
" 101-10

14 I. C.
29 100-16
35 R1-12
40 53- 6
53 R6- 7
56 8-20
73 8- 4
120 54-14
144 130-17
152 105-47
" 105-49
" 105-50
" 106-49
189 100- 5
212 108(d)-3
218 7- 7
229 108(l)-8
279 137- 4
286 8-20
292 37- 3
" 108(l)-6
293 10-12
324 105-79
332 58-31
338 R1-12
449 94- 3
515 7- 7
" 58-25
519 6-28
" 6-31
524 44- 7
537 67-19

14 I. C. con
537 R1-19
582 108(h)-2
" 108(o)-4
590 76- 8
591 R6-10
708 23- 2
" 30- 2
" 32- 4
" 33- 2
713 108(l)-2
" 108(l)-5
715 53-14
717 54-11
" 105-42
720 123- 1
" 137- 4
735 48- 6
" 94- 3
741 92-17
747 111-16
769 130- 2
" 130- 3
780 R14- 7
799 105- 1
" 105-25
" 108(j)-2
" 108(j)-9
801 109- 7
811 55- 3
" 55-20
815 59- 4
" 60-50
817 108(l)-14
" 116- 1

15 I. C.
14 100- 1
23 72- 5
" R6- 3
32 3- 1
" 3- 2
52 106-25
110 105-49
" 105-50
" 105-51
137 105-72
156 108(j)-6
173 45- 3
192 54-15
193 53- 3
" 130-17
228 54-22
234 3- 4
278 6-29
301 105-60
335 59- 6
338 105-79
" 111-14
343 123- 1
362 R2- 6
" R4- 5
380 130-12
" 137- 4
383 6- 6
423 58-33
432 105- 4
" 105-70
445 112- 1
" 116- 2
457 48- 3
458 108(l)-14
500 95- 3
526 58-18

15 I. C. con
529 122- 3
" 126- 9
584 106-25
" 111-23
589 R14-12
592 84-14
605 60-41
" 60-44
" 61- 2
" 61- 4
619 8-16
666 59- 8
" 100-14
698 123- 4
711 108(c)-1
" 108(c)-8
" 108(l)-14
718 65- 4
844 108(q)-1
845 111-23
849 60-42
851 8-20
" 58-30
" 100- 5
853 54-19
854 55-14
876 R1-12
880 60- 5
" 60-32
906 106-20
911 R6- 3
917 60- 5
" 60-32

16 I. C.
5 R6-19
27 92-17
42 4- 4
" 68-13
61 137- 5
73 55-14
" 68- 8
102 3-35
" 52-35
" 65A- 1
108 59- 6
109 120- 3
125 54-19
" 59-14
184 8-20
" R7- 4
207 3-11
209 58- 4
" 58-27
" 58-30
213 105-48
" 106-44
" 106-45
216 58-17
" R11- 2
217 72- 4
" 77- 1
222 100- 5
236 58-30
246 65- 4
351 105-32
" 106-49
359 52-41
374 83-17
" R3- 6
" R11- 2
376 8-20
405 100- 1
435 91-29

16 I. C. con
440 54- 1
" 130-13
441 8-10
" 108(o)-6
458 108(l)-6
546 116- 1
" 116-13
560 R11- 2
561 8-20
571 8-20
616 123- 4
618 3-32
" 3-34
622 7- 7
625 48- 9
" 59- 5
629 65- 4
633 51-10
635 63- 9
" 63A- 1
" 72- 3
" 72-11
638 58-30
674 R1-19
679 54- 4
686 2- 6
" 132- 2
" 132- 7
698 44- 6
703 R1-16
705 105-14
708 130-13
735 68- 5
779 52- 7
" 81- 8
" 101- 4
" R1-10
" R1-19
803 114- 8
811 3-28
" 3-39
" 41- 3
" 41-14
" 41-23
" 53- 9
825 3-32
" 41-23
830 R8- 4
911 105-59
" 105-71
" 108(l)-13
937 105-49
943 7- 3
" 59- 9
982 58-44
988 55- 7
1004 6-35

17 I. C.
1 52-39
" 65A- 1
" 66- 7
" 91-12
180 40-25
" 53A- 3
" 105-35
" 105-36
" 105-39
" 111- 3
238 108(c)-2
" 108(l)-14
243 63A- 1
" 72- 5

17 I. C. con
244 R6-11
247 38- 5
" 58-25
263 R6- 3
284 10- 6
" 10-12
291 R1-19
323 53- 3
342 53- 8
" 53-27
362 68- 5
368 83- 2
432 91-25
" R1- 6
467 2- 5
" 58-31
478 8- 6
494 8- 2
" 8-20
497 8-20
520 59- 4
522 4- 4
523 105-79
" 111-14
602 53-15
609 38- 8
619 128- 5
646 105-70
656 108(j)-9
" 117- 3
722 58-39
734 R1-12
878 65-11
885 123- 5
910 3- 3
918 53- 9
927 79- 2
" 79- 7
" 79- 8
" R6-14
931 79- 2
" 79- 5
936 R11- 2
947 111-16
966 8-13
987 59-14

18 I. C.
9 4- 4
11 7- 7
14 R8- 7
24 R4- 9
27 38-11
46 3-39
" 48- 9
77 105-26
" 106-34
81 55-12
99 101- 1
127 8- 5
" 8-20
" 105-68
177 52-13
" 52-18
" 52-31
181 R1- 6
185 2- 9
" 6-38
199 54- 5
" 55-12
" 81-13
" 101- 3
201 R14- 9

18 I. C. con
237 40-10
243 105-79
247 48-11
281 7- 7
286 68- 6
" 98- 5
289 3-31
318 3- 2
326 R3- 3
332 53- 5
" 53-16
336 55-12
357 R3- 3
362 R11- 2
379 2- 5
389 58- 5
" 67-21
" R1- 9
448 116- 1
451 7- 8
455 58- 4
457 R1-19
475 6-2a
479 108(j)-4
485 51- 1
487 78- 8
" 92-19
" 101- 1
492 52-19
496 105- 4
" 105-24
496 110- 2
519 53- 2
535 R11- 2
545 8-20
592 108(l)-9
610 92-27
621 108(l)-14
691 53- 6
" 60-44
" 91-22
704 92-13
" 101- 1
718 61- 5
724 48- 9
747 68- 8
" R3- 5
" R6- 4
" R11- 2
768 53-15
815 108(a)-1
844 105- 7
" 107- 7
" 107- 8
" 116-11
" 116-12
899 116-13
900 R14- 4
916 111-17
945 101- 1
953 38- 8
965 R11- 2

19 I. C.
18 101- 3
64 105-79
" 111-14
67 40- 1
" 40-14
90 63- 5
" 63- 8
119 105-79
" 111-14

References to Official Reports are invariably given in all cases found in the Official Reports.

19 I. C. *con*
124 9-12
" 111- 9
126 40-14
127 101- 4
221 58- 2
" 59-12
" 100- 6
255 3-31
301 118- 3
384 R10- 5
423 R1- 6
474 R10- 3
478 100- 5
493 106-12
562 54-14
589 3-18
624 7- 7
643 59- 8
658 58-30
" 100-15
661 58-30
" 100-13
" 100-15
721 106-15
729 R10- 5
" R10-8
758 106-20
" 106-41
789 59- 8
815 108(c)-1
" 108(c)-3
" 108(c)-8
818 54-19
856 R7- 3
" R8- 6
865 37- 8
881 6- 7
" 43- 4
930 117- 4
971 R6-21

20 I. C.
11 106-26
" 116-13
29 60-50
59 R5-13
69 105-69
151 67-27
184 91- 8
" R1-19
241 65- 4
286 123- 4
291 1- 4
" 41-10
" 59- 9
320 R6-10
325 54-14
329 67-27
" R1- 6
332 8-20
" 117- 3
349 53-20
355 53-20
" 53-34
363 106-45
" 106-49
374 105-48
385 3-34
" 59- 6
416 117- 3
429 14-13
544 58-12
" 59- 9

20 I. C. *con*
556 6- 3
664 105-38
666 58-33
" 60-22
667 61- 3
685 6-18
689 2- 5
715 107- 8
" 116-14
717 126- 9
" 126-10
792 60-14
803 53A- 3
812 60-34
823 105-79
825 82-18
827 82- 7
829 R6- 3
864 101-10
870 58-30
" 100-15
900 123- 4
917 R11- 2
951 38- 8
952 54-15

21 I. C.
19 58-33
21 41-23
47 105-47
60 122-16
69 54-12
" 58-33
78 59- 3
79 55-18
" 59-11
82 108(l)-2
83 3-11
87 60-22
90 58-33
93 8- 5
" 105-68
128 7- 7
192 R1-12
204 8-20
219 52- 3
251 60-44
333 53-34
367 3-31
405 111-16
" 114- 5
" 117- 2
457 58-40
" 67-18
" 98- 6
528 7- 7
538 Pre- 1
560 91- 5
" 91- 6
563 54-19
581 68- 3
" 68- 4
593 R11- 2
689 R1-12
691 R13- 2
712 R1-12
777 54-23
879 7- 7
957 108(l)-14
978 101- 4

22 I. C.
42 R10- 5
86 53- 9

22 I. C. *con*
250 3-39

24 I. C.
788 105- 1

27 I. C.
22 82-22

29 I. C.
16 3- 3

30 I. C.
886 2- 5
" 106-49

33 I. C.
264 105-47

34 I. C.
672 6-26a

40 I. C.
41 116-12
116 116- 1

41 I. C.
389 122- 7

46 I. C.
62 111-14
794 105-49

48 I. C.
335 6-26a

50 I. C.
243 R1-12

52 I. C.
236 111- 7

54 I. C.
265 84- 5
569 109- 2

55 I. C.
518 111-13

56 I. C.
656 111- 6
819 76- 6

57 I. C.
798 107-13

60 I. C.
454 83-18
476 112- 4
825 53-34

61 I. C.
328 107- 7
556 105-57
604 68- 5

62 I. C.
47 108(l)-6
390 106-12
" 106-24
621 92-10
692 64- 4
" 71- 2
762 67- 5
833 R5-13

63 I. C.
22 53A-18
" 54-23
87 58-18
90 107- 7
108 6-30
114 60-17
125 41- 7
" 41-10
144 52-18
" R5-20
169 53-22
255 38-11

63 I. C. *con*
303 67-31
" R14-13
400 59-14
" 60-48
483 111- 9
533 58-17
574 58-22
598 76-15
" 76--16
887 38-12

64 I. C.
178 36- 4
211 60-41
525 91-25
550 106-19
551 106-19
583 58-33
1001 14-10

65 I. C.
145 105-47
273 60- 5
" 67- 5
589 116- 1
" 116-12
" 116-13
709 R11- 2
734 55- 2

66 I C.
904 105-11
" 105-19
" 105-27
" 107- 2

67 I. C.
113 58-33
161 59-31
939 100- 9

69 I. C.
602 39- 5

70 I. C.
1 51- 1
" 63A- 1
152 60-26
" R2-18
" R3- 3

71 I. C.
20 53- 6
" 53-19
" 53-24
145 54-14
270 111-14
781 53A- 3
812 105-79

72 I. C.
931 60- 5
941 60- 5

73 I. C.
99 14-14
120 6- 3
682 60-14
711 41- 8
" 41-11

75 I. C.
246 6- 3
384 7- 7
402 8-20

90 I. C.
832 105-27
" 105-38
" 112- 2

91 I. C.
474 6-18
686 108(l)-14

92 I. C.
262 63- 9
524 38- 5
526 107- 6
665 60- 4
" 60-34

93 I. C.
86 111-10
334 123- 4
643 106-40
" 106-41
" 116-12

94 I. C.
756 58-33
967 8-20

95 I. C.
134 61- 5
213 52-31
" R1- 6
240 123- 2
406 122- 7
573 111-23
845 44- 4
863 58-31
945 60-50

96 I. C.
89 105- 1
" 117- 3
197 61- 5
" 62-12
304 60-50
315 105-49
" 105-50
" 105-51
450 52- 2
" 52-27
555 58- 4
765 82- 7
1005 38- 8

97 I. C.
70 5- 4
" 53- 5
256 R14-7
416 44-10
852 76- 6

98 I. C.
497 58-33
522 19- 2
" 19- 6
" 19- 8
691 53A- 3
729 54- 5
" 54-23
890 54-23
" 55- 1
" 55-20
911 111-17
" I16-13
940 54-17
1035 60-50
1039 52- 1
" 52-19
" 73- 1
1056 111-14

99 I. C.
183 76-20

100 I. C.
58 60-50

106 I. C.
646 6-2a

107 I. C.
110 53- 9
149 45- 7
195 52-18
401 92- 2
490 53-22

108 I. C.
161 107- 7
" 111-14
242 108(b)-2
291 3-28
" 55-12
" 58-39
" 101- 1
390 6- 3
440 6- 4
618 51-10
751 R5- 6

109 I. C.
35 38-12
110 7- 7
176 60-41
243 108(e)-3
" 108(e)-4
268 54- 5
335 108(b)-3
562 122- 2
654 19- 8

110 I. C.
45 111-14
193 53A-18
243 54- 1
386 53- 5
403 6-13
438 108(l)-1
689 60- 5
" 60-32
" 61- 5

111 I. C.
248 60- 5
" 60-32
738 R5-13

112 I. C.
243 8-20
257 106-24
" 106-25
" 111- 1
314 108(c)-4
609 51-23
651 1- 4
" 105- 1
" 105-31
" 105-37
" 105-38
" 105-72
" 111- 6
" 116- 1
" 116-12

113 I. C.
84 111-14
887 63- 5

114 I. C.
45 8- 6
416 53A- 3
696 51-10

115 I. C.
829 R14- 6
" R14-11

Topical Index and Synopsis for each Section show where exactly to look for the point required.

116 I. C.
17 6-31
„ 68-13
546 55- 9
894 63- 9

117 I. C.
819 60- 5
842 106- 2
„ 106-12
„ 111-16
848 105-69

118 I. C.
93 3-31
702 105-26
„ 105-31
„ 105-32
„ 107- 3
„ 107- 5

120 I. C.
163 55- 1
„ 55- 9
171 7- 7
673 105-13
769 60-22

121 I. C.
298 10- 8
„ 11- 2
869 7- 3

122 I. C.
333 70- 2
410 53A- 3

123 I. C.
687 92-·2
„ 101- 1

124 I. C.
669 R6- 3

125 I. C.
27 61- 2
739 44- 1

128 I. C.
308 51- 1

129 I. C.
730 91-16

130 I. C.
14 105- 3
„ 105-19

132 I. C.
95 123- 4
376 61- 5
802 55- 9

133 I. C.
551 54- 1
901 54-12

134 I. C.
95 76-12

134 I. C. *con*
95 77- 1
531 3-11
1038 111-14
1106 107- 7

135 I. C
244 53- 9
497 58-17

136 I. C.
264 92-15
332 58-17
824 101-1

137 I. C.
672 R6- 3
„ R6- 8

138 I. C.
247 58-39

139 I. C.
695 65- 4

140 I C.
430 68- 2

142 I. C.
376 100-22
880 R5- 6

145 I. C.
277 92-17
„ 92-24

147 I. C.
397 8- 20
504 129- 2

149 I. C.
229 73- 1

150 I. C.
762 3-19

156 I. C.
351 111-13

157 I. C.
657 68-17

159 I. C.
804 R14- 3

160 I. C.
632 8-20
924 7- 7
1012 112- 2
„ 114- 1

161 I. C.
412 128- 3

162 I. C.
749 53-20
881 53A-10
„ 54-12

163 I. C.
602 101-11
709 58-39

163 I. C. *con*
829 2- 2
„ 111- 7

164 I. C.
55 105-29
241 65A- 7
446 106-13
„ 106-45
„ 117- 3
477 100- 5
„ 100-16
490 60-44
720 123- 4
837 105- 1
„ 105-25
„ 105-37
„ 105-72
„ 108(h)-3
„ 108(h)-4
921 100-28
933 53- 2
„ 53- 6
1009 91- 4

165 I. C.
121 108'l)-7
352 55-12
941 8-20

167 I. C.
239 123- 4

168 I. C.
695 53-20

169 I. C.
169 52-20
„ 100- 1
„ 100-21
„ 100-28

170 I. C.
590 41- 8
„ 41-23
748 73- 1

171 I. C.
423 92-11
„ 92-22
735 53- 2
„ 53- 6

172 I. C.
527 126- 9
707 43- 7

173 I. C.
951 38-12

185 I. C.
173 130- 3

190 I. C.
40 63-23

196 I C.
380 3-31

(IV) OTHER JOURNALS

Moore's Indian Appeals.

1 M. I. A.
175 Pre- 8

2 M. I. A.
1 58-33
181 34- 3
311 8-20
390 6-2a
„ 18- 5
487 58-25
„ 58-35
„ 76- 5

3 M. I. A.
245 128- 4
261 105-72
„ 111- 6
329 136- 2
435 5- 5
„ 21- 4
457 69-10

4 M. I. A.
1 35- 3
„ 35-28
137 19- 6
321 105-12
444 68- 5

5 M. I. A.
72 58-33
109 2- 5
467 105-47

6 M. I. A.
1 8- 6

6 M. I. A. *con*
27 51- 4
53 122-11
„ 123-12
211 100-31
251 8-20
267 9- 1
393 8-20
„ 38- 1
„ 38- 5
„ 38- 8
„ 38- 9
„ 38-11
„ 76-12
„ R2-13
510 53-10a
526 8-20
„ 28- 2
„ 28- 3

7 M. I. A.
72 Pre- 1
128 105-69
323 58-31
„ 83- 2
„ 83- 8
„ 84- 5

8 M. I. A.
1 3- 2
„ 6-24
43 53A- 3
327 105-42
„ 105-43
„ 105-47
500 2- 7
„ 91-19
529 38- 5

9 M. I. A.
55 8- 4
123 28- 3
303 Pre- 2
„ 48-10
„ 58-39
303 96- 1
431 105-36

10 M. I. A.
151 60-50
252 53-18
340 35- 3
„ 58-31
„ 60- 1
„ 83- 2
„ 83- 3
„ 83- 8
454 38- 5
„ 38- 8
540 34- 2
„ 60-23
„ 60-27
„ 73- 1

11 M. I. A.
139 128-10
„ 129- 3
241 65-10
„ 72- 2
„ 72- 3
„ 72- 8
„ 100-25
241 100-29
295 Pre- 4
„ 3- 3
„ 8-15
„ 108(o)-4

11 M.I.A *con*
317 53-15
433 105-47
487 7- 7
619 38- 5
„ 38-11
„ 91-19

12 M. I. A.
157 35- 3
„ 62- 5
„ 76- 1
„ 76-15
263 105-47
275 5- 5
„ 5- 7
292 6- 3

13 M. I. A.
209 3-31
„ 38-11
„ 38-12
„ 59- 9
232 122-11
„ 123-12
248 105-64
270 5- 3
„ 7- 7
404 60-44
„ 82- 6
„ R1- 6
419 58-22
„ 126-10
438 105-69
467 63- 2
„ 108(d)-2
560 58-31
„ 60- 1

14 M. I. A.
40 6-16
101 52-14
129 54-23
144 67-20
„ R1- 6
187 38-11
247 8- 4
„ 105-47
„ 105-69
443 R2-13
„ R7- 4

Ajmer-Merwara Law Journal

1942
A. M. L. J.
51 R13- 5

1943
A. M. L. J.
1 R14-12

1944
A. M. L. J.
21 105-40

1945
A. M. L. J.
13 R5-14

Allahabad Law Journal

1 A. L. J.
20 67-15
„ R4- 3

1 A. L. J. *con*
201 116-13
207 R1-19
276 82-17
288 101- 1
300 R3- 3
„ R7-13
„ R8- 7
327 100- 5
360 91- 7
„ R14- 7
367 R1-12
394 100-31
470 58-17
486 R6-10
537 105-60
590 83- 7
621 5- 3
625 123- 2

2 A. L. J.
62 R7- 3
123 60-44
„ R14- 7
294 52- 8
„ 65A- 1
353 R6-10
356 R14- 7
379 55-14
„ 100-25
„ R15- 2
481 44- 4
519 18- 5
583 64- 3
609 91- 6
698 56- 1
„ 56-14

Remarks in foot-notes amplify principles in the Commentary and state the special features of the case.

2 A. L. J. con
698 82- 3
754 100- 6

3 A. L. J.
130 Pre- 4
" 107-12
134 108(f)-3
221 5- 7
" 100- 9
238 67A- 1
240 91- 5
441 82-23
474 44- 5
517 76- 6
" R7-11
531 58-31
534 41-12
621 10- 6
628 Pre- 4
672 61- 2
686 7- 7
768 61- 5
820 55- 9
829 R8- 7

4 A. L. J.
176 61- 3
" 72- 3
" 72-11
249 68- 5
253 58- 4
" 67A- 1
349 92- 2
492 73- 1
708 10-14
" 126- 2
712 6-10
717 58-31
" 60- 1
756 118- 3
787 60-22
" R14- 7

5 A. L. J.
402 67-21
" R1- 9
723 58-14

1930 A. L. J.
964 41-23

1938 A. L. J. (Sup)
.20 52-39

1944 A. L. J.
253 54-21
376 101- 4

1947 A. L. J.
592 118- 3

Allahabad Weekly Notes

1881 A.W.N.
10 76- 5
" 76- 7
11 60-41
13 58-18
20 108(h)-2
50 55- 9
59 68- 4
63 58-41
" 67-18
" 68-17

1881 A.W.N. con
66 72- 3
" 76- 8
67 41- 1
71 67-15
" 68- 2
" 68- 5
88 45- 7
97 51-23
147 6-24
160 55- 9

1882 A.W.N.
59 101- 1
100 105-14
131 60-50
137 60-50
209 59- 3
210 72- 3

1883 A.W.N.
38 8-20
40 101- 1
90 76-12
" R7- 4
91 68- 6
108 38- 1
134 40-10
193 91- 5
" R1-19
303 76- 6
208 63- 9
" 63A-.1
213 58-18
216 68-17

1884 A.W.N.
33 100-31
85 7- 7
121 10-16
136 R1-19
169 55- 3
178 R2-18
183 67- 2
184 123- 2
254 40-17
269 2- 5
274 2- 5
329 R7-13

1885 A.W.N.
19 100- 5
" 100-16
21 92-19
" 101- 1
57 43- 9
130 2- 5
" 101- 1
155 67-20
" 101- 1
201 54-21
210 101- 1
262 76-10
282 130-17
" 130-18
328 83-15
329 53A-16
" R4- 9

1886 A.W.N.
86 123- 2
" 126-16
115 105-31
" 107- 5
183 48- 9

1886 A.W.N. con
212 58- 41
" 67-18
" R4- 3
269 100-29

1887 A.W.N.
15 53A-16
52 53-16
61 58-28
84 2- 9
" 6-38
" 21- 5
" 123- 4
119 67-18
" 68- 8
125 91- 7
" R1-19
183 56-10
192 81-10
231 10-18
233 67-27
245 76-12
250 60-44
279 39- 5

1888 A.W.N.
10 82-14
45 50- 2
80 R7- 9
119 R7-13
125 108(p)-1
171 58-41
" 67-18
" R4- 3

1889 A.W.N.
81 40-10
91 52- 1
" 52-18
" 52-40
" R1- 6
149 R6-.3
154 111-14
169 6-2a
176 105- 7
177 R7- 5
" R11- 2
187 60-50

1890 A.W.N.
15 53- 5
59 65A- 1
90 72- 8
115 6-38
142 R6- 3
175 106-24
" 111-23
223 R5-20

1891 A.W.N.
9 100-22
168 68-17
186 51-22
213 126-10

1892 A.W.N.
66 67-15
" 68- 2
" 68- 4
103 108(o)-7
217 108(l)-5
246 67-27

1893 A.W.N.
163 38-12
199 6-10

1894 A.W.N.
2 2- 5
57 58-30
136 91- 5
143 60- 4
" 60-40
166 44- 4
167 60-50
205 67-31

1895 A.W.N.
1 67-28
" 82-18
" R14-12
145 83- 3

1896 A.W.N.
51 106-40
89 3-11
123 53- 6
129 92- 2
153 67-27
171 67-27

1897 A.W.N.
19 48- 9
69 107- 5
" 107- 9
90 48- 9
146 3-18

1898 A.W.N.
33 R2-11
" R5-26
" R10- 8
39 95- 4
105 R5-14
120 67-28
" R1- 6
129 108(l)-6

1899 A.W.N.
34 R1- 2
72 R6- 3
125 R-6 3
191 51-22
208 R6- 3
218 3-31

1900 A.W.N.
1 122-17
20 R1-19
27 105-47
81 44- 4
93 18- 5
95 R5- 4
134 76- 8
" 76-12

1901 A.W.N.
10 3- 1
14 58-18
22 R1-19
23 R5-20
36 60- 5
48 44- 4
52 48- 6
" 68- 4
53 111- 7
64 53-20
67 53-34
68 R1-10

1901 A.W.N. con
153 R1- 9
157 105-13

1902 A.W.N.
60 51-22
161 6-24
216 67-21

1903 A.W.N.
41 R6- 7

1904 A.W.N.
20 84-10
70 51-22
" 51-23
285 91- 5

1905 A.W.N.
14 60-50
35 R1-19
" R1-21
119 44- 4
156 R1- 6
160 41- 4

1906 A.W.N.
112 67-19
" R1-19
174 51-22
179 82-17
190 91- 5
" 101- 1
203 R3- 5
241 111- 5
285n R1-19

1907 A.W.N.
83 68-18

1908 A.W.N.
5 55-20
48 R14- 7
123 37- 7
155 43- 3
" 43-11
200 7- 7

Allahabad Weekly Reporter

1947 A.W.R. (H.C.)
167 106- 3
" 116- 1
284 110- 4
" 111- 4

Law Reporter Allahabad

3 L. R. All. (Rev.)
537 107- 7

8 L. R. All. (Rev.)
359 116-13

14 L. R. All. (Rev.)
645 91-12

—

Bombay Law Reporter

1 Bom. L. R.
191 51-22

1 Bom. L. R. con
191 108(h)-4
" 108(m)-2
273 69-15
" 69-16
" 69-17
" 69-26
381 60-49
" 83-10
" 84-16
491 108(q)-1
" 111-17
495 123- 1
498 Pre- 4
" 10- 6
739 106-26
" 106-31
" 108(e)-3
" 108(e)-5
841 81- 5
849 2- 5
854 40-22

2 Bom. L. R.
32 100-11
69 123- 2
93 105-37
" 105-44
" 105-47
110 3-39
" 48- 9
114 8-10
201 58-35
" 68- 5
" 68-17
215 58- 2
223 3-34
" 48- 9
" 59- 5
225 R6-20
" R11- 2
488 105- 9
" 105-27
" 107- 5
686 38- 5
688 8-10
884 40-15
1058 48-33

3 Bom. L. R.
92 67-20
" 91- 8
97 48- 9
152 60-17
156 58-35
" 67-15
243 38- 8
679 109- 5
" 111- 8
685 92-15
" 95- 1
768 105-47
785 15- 3
935 60-41

4 Bom. L. R.
25 2- 5
508 11- 2
577 58-11
587 38- 5
" 38- 9
883 129- 4
893 30- 2

Any case in the "Table of Cases" will show where to get the entire case-law on the point.

5 Bom. L. R.
118 76- 8
„ 108(j)-5
119 58-35
„ 58-141
„ 67-15
142 53-20
„ 53-34
213 53- 6
„ 53-16
247 69-21
255 53- 6
„ 53-11
„ 53-16
334 8- 6
373 6-17
„ 130- 5
„ 130- 7
387 60-49
„ 84- 5
„ 84- 8
389 R5- 7
392 4- 4
624 18- 5
„ 18- 6
643 51- 8
652 65- 4
678 38- 5
729 8- 5
983 Pre- 4
„ 8- 4
991 40-17
„ 41-25
1016 111-11
1036 60-26

6 Bom. L. R.
56 122-5a
288 68- 4
„ 68- 8
„ 68-17
557 3-41
„ 69-18
„ 69-21
„ 69-23
590 76-19
628 38- 5
„ 38- 8
„ 38-11
630 8-20
„ 58-31
„ 58-33
„ 58-35
800 3-47
„ 8- 9
832 55- 8
983 123- 4
1043 3-34
„ 123- 4
„ R5-29
1058 14-14

7 Bom. L. R. (Journal)
73 14- 4

7 Bom. L. R. (Reports)
138 6-16
„ 58-11
172 38- 5
„ 38-11
191 60-48
306 2- 9
„ 124- 3

7 Bom. L. R. (Reports)con
401 105-27
„ 105-50
407 3-28
618 2- 5
713 108(c)-1
772 60-28
„ 105-25
„ 105-67
„ R11- 2
816 R14-12
845 54-17
„ 54-23
934 59- 8
„ 100-14
993 84- 5

8 Bom. L. R.
110 53- 6
245 18- 5
252 6-38
283 118- 6
344 58-11
350 72- 3
„ 76- 8
550 6-2a
„ 58-21
576 R14- 7
„ R14- 9
580 105-29
„ 107- 3
669 58-33
764 58-33

9 Bom. L. R.
114 6-17
„ 130- 7
119 3-24
188 58- 8
254 60-20
295 19- 2
388 41-21
„ 41-22
„ 41-23
393 59-14
404 51-22
462 R14- 7
514 8-20
838 3-24
„ 131- 2
903 84- 5
1114 38- 5
„ 38-11
1173 52- 1
„ 52-35

10 Bom.L.R.
615 58-35
„ 58-44
„ 67-15
„ 68- 2
„ 68-17
617 54-12
1209 122-15

37 Bom.L.R.
246 53A- 3

Bom. Un. C.
120 53-34
185 53-34

—

Calcutta Law Journal.

1 C. L. J.
31 104- 1
„ R1-19
„ R4- 6
40 44- 5
65 91- 5
116 106-25
261 6-35
337 60-43
„ 101- 4
„ R1-10
517 8- 5
„ 8-10
„ 105-68
531 76-12
„ 100-13
„ 101-10
„ R2-13
572 105-48
605 19- 9

2 C. L. J.
20 8-10
„ 108(o)-6
70n 3-11
125 108(d)-3
138 52-14
„ 100- 5
202 60-26
„ 60-43
„ 92- 7
„ 101-10
„ R1- 6
„ R1-18
288 52-18
„ 92- 1
„ 92-10
„ 101- 1
338 122-16
343 53A- 3
„ 106- 3
„ 106- 6
„ 106- 8
389 111-14
403 105-69
„ 111-22
493 67-15
„ 68- 5
„ 68-17
540 112- 4

3 C. L. J.
12 R1- 2
52 73- 1
„ 73-14
188 R11- 2
220 68- 7
222 105-67
316 108(d)-2
377 60-44
„ 67-28
521 8- 5
„ 105-68
533 60-26
„ R3- 3
„ R8- 7
560 108(d)-2

4 C. L. J.
79 82-17
„ 95- 1
„ 95- 4
„ 95- 7

4 C. L. J.con
195 60-44
„ 82-18
246 58-29
„ 68- 2
„ R6- 5
317 82-18
„ R3- 7
„ R5-11
323 5- 4
334 54-14
338 54-14
399 8- 5
442 18- 5
476 39- 1
„ 39- 2
„ 100-30
490 48- 9
510 58-29
„ 58-38
„ 59- 8
„ 68-13
533 R2- 5
543 7- 7

5 C. L. J.
9 105-21
53 106-26
62 105-82
69 105-66
„ 108(l)-2
95 69-27
„ 92- 9
„ 101- 1
„ R1- 5
178 105-43
„ 105-50
188 3-20
205 106-37
„ 108(j)-1
„ 108(j)-2
267 44- 4
287 58-29
„ R6- 5
315 60-44
„ R1-19
413 108(o)-4
542 7- 7
„ 38- 5
653 R2- 7

6 C. L. J.
46 44- 7
„ 60-43
„ 73- 1
„ 92-24
„ 92-27
„ R5-17
72 105-71
„ 105-79
„ 111-14
74 48- 1
„ 48- 4
„ 73- 1
134 92- 1
„ 92-10
„ 92-16
143 68- 5
„ 68-17
202 105-71
208 58-33
212 105-60
883 60-15
398 55-14
472 53-34

6 C. L. J.con
490 38-11
612 60-43
„ 60-44
„ R1-19
639 68- 2
719 R1- 2
745 73-10
„ R5-17
„ R6-10

7 C. L. J.
1 52-18
„ 52-32
„ 67-11
72 65- 4
90 105-38
„ 105-69
„ 105-72
„ 106- 4
107 2- 5
„ 106-19
„ 108(j)-1
195 58-25
202 105-68
„ 105-71
„ 105-79
„ 111-14
215 72- 3
251 106-34
„ 106-45
257 106-34
274 82-12
284 105-64
291 8-20
309 2- 5
„ 108(j)-1
„ 111-10
381 43-10
387 43- 2
553 2- 5
604 76-20
615 105-79
„ 105-80
„ 116-13
644 7- 7
„ 43-11
648 111-14
„ 112- 2
658 3-22

8 C. L. J.
34 106-47
„ 110- 1
92 60-44
„ 67-28
„ 82-18
153 52-13
„ 52-18
173 67-20
„ 91-41
499 6-2a
513 105-48
„ 105-52
525 8-20

9 C. L. J.
78 R1-10

33 C. L. J.
516 106-19
518 106-19

62 C. L. J.
7 R11- 2
201 105-48

62 C.L.J.con
201 106- 6
„ 106-16
„ 106-24
„ 107- 4
551 105-47
„ 105-49
„ 105-55

64 C. L. J.
439 5- 3

66 C. L. J.
10 76- 1
„ 76- 8

68 C. L. J.
411 106-19
„ 106-40

72 C. L. J.
493 R1- 5

73 C. L. J.
246 58-40

75 C. L. J.
431 106-49

83 C. L. J.
200 R1-19

Calcutta Law Reporter.

1 C. L. R.
152 48-11
256 62- 5
„ 105-67
293 111-10
453 37- 3
466 41-23
542 54-17

2 C. L. R.
208 111-14
323 76- 8
„ 108(j)-4
474 38- 8

3 C. L. R.
1 51-22
112 6-2a
194 51-10
„ 51-25
247 123- 2
285 108(j)-4
386 58-33
417 100- 5

4 C. L. R.
100 108(l)-14
294 60-44
469 114- 2

5 C. L. R.
29 101- 1
91 123- 4
105 84- 8
192 108(d)-1
227 73- 1
231 106-24
„ 106-49
243 R1-15
496 14-13

6 C. L. R.
117 106- 6
336 82- 6
528 43- 2

7 C. L. R.
206 R11- 2

"Table of Cases" indicates first reference in foot-notes and reference to Official Reports.

7 CLR *con*
241 18- 6
267 R11- 2
460 100-31

8 C. L. R.
50 105-50
150 111-14
157 58- 4
210*n* 100-22
" 100-29
437 R2-11
" R10- 3

9 C. L. R.
66 18- 5
221 108(p)-1
347 108(n)-1

10 C. L. R.
15 111-10
25 105-50
526 108(l)-14
547 38- 5

11 C. L. R.
166 59-14
268 R1-11
387 108(o)-8
" 111- 1

12 C. L. R.
444 59- 3
479 58-31
" 109- 2

13 C. L. R.
128 76-14
272 60-44
" 82-18
280 41-25

Calcutta Weekly Notes.

1 C. W. N.
62 52-19
80 67-31
" R14-11
81 59- 8
" 100-14
142 105- 8
" 105-20
" 105-21
" 107- 8
158 111-25
174 40-25
197 R3- 5
221 108(l)-6
453 R1-10
493 6-2a
" 65- 4

2 C. W. N.
29 58- 4
33 100-25
" R14- 3
34 108(f)-1
43 6-18
122 108(j)-1
" 108(j)-10
147 130-19
207 54-14
229 44- 4
254 R6- 3
292 2- 5
" 105-41

2 CWN *con*
292 105-42
" 111-12
" 111-14
303 116- 1
320 67-31
" R14-11
383 106-40
397 81- 2
" 81-13
455 105-60
525 116- 1
575 14-10
" 40-10
" 60-30
591 59- 4
" 59-14
603 3-12
" 58-25
750 3-34
" 78- 4
" 78- 5
758 58-36

3 C. W. N.
5 6-35
30 3-34
126 10-16
" 11-13
151 108(l)-4
153 92- 2
" 101- 1
158 6-2a
207 3-31
" 59- 9
214 108(l)-9
255 105-50
323 52-31
499 59- 5

4 C. W. N.
42 111-14
70 5- 5
266 91- 8
268 101- 8
324 108(l)-5
452 91- 8
465 45- 7
470 3- 9
474 104- 1
" R5-13
507 60-41
" 60-44
" R1-19
508 108(d)-2
" 108(d)-3
521 108(m)-7
541 67-19
572 106-37
" 106-44
" 106-45
574 2- 5
" 108(j)-1
" 117- 2
590 108(j)-4
671*n* 14- 9
" 30- 2
769 92-19
792 117- 2

5 C. W. N.
83 60-41
" 91- 4
" R1-15
" R1-19

5 CWN *con*
158 54-15
232 67-20
" 91-41
300 8- 6
" 11- 2
343 14-10
353 108(c)-2
" 108(l)-14
356 73-11
" 73-14
403 53-14
423 R1- 6
" R1-19
454 3-11
" 3-18
505 126-10
653 R11- 2
724 118- 5
801 105-25
" 105-49
" 106-49
816 108(j)-14
846 51-22
" 51-25
" 105-47
" 108(b)-4
" 108(m)-2

6 C. W. N.
5 3- 2
134 51-25
" 105-47
" 105-50
" 106-37
" 106-45
" 108(h)-4
150 54-14
192 58-33
199 106-24
321 18- 3
326 108(l)-6
336 108(g)-2
352 105-51
372 64- 3
488 R1- 7
523 59- 6
583 82- 9
616 108(o)-4
654 R2-18
769 R11- 2
796 6-13
834 73- 1
" 101- 6
905 9-12
" 118- 4

7 C. W. N.
11 3-34
" 3-35
" 101-10
" R1-19
90 105-19
132 105- 8
160 3-11
384 59- 8
453 37- 5
454 109- 7
596 111-17
734 105-43
744 R6- 3
914 R14- 4

8 C. W N.
102 104- 1

8 CWN *con*
102 R2-16
" R5-14
139 106-16
155 105-49
" 105-52
216 83-17
" R11- 2
297 105-51
" 105-52
301 105-51
315 111- 8
332 73- 1
" 101- 6
365 R1- 5
385 92- 2
" R1-10
438 109- 4
454 117- 3
620 53- 9
665 6-24
690 92- 4
774 106-49
" 111-25
918 106-36

9 C. W. N.
14 48- 9
" 58-11
34 108(l)-6
56 111-13
117 73- 1
122 105-79
" 111-14
" 52-18
171 R5-13
255 108(o)-7
340 116- 3
656 109- 4
699 44- 5
710 8- 2
789 60-28
" 60-37
" 61- 5
865 82- 3
" 82-17
" 95- 1
" 95- 7
" 95- 8
871 108(l)-1
928 111-14
1001 58- 4
" 100-15

10 C. W. N.
763 7- 7
839 44- 5
841 106-12
" 106-41
" 106-42
910 R3- 5
" R5- 6
" R5-18
932 4- 4
" 58-18
" R2- 7
1000 7- 7
1102 6-13

11 C. W. N.
143 44- 4
342 118- 4
495 91-34
809 8-20
" 105-27

11 CWN *con*
809 105-29
828 52-31
1026 108(l)-7
1124 106-15
" 106-49

12 C. W N.
63 7- 7
" 38- 5
94 65- 4
" R1- 5
98 6-2a
145 R6-18
154 108(g)-2
282 104- 1
" R5-14
409 67-22
412 11- 2
525 111-14
625 3- 2
724 106-39
" 108(j)-1
" 108(j)-6
745 60-44
" 82- 3
767 108(l)-14
793 10-16
" 11-13
808 5- 3
878 58-33
911 R1- 2
" R1-19
966 6-13
1059 106-20
" 106-35
" 106-39
" 106-40
1083 18- 4

24 C. W. N.
297 67-27

39 C. W. N.
1069 106-10
1229 R6-11

40 C. W N.
166 108(l)-14
343 R14- 2
428 R1- 6
561 53- 6
1173 56-10
" R1-19
1176 53A-10
1203 44- 5

41 C. W. N.
54 53A-13
854 67A- 6
1103 18- 4
1133 R14-12
" R14-14
1201 123- 6

42 C. W. N.
34 53- 6
" 53-34
47 R6-10
107 107-13
378 50- 2
502 81- 7
" 81- 8
771 107-10
937 8-20
1030 108(l)-14
1088 108(j)-4

42 CWN *con*
1106 91- 4
" 91- 5
" 92- 5
" 92-17
" 92-23
1115 110- 1
" 110- 3
1177 83-13
" 83-21

43 C. W. N.
828 105-48
1136 53-20

44 C. W. N.
593 130- 3
783 52- 1
" 52-14
" 52-16
" 52-18
1109 112- 2
" 112- 7

45 C. W. N.
132 53A- 3
" 53A-11
" 53A-13
628 59A- 3
735 41-24

46 C. W. N.
147 14-10
407 44- 8

47 C. W. N.
207 106-20
" 106-40
441 3-22
" 3-24
" 3-26
" 3-27

48 C. W. N.
711 108(q)-2
736 R11- 2

49 C. W. N.
470 108(l)-14
494 100- 4
647 108(q)-2
649 54-21
779 5- 4

50 C. W. N.
4 R4- 8
" R5-20
" R5-29
461 105-31
" 106-17
" 106-40
" 110- 1
486 R4- 4
" R5-20
" R5-29

51 C. W. N.
227 21-13
" 22- 3
" 22- 4
" 23- 2
798 R4- 6

52 C. W. N.
446 73- 1
" 73- 7
530 1-19

53 C. W. N.
129 100-28
326 R3- 7
555 115- 3
631 R6-10

Sutherland Weekly Reporter (1862-1864).

Suth. W. R. Spl. Number
9 111-13
10 112- 2
30 50- 2
" 109- 7
34 111-14
79 60-28

1864 Suth. W. R. Gap. (Civil)
14 83- 2
" 83- 8
36 58-31
49 58-31
62 54- 5
75 62- 3
109 76-12
121 123- 4
143 38- 8
" 58-25
153 38-11
157 7- 7
" 60- 1
" R11- 2
166 38- 1
" 38- 8
177 76-12
" 76-14
183 58-31
185 123- 4
209 72- 2
216 60-41
219 62- 2
222 54- 5
225 53-21
260 58-36
" 60-43
265 53- 9
270 111-10
279 108(o)-7
285 58-31
" 67-27
303 82-22
318 41- 1
345 48- 1
" 92-16
349 60- 1
367 108(h)-2
" 108(o)-4
375 56-10
385 38- 1

Suth. W. R. Gap. (Act X Rul.)
6 50- 2
31 111-11
" 114- 1
" 114- 2
42 116- 1

Suth W R Gapcon
42 108(l)-14
63 108(l)- 6
112 108(l)- 6

1 Suth.W.R. (Civil)
1 108(c)-1
" 108(c)-2
" 108(l)-14
7 58-36
14 38-11
21 53- 6
22 58-33
41 53- 6
49 108(c)-8
52 58-36
59 38- 8
" 38-12
65 3- 2
66 3-31
110 41- 1
113 108(d)-1
115 41- 1
133 76-19
144 58-36
" 76-12
247 38-11
253 108(l)-6
296 72- 3
319 53-11
" 53-16
324 41-22
338 6- 4
353 56- 1
358 65A- 1
365 68- 5
" 76-12

2 Suth.W.R. (Civil)
10 55-12
109 108(l)-14
137 111-10
150 60-41
" 76- 6
157 108(o)-7
267 60-50
270 7- 7
289 76-16
290 111-26
292 38- 8

2 Suth W R (Act X Rul.)
1 111-14
15 108(l)-6
71 108(l)-8
73 116-13
101 111-13

3 Suth W R (Civil)
6 72- 2
" 72- 3
" 76- 1
10 41- 1
28 55- 1
30 53- 9
64 40- 8
" 4?- 3
71 51-22
87 41- 1
92 53- 9
103 48- 3

3 Suth W R (Civil)con
128 60- 4
" 91- 8
138 55-12
153 111-10
157 69- 4
162 72-10
174 72- 2
" 72- 3
184 84- 5
200 8-20
" 122-17
221 53- 9
230 58-31
" 91- 8

3 Suth W R (Miso.)
4 60-41
7 38- 5
16 6-13

4 Suth W R (Civil)
11 53- 9
24 116-13
45 78- 3
103 76-12

5 Suth W R (Civil)
4 21- 2
" 123- 4
37 41- 1
53 76-14
68 58-33
76 58-33
101 105-47
103 38- 8
104 58-33
120 41- 1
126 72- 8
163 91-42
200 76-16
244 38-12
246 126-10
248 54- 5
271 76-12
" R2-13
" R7- 4

5 Suth W R (Act X Rul.)
68 108(l)-6
78 108(l)-1

5 Suth W R (S. C. C. Ref.)
3 3-22
16 6-35

5 Suth W R (P.C.)
111 53A- 3

6 Suth W R (Civil)
6 76-12
30 53- 6
34 6- 4
67 111-10
68 122- 3
82 105-44
84 62- 5
" R2-13
90 53- 1
127 76-12
" 76-15

6 Suth W R (Civil)con
129 6-26
149 38- 8
152 55- 9
193 38- 8
228 8- 3
" 51- 1
" 108(b)-2
" 108(h)-4
230 58-31
" 91- 8
235 53-34
240 60-41
245 123- 2
253 56-10
267 54-15
269 58-38
283 53- 7
" 58-35
" 58-41
" 67-15
" 68-17
" 76-12
" 77- 1
287 53- 9
314 8- 8
" 8-13

6 Suth W R (Act X Rul.)
40 108(o)-3
88 111- 1

6 Suth W R (Misc.)
64 6-13

6 Suth W R (Civ. Ref.)
26 108(f)-3

7 Suth W R (Civil)
22 108(b)-3
23 38- 8
30 76- 1
" 76- 5
66 58-31
67 52-18
82 62- 5
" 76-14
" 76-15
98 126-10
103 52-40
118 53- 9
120 41-23
123 58-31
138 53- 7
152 106-49
" 116- 1
" 116- 6
" 116-12
169 6-24
225 52- 1
" 52-40
232 67-20
244 76-18
258 55-21
266 6-2a
272 108(l)-7
314 60-41
317 54-14
334 54-15
353 45- 4
366 45- 7

7 Suth W R (Civil)con
374 114- 2
428 54-15
446 7- 7
484 56- 1
513 53- 6

7 Suth W R (P.C.)
35 9-10

8 Suth W R (Civil)
54 108(l)14
67 41- 1
75 38- 8
106 54-11
" 105-42
138 112- 6
223 83- 2
" 83- 8
310 58-36
364 38- 8
379 R4-10
385 106-24
386 105-37
399 3-41
" 52-18
476 58-31
" 60- 1

9 Suth W R (Civil)
111 59-14
123 105-37
147 111- 8
200 117- 3
213 106-31
243 130- 2
257 123- 4
275 76- 1
" 76-15
285 38-12
291 44- 4
297 38-11
" 126-10
350 38- 1
" 38-11
351 9- 1
488 72- 3
" 76- 1
" 76-10
501 38- 8
572 76-14
" 76-19
582 108(l)14
593 41- 1

10 Suth W R (Civil)
15 111- 7
33 106-49
94 38-11
108 108(l)-6
120 108(l)14
151 10-18
167 91- 8
177 105- 4
185 41- 1
" 41- 8
194 54-14
" 55-12
208 54-15
289 111-22
293 3-31
299 6-2a

10 Suth W R (Civil)con
304 108(l)-7
325 65A- 1
" 65A- 4
326 58-31
359 58- 4
" 58-31
367 76- 1
384 111- 8
" 115- 1
392 108(l)-7
419 108(o)-4
441 44- 1
" 108(l)-6
445 53- 6
469 52- 1
" 52-40
" 126- 9
476 67-27
" R1- 6
477 106- 6
478 58-31
" 60-22

11 Suth W R (Civil)
16 107- 1
21 100-30
68 R11- 2
80 108(b)-1
" 108(b)-3
134 6- 6
151 60-22
201 114- 2
" 114- 7
202 56-10
212 100-31
231 106-24
278 108(b)-1
" 108(b)-3
286 78- 2
310 61- 2
408 60- 5
" 62- 8
446 38- 8
485 115- 1
520 58- 6
544 58-31
554 38- 5
" 52- 9
574 51-22

11 Suth W R (O. J.)
21 R1- 6

12 Suth W R (Civil)
3 105-47
19 65A- 1
30 108(l)-6
105 58-31
109 108(l)-14
122 109- 5
145 108(a)-1
" 108(a)-3
149 108(b)-2
163 59- 2
214 58-36
222 59- 2
289 105-70
" 107- 1
" 108(l)-12
291 82- 5

*In the foot-notes to the Commentary * indicates either a leading case or a case giving fuller reasons.*

12 Suth W R (Civil) con

299 38- 5
366 3- 4
413 105-47
456 48- 9
491 100- 5
538 105-35
" 116-12

13 Suth W R (Civil)

3 126-10
44 60- 1
49 100-31
87 53- 9
190 106-16
" 107- 4
" 111- 2
228 109- 7
267 106-24
" 106-49
281 115- 1
285 10- 1
307 107- 1
322 44- 4
338 108(l)-14
445 58-35
" 67-15
" 105-67

13 Suth W R (F. B.)

82 58-12

13 Suth W R (P. C.)

14 53-34

14 Suth W R (Civil)

29 58-35
43 108(c)-8
72 38- 8
80 7- 7
83 109- 5
85 108(l)-14
107 105-47
117 8-20
154 6-35
216 67-27
" R1-11
233 91- 8
" 101-10
238 67-20
239 6-38
250 107- 1
262 105-33
273 108(c)-1
"108(l)-14
315 92-17
379 8- 2
423 58-31
448 R1-11
450 R11- 2
455 62- 5
461 58-27
480 82- 2
491 79- 1
" 101- 1

14 Suth W R (O. C.)

5 137 -4

15 Suth W R (Civil)

38 6-26a
44 54-14
75 6-2a
128 100-25
188 6-13
230 108(l)-14
263 39- 5
" 58-31
273 53- 9
274 108(j)-1
284 R11- 2
308 2- 6
" 52-31
331 105-67
353 60-22
363 108(h)-4
372 52- 1
394 105-20
448 108(l)-8
526 8-13
545 108(g)-1
558 54-17

15 Suth W R (F.B.)

17 6- 3
17n 6- 3

15 Suth W R (P.C.)

16 43- 7

16 Suth W R (Civil)

32 126-10
•78 82- 2
79 108(l)-6
88 9- 1
" 123- 4
98 R1- 6
103 111-13
138 106-34
147 105- 9
" 105-72
" 111- 6
169 51- 8
171 6-2a
185 106-49
" 116- 1
201 108(l)-14
203 58- 9
" 58-39
222 73- 1
223 3-29
" 106-45
300 8-20

17 Suth W R

84 6-35
97 51- 1
192 R1- 8
230 58-31
271 91-12
342 60-41
" 83- 2
416 108(c)-7
432 100-30
433n 39- 5
480 92- 2
" 101- 1
523 126-10
560 65A- 7

18 Suth W R

12 44- 4
65 76-12
65 76-15
" R7- 4
" R9- 1
77 38-12
140 5- 7
151 41- 8
" 41-23
" 41-25
218 112- 2
244 111-13
256 58-33
293 9- 1
328 50- 3
359 5- 6
" 8-20
" 13- 4
" 13- 5
439 7- 7
454 67-22
465 111-14
508 50- 2
" 109-10
526 41- 1

19 Suth W R

24 82- 2
149 34- 3
160 58-36
170 58-31
197 52-14
" 52-42
255 8-17
270 53- 9
274 58-31
281 58-29
" 68- 2
292 41- 1
" 41- 8
333 58-33
353 111-10
422 92-17
432 8-20

20 Suth W R (Civil)

38 7- 7
49 6-35
76 108(l)-6
92 100-31
126 39- 5
163 82- 6
176 58- 4
" 58-31
192 38- 5
196 100-28
204 52- 1
" 52-11
341 105- 1
347 108(l)-14
357 105-35
363 58-31
383 111- 9
401 106-24
471 7- 7
472 13- 5
" 14-13
481 55- 5
484 68- 5

21 Suth W R

5 108(l)-1
37 58-35
115 108(d)-2
190 7- 7
196 38- 8
226 68- 3
268 106-49
287 38-11
289 6-30
344 108(o)-4
347 92-14
349 52- 1
" 52-31
386 105-44
" 105-51
" 105-53
421 48- 9
428 84- 3
" R1- 6

22 Suth W R

8 41-23
12 105-60
22 6-37
31 116- 1
60 53-31
99 9- 1
119 38-11
124 53-34
168 58-31
189 3-39
225 105-68
234 51-18
246 108(d)-3
260 68- 5
" 108(b)-3
262 60-41
274 108(j)-1
" 115- 1
285 108(l)-7
295 108(l)-7
314 123- 4
322 67-20
330 R5-17
334 105- 8
360 67-20
394 108(l)-6
" 116- 1
409 101-10
411 100-29
330 82- 2
442 55- 9
443 126-10
473 53-19
475 58-31
522 8- 3
" 8-13
523 108(o)-4
526 108(l)-6
532 R1- 6
539 58-31
542 108(l)-14
547 52- 1

23 Suth W R

10 111-11
33 100-30
37 108(l)-6
53 50- 2
111 53-34
131 9- 1
141 34- 3
163 6-16
187 R14- 7
253 5- 3
271 106-49
" 111-23
298 108(o)-8
312 106-49
" 111- 2
329 52-40
338 67-20
" 101- 1
382 52-18
393 51- 6
399 106-12
440 106-20
" 106-24
" 106-49
" 116- 1
453 126-10

24 Suth W R (Civil)

24 60-41
47 92- 2
68 50- 3
83 82-18
91 108(l)-12
172 105-32
" 105-37
176 105-47
210 60-23
" 91- 8
275 58-36
" 76-12
300 3- 2
301 105-47
321 10-16
" 14-10
330 8-15
344 111-10
359 52-40
397n 126-11
426 58-35
" 57-15
" 68- 5
429 60- 1
457 55- 5
461 106- 6

25 Suth W R

7 68- 4
10 60- 5
" 62- 8
32 6-35
35 37- 9
39 R1- 6
43 54-11
" 105-42
45 55- 9
48 6-16
51 65-10
" 68- 4
58 106-24
" 111- 1
60 R1- 6
66 105-79
78 59- 2
104 106-24
133 34- 3
139 58-31
171 93- 3
189 R11- 2
205 51-10
211 51-23
221 108(l)-6
234 116- 1
243 100-22
281 41- 1
318 R11- 2
319 111- 1
335 53A- 3
347 108(j)-1
" 115- 1
388 82- 6
492 108(c)-8
503 111- 7
532 41- 1

26 Suth W R

55 9- 1
98 105-29
" 107- 3

Hay's Reports.

2 Hay

644 R11- 2

Hydes Reports.

1 Hyde

160 52- 1
" 52-40
178 53-16

Marshal's Reports.

Marsh

122 52-39
357 122- 4
474 111-11

Punjab Law Reporter.

1900 P. L. R.

4 76-16
21 59- 6
23 91- 6
" 91-34
30 63A- 1
135 72- 3

1901 P. L. R.

40 59-11
155 68- 2

1902 P. L. R.

95 R11- 2

1903 P. L. R.

33 63A- 1
" 72- 3
" R11- 2
40 60- 5

1904 P. L. R.

134 3-34

1905 P. L. R.

107 58-33
143 19- 8

1906 P. L. R.

18 7- 7
23 78- 1
74 58-31

1908 P. L. R.

52 52-14
60 58-18
95 76-12
" 76-15

In the foot-notes to the Commentary † indicates a case which is most appropriate for the proposition.

1908 P.L.R. *con*
126 60– 5
189 107–10
1912 P. L. R.
203 60– 5
27 P. L. R.
433 123– 4
33 P. L. R.
240 R1– 5
37 P. L. R.
765 116–12
38 P. L. R.
90 41–24
566 58–35
39 P. L. R.
1014 123– 4
„ 123–15
42 P. L. R.
40 73–10
75 107– 6
„ 107–10
45 P. L. R.
454 111– 2
47 P. L. R.
87 111–14
„ 111–25
49 P. L. R.
302 43– 9

Lahore Law Journal.
3 L. L. J.
502 60–14

Indian Jurist.
1 Ind. Jur. (N. S.)
22 R2–11
95 R10– 3

Madras Law Journal.
1 M. L. J.
162 55– 9
218 106–25
„ 111–14
388 59–11
479 55– 9
485 98– 8
659 111–14
2 M. L. J.
188 R14– 2
240 122–12
3 M. L. J.
222 106–25
„ 106–39
292 108(j)–4
4 M. L. J.
201 105–62
260 R11–2
5 M. L. J.
27 3– 1
86 41–23
95 3– 2
154 58–17

5 M.L.J. *con*
154 R11– 2
233 126– 9
6 M. L. J.
59 106–24
„ 106–25
„ 111–14
„ 111–23
147 39– 5
209 59– 7
7 M. L. J.
191 7– 7
231 137– 4
234 55–20
266 R1–18
268 6–35
299 58–33
8 M. L. J.
201 108(l)–5
298 67–20
9 M. L. J.
26 108(l)–4
49 R1–18
113 6–13
137 119– 5
„ 119– 9
146 108(o)–3
177 72– 8
„ 72– 9
„ 92–27
290 105– 5
„ 105–67
306 111–11
349 R5– 4
„ R5–20
10 M. L. J.
26 108(l)–5
101 R11– 2
110 R14– 7
201 105–72
„ 106– 6
„ 111–24
203 11– 2
205 R5–20
211 132– 2
11 M. L. J.
7 R11– 2
27 58– 9
„ 122–12
183 58–17
„ R11– 2
186 116–12
12 M. L. J.
63 60–16
„ R7–10
71 55– 7
194 106–25
„ 111– 2
„ 111–16
351 137– 4
387 2– 5
„ 8– 6
„ 123– 1
13 M. L. J.
1 91– 5
2 67– 7
„ 67–13
3 8–15
72 91–41

13 M. L. J. *con*
72 R1–19
137 106–49
„ 117– 4
209 106–30
214 51–10
217 53A– 3
223 7– 7
228 100– 1
266 R8– 7
302 123–10
303 123– 6
323 6– 4
364 5– 8
„ 122– 5
367 69–20
475 106–24
„ 111– 1
477 44– 6
„ 105–71
„ 108(l)14
485 101– 4
500 9– 11
14 M. L. J.
103 R6– 3
139 38–11
285 55–14
337 54– 1
„ 58–33
347 2– 5
„ 58–31
467 R1–10
488 72– 3
„ 76– 8
15 M. L. J.
7 6–11
10 6–26a
„ 67–22a
210 Pre– 2
„ 114– 7
„ 114– 8
368 108(q)–1
„ 111–17
486 6–2a
„ 44– 7
492 8– 6
496 67–27
16 M. L. J.
5 105–79
20 55–14
28 54–22
146 60– 5
„ 60–40
351 111–17
352 8– 5
364 67– 5
524 54–14
557 106– 2
17 M. L. J.
11 53– 6
„ 53–20
„ 53–34
89 59– 8
83 60– 5
122 60–50
177 60– 5
„ 60–40
„ 67– 5
217 R14– 3
319 48– 9

17 M. L. J. *con*
387 106–25
„ 111–14
393 130– 9
„ 137– 4
469 105–82
517 72– 3
„ 76– 8
617 44– 6
622 51–17
18 M. L. J.
31 72– 3
„ 76– 8
247 43– 4
„ 43– 7
258 44– 1
462 58– 5
„ 67–21
67 M. L. J. (N. R. C.)
62 53A– 3
„ 53A– 5
(1937) 2 MLJ
865 53–20
(1939) 2 MLJ
664 59– 8

Madras Law Times.
2 M. L. T.
55 Pre– 4
3 M. L. T.
202 60–26
4 M. L. T.
217 78– 4
„ 78– 5
„ 78– 9
437 65– 9

Madras Law Weekly.
13 M.L.W.
230 9– 7
„ 9–12

Madras Weekly Notes.
1930 M.W.N.
572 52–13
„ 52–19
1054 6– 3
„ 6– 7
„ 43– 7
1145 53–15
1931 M.W.N.
297 54–23
470 53– 9
595 58–35
„ 63– 1
„ 72– 3
„ 76– 8
1932 M.W.N.
122 55– 7
1343 82–19
1934 M.W.N.
577 3–22

1937 M.W.N.
81 68–17
134 130– 9
373 68–18
395 128– 5
416 6– 7
533 51–10
1162 53–19
„ 53–30
1340 73– 1

Marwar Law Reports.
1944 Mar. L. R. (Civ)
38 53–15
„ 53–20

Nagpur Law Journal.
14 N.L.J.
31 58–31
15 N.L.J.
173 R1– 5
18 N.L.J.
291 R1– 5
19 N.L.J.
316 52–39
20 N.L.J.
42 R6–12
159 92–16
„ 92–17
1938 N.L.J.
123 5– 4
„ 53A–13
1939 N.L.J.
235 56– 5
1942 N L.J.
30 3–22
„ 6–16
144 R6– 3
„ R6– 4
1943 N.L.J.
148 105–70

Oudh Weekly Notes.
11 O.W.N.
390 52–27
1935 O.W.N.
288 100– 5
1936 O.W.N.
273 126– 9
1937 O.W.N.
423 10– 1
1938 O.W.N.
281 51– 8
„ 51–12
1080 107– 9
1940 O.W.N.
1233 105–67
1942 O.W.N.
16 52–39
1944 O.W.N. (H. C.)
65 54–21

Oudh Select Cases.
(1859) O.S C.
280 58–18
(1879) O.S.C.
70 38– 8
(1889) O.S.C.
155 105–47
(1894) O.S.C.
271 91–16

Revenue Decisions.
12 R. D.
191 107– 5
600 105–67
14 R. D.
83 105–67
585 76– 6
15 R. D.
281 59– 4
589 52–39
16 R. D.
16 58–34
17 R. D.
201 53A–10
„ 53A–16
270 58–36
526 58–36
„ 105–67
18 R. D.
231 58–13
282 52–39
572 53A– 5
654 53A–12
1936 R. D.
365 58–12
„ 100– 5
461 58–36

Patna Law Times.
14 P. L. T.
371 92–10
„ 92–13

Cuttack Law Times
13 Cut. L. T.
66 107– 7

Saurashtra Law Reporter
1948 1
Sau. L. R.
41 106– 2
„ 116– 1
„ 116–12

Burma Law Journal.
1 Bur. L. J.
26 123– 5

References to Official Reports are invariably given in all cases found in the Official Reports.

OFFICIAL REPORTS

Law Reports Appeal Cases

(1876) 1 A C
428 28- 7
(1877) 2 A C
262 105-14
(1879) 4 A C
391 69-27
(1880) 5 A C
588 100- 5
714 8-20
" 15- 2
" 15- 3
(1881) 7 A C
235 67-10
(1883) 8 A C
285 67- 5
467 53A- 1
(1888) 13 A C
199 132- 3
294 8-20
333 3-28
523 100-10
1892 A C
244 78- 4
437 48-14
(1894) A C
150 69-28
(1898) A C
321 92- 2
(1900) A C
260 8-20
(1901) A C
187 15- 2
(1902) A C
271 126- 9
325 41-14
461 R 14-12
(1904) A C
355 100- 6
" 100-10
405 105-14
(1905) A C
576 67-26
(1907) A C
139 13- 4
(1908) A C
224 35- 2
" 35- 9
" 35-11
" 35-12
(1913) A C
299 69-21
" 69-30
(1915) A C
900 8-20
(1916) 2 A C
54 105-14
(1920) A C
86 35- 2
" 35-11
(1927) A C
126 2- 5
(1943) A C
283 108(f)-1
(1944) A C
341 18- 3
(1945) A C
221 108(e)-1

L. R. Chancery Appeals.

(1866) 1 Ch
252 126- 9
463 3-32
(1867) 2 Ch
171 52-25
201 67-26
644 100- 5
(1868) 3 Ch
355 132- 2
488 3-28
(1869) 4 Ch
35 3-47
204 91-37
" 92-14
242 132- 3
537 67-25
(1870) 5 Ch
40 69-28
227 91- 4
" 91-15
408 28- 5
538 53-11
(1871) 6 Ch
15 35-10
339 35-17
652 78- 4
678 3-41
" 3-43
" 48- 9
782 21-13
(1872) 7 Ch
244 126- 9
507 72- 5
(1873) 8 Ch
155 78- 4
" 78- 6
192 36- 6
" 36- 7
295 84-16
430 126- 9
(1874) 9 Ch
79 3-39
229 91-25
447 3-46

L. R. Ch. Div.

(1876) 2 Ch D
148 76- 6
" 76- 7
" 76-19
235 115- 1
540 46- 2
753 25- 2
" 26- 5
" 29- 5
(1876) 3 Ch D
148 10- 5
" 12- 2
600 69-18
688 35-12
807 12- 2
(1877) 4 Ch D
251 29- 3
605 58-11
(1877) 5 Ch D
163 35-12
(1877) 6 Ch D
153 105- 4
173 76- 5
597 105-58

L. R. Ch. D.

(1878) 7 Ch D
188 76-19
192 72- 3
" 76- 9
271 40-26
(1878) 8 Ch D
173 55- 6
411 100- 5
424 76- 7
(1878) 9 Ch D
125 40- 1
" 40-26
189 3-41
" 3-43
" 78- 4
(1879) 10 Ch D
15 43- 2
42 67-26
335 76- 5
460 82- 7
530 100-10
(1879) 11 Ch D
1 92-20
121 67-27
327 100-22
" 100-23
790 3-28
(1879) 12 Ch D
639 28- 7
655 36- 7
812 65A- 3
(1880) 13 Ch D
639 91-41
(1880) 14 Ch D
406 3-28
432 100-23
563 48-10
699 67A- 4
(1880) 15 Ch D
465 100-10
639 3-47
(1881) 16 Ch D
53 76-19
188 32- 6
(1881) 17 Ch D
353 3-32
434 69-14
" 69-23
454 10-19
685 40-22
(1881) 18 Ch D
1 40- 1
" 49- 1
93 41-21
449 69-23
668 126- 9
(1882) 19 Ch D
233 105- 4
342 6- 3
615 91-37
" 92-14
(1882) 20 Ch D
1 78- 9
220 69-18
" 69-21
562 14-10
724 91- 5
" 91-41
758 43- 9

L. R. Ch. D.

(1882) 21 Ch D
9 53A- 3
" 105- 4
" 105-19
" 105-39
124 78- 5
442 105-59
469 76-18
583 82- 4
685 3-41
762 48- 4
" 48- 7
857 69-27
(1883) 22 Ch D
255 100-20
263 35-25
478 76- 5
597 122-12
(1883) 23 Ch D
158 28- 5
278 126- 9
552 100-29
690 69-26
(1883) 24 Ch D
11 55- 2
289 69-26
(1884) 25 Ch D
338 72- 8
617 100-20
710 100-20
788 57- 6
" 57- 7
(1884) 26 Ch D
208 35-27
358 35- 2
482 78- 1
" 78- 4
" 78- 5
590 71- 2
801 10- 6
(1884) 27 Ch D
89 55-20
246 92- 9
606 35- 8
" 35-13
" 35-25
" 35-27
(1885) 28 Ch D
103 40-23
124 35- 2
" 35-25
523 8-20
(1885) 29 Ch D
212 100-20
221 78- 4
725 78- 4
736 100-10
954 69-22
(1885) 30 Ch D
192 81- 5
336 76-12
(1886) 31 Ch D
275 35-25
402 2- 5
466 35-10
" 35-11
582 72- 5
671 3-43
(1886) 32 Ch D
53 76- 5

L. R. Ch. D.

(1886) 32 Ch D
con
53 76- 7
206 76- 5
525 100- 6
(1886) 33 Ch D
1 78- 4
111 69-23
226 76-10
279 76-19
(1887) 34 Ch D
43 100-14
160 35- 2
" 35-27
234 92-16
" 100-29
391 82-26
721 R 11- 2
742 29- 2
(1887) 35 Ch D
125 65A- 3
297 52-17
544 69-30
" 76-20
(1887) 36 Ch D
145 126- 9
348 6- 3
(1888) 38 Ch D
112 69- 6
176 11- 9
" 12- 2
273 69- 7
" 69-18
(1888) 39 Ch D
116 25- 2
" 28-11
238 78- 4
456 91- 4
" 91-12
636 91- 3
669 123-12
(1889) 40 Ch D
182 48- 1
" 78- 4
395 69-21
" 67-27
(1889) 41 Ch D
126 76-19
537 72- 5
(1889) 42 Ch D
237 76- 7
" 76-19
461 105-13
590 76- 5
(1890) 43 Ch D
191 69-24
(1890) 44 Ch D
161 91-41
492 69-13
(1892) 1 Ch
396 35-13
" 35-25
621 92-14
(1892) 3 Ch
402 2- 5
(1893) 1 Ch
129 76-19
352 78- 4
736 126- 9
" 126-14

L. R. Ch. D.

(1893) 2 Ch
54 56- 1
" 81-13
300 66- 5
461 56- 1
491 18- 2
(1894) 1 Ch
25 3-30
" 69-18
(1894) 2 Ch
205 48-12
600 69- 6
(1894) 3 Ch
181 100-14
220 100-17
(1895) 2 Ch
1 48-12
36 67-26
(1896) 1 Ch
549 35-25
762 69-27
(1896) 2 Ch
192 78- 4
212 76- 5
353 11- 2
743 3-42
808 91-15
(1897) 2 Ch
255 14-12
" 28- 7
(1898) 1 Ch
315 78- 4
343 67- 5
(1898) 2 Ch
230 69-18
347 78- 4
378 35-25
663 92-16
(1899) 1 Ch
353 92-16
440 92-16
" 92-17
642 29- 4
(1899) 2 Ch
130 100-10
264 3-32
" 78- 4
474 60-33
530 100- 6
(1900) 1 Ch
243 126- 9
354 126- 8
(1900) 2 Ch
211 69-22
388 40- 1
654 100-10
(1901) 1 Ch
361 35-25
578 105-14
(1901) 2 Ch
8 67-26
231 78- 4
" 78- 5
602 91-37
750 3-28
(1902) 1 Ch
428 3-39
436 35-15

Topical Index and Synopsis for each Section show where exactly to look for the point required.

L. R. Ch.
(1902) 1 Ch
436 35–27
727 12–11
765 126– 9
816 3–32
(1903) 1 Ch
27 126– 9
857 69–25
(1903) 2 Ch
284 100–10
539 40– 1
647 69–27
(1904) 2 Ch
95 19– 4
219 69–20
234 100–14
(1905) 1 Ch
16 35–12
" 35–25
191 35–15
" 35–27
241 76–16
256 35–15
" 35–27
391 40–20
435 76–16
632 3–32
" 3–41
(1905) 2 Ch
147 3–41
(1906) 1 Ch
165 76–16
365 48–12
(1907) 1 Ch
64 73–10
470 19– 9
(1907) 2 Ch
104 78– 4
" 78– 5
137 116– 1
292 69–27
465 82– 4
(1908) 2 Ch
20 69–15
(1909) 2 Ch
1 25– 3
437 91–10
(1910) 1 Ch
1 13– 7
" 14– 2
12 14– 5
" 14–10
648 79–4a
(1910) 2 Ch
227 92–16
342 43– 9
(1911) 1 Ch
618 76–19
(1912) 1 Ch
231 55–14
" 68– 8
323 60–18
735 92– 2
(1912) 2 Ch
414 49– 1
471 28–11
504 106–36
(1913) 2 Ch
18 78– 4
(1914) 1 Ch
954 100–10
(1914) 2 Ch
705 105–35
(1915) 1 Ch
22 67–10
94 57– 2
" 57–11
(1916) 1 Ch
132 100–10
452 67–10
(1917) 1 Ch
99 100– 2
(1918) 1 Ch
300 35– 2
458 32– 6
492 35–15
(1919) 1 Ch
249 29– 4
(1920) 2 Ch
481 28– 2
(1921) 1 Ch
98 3–30
" 78– 4
343 129– 3
349 130– 8
(1922) 1 Ch
36 106–20
(1922) 2 Ch
442 36– 7
449 69–22
" 69–23
" 69–27
(1923) 1 Ch
149 40– 1
(1925) 1 Ch
362 18– 3
553 129– 3
(1926) 1 Ch
842 28–11
992 29– 3
(1927) 2 Ch
225 40– 1
264 28– 7
(1935) Ch
310 69–22
(1943) 1 Ch.
59 71– 2
82 55– 8
97 115– 1
332 18– 3
422 14– 2
(1944) 1 Ch.
328 105–35
" 111 3
(1945) 1 Ch.
225 109– 5

L. R. Common Pleas.
L. R. 5 C. P.
589 108(l)–5
L. R. 10 C.P.
402 105–14

L.R. Equity. Cases.
(1866) 1 Eq
29 76– 5
499 40–26
651 100–20
675 29– 7
(1866) 2 Eq
134 3–41

L. R. Eq.
1866-2 Eq*con*
134 3–43
319 126– 7
789 76–19
834 35–15
" 35–24
(1867) 3 Eq
368 R1– 7
(1867) 4 Eq
537 61– 8
" 91–41
(1868) 6 Eq
198 129– 3
655 126– 9
(1869) 7 Eq
291 35–10
" 35–19
427 3–28
494 35–14
(1869) 8 Eq
155 79– 1
165 35– 6
" 35–15
" 35–27
619 22– 2
(1870) 9 Eq
51 3–39
" 3–40
519 35–17
678 3–32
(1870) 10 Eq
92 78– 5
302 132– 2
501 29– 7
(1871) 11 Eq
5 10–19
514 29– 7
591 67– 5
(1872) 14 Eq
32 58–38
419 36– 6
(1873) 16 Eq
221 21–13
(1874) 17 Eq
15 3–41
" 78– 9
435 91–25
(1874) 18 Eq
474 129– 3

L. R. Exchequer.
(1868) 3 Ex
299 58–11
303 113– 4
(1874) 9 Ex
662 116–14

L. R. Exchequer Division.
(1877) 2 Ex D
355 105–29
" 105–35
" 107– 3
(1879) 4 Ex D
201 106–20

L. R. House of Lords.
LR 1 HL
129 51–25
L.R.H.L.
LR 4 HL
317 137– 5
LR 5 HL
134 106–34
" 106–35
LR 6 HL
265 122–12
LR 7 HL
135 51– 8
" 78– 5

L. R. Eng. & Ir. (App.)
L R 7 Eng & Ir (App)
135 3–29
" 48– 9

L.R Queen's Bench.
(1866) 1 Q B
72 105–16
241 3– 6
(1867) 2 Q B
200 105–13
630 51–18
(1868) 3 Q B
350 105–14
" 105–15
567 106–38
739 10–17
(1869) 4 Q B
9 105–14
97 69–27
293 105–30
" 105–67
792 79–4a
(1872) 7 Q B
90 105–15
(1875) 10 Q B
422 105–16
444 105–14

L.R. Queen's Bench Division.
(1880)
5 Q B D
409 69–23
(1881)
6 Q B D
345 67–10
(1881)
7 Q B D
516 3–17
(1882)
8 Q B D
195 105–15
587 126– 9
" 126–13
(1882)
9 Q B D
139 3–11
(1883)
10 Q B D
327 105–14
(1883)
11 Q B D
27 10–19
380 49– 1

L. R. Q. B. D.
(1884)
12 Q B D
347 5– 4
" 100–13
(1884)
13 Q B D
454 12– 9
(1886)
17 Q B D
275 8–20
(1888)
20 Q B D
43 100–20
209 108(g)–2
523 3–32
(1889)
23 Q B D
239 100–13
(1890)
25 Q B D
57 123– 1
176 76–19

L. R. Queen's Bench.
(1891) 1 Q B
730 105–37
(1891) 2 Q B
484 105– 7
(1892) 1 Q B
582 123–12
(1892) 2 Q B
534 3–41
700 3–32
(1893) 1 Q B
736 116– 1
(1894) 1 Q B
164 105–31
(1895) 1 Q B
231 106–20
378 106–19
484 105–14
" 105–60
696 106–20
(1895) 2 Q B
679 126– 9
(1896) 2 Q B
283 123–12
" 129– 3
(1900) 1 Q B
23 106–19
426 111–10

L. R. King's Bench Division.
(1902) 1 K B
157 106–2
(1902) 2 K B
427 3–21
" 130– 2
" 137– 3
660 6–17
(1903) 1 K B
577 105– 3
" 105– 4
" 105–13
" 105–19
" 105–27
" 105–31

L. R. K. B.
1903-1 KB*con*
881 105– 4
(1903) 2 K B
487 3–32
(1904) 1 K B
84 105–16
417 51–81
444 106– 2
713 105–14
(1905) 1 K B
427 58–39
(1906) 1 K B
60 105–15
(1909) 1 K B
357 3– 2
(1909) 2 K B
344 3– 2
(1910) 1 K B
271 100–20
622 106–31
(1910) 2 K B
979 100–10
(1911) 2 K B
195 105–14
473 40–19
" 100–22
" 100–23
(1913) 3 K B
570 105–57
(1916) 2 K B
91 116– 1
(1918) 2 K B
805 106–19
(1922) 2 K B
95 106–40
(1924) 1 K B
117 105–31
" 106–40
149 106–19
" 106–40
(1925) 1 K B
14 106–19
" 106–42
(1929) 2 K B
356 3–47
(1943) 1 K B.
366 108(j)–4
(1944) 1 K.B.
368 105–25
602 108(l)–7
(1946) 1 K.B.
280 105–25
" 106–38
306 108(j)–5

L. R. Privy Council.
(1869) LR2PC
317 3–30
393 137– 4
(1876) LR6PC
381 18– 2
" 18– 3

ALL England Law Reports.
(1946) 1 A. E. L. R.
133 106–40

Remarks in foot-notes amplify principles in the Commentary and state the special features of the case.

(1946) 2 A. E. L. R.
778 113- 3

(1947) 1 A. E. L. R
116 112- 1
" 112- 4
" 113- 3

(1948) 1 A. E. L. R
177 106-19
260 106- 2

OTHER JOURNALS &REPORTS

English Reports.

1 E. R.
205 53A- 1
934 53-38

2 E. R.
727 3-43

3 E. R.
1074 60-33
1091 35- 7
1428 35- 7

4 E. R.
1 35- 2
1334 19- 4

6 E. R.
525 21- 8
" 21-12
930 35-21

7 E. R.
154 76- 5
347 16- 9

8 E. R.
450 8-20
539 19-11
1426 3- 6
1464 53-31
1523 14- 2

9 E. R.
815 14- 2
" 14- 5
897 3-43

10 E. R.
222 55-11
359 28- 5
1159 3-32
1216 21-12
" 29- 7
1459 111-11

11 E. R.
282 32- 3
463 8-10
1187 55-20
1461 35-12
" 35-21

14 E. R.
204 3-39
581 Pre- 4

15 E. R.
251 53-16

16 E. R.
151 60-13

21 E. R.
303 53A- 1
448 25- 9
815 53-31
1022 27- 2
1084 53-31

22 E. R.
40 53A- 1
506 84-14
576 3-41
664 76-12
804 3-32
913 84- 8
928 3-32
1026 64- 6
" 71- 2
1064 60-28
1195 60-31

23 E. R.
266 60-31
288 60-31
298 76- 7
325 26- 7
" 31- 6
342 126-16
402 91-42
435 60-31
453 76- 7
463 76- 7
492 76-19
524 53A- 1
585 52- 1
602 58-35
611 60-28
664 64- 6
" 72- 6
" 72-11
743 26- 7
758 35-10
781 55-16
784 61- 2
833 78- 2
890 18- 3
935 60-30
" 60-33
947 72- 5
958 78- 2
967 6- 3
978 35- 2
998 3-43

24 E. R.
51 53-11
" 53-20
150 21-13
232 53A- 1
384 60-31
440 78- 3
458 100- 6
774 84- 8
811 64- 6
825 52- 1
836 19-10a
889 29- 5
917 14- 2
1011 45- 3
1046 3-28
1081 35-21
1100 58-29

25 E. R.
205 76-10
362 72- 3
724 35- 2
" 35- 7

25 E.R.con
724 35-24
" 35-25

26 E. R.
9 53- 6
" 53-31
" 53A- 1
61 53- 6
328 60-18
359 53-21
377 3- 2
" 58-38
393 53-31
407 29- 5
427 78- 2
454 18- 3
467 65A- 3
475 76-19
509 52-22
565 60-48
618 62- 2
646 76-16
668 56- 1
" 81-13
688 53-11
698 60-28
720 76-16
758 53-11
" 53-17
774 35- 2
803 53A- 1
" 72- 6
" 72-11
811 108(h)-2
818 3-42
917 91-25
952 60-28
962 58-29
" 58-35
970 3-43
998 26- 3
1025 3-43
" 52- 1
" 52- 8
" 52-14
1098 64- 6
" 72- 4
" 76- 9
" 76-19
1172 3-41
" 48-10
1191 35-22
1198 51-23
1214 66- 8
" 76-10

27 E. R.
89 125- 1
192 53-31
259 35- 7
" 35-17
381 53A- 1
422 18- 3
433 71- 2
439 52-17
440 48-10
474 61- 8
" 71- 2
621 3-43
934 53- 6
1064 130- 2
1074 130- 2
1106 58-35
1117 27- 2

28 E. R.
1 53- 6
" 53-31
8 35-15
" 35-25
21 35-20
41 19-12
163 45- 3
302 48- 1
" 48-10
433 55- 3
605 60-28
" 60-31
647 53- 2
" 53- 6
" 53-17
741 13- 7
" 14- 2
825 61- 2
" 61- 8
838 60-28
884 3-41
" 48- 9
1069 19-11
1073 35- 8
1080 71- 2
1205 53A- 1

29 E. R.
58 68- 8
87 55-18
" 68- 8
135 64- 6
224 55-13
360 78- 5
526 48-10
539 35- 2
" 35-25
917 26- 3
975 84- 5
1133 58-39
1165 53-17
1183 18- 3
1184 82- 2
1186 14- 2

30 E. R.
6 58-39
73 100- 5
109 53-17
113 58-39
126 53A- 1
311 55- 2
346 35- 7
372 35-21
464 35- 2
" 35- 7
" 35-11
475 35- 7
485 35-10
660 35- 8
671 13- 7
676 35- 2
" 35- 8
" 35-11
" 35-17
" 35-21
" 35-27
679 61- 2
713 3-32
" 3-39
768 35- 2
" 35-10
" 35-11
" 35-25

30 E.R.con
846 35- 2
" 35-25
930 68- 8
941 12- 2
963 35- 2
1019 111- 3
1034 11- 9
1063 53A- 1
1114 3-28
1141 35- 7
1192 45- 3

31 E. R.
62 58- 4
117 14- 6
198 58- 4
278 18- 3
321 35-14
549 29- 2
555 35- 2
642 53-11
707 55- 2
710 35- 2
724 55-15
" 68- 8
875 55- 7
913 53A- 1
934 6-27
998 78- 4
1030 21- 8
" 21-13
1088 55-16
1152 55-12
1243 122-2a

32 E. R.
71 71- 3
108 58-38
136 68- 8
139 53A- 1
171 19- 5
194 35- 2
234 72- 5
309 55-11
402 56- 1
" 81-13
441 35-15
575 53-31
644 35-11
659 58- 4
" 130- 2
706 127- 2
741 53-31
902 76-19
947 18- 3
976 35-10
1030 14- 2
1062 52- 1
" 52-14
" 60-54
1141 58-39
1205 55-16

33 E. R.
10 55-11
50 78- 4
53 35-21
" 53-11
55 35-10
73 58-39
176 53A- 1
237 3-39
" 3-41
" 3-43
" 3-48

33 E.R.con
273 35-15
" 35-17
346 12- 2
569 53A- 1
570 21-12
574 54-12
581 68- 8
653 58-39
707 54-23
748 16- 6
752 55- 9
" 111-11
778 55-12
978 3-39
" 3-40
1041 29- 4

34 E. R.
88 58-39
142 58-39
153 55- 2
199 81- 6
249 53-31
255 53-31
341 53A- 1
360 6-27
379 11-12
" 12- 2
493 58-39
296 58-39
513 58-39a
560 76-16
578 48- 9
593 53A- 1
659 35-11
" 35-24
662 35- 2
" 35-11

35 E. R.
146 55- 2
214 44- 5
249 58-39
290 35-11
" 35-12
" 35-17
" 35-21
295 3-48
335 55-12
642 26- 3
679 3-39
855 19-11
887 53-31
979 21- 8

36 E. R.
21 55- 3
81 3-43
" 3-45
" 101- 1
422 35- 2
" 35-11
" 35-21
443 35-11
469 12- 6
600 55- 2
" 55- 3
625 55- 2
815 55- 2
844 91-42
939 53A- 1
958 12- 2

37 E. R.
45 53A- 1
334 32- 8

Any case in the "Table of Cases" will show where to get the entire case-law on the point.

37 E. R. con
389 55- 2
456 54-23
501 55- 3
527 60-53
656 35- 2
" 35- 5
814 55-13
958 53- 6
" 53-11
1105 58-39
1107 53-31
1184 76-16

38 E. R.
83 14- 5
193 29- 2
309 78- 4
475 130- 2
540 55- 2
" 55- 3
647 69-30
" 72- 5
658 55-12
694 130- 2
705 55- 3
822 13- 7
857 14- 2
" 16- 3
885 127- 3
" 128- 5

39 E. R.
15 3-39
78 19-11
114 55- 2
236 3-48
" 52- 8
686 76- 6
" 76-19
839 6- 3
944 35- 7
1055 11-11
1084 3-39
1106 18- 3

40 E. R.
96 127- 2
97 55- 3
250 55-12
266 3-28
" 3-47
773 18- 3
1084 72- 5

41 E. R.
662 6- 3
1002 55-14
1114 32- 6
1120 58- 4
1143 40- 1
" 40-25
1848 18- 2

42 E. R.
115 35-17
" 35-21
293 8-13
544 61- 2
826 13- 7
" 14- 9
" 16- 3
907 53A- 1
958 16- 7
" 16- 9
1048 35-15
1188 84- 5

43 E. R.
10 54-12
17 16- 8
112 55- 5
592 8- 9
668 55- 2
1063 16- 3
1166 53- 6

44 E. R.
53 76- 7
194 3-28
347 32- 8
465 3-43
" 78- 9
485 58-39
510 3-39
537 35- 7
634 53A- 1
645 35- 2
842 52- 1
" 52-37
887 78- 4
895 3-32
" 78- 5
1053 3-28
" 3-39
1380 3-28
" 3-41
1405 58-39

45 E. R.
6 58-33
22 108(d)-2
108 40- 1
233 53-16
339 16- 7
745 78- 5
1009 61- 4
1238 55- 1

46 E. R.
456 60-23
" 60-24
534 14- 6
562 52-41
649 53- 6
746 58-21

48 E. R.
12 60-28
199 55- 2
325 35- 7
638 12- 7
970 55- 2
1164 19-10
" 19-11
1273 16- 6
1292 6-23
1805 18- 3

49 E. R.
27 76-16
34 60-49
" 84-16
53 76-16
91 6- 3
231 16- 6
243 3-28
252 52-41
545 18- 3
554 19-11
" 21-14
772 55- 5
820 72- 3
" 72- 5
" 76- 9

49 E. R. con
1006 53-17
" 53-33
1134 126- 2

50 E. R.
79 122-2a
378 60-26
1061 55-16

51 E. R.
119 58-39
371 35-27
475 58- 5
496 76- 5
595 53-31
733 44- 5
737 69- 4
739 14-10
759 69-26
770 55- 4

52 E. R.
5 3-28
34 3-32
69 111- 3
81 3-32
612 3-29
738 58-39
741 81- 2
756 76-16
800 55-10
957 53- 6
1078 53- 6
" 122-2a
1123 3-28
1192 55- 2

53 E R.
134 61- 8
152 12- 7
" 12- 8
" 12-11
157 76- 5
225 111- 7
269 3-28
274 3-28
" 58-39
343 58-39
423 32- 4
501 55- 2
553 3-48
" 52-37
771 67-26
808 82- 7
939 14- 9

54 E. R.
68 58- 6
70 12- 2
136 60-17
" 68- 2
142 35- 8
223 55- 9
426 35- 7
" 35-10
435 21-12
566 55- 4
677 3-41
689 53-11
704 19- 5
879 35-21
" 35-22
" 35-24
932 58- 6
1012 6-34
1132 18- 3

54 E. R. con
1142 60-40
1172 55-12
1185 3-32

55 E. R.
46 56- 1
172 76-16
218 46- 3
286 59-11
351 58-39
429 58- 5
498 45- 3
507 18- 3
585 68- 9
626 53A- 1
680 55- 4
804 55-21
860 76- 5
870 111- 3
918 3-28
1066 58-39

56 E R.
6 76-16
152 53- 6
" 53-31
195 55-16
245 55-11
386 53- 6
" 53-16
" 53-17
473 76-19
502 60-49
503 29- 4
550 55-16
690 55- 3
699 76-16
839 35-25
992 69-25
" 76-20

57 E. R.
174 55-12
270 18- 3
281 18- 3
503 12- 2
747 91-37
757 6- 3
1085 55-12

58 E. R.
254 19-11
322 55-20
329 52- 1
524 21-12
667 76-16
738 100- 5
762 46- 3
979 19-11

59 E. R.
333 40- 1
383 130- 2
531 14- 2
678 84-14
796 35-25
940 16- 6

60 E. R.
21 18- 4
157 55-12
424 60- 5
474 14- 2
619 76-18
665 40- 1
725 60-16
899 60-16
987 3-32

61 E. R.
425 78- 5
618 3-41
646 48- 1
775 69-14
781 18- 3
954 55-20
963 53-11
1024 58-39

62 E. R.
66 55- 3
332 69-18
944 56- 1
" 81- 2

63 E. R.
76 53-11
268 84- 5
" 84-16
340 60-16
422 76-16
759 55- 2
1217 55- 2

64 E. R.
224 3-39
824 35- 9
1322 67- 3

65 E. R.
98 53-16
231 55- 2
354 55-10
" 60-16
572 14- 2
994 61- 8

66 E. R.
122 3-32
" 3-49
403 58-33
930 19- 5
" 21- 8
943 3-33
" 78- 9
969 111-13

67 E. R.
104 3-32
162 3-43
168 8- 2
712 84- 5
808 48- 1
870 35-15
919 58-39
955 53A- 1
1036 19-11
1049 69-15
1103 3-28
1136 3-32
1251 60-18

68 E. R.
75 3-32
170 55- 2
337 72-12
586 3-28
" 3-32
" 48-10
597 12- 2
" 12- 8
" 28- 5
654 16- 8
711 3-39
813 55- 3
826 53-20
1182 55- 6

69 E. R.
1 40- 1
25 40- 1
233 55- 2
237 40-26
279 126-16
350 55-10
462 100- 4
507 60-20
704 48- 1
827 111- 3
1043 53- 6
1116 26- 3
1219 19-12
1256 78- 5

70 E. R.
19 111- 3
294 21-12
" 29- 2
423 19- 9
726 91-15
807 53- 6
" 53-16
831 35-10
905 105-31
1002 72-12
1031 12- 6

76 E. R.
1 55-10
668 19- 6
" 21- 8
676 109- 5
809 53- 6
" 53- 9
" 53-16
" 53-17
" 53-20
1114 119- 2

77 E. R.
61 111- 6
72 40- 1
146 53-31
232 83-17
1476 111- 4

79 E. R.
222 110- 1

83 E. R.
614 19-11
743 109- 5

86 E. R.
135 29- 6
772 133- 5
898 31- 6

87 E. R.
822 Pre- 1

91 E. R.
80 91-19
157 29- 5
359 105-31
584 3-14

95 E. R.
847 6-35
857 53-31

96 E. R.
599 53-17

98 E. R.
201 5- 5
384 53- 5
956 27- 2
1085 53- 31
1171 53-16

"Table of Cases" indicates first reference in foot-notes and reference to Official Reports.

98 E.R.*con*
1171 53-31
1318 53- 6
" 53-31
1371 112- 1
99 E. R.
17 65A- 1
36 111- 5
119 108(j)-5
157 3-14
182 65A- 1
415 55- 9
944 3-41
1089 60- 7
100 E R.
72 12- 9
131 16- 3
249 53- 3
315 53- 6
319 53- 6
468 13- 7
517 130- 2
639 40- 1
101 E.R.
132 53-20
236 53-20
875 14- 6
1129 16- 3
1264 12- 8
" 12- 9
" 111-13
1400 12- 8
102 E R.
490 40- 1
" 109- 5
510 108(h)-2
594 60-26
1219 111-10
1285 53- 6
1419 53A- 1
103 E.R.
380 106- 3
495 53-31
538 28-11
555 3- 6
625 19-11
714 84- 5
1160 29- 6
104 E.R.
113 29- 7
290 133- 5
732 19-11
1022 111-11
1060 53-31
105 E.R.
94 53- 6
644 111-13
1005 115- 1
106 E.R.
316 53- 6
706 109- 2
984 111-13
1082 59-11
1094 40- 1
1411 109-10
107 E.R.
152 40-25
" 108(j)-4
638 108(d)-2
108 E R.
134 3-27

108 E. R.*con*
610 111-10
863 Pre- 1
110 E.R.
63 8-19
" 55-10
180 53- 6
561 83-17
1019 25- 4
1058 55- 3
111 E.R.
7 111-17
1016 3- 6
112 E.R.
360 2- 5
1033 29- 6
114 E.R.
698 65- 4
957 55- 5
1402 119- 8
115 E.R.
107 60-16
169 60-16
724 53-16
116 E.R.
543 40- 1
118 E.R.
616 41- 4
122 E.R.
865 112- 1
123 E.R.
1253 10- 7
125 E.R.
1106 25- 3
1184 27- 2
126 E.R.
1379 55-10
127 E.R.
492 53-21
" 53-31
901 55- 3
128 E.R.
235 6- 8
555 53- 6
669 53- 6
707 84- 5
936 55-10
1020 109- 2
1064 84- 5
129 E.R.
609 53- 6
130 E.R.
530 84- 5
596 111-17
708 8-19
883 111-14
995 6-23
131 E.R.
649 111-24
744 111-17
999 108(l)-6
132 E.R.
275 8-18
866 55- 2
1183 109- 3
133 E.R.
278 111-14
134 E.R.
168 55- 3

134 E. R.*con*
1029 84- 5
1063 111-10
136 E.R.
274 6- 8
919 84- 5
" 84- 8
137 E.R.
1040 111-10
138 E.R.
68 40- 1
139 E.R.
169 53- 6
" 53-11
253 55- 3
140 E.R.
986 55- 3
" 55-20
141 E.R.
224 55- 3
142 E.R.
664 111-14
143 E.R.
630 60- 7
145 E.R.
811 76- 9
926 3-28
964 64- 6
" 72-11
1455 Pre- 4
146 E.R.
850 58-39
878 58-39
147 E.R.
697 71- 2
1153 35-21
148 E.R.
724 3- 3
1131 58-39
149 E.R.
7 84- 5
101 6- 8
283 6- 8
150 E.R.
490 111-13
540 55- 2
614 111-14
151 E.R.
130 84- 5
1086 109- 9
152 E.R.
406 Pre- 4
695 49- 1
737 3-30
837 84- 5
1204 21- 8
153 E.R.
87 105-31
1044 25- 2
1441 133- 5
154 E.R.
175 110- 2
155 E.R.
554 3- 6
800 55- 3
1529 84- 5

156 E.R.
463 109- 2
1430 109- 5
157 E.R.
678 36- 5
158 E.R.
333 53-16
" 53-20
1092 84- 5
160 E.R.
123 3-32
196 6-16
" 6-20
335 76- 9
383 3-32
612 58-39
669 55- 2
839 61- 2
" 61- 8
1064 130- 2
1136 76- 9
163 E.R.
1147 32- 6
1330 3-11
170 E.R.
101 84- 5
142 84- 5
329 53- 6
553 58-39
733 84- 5
864 60- 7
976 53- 6
1027 84- 5
1309 84- 5
1338 55- 2
1384 55- 2
171 E.R.
24 111-13
45 55- 2
50 84- 5
439 106- 3
692 55- 2
1185 84- 5
1199 84- 5
172 E.R.
23 84- 5
24 84- 5
111 111-13
448 84- 5
1210 53- 9
173 E.R.
145 3- 9
579 55- 2
991 53- 6
" 53-16
1047 111-14
1126 111-11
174 E.R.
426 53- 6
507 111-26
675 55-10
175 E.R.
6 84- 5
145 106-39
566 109- 4

Law Journal Reports
L. J. Bey.
3 L. J. Bey.
92 58-39

L. J. Bk.
4 L. J. Bk.
58 58-39
L. J. Ch.
1 L. J. Ch.
115 13- 4
148 55- 3
2 L. J. Ch.
113 55- 3
3 L. J. Ch.
57 76-18
100 55- 3
4 L. J. Ch.
13 21- 8
39 35-16
118 3-32
172 58-39
5 L. J. Ch.
99 35- 7
8 L. J. Ch.
139 69-30
235 3-43
9 L. J. Ch.
37 56- 1
241 53- 6
10 L.J.Ch.
161 34- 4
367 55- 3
11 L.J.Ch.
145 12- 2
12 L.J.Ch.
381 3-32
14 L.J Ch.
120 76-10
17 L.J.Ch.
471 60-16
18 L J.Ch.
83 40- 1
191 17- 6
19 L.J.Ch.
130 17- 8
146 21- 8
20 L.J.Ch.
105 69-26
186 6-34
21 L.J.Ch.
511 10- 1
843 3- 2
22 L.J.Ch.
369 37-10
1063 60-16
1066 53-16
23 L.J.Ch.
348 6-35
" 25- 9
478 49- 2
593 55- 2
24 L.J Ch.
246 55- 3
361 3-30
488 32- 6
505 19- 5
716 16- 3
773 35-21
25 L.J.Ch.
29 69-30
232 53- 6
299 53-31

25 L.J.Ch.*con*
338 53- 6
612 53- 6
734 69-27
795 58- 9
896 132- 2
" 132- 4
26 L.J.Ch.
1 29- 2
148 35-25
179 53- 6
" 53-11
" 53-16
389 58- 4
621 36- 6
635 21-13
797 3-48
27 L.J Ch.
621 36- 6
694 61- 8
782 76-16
28 L.J.Ch.
132 69-21
700 53-16
868 6-23
891 79-4a
29 L J Ch.
39 60-32
230 17- 7
30 L.J.Ch.
569 3-33
642 53-16
649 12- 2
31 L.J.Ch.
52 18- 3
282 100-17
433 12- 6
32 L.J.Ch.
333 36- 1
" 36- 7
520 3-28
648 60-28
33 L. J. Ch.
51 58-39
134 55-20
234 3-47
385 55-20
511 35- 7
639 55-16
34 L. J. Ch.
3 15- 3
" 15- 4
196 86- 1
646 3-28
35 L. J. Ch.
140 53A- 1
186 3-28
292 53A- 1
345 18- 3
" 18- 6
371 6-20
406 19-12
412 49- 2
454 6-27
717 6-35
36 L. J. Ch.
81 111- 3
147 18- 3
" 18- 6

36 L.J.Ch.*con*
173 63- 3
258 19-11
" 21-13
339 34- 4
350 14- 2
442 56- 1
671 60-40
" 84-14
865 61- 8

37 L. J. Ch.
657 17- 7
" 17- 8
830 55- 2
881 3-28

38 L. J. Ch.
382 63- 2
" 68- 3
" 68- 4
543 53-16
566 60-18
" 60-49
669 53-20

39 L. J. Ch.
148 53- 6
" 53-11
304 53- 9
606 55- 5
655 58-13
689 53- 6

40 L. J. Ch.
5 35- 2
137 61- 2
242 32- 5
253 35- 7
289 53-31
316 21-12
355 21-12
480 53- 6
" 53-11
556 22- 5
577 55- 2
640 18- 3
701 3-47

41 L. J. Ch.
96 58- 6
175 3-32
539 53- 6
" 53-11
643 55- 2
673 71- 6
734 110- 4

42 L. J. Ch.
14 53- 6
49 55- 6
" 58-39
210 58-39
334 36- 1
368 18- 2
417 60-49
" 84-16
452 29- 6
526 35- 2
641 71- 6

43 L. J. Ch.
635 55- 2

44 L. J. Ch.
6 35- 2
" 35- 7
" 35-10

44L.J.Ch.*con*
6 35-11
" 35-27
441 10- 9
" 10-10
487 53-31
500 6-35
514 8-20
705 25- 9
766 18- 3

45 L. J. Ch.
165 61- 2
" 61- 4
" 61- 8
208 21-13
293 53-20
310 32- 6
522 111- 3
660 35- 2

46 L. J. Ch.
33 15- 4
48 3-29
121 2- 5
128 23- 2
133 46- 3
189 53A- 1
214 53-31
248 13- 7
352 101- 1
356 55- 5
396 53-31
505 40- 1
537 49- 1
729 53-16
" 53-17
857 8-20

47 L. J. Ch.
323 108(m)-2
381 51-22
" 51-24
735 36- 6
738 53-31

48 L. J. Ch.
150 15- 4
239 55- 3
327 55- 4
837 55- 3

49 L. J. Ch.
68 40-19
209 61- 2
" 61- 4
" 61- 8
465 3-42
" 130-17
563 61- 2
" 67A- 8
618 55-11
792 51-22

50 L. J. Ch.
187 61- 2
" 67A- 4
212 63- 3
218 58- 5
331 111-14
446 36- 1
463 55-10
472 49- 1
" 49- 2
577 111-18
601 60-16
642 3-32

50 L.J.Ch.*con*
731 8-13
772 132- 3

51 L. J. Ch.
129 61- 2
" 61- 4
" 61- 8
154 53- 6
" 53-16
" 53-30
" 53-34
281 55-12
369 14- 9
" 15- 3
481 61- 8
503 53-34
521 53- 6
" 53-11
530 40- 1

52 L. J. Ch.
189 55- 2
191 111- 3
294 40- 1
333 58-29
343 53- 6
420 28- 6
577 53A- 1
654 55- 2
737 53A- 1

53 L. J. Ch.
87 53-31
474 29- 4
1055 55-20

54 L. J. Ch.
517 55- 3
567 57- 6
732 14-12
991 3-28
1081 73- 1

55 L. J. Ch.
259 35-13
576 58-39
633 11-11
" 40- 1

56 L J. Ch.
85 130- 2
456 55-20
642 6- 3
662 53A- 1
840 55- 6

57 L. J. Ch.
95 40- 1
570 53A- 1
843 34- 2
905 68- 2
936 32-11
1061 14- 2

58 L. J. Ch.
124 108(c)-2
309 40-26
355 60-33
361 60-33
495 12- 2
539 69-21
556 84-16

59 L. J. Ch.
159 12- 2
174 60-33
188 40-26
477 40- 1

59 L.J.Ch.*con*
604 55- 3
608 6-35
636 55- 3
666 6- 3
" 6- 4

60 L. J. Ch.
1 48-10
111 130-20
181 53-21
190 69A- 4
671 21-13
675 17-10
686 18- 2
694 60-40
" 84-14
" 84-15
732 60-16

61 L. J. Ch.
1 12- 2
44 8-13
49 60-28
" 60-30
59 84- 5
113 55- 5
138 6-35
220 35-11
231 60-40
" 84-14
244 58- 6

62 L. J. Ch.
342 18- 3
347 55- 9
681 18- 2
804 81- 2

63 L. J. Ch.
122 29- 4
239 60-35
544 15- 4
651 61- 4
" 61- 8
689 52-15
705 61- 8
872 14- 2
" 18- 2

64 L. J. Ch.
1 101- 1
666 114- 1
" 114- 6
695 18- 3
759 108(d)-2
856 18- 3

65 L. J. Ch.
449 61- 2
" 61- 4
" 61- 8
486 101- 2
542 60-40
754 53A- 1
863 21-13

66 L. J. Ch.
127 84- 5
616 14- 5
627 8-19

67 L. J. Ch.
65 36- 3
251 101- 2
205 11-11
" 108(o)-3
218 55-10
313 55-20

67 L.J.Ch.*con*
409 36- 3
540 60-32
" 60-33

68 L. J Ch.
15 25- 9
322 53A- 1
425 84- 5
517 69A- 6
572 58- 5
681 60-33

69 L. J. Ch.
1 21-13
59 40- 1
257 108(o)-1
465 58- 5
635 60-33
879 55- 2

70 L. J. Ch.
3 2- 5
51 14-10
72 14-11
144 58- 5
407 17-10
477 55- 4
" 58- 4
" 58- 5
562 58-39
587 60-14
822 55- 2

71 L. J. Ch.
139 60-28
" 60-33
270 59-11
363 3-33
424 55-20
500 61- 5
518 12- 2
" 53- 6
666 55- 2
680 21-13
688 60-30
768 60-28
850 55- 3

72 L. J. Ch.
218 6- 3
262 60-30
281 28- 6
" 29- 5
664 56- 1
670 13- 4
" 14- 2

73 L. J. Ch.
3 17- 8
" 17- 9
279 55-11
365 6- 3
526 60-30
" 60-33
543 17- 7
701 53A- 1
849 3-47

74 L. J. Ch.
62 14- 2
86 7- 3
95 18- 3
199 55- 2
310 40- 1
354 18- 2
370 114- 4
" 114- 7

74 L.J.Ch.*con*
487 21- 8
512 18- 3
529 14- 6
555 14-10
" 109- 2
697 59-11

75 L. J. Ch.
175 55- 2
359 21-13
464 55- 2
556 73-10
599 14-12
739 61- 5
" 61- 8
743 36- 1
761 14-10
" 18- 2
768 55-10

76 L. J. Ch.
41 21-13
78 40- 1
" 108(j)-5
179 55- 8
339 14- 6
507 108(j)-1
621 55- 2

77 L. J. Ch.
265 30- 2
617 40- 1

78 L. J. Ch.
504 14-10
753 40-26

79 L. J. Ch.
121 55-20
239 40-26
252 68- 2
281 23- 4
345 60-28
360 60-32
" 60-33
502 29- 4
669 57- 6

80 L. J. Ch.
29 17- 7
47 14- 2
65 60-28
242 68- 2
249 22- 5
295 60-49
532 84- 8
" 84-14
" 84-15
" 84-16
623 6- 3

81 L. J. Ch.
46 55-20
137 60-28
259 60-18
386 55-20
588 55- 3
800 32- 3
" 32- 5

82 L. J. Ch.
1 6-16

83 L. J. Ch.
79 60- 1
" 60-33
186 58- 5
243 6- 3

In the foot-notes to the Commentary ✠ indicates either a leading case or a case giving fuller reasons.

83 L. J. Ch. con
260 40- 1
263 8-20
579 53A- 1

84 L. J. Ch.
193 50- 3
203 111- 3
259 55- 5
505 16- 3
578 35- 2
715 14- 9
" 16- 3
814 60-18
825 18- 3

85 L. J. Ch.
473 11- 2
598 36- 6
677 53-21

86 L. J. Ch.
368 55- 3
400 110- 4
726 53A- 1

87 L. J. Ch
81 14- 5
499 17- 8

88 L. J. Ch.
31 60-49
392 130- 2

89 L. J. Ch
204 7- 3
301 26- 7
583 32- 8

90 L. J. Ch.
111 14-12
116 130- 2
" 130- 8
373 53A- 1
417 108(j)-1
440 60-33
499 19-11
" 21- 8

91 L. J. Ch.
17 8- 2
228 55- 6
250 32- 5
277 19-11
" 21- 8
521 21-13
567 55- 2

92 L. J. Ch.
194 55- 2
400 53-20

94 L. J. Ch.
113 53A- 1
221 68- 2

95 L. J. Ch.
37 32- 6
46 18- 3
136 25- 2
140 53-20
172 19- 4
" 21-15

96 L. J. Ch.
104 5- 5
487 32- 2
" 32- 6

98 L. J. Ch.
261 18- 3

99 L. J. Ch.
232 18- 3
286 25- 3

100 L. J. Ch.
276 72- 5

101 L. J. Ch.
52 18- 3

102 L. J. Ch.
133 106-35
241 40- 1
353 108(j)- 1

103 L. J. Ch.
49 18- 3
168 60-40
311 60-32
" 60-40

104 L. J. Ch.
111 13- 4
243 65A- 5

105 L. J. Ch.
233 40- 1

107 L. J. Ch.
6 14-12
417 14- 9

L. J. C. P.
4 L J C P
66 55- 2
12 L J C P
2 84-5
25 L J C P
229 130-20
" 133- 5
27 L J C P
220 112- 4
28 L J C P
297 115- 1
31 L J C P
226 6- 9
32 L J C P
161 132- 2
" 137- 4
34 L J C P
48 3-43
35 L J C P
293 84- 5
321 3-30
351 114- 9
36 L J C P
1 108(n)-7
173 130- 2
" 130-20
" 133- 5
218 19-12
39 L J C P
297 50- 3
41 L J C P
89 50- 3
239 112- 7
42 L J C P
127 68- 2
44 L J C P
402 15- 4

L. J. Eq.
37 L J Eq
825 40- 1

L. J. Ex.
10 L J Ex
12 60-14
15 L J Ex
92 116- 3

17 L. J. Ex.
106 25- 2
21 L J Ex
135 105-11
23 L J Ex
94 55-20
25 L J Ex
212 3-30
28 L J Ex
257 59-11
30 L J Ex
40 2- 5
35 L J Ex
134 6-34
37 L J Ex
173 113- 2
38 L J Ex
175 40- 1
39 L J Ex
69 108(j)-7
42 L J Ex
108 55- 3
" 55-20
43 L J Ex
57 8-10
" 55- 9
44 L J Ex
33 115- 1
48 L J Ex
362 53A- 1

L. J. K. B.
3 L J K B
41 84- 5
5 L J K B
116 106-19
6 L J K B
185 111-13
70 L J K B
832 60-33
71 L J K B
476 53- 6
693 111- 8
712 6-17
" 130- 2
857 25- 9
949 130- 2
72 L J K B
51 65A- 3
215 36- 5
237 53- 6
294 8-13
471 60-32
" 60-33
873 55- 2
73 L J K B
97 109- 2
114n Pre- 4
74 L J K B
620 6-35
829 6-16
898 130- 2
" 130-13
75 L J K B
38 111- 8
149 109- 2
873 6-17
76 L J K B
658 114- 4
79 L J K B
664 130- 2
" 130- 8
921 108(j)-1

80 L.J.K.B.
713 108(n)-2
1058 130- 4
" 133- 4
81 L J K B
334 53-11
" 53-17
" 53-20
1081 6-16
" 53-11
" 53-17
" 53-20
84 L J K B
154 110- 4
462 43- 2
87 L J K B
333 6-27
510 108(m)-2
907 6-35
1101 53A- 1
88 L J K B
679 53- 6
" 53-16
89 L J K B
369 6-16
819 6-16
93 L J K B
33 5- 7
729 108(f)-2
106 L J K B
641 6-35
" 25- 9

L. J. P.
73 L J P
97 53- 6
95 L J P
83 53-16
" 53-17
97 L J P
71 40- 1

L. J. P. C.
35 L J P C
30 60-18
37 L J P C
1 10- 8
46 L J P C
1 Pre- 4
47 L J P C
8 111-13
58 L J P C
82 84-16
60 L J P C
66 53-31
61 L J P C
72 53-31
64 L J P C
136 53-34
67 L J P C
75 2- 5
71 L J P C
20 10-17
" 40-25
72 L J P C
50 10-12
74 L J P C
77 2- 5
77 L J P C
64 35- 2
81 L J P C
207 60-28
89 L J P C
195 35- 2

93 L.J.P.C.
173 18- 3
237 55-20
95 L J P C
71 40- 1
" 40- 2

L. J. Q. B.
10 L J Q B
158 84- 5
11 L J Q B
104 6-28
" 40-24
12 L J Q B
333 109- 4
13 L J Q B
239 111-10
258 60-16
359 6-35
16 L J Q B
119 3-43
269 106- 6
17 L J Q B
5 84- 5
151 111-10
282 3-42
" 3-43
21 L J Q B
139 53-31
27 L J Q B
361 55-20
28 L J Q B
252 Pre- 1
30 L J Q B
308 60- 7
33 L J Q B
3 112- 2
" 112- 3
35 L J Q B
99 130-17
" 130-20
37 L J Q B
80 2- 5
231 108(j)-1
41 L J Q B
165 40- 1
45 L J Q B
166 32- 6
498 53-20
46 L J Q B
537 55- 5
48 L J Q B
204 53- 6
50 L J Q B
33 49- 1
49 53-33
437 130- 2
473 58-38
51 L J Q B
73 11-11
" 40- 1
52 L J Q B
140 53A- 1
193 18- 2
340 108(j)-6
" 109-10
454 6-16
584 3-26
" 133- 3
609 55- 2
737 53A- 1
" 53A- 3

53 L.J.Q.B.
222 130- 2
280 130- 2
54 L J Q B
6 111- 3
277 114- 5
55 L J Q B
280 40-26
462 122-2a
558 53- 6
" 53-29
56 L J Q B
15 6-24
353 58-39
57 L J Q B
83 32- 8
134 84- 5
58 L.J Q B
75 6- 3
" 130-17
302 60-14
341 40- 1
459 130- 2
60 L J Q B
397 6-23
" 25- 9
679 55- 6
776 12-11
61 L J Q B
265 18- 2
" 18- 3
62 L J Q B
187 114- 1
232 55-20
628 36- 1
64 L J Q B
10 58-38
245 108(d)-3
454 36- 1
787 108(o)-1
65 L J Q B
435 69A- 2
578 108(j)-1
66 L J Q B
111 53- 6
" 53-16
67 L J Q B
11 113- 3
296 3-39
" 111- 3
470 58- 6
484 130- 2
507 108(j)-5
517 36- 8
986 137- 4
68 L J Q B
114 108(j)-7
287 53- 6
392 Pre- 1
69 L J Q B
379 36- 3
722 53- 6
856 6- 8
904 109- 2
70 L J Q B
225 63- 3

Law Times
2 L. T.
128 69-18
" 69-26
3 L. T.
130 41- 1

In the foot-notes to the Commentary † indicates a case which is most appropriate for the proposition.

3 L. T. con
313 92-14
809 105- 4
4 L. T.
639 123-12
7 L. T.
422 67- 5
811 91-37
8 L. T.
409 72-12
429 105-59
697 105-14
777 126- 9
792 105-14
10 L. T.
519 91-19
840 78- 4
11 L. T.
353 13- 4
591 91-15
645 69-27
730 91-29
12 L. T.
114 72-12
446 69-27
811 69-27
13 L. T.
66 43- 2
177 100-14
783 100-13
14 L. T.
280 100-20
16 L. T.
157 106-44
19 L. T.
809 123- 1
22 L. T.
661 50- 1
23 L. T.
584 91-25
26 L. T.
848 92-14
28 L. T.
547 55-12
30 L. T.
409 35- 2
32 L. T.
682 10- 6
689 91-41
39 L. T.
78 91-41
671 36- 3
40 L. T.
771 106-19
43 L. T.
117 129- 3
44 L. T.
210 111-14
293 105-30
" 105-31
46 L. T.
858 53A- 3
49 L. T.
389 69-18
51 L. T.
191 69-28
55 L. T.
554 39- 6
57 L. T.
527 109- 5
60 L. T.
583 92-16
61 L. T.
8 126- 9
71 69-21
" 69-23
729 106-19
" 106-20
63 L. T.
753 19- 9
64 L. T.
645 123-12
66 L. T.
718 100-20
69 L. T.
169 100-10
380 100- 5
70 L. T.
718 100- 5
83 L. T.
548 105-14
85 L. T.
645 3-14
650 105-14
90 L. T.
89 106-35
" 109- 4
104 L. T.
149 50- 3
113 L. T.
694 106-19
142 L. T.
299 116- 1
152 L. T.
390 69-21
" 69-22

Revised Reports

1 R. R.
169 106- 3
" 106-40
425 137- 5
445 111-15
467 16- 3
791 6-23
2 R. R.
341 108(j)-6
532 6- 9
3 R. R.
417 16- 3
4 R. R.
7 11- 2
586 10- 1
708 6- 9
5 R. R.
322 22- 5
521 119- 8
719 59- 9
6 R. R.
376 108(h)-2
511 108(j)-4
8 R. R.
137 22- 5
178 71- 2
" 71- 3
8 R. R. con
185 105-72
364 76- 7
447 10- 9
" 11- 9
9 R. R.
3 53A- 1
54 53A- 1
71 60-33
122 60-33
800 106-41
810 106-19
10 R. R.
74 108(j)-1
11 R. R.
226 10- 5
491 137- 5
605 105-16
780 105-37
807 106-19
12 R. R.
1 71- 2
14 64- 6
22 55-13
82 58-29
" 58-38
94 3-28
" 48- 9
119 64- 6
198 27- 2
507 106-37
509 106-19
13 R. R.
76 108(m)-2
104 27- 2
234 54-12
556 108(e)-4
14 R. R.
231 55- 2
392 3-41
15 R. R.
561 121- 1
579 111-10
16 R. R.
293 10-12
" 10-13
17 R R.
62 69-27
95 71- 2
296 111- 8
18 R. R.
230 29- 5
444 108(j)-1
19 R R.
201 91-42
20 R. R.
268 24- 2
816 29- 2
868 109- 5
21 R. R,
358 108(i)-3
585 58-38
22 R. R.
69 82- 2
238 3-32
24 R. R.
136 29- 4
553 16- 3
25 R. R.
16 58-39
117 26- 7
28 R. R.
375 108(l)-14
505 111-10
30 R. R.
244 106-37
699 108(b)-1
31 R. R.
654 84- 5
32 R. R.
393 10- 5
456 108(j)-4
33 R. R.
408 108(i)-3
34 R. R.
56 10- 5
301 58-35
37 R. R.
623 84- 5
41 R. R.
203 76-16
599 55- 2
42 R. R.
101 22- 5
274 5- 5
522 108(c)-1
44 R. R.
126 91-15
819 119- 8
46 R. R.
218 56- 1
48 R. R.
322 58-33
" 58-38
729 110- 3
49 R. R.
280 10-19
50 R. R.
347 41- 4
832 106-19
53 R. R.
266 26- 6
" 26- 7
56 R. R.
246 3-41
57 R. R.
27 22- 3
58 R. R.
249 71- 4
266 76-16
59 R. R.
726 3-48
" 52- 8
746 71- 2
833 84- 5
60 R. R.
184 101- 3
779 108(q)-1
61 R. R.
39 56- 1
339 106-35
62 R. R.
67 91-38
316 58-29
63 R. R.
72 65- 4
65 R. R.
333 91-42
66 R. R.
611 111-11
867 106-34
67 R. R.
593 111-10
614 111-10
70 R. R.
800 108(l)-14
71 R. R.
311 65- 4
808 32- 2
72 R. R.
62 8- 9
74 R. R.
633 55-10
" 55-12
78 R. R.
289 11-11
80 R. R.
97 16- 3
82 R. R.
98 67-27
84 R. R.
436 106-38
86 R. R.
619 55-20
746 58-11
87 R. R.
449 21- 8
88 R. R.
296 132- 2
" 132- 4
" 132- 5
89 R. R.
539 10-12
90 R. R.
501 91-37
719 26- 4
91 R. R.
705 108(l)-5
94 R. R.
1 32- 5
98 R. R.
12 24- 2
100 R. R.
140 58-39
102 R.R.
316 27- 2
104 R.R.
263 27- 2
458 10- 7
" 10- 9
538 24- 2
105 R R.
782 108(q)-1
108 R. R.
810 58-29
953 56- 1
110 R. R.
281 24- 2
111 R. R.
48 27- 2
85 27- 2
414 55-13
112 R. R.
23 22- 5
231 10-12
114 R. R.
60 126- 9
115 R. R.
257 16- 4
345 29- 2
854 108(c)-2
118 R. R.
213 69-10
" 69-18
119 R. R.
548 71- 4
121 R. R.
128 132- 2
122 R. R.
141 16- 3
" 16- 4
125 R. R.
99 27- 2
127 R. R.
158 63A- 1
129 R. R.
9 24- 2
131 R. R.
258 27- 2
135 R. R.
415 15- 3
736 10- 5
138 R. R.
108 43- 2
139 R. R.
170 24- 2
730 108(c)-1
140 R. R.
478 3-30
142 R. R.
180 3-42
145 R. R.
639 11- 2
146 R. R.
349 60-14
147 R. R.
129 58- 4
" 91-43
180 29- 5
149 R. R.
543 51-22
711 60-18

Times Law Reports.

1 T. L. R.
267 111-10
3 T. L. R.
34 114- 7
9 T. L. R.
77 111-10
14 T. L. R.
3 60-28
17 T. L. R.
5 60-18
570108(m)-3
19 T. L. R.
209 69- 4
20 T. L. R.
282 32- 5
607 78- 4

22 T. L. R.
233 111-13
23 T. L. R.
45 5- 5
24 T. L. R.
225 32- 5
834 Pre- 4
25 T. L. R.
166 40- 1
26 T. L. R.
138 60-28
375 111- 3
27 T. L. R.
203 28-11
28 T. L. R.
40 68- 8
29 T. L. R.
306 14-12
579 134- 2
33 T. L. R.
108 110- 4
114 105-25
" 111- 4
36 T. L. R.
674 29- 3
38 T. L. R.
619 110- 3
40 T. L. R.
650 40- 1
42 T. L. R.
694 68- 2

Weekly Reporter. (Eng.)

5 W. R.
744 72- 5
7 W. R.
213 69-25
8 W. R.
92 55- 2
9 W. R.
155 55- 2
880 3-28
" 3-44
10 W. R.
287 76- 7
681 29-4a
720 60-16
11 W. R.
803 132- 3
1019 58-39
1036 60-33
" 60-49
12 W. R.
585 55-20
683 49- 1
" 49- 4
14 W. R.
166 60B- 1
15 W. R.
214 6-16
325 67-26
420 55-20
860 55- 3
919 53- 6

15 W. R. *con*
919 53-17
952 27- 2
16 W. R.
637 132- 2
777 3-28
876 60-18
1041 40-25
17 W. R.
211 55- 2
" 55-20
355 81- 2
601 53- 6
" 53-12
810 132- 3
879 40-25
989 58-39
1034 53-17
1083 11- 7
18 W. R.
742 15- 2
1041 137- 5
19 W. R.
430 132- 5
20 W. R.
793 3-43
21 W. R.
73 55- 3
179 55- 6
" 55-16
558 34- 3
571 58- 6
798 11-11
838 21-13
878 6-27
22 W. R.
620 29- 6
" 34- 3
629 29- 6
23 W. R.
286 132- 2
" 132- 5
314 21-13
718 10- 6
718 11- 9
846 55-20
24 W. R.
8 53A- 1
695 69-20
756 11- 2
778 54-23
947 27- 2
25 W. R.
481 55-12
26 W. R.
123 58- 4
403 132- 3
504 58-39
670 132- 3
27 W. R.
492 53-17
527 10-19
544 21-13
545 32- 5
704 58-39
744 53-17
896 15- 2
28 W. R.
28 36 -6
242 65A- 3

28 W. R. *con*
401 22- 5
876 53-29
29 W. R.
113 111- 3
348 21-13
437 76-16
449 23- 2
546 55-16
30 W. R.
70 5- 7
620 14-10
878 5- 5
887 10- 5
" 12- 2
" 57-10
" 57-13
918 27- 2
31 W. R.
109 53A- 2
" 53A- 3
285 127- 2
369 Pre- 1
545 32- 3
661 5- 5
945 19-12
956 5- 5
32 W. R.
284 16- 3
538 55- 2
621 51-22
626 51-12
667 65A- 1
821 11- 9
33 W. R.
17 5- 5
163 130- 2
301 55- 1
341 63A- 1
578 71- 3
" 71- 6
637 16- 4
34 W. R.
141 60-11
593 65A- 3
600 60-18
709 5- 5
35 W. R.
180 55-12
36 W. R.
801 5- 5
37 W. R.
30 11- 2
217 55- 2
234 60-27
513 43- 2
726 69A- 4
38 W. R.
5 13- 7
264 13- 7
397 11- 2
425 10-19
732 58-17
39 W. R.
697 22- 5
40 W. R.
253 68- 8
41 W. R.
154 16- 3
475 132- 3

43 W. R.
89 114- 7
473 57- 2
" 57- 5
657 53-31
44 W. R.
638 5- 5
45 W. R.
105 5- 5
471 114A-3
46 W. R.
514 5- 5
47 W. R.
203 55- 2
479 55-21
644 114A-3
48 W. R.
59 58- 9
264 114A-3
441 114A-3
49 W. R.
236 81- 2
51 W. R.
504 71- 2
609 14- 6
53 W. R.
293 32- 6
393 29- 6
651 71- 2
" 71- 6

Weekly Reporter (Eng.) Digest
Vol. 4
56 55- 2
Vol. 14
8 36- 1
W. R. Dig.
Vol. 19
125 11- 2
Vol. 20
7 60-40
Vol. 25
325 35-11
Vol. 26
58 68-*2
265 29- 5
Vol. 29
113 111- 3
133 61- 5
Vol. 30
225 21- 8
Vol. 31
23 5- 7
210 55- 3
303 63A- 1
Vol. 32
107 111-15
137 60-40
176 8-10
220 55- 2
Vol. 33
232 3-32
237 55- 2
Vol. 36
12 53-20

W. R. Vol. 37
45 36- 8
129 58-39
" 84- 8
Vol. 38
137 69A- 7
138 60-40
" 84-14
Vol. 39
263 16- 4
Vol. 47
137 61- 4

Weekly Reporter (Eng.) P.C. Digest.
Vol. 11
6 58-39

Weekly Reporter (Eng.) Col. Digest.
Vol. 4
74 69- 4

Misc. Other Journals.

Ad. & E.
4 Ad. & E.
785 137- 4
6 Ad. & E.
469 132- 7
9 Ad. & E.
809 108(g)-2
12 Ad. & E.
743 106-19

Atkyns.
2 Atkyns
329 21- 8

B. & Ald.
1 B & Ald
135 106-34
584 108(m)-2

B. & C.
9 B. & C.
840 114- 9
10 B. & C.
626 106-38

B. & P.
3 B & P
399 110- 4

B. & S.
5 B & S
359 112- 1

Beav.
2 Beav
352 30- 2
6 Beav
246 63A- 3
" 76-10
7 Beav
437 30- 2
551 126- 9
20 Beav
541 30- 2
614 81-13

21 Beav
621 34- 3
23 Beav
33 127- 3
24 Beav
283 45- 3
25 Beav
622 100-20
26 Beav
365 14- 9
28 Beav
440 29- 7
33 Beav
43 15- 3
" 15- 4
330 76- 7

Bing.
4 Bing
446 106- 3
5 Bing
163 108(d)-2

Bligh. (N.S.)
1 Bligh (N S)
497 129- 3
2 Bligh. (N S)
147 63- 2

Bro. C. C.
1 Bro C. C.
55 33- 2
2 Bro. C. C.
612 129- 3
3 Bro. C. C.
166 58- 4
401 22- 5
471 21-13

Burr.
1 Burr.
228 24-13

C. B.
3 C. B.
215 106-19
4 C. B. (N S)
376 112- 1
5 C. B.
365 84- 7
11 C. B.
520 113- 3
13 C. B.
178 113- 2
" 113- 3

Camp.
2 Camp
387 113- 3
559 106-19
3 Camp
71 106-19
115 106-23

Car. & P.
3 Car & P.
432 106-32

Co. Rep.
3 Co Rep
16 21-13
4 Co Rep
80 119- 8

Comb.
1 Comb
393 R2-20

Cox.
1 Cox
324 15- 4
327 15- 4

De. G. F. & J.
(1862)
De G. F. & J.
264 122-15

De. G. & J.
1 De G & J
535 69-27
566 52- 1
598 71- 2

De. G. J. & Sm.
3 De G J&Sm
293 53- 6

De. G. M. & G.
7 De G M & G
134 76- 7

De. G. & Sm.
4 De G & Sm
472 19- 6

Dickens
1 Dick
344 15- 4

Dr. & Sm.
2 Dr & Sm
167 15- 4

Drew.
3 Drew
451 28- 7
" 29- 2

Dr. & Wal.
1 Dr & Wal
618 72- 4

East's Rep.
2 East
481 29- 4
5 East
198 13- 7
6 East
530 106- 3
7 East
551 106-37
9 East
15 110- 4
10 East
13 113- 3
11 East
312 106-40
12 East
614 137- 5
13 East
526 15- 4
16 East
53 113- 3

Eden Rep.
1 Eden
151 3- 2
2 Eden
224 3-41
286 126- 9

Esp. Rep.
4 Esp.
185 106-19

Eq. Cas. Abr.
1727-1
Eq Cas Abr
358 48- 9
1729-1 Eq
Cas Abr
291 45- 3

Giff. Rep.
2 Giff
246 126- 9

Hare's Rep.
1 Hare
43 3-33
109 114- 7
6 Hare
112 3-28
7 Hare
191 3-32
9 Hare
37 15- 3

Hy. Bl. Rep.
1 Hy. Bl.
96 105-37
311 113- 3

H. L. C.
2 H. L. C.
579 3-22
4 H. L. C.
1 29- 2
5 H. L. C.
627 126- 9
7 H. L. C.
707 28- 7
" 29- 5
9 H. L. C.
514 79- 2
" 79- 3
10 H. L. C.
404 53- 5
367 14-10

H. & C. Rep.
3 H. & C.
458 110- 4

H. & N. Rep.
1 H. & N.
732 108- 2

Irish. Rep.
21 Irish
27 53- 1

Ir. Ch. Rep.
5 Ir. Ch. R.
129 45- 3
9 Ir. Ch. R.
57 82- 4

Ir. Rep.
2 Ir. R.
204 129- 3

Ir. Rep. Eq.
4 Ir. R Eq.
15 82- 4

Jac. Rep.
1820 Jac.
381 11- 2

Johns.
1859 John.
133 72- 5

John. & H.
1 J. & H.
1 127- 2
215 91-15
287 45- 3
" 45- 4

Jones & Lat Rep.
1 Jo & Lat
620 72- 3
710 101- 1
" 101- 3
2 Jo & Lat
521 72- 3

Kay.
1854 Kay.
638 15- 4

Kay & John Rep.
3 K. & J.
90 12- 2
458 12- 2
4 K. & J.
505 45- 3

L. R. Ir.
32 L. R. Ir.
347 14- 5

Mac. & G. Rep.
1 Mac. & G.
488 69-27
5 Mac & G
54 105-16
112 105-16

Madd's Rep.
3 Madd.
256 30- 3
6 Madd.
59 3-32

M. & S.
6 M. & S.
40 106-19

M. & W. Rep.
1 M. & W.
402 112- 1
695 111-14
4 M. & W.
198 106-40
7 M. & W.
226 105-37
16 M. & W.
862 130- 5

Mer. Rep.
1 Mer.
572 79-4a
2 Mer.
363 15- 2
483 10-19
3 Mer.
210 92- 2
237 105- 4

Mod. Rep.
8 Mod. Rep.
345 114- 5

Moo. & P.
1 Moo & P.
480 111-23

Moo P. C. C.
10 Moo P.C.C.
140 123- 2
14 Moo P. C.
121 53- 6

Moo P. C. C. (NS)
3 Moo P.C.C.
(N S)
245 84- 5

Mosley's Rep.
Mos.
225 72- 3

My. & Cr.
3 My. & Cr.
407 53-24

My. & K.
2 My. & K.
202 27- 2
3 My. & K.
36 130-20

P. Wms. Rep.
2 P. Wms
511 71- 2
3 P. Wms.
26 3- 2

Phillips' Rep.
2 Ph.
774 40- 1
" 40-25

Queen's Bench Reports.
(1847) 11Q.B.
127 106-38
(1850) 15Q.B.
257 106- 3

Rep. Ch.
8 Rep.
89 29- 2

Sch. & Lef.
2 Sch. & Lef.
583 3-39

Simons'
6 Sim.
485 15- 2
" 15- 3

Sm. & G.
2 Sm. & G.
578n 48-11
3 Sm. & G.
468 127- 2

Story
1 Story.
478 51- 1

Strange's Rep.
1 Str.
447 114- 1

Swanst.
1 Swanst
337 36- 1
" 36- 2
359 35-21

Tamlyn.
1830 Taml.
393 127- 3

Taunton's Rep.
2 Taunt.
339 105-16
3 Taunt.
54 116- 6
119 106-34
402 114- 4
4 Taunt.
128 105-32

Turn. Rep.
3 T. R.
462 105-25
6 T. R.
554 51-22

Turn. & R.
1822 Turn &R
31 16- 7

Vernon's Rep.
2 Vern.
84 64- 6
103 114- 4
308 32- 6
673 21-13

Ves. Sen. Rep.
1 Ves. Sen.
278 R2-20
2 Ves. Sen.
252 45- 3
547 126- 9

Ves. Jun.
1 Ves.
478 43- 2
2 Ves.
111 129- 3
3 Ves.
324 28-11
4 Ves.
118 58- 5
389 58- 5
802 122-12
7 Ves.
421 19- 5
583 72- 5
8 Ves.
34 110- 4
9 Ves.
197 45- 6
292 126- 9
10 Ves.
152 15- 4
" 22- 5
12 Ves.
475 114- 1
" 114- 7
13 Ves.
135 36- 1
14 Ves.
273 126- 6
15 Ves.
248 34- 4
16 Ves.
249 50- 3
314 19- 6
18 Ves.
27 35- 7
19 Ves.
88 12- 2
441 45- 3

W. & T. L. C.
2 W & T L C
438 60-17

Weekly Notes.
1893 W. N.
128 126- 9

Remarks in foot-notes amplify principles in the Commentary and state the special features of the case.

S. N. Dar
Advocate High Court
Jammu & Kash
Srinagar

SUPPLEMENT

THE TRANSFER OF PROPERTY ACT (IV OF 1882)

[LAW HEREIN STATED IS AS ON 30-6-1955.]

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*INDICATES THAT CITATION OF NEW CASE BEGINS

Chronological Table of Enactments.

To the Chronological Table the following entries shall be added at the end :

"1950	...	Adaptation of Laws Order	Amending Ss. 1, 37, 57, 58, 69, 107 and 117,
1951	III	The Part B States (Laws) Act	Amending Ss. 1, 3 and 52.
1952	XLVIII	The Repealing and Amending Act	Amending S. 69.
1954	XXIV	U. P. Civil Laws (Reforms and Amendment) Act.	Amending S. 105."

PREAMBLE

Note 2

Add in the Foot Note indicated :

4. 1953 Pat 193 (A I R V 40 C 64 Pr 3) (DB). *Lachhminarayan* v. *Janmaijai Mahton*. (It purports to do no more than to define and amend certain parts of the law relating to transfer of property.) ✣ ('50) 86 Cal L Jour 198 (205), *Sm. Durgarani Devi* v. *Mohiuddin*. (Act provides for some and not all consequences of assignment of reversion.)

Add after Pt. 10 as a separate para :

[Pt. 11] It is erroneous to suppose that every provision in the Transfer of Property Act and every amendment effected is necessarily based on the principles of justice, equity and good conscience. Before applying the provisions of this Act to cases not falling under it, on the ground of justice, equity and good conscience, it has to be seen in every case whether the particular provision of the Act relied upon restates a known rule of equity or whether it is merely a new rule laid down by the Legislature without reference to any rule of equity and what is the true nature and character of the rule. *1953 SC 228 (AIR V 40 C 55 P 17) = 1953 S C R 1009 (SC), Namdeo Lokman Ladhi* v. *Narmadabai*.

Note 6

Add after Pt. 1 :

[Pt. 1a] The English decisions may be referred to, in cases where the Act is silent and also in cases where are there specific provisions in the Act, for a proper understanding of such provisions. *('50) 86 Cal L Jour 198 (206), Sm. Durgarani Devi* v. *Mohiuddin*.

SECTION 1

In Section 1,

(i) for third para the following shall be substituted :—

'It extends in the first instance to the whole of India except Part B States, Bombay, Punjab and Delhi.'

—*Substituted* by A. L. O. 1950.

(ii) In the fourth para of S. 1,

(a) the words "Bombay, Punjab and Delhi", were substituted for the words 'the said Provinces' and the word 'State' for the word 'Provincial', by A. L. O. 1950.

(b) for the words 'Bombay, Punjab and Delhi' the words 'the said States', shall be substituted.

—*Substituted* by the part B States (Laws) Act, III of 1951, (S. 3 and Sch.).

(iii) In para five of S. 1,

For the word 'Provincial' occurring twice in the para the word 'State' shall be substituted.

—*Substituted* by A. L. O. 1950.

On page 171,

(i) after the para beginning with the words "Act IV of 1882" and ending with "*See* ibid, p. 195", add the following :—

'It has also been *extended* to the whole of Hyderabad State from 17-7-52 (*vide* Hyderabad Gaz., D/- 17-7-52, Pt. 1-D, P. 718), to the whole of the State of Mysore from 1-10-1951 (*vide* Mysore Gaz., D/- 20-9-1951, Pt. IV S. 1-c, p. 453), to the whole of the State of Rajasthan from 1-2-1952 (*vide* Rajasthan Gaz. D/- 5-7-52, Pt. IV-A p. 185) and

the whole State of Travancore-Cochin from 1-5-1952 (*vide* Travancore-Cochin Gaz., D/- 1-4-1952-Pt. 1 p. 356.)"

(ii) To the para beginning with "The Act has been declared" and ending with "(1 of 1929)", add the following :—

"It has also been declared to be in force in Saurashtra from 28-8-1951 (*vide* Saurashtra Gaz., D/- 28-8-1951 Pt. III Extra, p. 884.)"

Add in Synopsis after heading 5 ;

"*5A. Applicability of principles to matters expressly excluded from purview of the Act.*"

Note 1

Add in the Foot Note indicated :

1. *See* 1950 Kutch 64 (A I R V 37 C 53 P 7, 9), *Gangabai Ratonshi* v. *Malbai*. (Act not applicable in Kutch and cannot be literally followed —Kutch Shirasta Sangraha (Collection of Customs) often prevailed over Indian Act in matter of transfer of property.)

Note 3a

Add after Pt. 1 :

[Pt. 2] But it was held in the following case that the Transfer of Property Act does not apply to the pre-emption chapter of the Berar Land Revenue Code. *1949 Nag 34 (A I R V 36 C 17 P 9)=I L R (1948) Nag 327 (DB), Jainarayan Ramkisan* v. *Motiram Gangaram*.

Note 5

Add in the Foot Note indicated :

1. See however 1951 Trav-Co 17 (AIR V 38 C 7 P 5) (DB), *Varaha Devaswom* v. *Umer Sait*. (T. P. Act came into force in Cochin on 1-1-1112—Mortgage transaction in State prior to passing of T. P. Act - Rights and liabilities are to be determined in accordance with common law.)

Note 5A

Add after Note 5 :

5A. Applicability of principles to matters expressly excluded from purview of the Act.

[Pt. 1] The assistance of the Act as a guide on matters which have been excluded from the purview of the Act by express words should not be invoked, unless the provisions of the Act embody principles of general application. *1953 S C 228 (A I R V 40 C 55 Pr 22) : 1953 S C R 1009 (S C), Namdeo Lokman Lodhi* v. *Narmadabai*. (1919 Mad .2 [AIR V 6] Krisha Shetty v. Gilbert Pinto, Approved.)

[Pt. 2] Section 2 (d) clearly excludes the application of the provisions of S. 105 to the relationship which has been created by a decree. But the provisions of S. 105 can be invoked as matters of justice, equity and good conscience. *1954 Bom 370 (AIR V 41 C 107 Pr 16) : I L R (1954) Bom 615 (DB), Ramjibhai Virpal* v. *Gordhandas Maganlal*.

See also Preamble N. 2.

SECTION 2

Note 5

Add in the Foot Note indicated :

10. 1953 Sau 113 (A I R V 40 C 59 Pr 16) (DB), *Karsandas Ramji* v. *Karsanji Kalyanji*. (A lease executed in the former Nawanagar State before the T. P Act was made applicable to the territory comprised in that State will not be governed by the provisions of T. P. Act but will be governed by the Common Law principles which were usually held applicable by all Courts in India.)

Note 6

Add in the Foot Notes indicated :

9. 1953 All 449 (A I R V 40 C 208 Pr 14) (DB), *Lalta Prasad* v. *Brahmanand* (Consideration of equity does not arise in case of such sale — Principle of caveat emptor applies to such sale. 1931 All 277 (AIR V 18) (FB), Nannu Mal v. Ram Chander, Relied on.)

10. 1955 Trav Co 130 (Prs 7, 9) [(S) A I R V 42 C 17] (DB), *Bhageerathi Pillai* v. *Narayanan Prabhakaran*. (Where at a time when the T. P. Act was not in force in Travancore the decree in a suit for recovery of property and mesne profits allowed the defendant to retain possession, of the property till she got the amount that was declared to be due her or to surrender possession of the property and claim the amount with interest and further she was also allowed to appropriate the profits from the property till she was paid her amount or till she surrendered possession of the property and claimed the amount with interest thereafter :

Held, that a mortgage was created on which the plaintiff could file a suit for redemption.)

Add before Pt. 1 after the words "act of parties" in the last line in para 1 :

[Pt. 1a] Section 2 (d) clearly excludes the application of the provisions of S. 105 to the relationship which has been created by a decree. In other words, when the Court is dealing with the relationship created by a decree passed by a Court, the terms of S. 105 as such would not be applicable. *1954 Bom 370 (A I R V 41 C 107 Pr 16) : I L R (1954) Bom 615 (DB), Ramjibhai Virpal* v. *Gordhandas Maganlal*. (Provisions of S. 105 would be invoked, as matters of justice, equity and good conscience.)

SECTION 3

In Section 3,

(i) For the words 'a Province' the words 'a Part A State or a Part C State' were substituted by A. L. O. 1950.

(ii) For the words 'a Part A State or a Part C State' the words 'any State to which this Act extends' shall be substituted.

— *Substituted* by the Part B States (Laws) Act, III of 1951 (S. 3 and Sch.)

Note 2

Add in the Foot Notes indicated :

3. 1951 Bom 127 (A I R V 38 C 25 Prs 6, 10) : I L R (1951) Bom 692 (DB), *Ramchandra Annappa* v. *Subraya Fimmaya.*

6. 1952 Bom 454 (A I R V 39 Prs 7, 10) : I L R (1952) Bom 1090 (DB), *Prahlad Dalsukhrai* v. *Maganlal Muljibhai Tewar.* (Mortgagee's interest in mortgaged property.) ✣ ('50) 1950 Bur L R (HC) 80 (85, 87, 89), *Ko U Mar* v. *Ma Saw Myaing.*

7. 952 Bom 454 (AIR V 39 Prs 7, 10) : I L R (1952) Bom 1090 (DB), *Prahlad Dalsukhrai* v. *Maganlal Muljibhai Tewar.* (Even in case of usufructuary mortgage.)

28. 1952 Orissa 116 (A R V 39 C 30 P 5) (DB), *Udayanarayan Ananga Bhima* v. *Badia Dasu.* (Lease of such a right to collect rents (such as Must jir lease in Orissa) is a lease of immovable property.)

31. 1951 Madh B 92 (A I R V 38 C 37 P 15), *Abbasali Shah* v. *Mohammad Shah.*

Add after Pt 33 :

[Pt. 33a] (20) Mortgage decree is immovable property. *1949 Cal 549 (A I R V 36 C 147 Prs 14, 19) : I L R (1945) 2 Cal 526, Anandilal Poddar* v. *Keshao Deo Poddar.* (This is the effect of amendment of S. 17 (1), Registration Act by addition of cl. (e), by T. P. (Amendment) Supplementary Act of 1929; 1940 Mad 140 (A I R V 27) (DB), Shiva Rao v. Official Liquidator, Ref.) ✣ *('76) I L R 1 Bom 267 (268) (DB), Gopal Narayan* v. *Trimbak Sadasiv.*

[NOTE:— It is submitted that following cases are no longer good law.

('96) ILR 23 Cal 450 (453) (DB), *Gous Mahomed* v. *Khawas Ali Khan.*

('13) ILR 35 All 524 (526), (463) (DB), *Mumtaz Ahmed* v. *Sri Ram.*

('02) 6 Cal W N 5 (6) (DB), *Baij Nath Lohea* v. *Binoyendra Nath Palit.*

('08) 12 Cal W N 625 (627) (DB), *Ram Ratan Chuckerbutty* v. *Jogesh Chandra*]

[Pt. 33b] (21) Right to tap cocoanut trees and obtain toddy. *1949 Mad 148 (A I R V 36 C 63 Pr 8) (DB), P. Venugopala Pillai* v. *Thiruravukkarasu.* (The right is in the nature of immovable property being benefit arising out of land.)

[Pt. 33c] (22) Improvements on the immovable property made by the lessee of such property *1955 N U C (Trav-Co) 1040 (A I R V 42), Michel Michel* v. *Narayanan Potti.*

41. Delete Point 41 from Note 2 and footnotes under it.

Note 3

Add in the Foot Note indicated :

2. 1952 Mad 59 (A I R V 39 C 29 P 2), *Kunhikoya Thangal* v. *D Ahmad Kutty.* (Scope of S. 62 cannot be enlarged by introducing into it in an indirect manner the definition of immovable property in General Clauses Act.)

Note 6

Add in the Foot Note indicated :

3. 1953 Hyd 11 (A I R V 40 C 9 P 7) : I L R (1952) Hyd 495 (DB), *Addu Achiar* v. *Custodian, Evacuee Property.*

Add after the sentence "Thus, a superstructure . . . be removable by him."

[Pt. 4a] But it has been held that if a trespasser puts up a structure on a plot of land belonging to another without the permission of the owner, the structure becomes the property of the owner of the land. *1955 Punj 34 (Pr 10) ((S) A I R V 42 C 12) (DB), Gurcharan Singh* v. *Chairman Delhi I Trust.*

Add after Pt. 5, as separate para :

[Pt. 6] In order to determine what is and what is not immovable property as a result of attachment or annexation to land, two tests have been laid down, viz., (1) the degree or mode of annexation, and (2) the object of annexation. Of the two tests the latter is the more important, and it is a question which depends upon the particular circumstances of each case. Thus, where the land, on which the machinery belonging to A was erected, belonged to B, it must be assumed that the machinery was erected by A either as a licensee or as a temporary tenant and that he did not intend the machinery to form part and parcel of the immovable property to which it was attached for the time being. *1953 Nag 224 (A I R V 40 C 88 Prs. 9 10) : I L R 1953 Nag 488 (DB), Subhiah, J. H.* v. *Govindrao Bhiwaji.*

Note 7

Add after Pt. 2 :

[Pt. 3] But machinery erected by a tenant in the premises with the intention of removing it when vacating the premises is not immovable property. *1953 Hyd 14 (A I R V 40 C 9 P 5, 7, 11) : I L R (1952) Hyd 495 (DB) Addu Achiar* v. *Custodian, Evacuee Property.* (English law of fixtures and its limited application in India discussed — Tests indicated.)

Note 9

Add after Pt. 4 :

[Pt. 4a] Where a tenant running an ice factory in the premises of another, instals machinery it will always be presumed that he instals the same with the intention of removing the same whenever he chooses to vacate the premises and the machinery is not therefore immovable property. *1953 Hyd 14 (A I R V 40 C 9 P 5, 7, 11) : I L R (1952) Hyd 495*

(DB), Addu Achiar v. *Custodian, Evacuee Property.*

Add after Pt. 7 :

[Pt. 8] The question whether a particular machinery is imbedded in the earth within S. 3 is a question which depends upon the circumstances of each case. *1953 Pat 298 (A I R V 40 C 104) (DB), Commissioner of Income-tax* v. *Bhurangiya Coal Company.*

[Pt. 9] The test is degree or mode of annexation and the object of annexation. Of the two tests the latter is more important. Thus, where A erects machinery of his own on land belonging to B, it must be assumed that machinery was erected by A either as licensee or as temporay tenant and that he did not intend the machinery to form part and parcel of the immovable property to which it was attached for the time being. *1953 Nag 224 (A I R V 40 C 88 (Prs. 9, 10) : I L R (1953) Nag 488 (DB), Subhiah J. H.* v. *Govindrao Bhiwaji.*

[Pt. 10] See also the undermentioned case. *1954 Pat 249 (A I R V 41 C 90 P 11): 32 Pat 887: 1954 Cri L Jour 664 (DB), State of Bihar* v. *Ishri Bhagat.* (A platform erected over a drain, cannot be considered, apart from the drain, to be immoveable property.)

Note 10

Add after Pt. 4 :

[Pt. 4a] If the machinery and other articles pertaining to the factory are in the nature of permanent fixtures, then they would be regarded as immovable property. *1953 Hyd 14 (A I R V 40 C 9 P 5, 7, 11) : I L R (1952) Hyd 495 (DB), Addu Achiar* v. *Custodian, Evacuee Proporty.* (Tenant running ice factory in premises of another installing machinery with intention of removing it when vacating premises — Machinery is not immovable property — English law of fixtures and its limited application in India discussed.)

Add after Pt. 5 :

[Pt. 6] The amount of degree of annexation is also matter which will be taken into account in coming to a conclusion whether it is a permanent fixture or not. If the degree of annexation is such that the fixture cannot be taken away without destroying the principal it would be regarded as permanent fixture. *1953 Hyd 14 (A I R V 40 C 9 P 7) : I L R (1952) Hyd 495 (DB), Addu Achiar* v. *Custodian, Evacuee Property.* (English law of fixtures and its limited application in India discussed.)

Note 11

Add in the Foot Note indicated :

13. ('49) 1949-2 All E R 90 (94) : 65 T L R 395, *In the Estate of Gibson.* (Attestation by blind man — Case under English Wills Act (1837), S. 9.)

Add before Pt. 1 :

[Pt. 1a] The attestation of persons to a document is to ensure that there is no fraud or other vitiating circumstance in the execution of the document. *1954 Mad 126 (A I R V 41 C 48 Pr. 6), Gomati Ammal* v. *Krishna Iyer, V. S. M.* (('12) I L R 35 Mad 607 (P C), Shamu Patter v. Abdul Kadir, Rel. on.).

Note 11a

Add in the Foot Note indicated :

4. 1954 S C 316 (A I R V 41 C 76 P 11) : 1954 S C R 919 : 33 Pat 313 (SC), *Chandra Singh Deo* v. *Ganssh Prasad Bhagat.* (Attesting witness deposing that he had attested the mortgage bond executed by *A* in favour of *B* and that the other attestors also witnessed its execution. It is sufficient evidence of valid attestation.)

Note 12

Add in the Foot Note indicated :

8. 1951 Pat 363 (A I R V 38 C 90 P 3) : 28 Pat 158 (DB), *Dahu* v. *Jamdar.* (Signature of one attesting witness for another at the instance and in the presence of the latter is good though no mark is affixed by the latter) ✠ ('49) 1949 Nag L Jour (Notes) 55, *Lachhmanprasad* v. *Pt. Laxmanprasad.* (Person signing name of attesting witness must be shown to have been so authorised by the attesting witness.)

Note 14

Add in the Foot Note indicated :

4. *See also* 1954 Nag 11 (AIR V 41 C 2 P 7) : ILR (1953) Nag 281 (DB), *Vinayak* v. *Shaikh Mahammad Hanif.*

Add after Pt. 5 :

[Pt. 5a] But where the executant, a lady who did not observe strict *pardah*, was inside the room while the attesting witnesses were outside in the adjoining verandah and there was no curtain in the door of the room and the witnesses signed the instrument in the verandah, the attesting witnesses must be held to have signed the instrument in the presence of the executant. *1954 Nag 11 (AIR V 41 C 2 P 8) : ILR (1953) Nag 281 (DB), Vinayak* v. *Shaikh Mahammad Hanif,* (It is not necessary that the executant must have seen the attesting witnesses sign the instrument.)

Note 15

Add in the Foot Note indicated :

1. 1950 Nag 83 (AIR V 37 C 26 P 6): ILR (1950)

Nag 321 (DB), *Kuwarlal Amritlal* v. *Rekhlal Koduram*. (If the other side wants to challenge, it is its duty, quite apart from raising it in pleadings, to cross-examine the witness.)

Note 17

Add after Pt. 5 :

[Pt. 5a] But where *B* executes a mortgage deed as a power-of-attorney agent of *A*, though he is a different person, yet the act he does is on behalf of *A* and in law *A* is the executant of the deed. *A* thus being a party to the deed cannot be a valid attesting witness to that deed. *1954 Mad 126 (AIR V 41 C 48 P 10), Gomati Ammal* v. *Krishna Iyer, V. S. M.* ((1881) 7 Q B D 516 : 50 L J Q B 316, Seal v. Claridge; 1922 Cal 168 (AIR V 9). Sristidhar Ghose v. Rakhya Kali Dasi, Foll.)

Note 18

Add in the Foot Note indicated :

2. ('50) 1950-2 Mad L Jour 262 (264), *Murugesa Mudaliar* v *Gopalakrisha Mudaliar*. (Decision in 1918 Mad 491 (AIR V 5), Paramasiva Udayan v. Krishna Padayachi held unaffected by 1925 P C 89 (AIR V 12) (PC), Sarkar Barnard & Co. v. Alak Manjary Kuari.)

Add after Pt. 5 :

[Pt. 6] Where the signature of attesting witness is written by another, it must be shown that he had been so authorised by the attesting witness. *('49) 1949 Nag L Jour (Notes) 55, Lachmanprasad* v. *Pt. Laxmanprasad* ✣ *1951 Pat 368 (AIR V 38 C 90 P 3) : 28 Pat 158 (DB), Dahu* v. *Jamadar*. (Signature at the instance of the attesting witness and in his presence is good—No mark of the attesting witness is necessary.)

Note 19

Add in the Food Note indicated :

3. 1953 Nag 339 (AIR V 40 C 146 P 4): ILR (1953) Nag 507 (DB), *Sakharam Shriniwas* v. *Sushilabai*. (Absence of evidence that Sub-Registrar signed endorsement in presence of executant—Endorsement does not by itself prove execution and attestation of deed. 1940 Nag 382 (AIR V 27), Ganpatrao Yadorao v. Nagorao Vinayakrao, Dissented from.)

Note 20

Add in the Foot Note indicated :

3. 1954 Orissa 195 (Prs 7, 8) (AIR V 41 C 59):ILR (1954) Cut 298 (DB), *Udaya Naik* v. *Lokanath Naik* (Sub-section (5) of S. 46, C. P. Tenancy Act (11 of 1898) is also 'a law for the time being in force regulating the registration' of a certain class of documents. Hence, by construing sub s. (5) of S. 46, along with the provisions of the Indian Registration Act and S. 123, T P. Act it may be reasonably held that the requirement about compulsory registration of a deed of gift under the general law of transfer is not applicable where the transfer is of an occupancy holding to a person other than the persons specified in sub-s. (3) of S. 46. Hence invalidity of a deed of gift arises not on the ground of non-registration of a compulsorily registrable document because it is not registrable under any circumstance but by virtue of the contravention of sub-s (3) of S. 46.)

Note 21

Add in the Foot Note indicated :

11. 1952 Raj 187 (AIR V 39 P 2, 3) : ILR (1952) 2 Raj 5, *Chimanlal* v *Ganesh* ✣ 1951 Pat 415 (AIR V 38 C 107 P 8) (DB), *Ambica Prasad Singh* v. *Ram Charitar Singh*. (The words "right to sue" do not connote the same thing as the words "actionable claim")

Note 22

Add in the Foot Notes indicated :

8. 1952 Raj 187 (AIR V 39 P 2, 3) : ILR (1952) 2 Raj 5, *Chimanlal Singh* v. *Ganesh*.

21. 1951 Assam 56 (AIR V 38 C 29 P 3, 4 : ILR (1951) 3 Assam 1 (DB), *Alkash Ali Khalifa* v. *Nath Bank Ltd.* (The right to the proceeds of a business is an actionable claim.) ✣ 1952 Raj 187 (AIR V 39 P 2, 3) : ILR (1952) 2 Raj 5 *Chimanlal* v. *Ganesh*.

Add after Pt. 11 :

[Pt. 11a] Similarly, a claim for the recovery of the earnest money upon failure of the other party to perform his part of the contract being a claim for an ascertained amount, is not a mere right to sue but claim for a debt and, therefore, transferable. *1952 Raj 187 (AIR V 39 P 2) : ILR (1952) 2 Raj 5, Chimanlal* v. *Ganesh*.

Note 23

Add in the Foot Note indicated :

1. 1955 S C 376 (Pr 54) ((S)AIR V 42 C 66) (S C), *Jugalkishore Saraf* v. *Raw Cotton Co., Ltd.*

Delete the Pt. 2, and the submission with the corresponding cases in the Foot Note and substitute the following

[Pt. 2] The contrary view taken in the undermentioned cases is no longer good law in view of the recent Supreme Court decision. *1955 S C 376 (Pr 54) ((S) AIR V 42 C 66) (S C), Jugalkishore Saraf* v. *Raw Cotton Co. Ltd.*

Add after new Pt. 2 :

[Pt. 2a] It has also been held by the Supreme Court in the undermentioned case that a decree to be passed in future on the debt does not come within the definition of an actionable claim. *1955 S C 376 (Pr 54) ((S)AIR V 42 C 66) (SC), Jugalkishore Saraf* v. *Raw Cotton Co. Ltd.*

Sentence, "It is submitted that this view does not seem to be correct," between Point 2 and Point 3 should be *deleted*.

Note 24

Add in the Foot Note indicated :

7. 1954 Assam 95 (AIR V 41 C 35 Pr 2), *Rashid Ali* v. *Darparam Namasudra*. (Sale of land

containing stipulation by vendee to reconvey to or repurchase by vendor within particular period — Benefit of contract of repurchase can be assigned in favour of third person — 1928 P C 174 (AIR V 15), Sakalaguna Nayudu v. Chinna Munnuswami Nayakar, Rel. on.)

Note 28

Add in the Foot Note indicated :

9. 1954 Cal 367 (Pr 6) (AIR V 41 C 124) : 1954 Cri L Jour 132, *Radha Nath* v. *Ram Chandra.* (Facts and circumstances of the case held sufficient to put the appellants to enquiry as regards the respondents' mortgage so as to attract the general doctrine of constructive notice.) ✣ 1952 Mad 265 (AIR V 39 C 105 (10) P 5), *Parvathathammal* v. *Sivasankara Bhattar* (Possession of mortgagee is notice to purchaser of property, of all the equities in favour of mortgagee)

Add after Pt. 9 :

[Pt. 9a] The question of constructive notice is a question of fact which falls to be determined on the evidence and circumstances of each case. *1951 Cal 398 (AIR V 38 C 102 P 15) (DB), Chandu Ram* v. *Municipal Commrs. of Kurseong Municipality.*

Note 29

Add in the Foot Notes indicated :

1. 1952 Mad 265 (A I R V 39 C 105 (10) P 5), *Parvathathammal* v. *Sivasankara Bhattar.* (Mortgagee in possession — Mortgagor selling property to third person Failure of purchaser to make enquiries of mortgagee whether he has any rights other than as usufructuary mortgagee amounts to wilful abstention or gross negligence — Purchaser is bound by existing equities in favour of mortgagee.)

6. 1951 Cal 398 (A I R V 38 C 102 P 15) (DB), *Chanduram* v. *Municipal Commrs. of Kurseong Municipality* (Acquiring property, be it by private sale or court sale)

Add at the end of the Note :

[Pt. 7] It is the duty of a person taking a transfer of immovable property to inspect the Registration Index for any incumbrance on the property. Inspection of Index for 12 years prior is not sufficient in case of a mortgage though it might be enough in case of sales, and the person cannot discharge the burden by such a search and must suffer the consequences of not making a necessary search, if the property is found to be mortgaged and the mortgage duly registered for his conduct can only be regarded as wilful abstention from search which he ought to have made. *1952 Nag 106 (A I R V 39 C 45 (7), P 14) : I L R (1953) Nag 684, Sadiq Hussein* v. *Co operative Central Bank, Yeotmal.*

Note 30

Add in the Foot Note indicated :

9. *See also* 1955 All 24 (Pr 11) ((S) A I R V 42 C 8) (DB), *Sampat Ram* v. *Babco Lal.* (The usual thing when a person purchases property is to find out from the registration office whether there are any encumbrances)

Add after Pt. 9 :

[Pt. 10] It would be gross negligence on the part of the purchaser of property in municipal area, not to make an enquiry before acquiring property either by private sale or at court sale, as to the amount of tax which is due or which might be due. *1951 Cal 398 (A I R V 38 C 102 P 15) (DB), Chanduram* v. *Municipal Commrs. of Kurseong Municipality.*

[Pt. 11] Similarly, if a prospective purchaser of property in possession of a mortgagee fails to enquire of the mortgagee, whether he has any other rights than as usufructuary mortgagee, his abstention amounts not only to wilful abstention but even to gross negligence and he is therefore bound by the existing equities in favour of the mortgagee. *1952 Mad 265 (A I R V 39 C 105 (10) P 5), Parvathathammal* v. *Sivasankara Bhattar.*

Note 31

Add in the Foot Notes indicated ;

1. 1951 Madh B 92 (A I R V 38 C 37 P 15), *Abbasali Shah* v *Mohammad Shah* ✣ ('51) ILR (1951) 1 Raj 597 (Pr 5), *Rooplal* v. *Shankar* ✣ ('51) 1951 Nag L Jour (Notes) 156, *Manikrao* v. *Vithalrao* ✣ ('49) 1949 Nag L Jour (Notes) 22, *Gulabrao* v. *Tukaram.*
2. ('51) 1951 Nag L Jour (Notes) 156, *Manikrao* v. *Vithalrao.*
4. 1951 Pepsu 71 (AIR V 38 C 27 P 4) : 2 Pepsu L R 237, *Gurmukh Singh* v. *Sadhu Singh.* (Remote reversioner attesting alienation — Custom case)
8. 1953 Pepsu 86 (A I R V 40 C 35 P 3) : 3 Pepsu L R 413 (418) (DB), *Jesmer Singh* v. *Ajab Singh.*

Note 33

Add in the Foot Note indicated :

2. 1951 Cal 393 (A I R V 38 C 102 P 15) (DB), *Chanduram* v. *Mudicipal Commrs., Kurseong Municipality* (Constructive notice is a question of fact.)

Note 34

Add in the Foot Notes indicated :

9. 1954 Cal 367 (Pr 6) (A I R V 41 C 124) : 1954 Cri L Jour 132, *Radha Nath* v. *Ramchandra* ✣ 1953 Mys 22 (A I R V 40 C 10 P 6) : I L R (1953) Mys 152, *Kenchegowda* v. *P. Channiya* ✣ 1952 Nag 106 (A I R V 39 C 45 (7) Pr 14) : ILR (1953) Nag 684, *Sadiq Hussain* v. *Co-operative Central Bank, Yeotmal.* (Mortgage registered —Party cannot be heard to say that he searched the Registration index, without finding necessary entry —Conduct amounts to wilful abstention — Inspection of Registration Index for 12 years prior does not discharge the burden, and is not sufficient in case of mortgage though it might be sufficient in case of sale) ✣ 1952 Pepsu 31 (A I R V 39 C 19 P 5) : 2 Pepsu L R 571, *Teja Singh* v. *Hamir Singh.* (Deed of

adoption — Mere registration does not amount to a notice to all the world unless there are circumstances from which a presumption could be raised.)

11. 1952 I D A 17002 (Punj), *Harnam Singh* v. *Atu*. (1940 Lah 269 (A I R V 27), *Mt. Ghulam Fatima* v *Mt. Gopal Devi*, Foll.)

Add after Pt 8 in the beginning of the last para on page 229 :

[Pt. 9a] The object of Explanation (i) to S. 3, T. P. Act, is to safeguard the interests of a third party who has acquired a good title under a previous registered instrument but it does not in any way alter or modify the criminal liability of a person who deliberately suppresses certain facts or mis-states certain facts. Constructive notice of a previous registered mortgage is no defence to a charge of cheating by selling property on misrepresentation that it was unencumbered. *1954 Punj 31 (A I R V 41 C 18 Pr 4) : 1954 Cri L Jour 299 (DB). Kuldip Singh* v. *State*. (1915 Sind 21 (A I R V 2) : 16 Cri L Jour 706, Karachi Municipality v. Bhoj Raj, doubted but distinguished; 1937 Sind 56 (A I R V 24) : 38 Cri L Jour 510, Shivnath Sahibram v. Jethadand Moorij Mal, relied on.)

Note 39

Add after Pt. 9 :

[Pt. 9a] In the following Madras case, it was held that the possession of a usufructuary mortgagee of the mortgaged property is notice to the purchaser of the said property of the previous agreement of sale of the property between the mortgagor and the mortgagee. *1952 Mad 265 (A I R V39 C 105 (10) P 5), Parvathathammal* v. *Sivnsankara Bhattar*.

Add after Pt. 11 :

[Pt 12] In a case arising in a State where the T. P. (Amendment) Supplement Act, 1929, did not apply, it was held that the possession of a prior vendee under an unregistered sale deed which was compulsorily registrable. being that of a trespasser no question of notice by possession would arise and the subsequent vendee for consideration under a registered sale deed would have priority. *1950 Pepsu 34 (AIR V 37 C 12 P 4, 5, 7) (DB), Chanan Singh* v. *Sham Lal*. (Equitable doctrine of part performance also would not apply to such a case.)

SECTION 4

Note 3

Add after Pt. 1 :

[Pt. 2] Such contract when carried out terminates in a completed contract. So long as it is inchoate in that respect it is an enforceable contract, that is, nothing deters from exercising right of specific performance of contract. *1952 Orissa 116 (A I R V 39 C 30 P 6) (D B). Udayanarayan Ananga Bhima* v. *Badia Dasu*.

Note 5

Add in the Foot Note indicated :

7. 1952 Orissa 116 (A I R V 39 C 30 P 6, 7) (D B), *Udayanarayan Ananga Bhima* v. *Badia Dasu*. (Non-registration of lease deed — Deed would be treated as contract to lease — Lessor delivering possession in part performance — He is entitled to decree for sum agreed to be paid.)

SECTION 5

Note 1

Add in the Foot Notes indicated :

1. *See* 1951 Bom 94 (A I R V 38 C 20 P 2) : ILR (1951) Bom 673 (D B), *Soniram Raghushet* v. *Dwarkabai*. (Definition is to be taken as definition of "transfer of property" for determining what is transfer within the meaning of that term used in Proviso to S. 2 of Bombay indu Women's Right to Property (Extension to Agricultural Land) Act (17 of 1942)) ✠ 1946-52 I. D. 39363 (All), *Khurshed Jehan Begam* v. *Roshan Jehan Begam* (Expression "transfer" in S 11, U. P. Encumb. Est. Act — What amounts to, stated.)

3. 1951 All 462 (A I R V 38 C 100 P 5) : I L R (1951) 2 All 703 (D B). *Prithi Singh* v. *Ganesh Pd. Singh*. (Mortgage of property, part of which is outside British India.)

Note 3

Add in the Foot Note indicated :

6. *See also* 1955 N U C Cal) 797 (A I R V 42), *Muhammad Moshin* v. *Commissioner of Wakf*. (The creation of the wakf deed mounts to transferring the property to the Almighty for the benefit of his creatures)

16. *See also* 1955 Mad 245 (Pr 4) ((S) A I R V 42 C 66) : I L R (1955) Mad 570, *Benjamin* v. *Devadoss* (Case under Madras Agriculturists Relief Act.) ✠ 1946-52 I D 39369 (All), *Khurshed Jehan Begam* v. *Roshan Jehan Begam*. (Expression "transfer" in S 11, U. P. Encum. Est. Act—What amounts to, stated.)

Note 4

Add in the Foot Notes indicated :

4. 1953 All 213 (A I R V 40 C 97 P 5), *Bachchu Singh* v. *Harbans Singh*. (Arrangement between reversioners and the widow.) ✠ 1951 All 823 (A I R V 38 C 202 P 4), *Inder Pal Singh* v. *Th. Sarnam Singh*.

[See however 1950 All 320 (A I R V 37 C 124 P 10), *Ram Pratap* v. *Indrajit* (Members of a family who have no proprietary interest in the property in their possession can enter into a family arrangement with respect to such right as they may possess in the property)]

6. 1953 All 213 (A I R V 40 C 97 P 5), *Bachchu Singh* v. *Harbans Singh* ✠ 1951 All 823 (A I R V 38 C 202 P 4), *Inder Pal Singh* v. *Sarnam Singh*.

12. 1953 Mad 161 (A I R V 40 C 50 P 7), *Sulaiman Sahib* v. *Ibrahim*. (Parties must have competing titles in respect of the properties in

dispute. Invalid gift deed cannot be construed as a family settlement. ('35) I L R 13 Rang 679, Phul Bee Bee Firm v. R. M. P. Chettiar Firm and 1942 P C 54 (A I R V 29) (P C), Ramayya v. Lakshmayya, Rel. on.)

15. 1953 All 213 (A I R V 40 C 97 P 5), *Bachchu Singh* v. *Harbans Singh* ✣ 1951 All 823 (A I R V 38 C 202 P 4), *Inder Pal Singh* v. *Sarnam Singh* ✣ 1951 Nag 171 (A I R V 38 C 34 P 6) : I L R (1950) Nag 618, *Balkrishna* v. *Raghunath*. (Each agreeing to recognise a part of the title claimed by the other — The transaction is not a sale, gift or exchange because on the facts agreed to by such a compromise, there is no transfer of title from one to the other.)

20. 1952 Jam & Kash 18 (A I R V 39 P 3, 4) : 10 J and K L R 176, *Skattar Singh* v. *Rawela*. (It is mixture of surrender and conveyance of rights in property.) ✣ 1951 Bom 94 (A I R V 38 C 20 P 4) : I L R (1951) Bom 679 (DB), *Soniram Raghushet* v. *Dwarkabai*. (A partition by metes and bounds between the members of a joint Hindu family amounts to a transfer within the meaning of S. 5, T. P. Act. Hence, it is also a transfer within the meaning of S. 2 Proviso of the Bombay Act 17 of 1942 : ('45) 49 Cal W N 779, Khirode Sundari v. Chuni Lal and 1946 Cal 129 (A I R V 33 C 34) : I L R (1945) 2 Cal 651, Subashini Poddar v. Sreenath, Dissent. from; Case law referred.)

21. 1955 N U C (Sau) 1459 (A I R V 42), *Jadav Gokal* v. *Chandra Sinhji* ✣ 1954 Sau 46 (A I R V 41 C 24 P 6) (D B), *Smat Zaveri* v. *Jitu*. (Doctrine of part performance does not apply to an unregistered deed of partition. 1951 Mad 213 (A I R V 38) : I L R (1951) Mad 607, followed.) ✣ 1951 Mad 213 (A I R V 38 C 43 P 10) : I L R (1951) Mad 607 (D B) *Radhakristnayyar* v. *Sarasamma* (A partition is not a transfer within the meaning of S 53A) ✣ ('50) 86 Cal L Jour 198 (212, 213), *Sm. Durgarani Devi* v. *Mohiuddin*. (Division of land or reversion due to partition.)

Add after Pt 14.

[Pt. 14a] Though it would be open to the members of family who had not joined in a family settlement to challenge it, it would bind such members as had joined in it. *1950 All 320 (A I R V 37 C 124 P 10), Ram Pratap* v. *Indrajit*.

Add after Pt. 16 :

[Pt. 16a] There is a well-settled difference between a transfer or a sale and a relinquishment. A sale or a transfer presupposes the existence of the property which is sold or transferred. It presupposes the transfer from one person to another of the right in property. On the other hand, relinquishment means the extinction of a right or the destruction of a property and if the property is destroyed or the right is extinguished, there is nothing left to transfer or to sell, *1954 Bom 95 (A I R V 41 C 23 Pr 8)* : *I L R (1953) Bom 1281 (DB), Provident Investment Co., Ltd.* v. *Commr. of I. T., Bombay City.*

Note 5

Add in the Foot Notes indicated :

1. 1949 All 433 (A I R V 36 C 164 P 8, 10, 14) : I L R (1949) All 746 (DB), *M/s. Bans Gopal Sheo Narain* v. *P. K. Banerji*.

2. 1949 All 433 (A I R V 36 C 164 P. 8, 10, 14) : I L R (1949) All 746 (DB) *M/s. Bans Gopal Sheo Narain* v. *P. K. Banerji*. (Right to personal liberty, life or reputation is not property.)

5. 1949 All 433 (A I R V 36 C 164 P 8, 10, 14) : I L R (1949) All 746 (DB) *M/s. Bans Gopal Sheo Narain* v. *P. K. Banerji*. (S. 2 (d), Provincial Insol. Act—Right to claim damages for breach of contract is not a mere right to sue, and is property within meaning of S. 2 (d).)

8. 1949 All 433 (A I R V 36 C 164 P 8, 10, 14) : I L R (1949) All 746 (DB), *M/s. Bans Gopal Sheo Narain* v. *P. K. Banerji*. (Lands, Chattels, shares.)

Add after Pt. 11.

[Pt. 11a] An interest of a female member of a Hindu family, specified in S. 8 (1), Hindu Law Women's Right to Property Act (Mys. Act 10 of 1933), in the family property, until it is separated off, is a vested interest, which is heritable and transferable. *('51) 29 Mys L Jour 64 (65, 66) : 53 Mys H C R 278 (DB), Chikkakamppe Gowda* v. *Madaiya*. (It can be attached and sold in execution of decree against the female.)

Add after Pt. 18 :

[Pt. 18a] All properties need not be transferable or attachable and saleable or even heritable. *1949 All 433 (A I R V 36 C 164 P 8, 10, 14) : I L R (1949) All 746 (DB) M/s Bans Gopal Sheo Narain* v. *P. K. Banerji* (For example, benefits arising out of contract.)

Add after Pt. 23 (before the last para.) :

(Pt. 24] As to whether shebaitship is "property" see the following case. *1949 Cal. 278 (A I R V 36 C 85 P 38, 39), Sm. Angurbala Mullick* v. *Debabrata Mullick*. (It is species of property with peculiar characteristics and limitations— But it is not such property as can be partitioned in ordinary way or capable of being disposed of by will by shebait.)

Note 7

Give pt. (1a) at the end of the second sentence "The words" in present or in future . . . . . not the word property" and add the following case in the foot note ;

1a. 1955 S C 376 (Pr 53) [S) A I R V 42 C 66] (SC), Jugal Kishore Saraf v. Raw Cotton Co. Ltd.

SECTION 6

In section 6.

For the word 'Crown' the word 'Government' shall be substituted.

—*Substituted* by A. L. O. 1950.

Note 1

Add in the Foot Note indicated :

2. ('50) 1950 All W R 498 (500) (DB), *Dhurva Das* v. *Raghvendra.* (Unless there is a custom or some law which prohibits alienation, a riyaya or a zamindar is entitled to transfer the trees owned by him.)

Note 3

Add in the Foot Notes indicated :

5. 1953 Bom 101 (A I R V 40 C 33 P 7), *Fatechand Tarachand* v. *Parashram Maghammal.* (The rule of English Law as stated in *Holroyed* v. *Marshall.* (1862) 10 H. L. C. 191 : 33 L J Ch 193 and *Collyer* v. *Isaacs,* (1881) 19 Ch. D. 342 : 51 L J Ch 14 applies to India. Hence a charge on future property operates upon such property as soon as it comes into existence.)

8. *See also* 1954 Trav-Co. 357 (Pr. 4) (A I R V 41 C 121), *Chacko Thomas* v. *Mathai Abraham,* (The Act was not in force in Travancore and, therefore, an agreement to convey property to be acquired in the future is enforceable in spite of S. 6).

19. 1950 All 320 (A I R V 37 C 124 P 13, 14), *Ram Pratap* v. *Indrajit.* (Family arrangement between widow and next reversioner.)

[*See also* 1954 Madh B 153 (Pr 10) (A I R V 41 C 76), *Rajmal Mulchand* v *Parabai Mulchand.* (Where a son had entered into a distinct agreement with his father that he should be given 16,500 rupees, that he should be considered as having separated from the joint family and that he will have no claim in future to the remaining property of his father, that his father may give the entire remaining property to his mother and it was to be considered her absolute property. *Held,* that such a family arrangement was not hit by S. 6 (*a*).]

Add as a separate para at the end of the Note:

[Pt. 22] Where property of A was under attachment of the Government for non-payment of revenue and before it could be put to sale the amount was paid by B to Government and the property released from attachment it was held that the agreement to transfer the property by A to B during the pendency of attachment was not paid as it was not a transfer of spes successionis. *1955 Hyd. 101 (Pr. 9) (A I R V 42 C 25) : I L R (1954) Hyd 822, Jahangir Begum* v. *Gulam Ali Ahmed.*

Note 4

Add in the Foot Notes indicated :

5. 1955 Andhra 49 (Pr 20) [(S) A I R V 42 C 21] *Subbareddi* v. *Gunturu Govind Reddi.*

7. 1955 Andhra 49 (Pr 20) ((S) A I R V 42 C 21), *Subba Reddi* v. *Gunturu Govind Reddi* ✣ 1951 All 522 (A I R V 38 C 123 P 26) : I L R (1953) 1 All 437 (DB), *Chanderji Das* v. *Debi Das.*

8. 1953 All 213 (A I R V 40 C 97 P 5), *Bachchu Singh* v *Harbans Singh* ✣ 1951 All 522 (A I R V 38 C 123 P 26): I L R (1953) 1 All 437 (DB), *Chanderji Das* v. *Debi Das* ✣ 1950 All 320 (A I R V 37 C 124 P 13, 14), *Ram Pratap* v. *Inderjit,* (Family arrangement between reversioners and widow — Reversioners giving up claim to half share—Death of widow— Arrangement is not transfer of spes successionis and is binding on parties.)

Add after point 4 in the same para :

[Pt 4a] Where it was provided by a deed of divorce between father and mother of the plaintiff who was a minor that the mother would be given certain money for the maintenance of the plaintiff and that neither the plaintiff nor the mother would be entitled to share in the property of the father, it was held that at the date of the divorce deed the right which the plaintiff had was only a *spes successionis* and that the deed did not extinguish his right to inherit over half of the properties of the father after his death intestate. *1952 Trav-Coch 351 (A I R V 39 P 5, 6) : I L R (1952) Trav-Coch 329 (DB), Krishna Pillai* v. *Padmanabha Pillai.*

Add after Pt. 9 :

[Pt. 9a] A, B and C the reversioners instituted a suit against widow for declaration that the girls set up by her as her daughters were not her daughters. During pendency of the suit, A died and his son D was substituted in his place. D, B and C entered into agreement that, in the event of the suit succeeding D would get the same share in property left by the widow, as A would have got. B and C were members of one family while A and D were members of another family. Both families had no concern with each other. The suit succeeding D filed a suit against B and C, upon the agreement. It was held that the agreement was not a family arrangement but an agreement dealing with a mere *spes successionis. 1950 Pat 488 (A I R V 37 C 124 P 5, 6) (D B), Baikunth Singh* v. *Jhulan Singh.*

Note 6

Add in the Foot Notes indicated :

3. 1951 Madh-B 120 (A I R V 38 C 57 P 2, 7), *Radhya Pama Mehtar* v. *Kumaraya.* (Right cannot be founded on custom.)

11. *See also* 1953 Raj 141 (A I R V 40 C 50 P 6): I L R (1952) 2 Raj 116 (D B), *Chandi* v. *Ram Pratap.* (Birat Jajmans — Lady the last holder of Birat can make arrangement with another to officiate as priest.)

Note 7

Add in Foot Note 5 the following as foot-note remark to A I R 1933 Mad. 795 :

"[Overruled in 1953 Mad 637 (AIR V 40 C 250): I L R (1953) Mad 427 (F B), *Jumma Musjid Marcara* v. *Kodimani Andra Devaiah.*

Add in Foot Note 6 the following as foot-note remark to A I R 1933 Mad. 795 :]"

"[Overruled in 1953 Mad 637 (AIR V 40 C 250) : I L R (1953) Mad 427 (F B), *Jumma Musjid Marcara* v. *Kodimani Andra Devaiah.*]"

Add after Pt. 9 as separate para :

[Pt. 10] In a recent Full Bench case, it was held by the Madras High Court, overruling 1933 Mad 795 [A I R V 20] (DB), Official Assignee Madras v. Sampath Naidu and approving 1915 Mad 972 [A I R V 2] (D B), Alamanayakunigari Nabi Sab v. Murukuti Papiah that S. 43 proceeds on the fundamental assumption that the erroneous or fraudulent representation induced the transferee to part with the consideration without knowing the true facts A transfer which was made on an erroneous representation may, in fact and in effect be a transfer of an expectancy, which is prohibited by the statute. That does not prevent the section from operating. Section 43 is not concerned with the ultimate effect of the transfer when it was made. It is concerned only with an erroneous representation by the transferor of his authority to transfer when in fact he had none. If it was the intention of the Legislature that in all cases of transfer whether the transfer was made disclosing the true facts or was made with an erroneous representation regarding the authority, no effect should be given to the transfer, where the transfer is prohibited under S 6 (a), it would have stated so and created an exception to S. 43. On the other hand, the illustration to the section indicates a contrary intention. Where, therefore the transferee from a reversioner was not aware of the truth at the time of the transfer that that which was being transferred was only a spes successionis. S. 43 would apply. *1953 Mad 637 [A I R V 40 C 250]: I L R (1953) Mad 427 (F B). Jumma Musjid Marcara* v. *Kodimani Andra Devaiah.* (1915 Mad 972 [A I R V 2] (D B, Alamanayakunigari Nabi Sab v. Murukuti Papiah, Approved. 1933 Mad 795 [A I R V 20] (D B), Official Assignee, Madras v Sampath Naidu, Overruled; Case law reviewed.)

Note 10

Add in the Foot Notes indicated :

3. 1946-52 I D 1474 (Mad), *Joseph Andrade D. R.* v. *The Udipi Bank Ltd.* (Mulgani inalienable according to its terms—Enjoyment is restricted to owner personally.)

9. 1952 All 662 (A I R V 39 P 19) : JLR (1951) 1 All 740 (DB), *Zahiruddin Husain* v *Chokhey Lal.* (" Parwarish " accompanied with words "gujara ke vaste.")

Note 13

Add in the Foot Notes indicated :

7. 1953 Mad 204 (A I R V 40 C 68 P 10) : I L R (1953) Mad 527 (D B). *Muthalammal* v. *Veeraraghavalu Nayudu.* (Widow's claim to maintenance against husband's estate — Death of widow pending suit—Right does not survive to legal representative.)

7. 1952 Pat 78 (A I R V 39 C 32 P 6) : 30 Pat 1146 (D B), *Bala Prasad* v. *Ajoodhya Prasad.* (Gift of entire property with obligation on donee to pay a monthly sum to donor as maintenance for life of donor.)

14. 1955 Mad 165 (Prs 6, 8, 11) ((S) A I R V 42 C 41) (D B), *Dhanapala* v *Krishna Chettiar.* ✣1950 Orissa 220 (A I R V 37 C 40 P 3) (DB), *Province of Orissa* v. *Venkata Rangamma.* (Prohibition against attachment in respect of maintenance applies only to future maintenance and not to arrears of maintenance.)

Add after Pt. 13a :

[Pt. 13b] A right of beneficiaries under wakf deed to allowance specially spoken of as 'Kharch parwarish' and 'parwarish' with words "gujara ke vaste," was held to be a right to receive a certain amount of money periodically during their lifetime for purposes of maintenance and was merely a right to future maintenance. *1952 All 662 (A I R V 39 P 19); I L R (1951) 1 All 740 (D B), Zahiruddin Hussain* v. *Chokhey Lal.* (Such right who neither attachable nor saleable in execution of decree under S. 60 (1) (n), C. P. C.)

Add after Pt 14 :

[Pt. 15] Prohibition against assignability under this clause, must be read in the light of the provisions of O 33, R. 10 of the Civil P. C. Thus, a Receiver can be appointed at the instance of the Government in respect of the decree for future maintenance in order to realise the court-fee payable to them under the decree. *1950 Orissa 220 (A I R V 37 C 40, P. 10; 11), Province of Orissa* v. *Venkata Rangamma.* (Government's right is subject to safeguards as to leaving adequate provision for the plaintiff.)

Note 16

Add in the Foot Notes indicated :

7. 1949 All 433 (AIR V 36, C 164, P 17, 18, 19): I L R (1949) All 746 DB), *M/s. Bans Gopal Sheo Narain* v. *P K. Banerji.*

9. 1952 Raj 187 (A I R V 39, P 2) : ILR (1952) 2 Raj 5, *Chimanlal* v *Ganesh* ✣ 1949 All 433 (A I R V 36 C 164, P 17, 18 19) : I L R (1949) All 746 (DB), *M/s. Bans Gopal Sheo Narain* v. *P. K. Banerji.* (Benefits arising out of con-

tract with insolvent vest in Official Receiver — He can sue for damages for breach of contract – 1937 All 3 7 (AIR V 24), Ram Dayal v. Mukat Manohar, held obiter and distinguished.)

11. ('52) 1952 Nag L Jour (Notes) 148, *Mst. Malida* v. *Mst Battobi.* (Transfer of property by reversioner after death of widow is not transfer of mere right to sue Transferee can sue the donee of property to whom it was gifted by the widow.) + 1953 Cal 321 (A I R V 40, C 112, P 4), *Murlidhar Agarwalla* v *Rupendra Nath.* (Transfer of right to recover damages in respect of property along with property itself.)

14. 1955 Mad 165 (Prs 6, 8, 11) ((S) A I R V 42, C 41) (DB), *Dhanpala* v *Krishna Chettiar.* (Preliminary decree in partition suit declaring a party as entitled to arrears of maintenance and to maintenance subsequent to the preliminary decree.)

16. 1953 Cal 321 (A I R V 40, C 112, P. 11) *Murlidhar Agarwalla* v. *Rupendra Nath.* (Damages for use and occupation or alternatively for mesne profits.)

Add after Pt. 8 :

[Pt 8a] The words "right to sue" do not connote the same thing as the words "actionable claim." *1951 Pat 415 (A I R V 38, C 107, P 8) (DB), Ambica Prasad Singh* v. *Ram Charitar Singh.*

Add after Pt. 10 :

[Pt. 10a1] Where, however, the reversioner transfers the property after the death of the widow, she does not transfer a mere right to sue but a substantial right to sue for the property and the suit by the transferee against the donee of the property from the widow is maintainable. *('52) 1952 Nag L Jour (Notes) 148, Mst. Malida* v. *Mst. Battobi.*

Add after Pt. 13 :

[Pt. 13a] Where the income from the Jagir has been received by the certificate holder, the other sharers can validly assign their right to take accounts of their shares in the income of the Jagir. *1953 Nag 335 (A I R V 40, C 144 Prs 19, 20) : I L R (1953) Nag 764, Khwaja Ajijoddin* v. *Jaiwant Madhao Joglekar.*

Add after Pt. 16, at the end of the same para :

[Pt. 16a] Where the manager of a joint Hindu family consisting of, among others, a minor, alienates the family property and the minor after attaining majority transfers his rights in the property. the transferee is entitled to sue for partition and recovery of possession without setting aside the prior sale by the manager. *1950 Mad 560 (A I R V 37, C 234 P. 2) Pethu Reddiar* v. *Kandaswami Pillai,* (1939 Cal 460 (A I R V 26), Mon Mohan v. Bidhu Bhusan, Dissented.)

See also 1951 Mad 817 (AIR V 38, C 283, P 13), *Palaniappa Goundan* v. *Nallappa Goundan.* (Transfer by ex-minor of property unauthorisedly sold by his guardian is not transfer of mere right to sue but is a transfer of interest in property, though suit may be necessary to avoid sale by guardian and recover possession.)

[Pt. 16b] The right to recover money paid under a contract of sale on failure of the seller to hand over possession of the property is not a mere right to sue. It is a claim for an ascertained amount and can be transferred as an actionable claim. *1952 Raj 187 (A I R V 39, P 2) : I L R (1952) 2 Raj 5, Chimanlal* v. *Ganesh,*

Add at the end of the Note as a separate para:

[Pt. 19] The right of a chalgeni tenant to claim the value of the improvements of the property by reason of his putting up additional buildings which are attached to the land is a right annexed to the ownership of the land and the ownership of the buildings put up by the tenant. Such a right which is annexed to immoveable property is transferable and the purchaser of the tenant's right therefore acquires a right to claim the value of the improvements. *1955 N U C (Mad) 2430 (A I R V 42), Aliabba U N.* v *Albuqueque.*

Note 17

Add in the Foot Note indicated :

7a. 1949 All 433 (AIR V 36 C 164, P17, 18 19): ILR (1949) All 746 (DB), *M/s. Bans Gopal Sheo Narain* v. P. *K Banerji.* (Where the Official Receiver has become entitled to the benefits of a contract between the insolvent and another person, the right to sue for damages for the breach of the contract in his hands will not be a mere right to sue for damages.)

Add after Pt. 9 as a separate para :

[Pt. 9a] In order that an assignment should be effective all the interest of the assignor under the contract must be transferred and conveyed to the assignee. The only question that the Court has to consider with regard to assignments is whether if the debtor paid the assignee, he would get a complete and proper discharge. *1954 Bom 167 (AIR V 41, C 45, Pr 7) : I L R (1954) Bom 424 (DB), Jethalal Nagji Shah* v *Municipal Corporation for Greater Bombay.* (*A*'s contract with *B*, as sole proprietor of *A* and sons – Assignment of benefits under the contract by *A* to *C* as Karta of the Hindu joint family firm of *A* and sons does not affect *B*'s liability to pay *A* and in law to pay his assignee *C*—*B* cannot plead against *C*'s claim on the ground that since the assignment was made by *A* as Karta, the other

co-parceners of the joint family may make claim against him contending that the assignment was not made for the benefit or legal necessity of the family, and that therefore, he apprehended that by paying the assignee he could not get a complete discharge.)

Add after Pt. 13 :

[Pt. 14] Where a sale deed in respect of certain land contains a stipulation that the vendee would reconvey the property to the vendor in case he repays the purchase price to the vendee after two years but within fifteen years from the sale, the benefit of such a contract of repurchase can be validly assigned in favour of a stranger who can enforce the same against the vendee. *1954 Assam 95 (A I R V 41, C 35, Pr 2) Rashid Ali* v. *Darparam Namasudra.* (1928 P C 174 (A I R V 15) (PC). Sakalaguna Nayudu v. Chinna Munnuswami Nayakar, Relied on.)

[Pt. 15] An assignee of the equity of redemption from the original mortgagor against whom an instalment mortgage decree has been passed under S. 34 of the Bengal Money-lenders Act can avail of the right to pay by instalments conferred by the decree. *1954 Cal 129 (AIR V 41, C 48, Pr 12), Shyamapada Bhattacharjee* v. *Mohammad Dharam Buksh.* (Right to redeem by instalments attaches to the loan itself and is not a personal right reserved for the original borrower.)

Note 18

Add in the Foot Note indicated :

2. 1951 Trav-Coch 180 (A I R V 38, C 67, P 5) (DB), *Thoma* v. *Govindakurup* & 1953 Cal 321 (AIR V 40, C 112, P 4), *Murlidhar Agarwalla* v. *Rupendra Nath.*

Note 19

Add in the Foot Note indicated :

1. 1955 Mad 165 (Prs 6, 8, 11) (S) (AIR V 42 C 41) (DB), *Dhanapala* v. *Krishna Chettiar.* (Preliminary decree in partition suit declaring a party as entitled to arrears of maintenance and also to maintenance subsequent to the preliminary decree.)

Add after Pt. 3 :

[Pt. 4] An assignment of a right to apply under mortgage decree for personal decree for portion not paid off by sale proceeds is not invalid. *1951 Mad 628 (AIR V 38, C 180, P 1, 7) (DB), Shanmugam* v. *N. S. Radhakrishna.* (Rule applies to assignee also.)

Note 20

Add after Pt. 9, at the end of the last but one para :

[Pt. 10] In similar case, it was held by the Madras High Court that the transferee could sue for partition and recovery of possession without setting aside the prior sale by the manager. *1950 Mad 560 (AIR V 37, C 234, P 2), Pethu Reddiar* v. *Kandaswami Paillai,* (1939 Cal 460 (AIR V 26), Mon Mohan v. Bidhu Bhusan, Dissented from.)

See also 1951 Mad 817 (AIR V 38, C 283, P 13), *Palaniappa Goundan* v. *Nallappa Goundan.* (Alienation by guardian — Ex-minor transferring his interest — It is not transfer of mere right to sue but interest in property, though suit may be necessary to set aside alienation.)

Note 21

Add in the Foot Note indicated :

4. 1953 Nag 335 (A I R V 40, C 144, Prs 19, 20): I L R (1953) Nag 764, *Khwaja Ajijoddin* v. *Jaiwant Madhao Joglekar.* (Where the income from Jagir has been received by the certificate holder the sharers can validly assign their right to take accounts of their share in the income of the Jagir.)

Note 22

Add in the Foot Note indicated :

1. 1950 Mad 824 (A I R V 37 C 345 P 7, 8), *Srinivasa Mudaliar* v. *Abraham Pillai.* (Transfer during pendency of appeal of interest in partnership including right to continue appeal in case of transferor's death — Transfer is of tangible interest in partnership and transferable right to sue notwithstanding the fact that suit stood dismissed at the time of transfer.)

Note 23

Add in the Foot Note indicated :

3a. 1950 Bom 155 (A I R V 37 C 40 P 8, 9, 13) : I L R (1950) Bom 185 (DB), *M & S. M. Rly.* v. *rupchand.* (Attachment of salary of railway employee in execution of consent decree — Contract is void under S. 6 (f).

Note 26a

Add after Pt. 5b in the same para :

[Pt. 5c] See also the undermentioned case, where their Lordships of the Supreme Court have pointed out the nature of Ghatwali tenures, which are service grants, and the circumstances in which they are alienable. *1951 S C 288 (AIR A 38 C 49 P 7, 13, 16): 1951 S C R 534; 30 Pat 931 (SC), Sukhdev Singh* v. *Maharaja Bahadur of Gidhaur.*

Note 27

Add as a separate para after the last sentence in page 298, namely "this is what is enacted in this clause."

[Pt. 1a] No question of unlawful consideration arises in the case of a gift which is a transfer without consideration.

The only relevant factor to be taken into consideration in deciding the question whether a gift would come under this

clause is the object of the donor in making the gift. It has been held that even if the marriage between the donor and the donee is not valid according to law the object in making the gift cannot be said to be unlawful so long as the donor regards the donee as his lawfully wedded wife. *1954 Trav.Co. 348 Pr 9 (A I R V 41 C 118) : I L R (1953) Trav.Co 1121, Kalliyani Amma* v. *Kutty Amma.*

SECTION 7

Note 3

Add in the Foot Note indicated:

10. 1953 Y D F 1381 (All) (D B), *Bashir Ahmad* v *Daya Shankar.* (If it is clear that the lady executed the sale deed with a full understanding of its effect upon her interest, nothing more is required.)

Add after Pt. 3b in the same para:

[Pt. 3c] According to law in force in Manipur, a sale certificate is necessary in the case of a guardian when he wants to dispose of property of the minor. *1952 Manipur 11 (1) (AIR V 39 P 2), Mani Devi* v. *Ahanbi Devi.*

[Pt. 3d] (3a) Relinquishment being a personal act can only be performed by that person and not vicariously. A minor is, therefore, incompetent to relinquish personally or through his guardian. *('52) 1952 Nag L Jour (Notes) 164, Shewantibai* v. *Shamrao.*

Add after point 7:

[Pt. 7a] According to law in Manipur a sale certificate is necessary in the case of a widow when she wants to dispose of property left by her deceased husband. But when the daughters want to dispose of some of the property left by their father, there is no cause for the grant of a sale certificate. *1952 Manipur 11 (1) (A I R V 39 P 2), Mani Devi* v. *Ahanbi Devi.*

Note 7

Add in the Foot Note indicated :

15. 1954 Manipur 22 (Prs 2, 3) (AIR V 41 C 10). *Kali Prosad Gupta* v. *Rameshwar Prosad Gupta.* (Where a person claims a half portion of the property on the allegation that a few years after his marriage with the daughter of the donor (Hindu governed by Mitakshara Law) the property was gifted to him by the donor but fails to prove that the property was the self-acquired property of the donor he fails to establish that the donor could have legally made the gift of that property to him).

SECTION 8

Note 2

Add in the Foot Note indicated:

1. ('50) 1950 Nag L Jour (Notes) 83, *Khupchand* v. *Narayan.* (Interests of the vendors pass to the purchaser and thence to the pre-emptor who has a right to be substituted in place of the original vendee. ('98) I L R 22 Bom 610 (DB), Pandurang Sheshagir v. Bhimrao Keshav, Foll.)

Note 3

Add in the Foot Notes indicated :

2. 1946-52 I D 39415 (All), *Raghubir Saran* v. *Toki Singh.* (Execution sale of share in zamindari passes to purchaser a share in grove also.)

1946-52 I D 2633 (Mad), *Ganapathi Pallavarayar* v. *Iswarmurthi Gounder.* (Unless different intention is expressed or necessarily implied.)

3. *See also* 1946-52 I D 2633 (Mad), *Ganapathi Pallavarayar* v. *Iswaramurthi Gounder.*

Add After Pt. 6a :

[Pt. 6b] A sale of a share in zamindari land in a court sale implies the sale of everything that is attached or appertains to it. A grove standing on it is appurtenant to the zamindari and therefore passes to the purchaser a share in the grove also. *1946 52 I D 39415 (All) Raghubir Saran* v. *Toki Sing.*) (1939) All 415 (A I R V 26) (FB), Umrao Singh v. Kacheru Singh, Explained and distinguished.)

[Pt. 6c] Where the court sale of a survey number referred to the survey number without any reference to the well which formed part of it and at the time of the court sale the land enjoyed the amenity of irrigation from the well, it was held that the rights in the well, though they were attached, were not sold and were not intended to be sold by the Court in execution of the decree; the right to irrigate the survey number with the water of the well passed by implication to the purchaser at the court sale. *1946-52 I D 2633 (Mad), Ganapathi Pallavarayar* v. *Iswaramurthi Gounder.*

Note 4

Add after Pt. 2 in the same para :

[Pt. 2a] Thus when an owner of a grove sells the grove by declaring that he was selling it with every right that he possessed therein, it follows that his right to the land is also conveyed to the vendee unless it is expressly reserved by him. *1953 All 705 (A I R V 40 C 343 P 4) (D B), Mahmood Hasan Khan* v. *Bhikhari Lal.*

Add after Pt. 10 at the end of the same para :

[Pt. 10a] Gift to a daughter at the time of her marriage or to a woman under coverture for her "choli bangadi" or "Haldi Kunkum" does not necessarily revert to the donor upon the donee becoming a widow. The idea conveyed by the use of these traditional expressions is that the woman going in the new family should have independent means for her personal

needs. *1952 Nag 55 (A I R V 39 C 26 P 12): I L R (1952) Nag 60, Yadeorao Jageshwar* v. *Vithal Shamaji.*

Note 5

Add at the end of the Note :

[Pt. 5] It has now been authoritatively stated by their Lordships of the Supreme Court that the mere fact, that a gift of property is made for the support and maintenance of a female relation cannot be taken to be a prima facie indication of the intention of the donor that the donee was to enjoy the property only during her life time. The extent of interest which the donee is to take depends upon the intention of the donor as expressed by the language used and if the dispositive words employed in the document are clear and unambiguous and import absolute ownership the purpose of the grant would not by itself, restrict or cut down the interest. The desire to provide maintenance or residence for the donee would only show the motive which prompted the donor to make the gift but it cannot be read as a measure of the extent of the gift. *1951 S C 139 (Pr. 13) (A I R V 38 C 21): 1950 S C R 766 (S C), Ramgopal* v. *Nandlal.* (1944 All 17 (A I R V 31), Lal Nandlal v. Sunderlal Reversed; 1933 P C 67 (AIR V 20) (P C), Bishnurath Prasad v. Chandrika Prasad, Rel. on.)

Delete, ('44) 31 A I R 1944 All 17, from Foot Note (2).

Note 6

Add new Pt. (1a) after the second sentence—"So far as transfers .... principles enunciated by this section."

[Pt. 1a] Thus if an estate is given to a man without express words of inheritance, it would in the absence of a conflicting context, carry, by Hindu law an estate of inheritance. *1954 S C 355 (Pr 15) (AIR V 41 C 86): 1955 S C R 51 (S C), Nathoolal* v. *Durga Prasad.*

Add at the end of the Note :

[Pt. 23] The position has again been made clear in recent decisions of the Supreme Court where their Lordships have held that to convey an absolute estate to a Hindu female no express power of alienation need be given and it is enough if words are used of such amplitude as would convey full rights of ownership. *1951 S C 139 (Prs 8, 9) A I R V 38 C 21): 1950 S C R 766 (S C), Ram Gopal* v. *Nand Lal* ✠ *1954 S C 355 (Pr 15) (AIR V 41 C 86 : 1955 S C R 51 (S C), Nathoolal* v. *Durga Prasad.* (1951 S C 139 (A I R V 38 C 21): 1950 S C R 766 (S C), Ramgopal v. Nandlal, Foll.)

Note 9

Add in the begining of the Note :

[Pt. 1a] This section passes all interest which the transferor can, at the date of transfer, pass. The section will not operate to pass any future property. *1955 S C 376 (Pr 8) (A I R V 42 C 66) (S C), Jugal Kishore Saraf* v. *Raw Cotton Co., Ltd.* (Per Das J.)

Add after Pt. 9:

[Pt. 10] Under Hindu law, it is incompetent for an undivided member of a Hindu family to alienate by way of gift his undivided share and such alienation would be void ab initio; under such transaction nothing passes to the transferee or the donee. *1951 Mad 318 (A I R V 38 C 81 P 9), Venkatappayya* v. *Raghavayya.* (('04) ILR 27 Mad 162 (FB), Runganatham Chetty v. Ramasami Chetti, Ref.)

Note 12

Add after Pt. 3 :

[Pt. 4] Section 8 does not take in rights under a decree in respect of immovable properties obtained by the transferor. *1952 Tra-Co 254 (A I R V 39 P 2) : I L R (1951) Tra-Co 743 (DB), Chempakutty Pillai* v. *Rajaian Nadar.* (Transferee of equity of redemption of an item of immovable property cannot execute decree for redemption obtained by transferor.)

Note 14

Add in the Foot Notes indicated :

2. 1951 Mad 601 (AIR V 38 C 169 P 3), *Poongaram* v. *Subramanya* ✠ 1951 Nag 299 (A I R V 38 C 88 P 8), *Srikisandas Seth* v. *Mst. Gangia.*

4. 1951 Mad 601 (AIR V 38 C 169 P 3), *Poongaram* v. *Subramanya.*

Note 15

Add in the Foot Note indicated :

2. ('50) 1950 Nag L Jour (Notes) 83, *Khupchand* v *Narayan* ✠ ('49) 1949 Nag L Jour (Notes) 54, *Khubchand* v. *Harakchand* (Unless otherwise expressed.)

Add after Pt. 2 :

[Pt. 2a] and their fruit. *('50) 1950 Nag L Jour (Notes) 83, Khupchand* v. *Narayan.*

Note 17

Add in the Foot Note indicated :

9a. 1949 Mad 52 (AIR V 36 C 22 P 1, 2, 5), *V. V Bank* v. *L M. Bank* (Rule holds good as regards usufructuary mortgage containing covenant to pay.)

Add after Pt. 2 :

[Pt. 2a1] Similarly where a decretal debt is transferred by a registered deed,

there is a transfer of securities also. *1950 Pat 211 (A I R V 37 C 51 P 6), Bhagirath* v. *Sm. Jamuna Devi.*

Add as a separate para at the end of the Note:

[Pt. 19] *Transfer of debt pending litigation—Decree whether passes.*—It has been held by his Lordship Das J. of the Supreme Court that the transfer of book-debts during the pendency of the suit on them does not pass the decree to be passed thereon; but a contrary view is taken by his Lordship Bhagawati J. in the same case. *1955 S C 376 (Prs 8, 56) [(S) AIR V 42 C 66] (SC), Jugal Kishore Saraf* v. *Raw Cotton Co. Ltd.*

Note 19

Add in the Foot Note indicated :

6. 1954 Ajmer 63 (2) (Pr 4) (AIR V 41 C 64), *Makhanlal* v. *Lala Lakshmi Chand.* (Ordinarily, the roof goes along with the room, being treated as a part of it and in view of the general law that any person owning a piece of ground owns all the space over it. But where the executant of the will thought it advisable to divide the house between his sons and in allotting shares gave different floors to different persons and not portions on the ground floor with all constructions on the top of it, open roofs were not held as joint property.)

Add after Pt. 3 :

[Pt. 3a] But it has been held that the presumption in a case of a residential house is that it is not necessarily appurtenant to the zamindari and unless it can be established from evidence that it was intended to be transferred along with the rest of the zamindari, the house must be deemed to have remained the property of the erstwhile Zamindar. *1955 All 292 (Prs 12, 27) [(S) AIR V 42 C 86] (FB), Deota Din* v. *Gur Prasad.*

Note 20

Add in the Foot Notes indicated ;

1. 1954 S C 345 (Pr 6) (AIR V 41 C 83) : 1955 S C R 174 (SC), *Chunchun Jha* v *Ebadat Ali* ✣ 1954 Bom 370 (AIR V 41 C 107 Pr 4) : ILR (1954) Bom 615 (DB), *Ramji Bhai Virpal* v. *Gordhandas Maganlal.* (Agreement reduced to writing—Relationship brought into existence by writing must be determined in light of words used—Document must be read as whole.) ✣1954 Mad 1008 (Pr 12) (A I R V 41 C 346) *Nagarathnammal* v. *D Veeraraghavan* ✣ 1951 S C 139 (Pr 7) (AIR V 38 C 2) : 1950 S C R 766 (SC), *Ram Gopal* v. *Nand Lal.*

2. 1954 S C 345 (Pr 6) (AIR V 41 C 83) : 1955 S C R 174 (SC), *Chunchun Jha* v. *Ebadat Ali.* ✣ 1954 Assam 45 (A I R V 41, C 17, Prs 15, 16 17) : ILR (1953) 5 Assam 94, *Mahamad Sheikh* v. *Ramesh Chandra.* (Plain meaning should not be ignored only because terms of contract appear to be unreasonable—Rent payable in kind—Fixed quantity of paddy payable as rent —In case of default, fixed sum payable as its price Default occurring—Held, landlord was entitled to recover only stipulated sum and not price of crop at market rate) ✣ 1954 Bom 370 (AIR V 41 C 107 Pr 4) : ILR (1954) Bom 615 (DB), *Ramji Bhai Virpal* v. *Gordhandas Maganlal.* (Court have to take into account words used by parties—Words should be given plain grammatical meaning.) ✣ 1951 Pat 56 (AIR V 38, C 157, P 28) : ILR 30 Pat 406 (DB), *Radha Gobinda Roy* v. *Sri Nilkantha Narayan Singh.* (Lease of "underground coal"—Meanings of "coal" and "mine" considered) ✣ ('49) ILR (1949) 1 Cal 498 (505), *Yolanda Dorothy Wills* v. *Official Trustee of Bengal.* ("Children" in ordinary parlance do not include grand children, unless there is something in operative part to abridge or enlarge the meaning.)

3. 1954 S C 345 (Pr 6) (AIR V 41 C 83) : 1955 S C R 174 (SC), *Chunchun Jha* v. *Ebadat Ali.* ✣ 1954 Ajmer 63 (2) (Pr 4) (A I R V 41 C 64), *Makhanlal* v. *Lala Lakshmi Chand.* (Questions of convenience cannot be taken into consideration when interpreting a document.) ✣ 1954 Assam 45 (A I R V 41, C N 10, Pr 17) : ILR (1952) 5 Assam 94, *Mahamad Sheikh* v. *Ramesh Chandra De.* (Unreasonableness is no reason to ignore plain terms of contract.)

4. 1954 Bom 257 (AIR V 41, C 75, Prs 3, 5, 6) : ILR (1954) Bom 448 (DB), *Bavasaheb Walad Mansursaheb* v. *West Patent Press Co. Ltd.* (Whether it is a tenancy for life or a permanent tenancy must ultimately depend upon the terms of the contract itself, and in construing the terms of such contracts the Courts must look at the substance of the matter and decide what the parties really intended to do. 1926 Bom 374 (AIR V 13), Sona Bai v. Hiragavri, Dissented from) ✣ 1954 Bom 370 (A I R V 41 C 107) : I L R (1954) Bom 615 (DB), *Ramjibhai Virpal* v *Gordhandas Maganlal.* (Applicability or rule of intention where words used are capable of two constructions, indicated.) ✣ ('49) ILR (1949) 1 Cal 498 (506), *Yolanda Dorothy Wills* v. *Official Trustee of Bengal,* (Court to adopt construction which will give best effect to donor's intention and reject that construction which will totally defeat the same.)

5. 1950 Raj 56 (AIR V 37 C 22 P 6), *Bal Chandra* v. *Banshi Dhar* ✣ ('49) 1949 Ker L Tim 103 (111, 112, 114) (DB), *Govinda Pillay* v *Scaria.*

[*See* 1954 All 195 (A I R V 41 C N 108 P 10), *Central Finance and Housing Co. Ltd.* v. *British Transport Co.*, (Court should not be led away merely by ostensible appearance given to transaction by words used but should attempt to go behind them to ascertain real intention The spirit governing transaction is the determining factor — Court should dissect transaction, scrutinise legal implication and bear in mind legal consequences that would ensue.)]

7. 1954 S C 345 (Pr 6) (AIR V 41 C 83) : 1955 S C R 174 (SC) *Chunchun Jha* v. *Ebadat Ali* ✣ 1954 Mad 1008 (Pr 12) (A I R V 41 C 346), *Nagarathnammal* v *D Veeraraghavan* ✣ 1953 Mad 566 (A I R V 40 C 219 Pr 1), *Poomalai Ammal* v. *Subbamal* (Settlement deed — Ambiguity —Circumstances under which the docu-

ment came to be executed and if necessary conduct of parties may be looked into.) ✠ 1951 S C 139 (Pr 7) : A I R V 38 C 21): 1950 S C R 766 (S C), *Ram Gopal* v. *Nand Lal.*

8. 1954 Mad 1008 (Pr 12) (A I R V 41 C 346), *Nagarathnammal* v. *D. Veeraraghavan.*

9. 1955 Bom 175 (Prs 6, 8) (A I R V 42 C 46) : I L R (1954) Bom 1256, *Narayan Ramchandra* v *Gangadhar Keshav.* (In a suit to recover possession of immovable property a compromise decree was passed in first appeal, which provided that the possession of the property might be retained with the defendant for a specified period on a condition to pay a rent of Re. 1 a year and if the defendant failed to give possession after that period the plaintiff No. 2 should take possession by executing the decree and that on this condition the defendant had left his contentions in the suit: *Held* that the parties intended to create a lease and not a license.) ✠ 1954 All 195 (A I R V 41 C N 108 Pr 10), *Central Finance & Housing Co. Ltd.* v. *British Transport Co* (Transaction has got to be looked at as a whole -- Conclusions should be the cumulative result of totality of circumstances emerging from the agreement.) ✠ 1954 Bom 257 (A I R V 41 C 75 Prs 3, 5, 6) : I L R (1954) Bom 448 (DB), *Bavasaheb Walad Mansursaheb* v. *West Patent Press Co Ltd.* (Determination of nature of tenancy — Document must be read as a whole— 1926 Bom 374 (A I R V 13), Sona Bai v. Hiragavri, Dissented from) ✠ 1954 Bom 370 (A I R V 41 C 107) : I L R (1954) Bom 615 (DB), *Ramji Bhai Virpal* v. *Gordhandas Maganlal* ✠ 1954 Mad 1008 (Pr 12) (A I R V 41 C 346), *Nagarathnammal* v. *D. Veeraraghavan* ✠ 1953 Mad 566 (A I R V 40 C N 219 Pr 13), *Poomalai Ammal* v. *Subbamal* (Settlement deed — Intention has to be ascertained from reading the document as a whole.) ✠ 1950 P C 105 (A I R V 37 C 37 P 10) (P C), *Krishnaswamy Ayyangar* v *Perumal Goundan.* (Conveyance purporting to carry out contract for sale of land—Terms of conveyance clear— They override the contract — If part of conveyance must be rejected, it is legitimate to lean towards rejection of that part which is inconsistent with contract.)

11. 1954 Mad 1008 (Pr 12) (A I R V 41 C 346), *Nagarathnamal* v, *D. Veeraraghaaghvan.*

13. 1951 Mad 1008 (Pr 12) (A I R V 41 C 346), *Nagarathnammal* v. *D Veeraraghavan.*

14. 1955 N U C (Trav-Co) 1249 (A I R V 42), *Kathiru Kunju* v. *Muhammad Kunju* ✠ 1953 Mad 566 (A I R V 40 C N 219 Pr 28), *Poomalai Ammal* v *Subbamal.* (Defeasance clause cannot be operative so as to curtail the absolute estate given to the settlee in the earlier portion of the document.) ✠ 1953 Sau 180 (A I R V 40 C N 89 P 15) (DB), *State of Saurashtra* v. *Memon Haji Ismail Haji.* (Gift of immovable property under Muhammadan Law — Donee gets title to it—Condition against alienation being repugnant to gift is void.)

16. 1955 N U C (Pat) 1591 (A I R V 42), *Gopal Tewary* v. *Raj Kali Kuer.* (Where the operative part of a sale deed stated that a cadastral survey plot (corresponding to four municipal survey plots) was sold and this description was followed by an enumeration of only three of the four municipal survey plots,

Held that the principle of false demonstration applied.) ✠ ('49) I L R (1949) 1 Cal 493 (504), *Yolanda Dorathy Wills* v. *Official Trustee of Bengal,* (Recitals cannot be used to create ambiguities in otherwise clear and plain provisions in operative part.)

19. 1955 N U C (Cal) 1068 (A I R V 42) (D B), *Bengal Coal Co. Ltd.* v. *Balmukunda Goenka.* (If the description by boundaries is precise and accurate, it prevails over or overrides the description by area.) ✠ 1953 Mad 769 (A I R (V 40, C 294, P 32) : I L R (1952) Mad 682 (DB), *Delli Grammi M.* v. *Ramchandran.* (Intention of the parties was to sell a parcel of land within well-defined boundaries — The measurements should be rejected as *falsa demonstratio.*)

23. *See also* 1954 Mad 1045 (Pr 14) (A I R V 41, C 365), *The Management of Messrs Odeon Cinema, Madras* v. *Workers of Sagar Talkies.* (When once the terms of a contract are reduced to the form of a document, particularly to the form of a registered lease deed, the contract must be construed according to its term, and cannot be explained or interpreted by antecedent negotiation that led up to it.)

24. 1953 Mad 566 (A I R V 40, C N 219, Pr 13), *Poomalai Ammal* v. *Subbamal.*

28. 1955 N U C (Trav Co) 543 (A I R V 42), *Sivagurupandran Nadar* v. *Chudalayandi Nadar.* (The nomenclature of the document by itself cannot lead to any conclusive inference as to whether the tenure created was redeemable or irredeemable.) ✠ 1954 All 195 (A I R V 41, C N 108, Pr 10), *Central Finance & Housing Co. Ltd.* v. *British Transport Co.* (It is not the garb with which parties clothe the transaction but it is the spirit permeating the transaction that should be the determining factor.) ✠ 1954 Bom 370 (A I R V 41, C 107 Pr 4) : I L R (1954) Bom 615 (D B), *Ramji Bhai Virpal* v. *Gordhandas Maganlal.* (Substance of transaction appearing to be lease—Transaction clothed to appear as licence by use of ingenious word—Transaction is lease.) ✠ 1954 Punj 116 (A I R V 41, C 55, Pr 6), *Bakshi Ram* v. *Dewat Ram.* (The Courts should not be satisfied merely by the apparent tenor of a document.) ✠ 1954 Punjab 115 (A I R V 41, C N 54, Pr 5), *Sajan Singh* v. *Phuman Singh.* (Pre-emption suit—Transaction whether exchange or sale.)

29. ('49) I L R (1949) 1 Cal 498 (505), *Yolanda Dorothy Wills* v. *Official Trustee of Bengal.* (Unless it is clearly repugnant to or excluded by the context.)

31. 1952 Nag 55 (A I R V 39, C 26, P 11) : ILR (1952) Nag 60, *Yadcorao Jageshwar* v. *Vithal Shamji.* (Purpose of gift stated to be for maintenance of donee—Estate given is not necessarily limited to the life of donee, if dispositive words are clear that absolute estate is given.)

34. 1955 N U C (All) 1704 (A I R V 42), *Abinash Chandra Banerji* v. *Uttarpara Hitkari Sabha.* (In interpreting a will a decision based on the language of another will cannot be of much assistance.) ✠ 1953 Mad 566 (A I R V 40, C 219, Pr 12), *Poomalai Ammal* v. *Subbamal.* (Decisions may serve as useful guide if they contain general rules of construction. But where construction of document depends upon words used therein, it is futile to attempt to construe

it in light of authorities interpreting the terms of documents in other cases.)

37. *See* 1952 Nag 55 (A I R V 39, C 26, P 12) : I L R (1952) Nag 60, *Yadeorao Jageshwar* v. *Vithal Shamji.* (Gift to daughter upon her marriage for her "*Choli bangdi*" or "*haldi kumkum*" does not mean that gift reverts to donor upon the donee becoming widow.)

40. 1955 N U C (Cal) 2865 (A I R V 42) (D B), *Madan Theatres, Ltd.* v. *Sm. Charushila Dassi.* (A lease of premises granted for the purpose of cinema shows contained a covenant for free admission to the effect that the lessee "shall at all times during the period of the lease keep one box containing not less than four seats at the disposal of the lessor for use of herself or other person or persons authorized by her or on her behalf in writing. In April 1949, the Bengal Amusements Tax Act, 1922, as amended, imposed entertainment tax on free or complimentary passes or tickets as well, if they were for admission to a cinematographic exhibition.

Held, that the proper meaning of such a contract was that the lessee had undertaken no more than to forgo all payments in respect of the box chargeable by himself and had only agreed that as between the lessor and the lessee, the box shall be free. There was no further undertaking, implied in the covenant, that the lessee would also pay on the lessor's behalf a tax imposed on her by the State for witnessing the performances, if such a tax came to be imposed.) ✠ 1954 Ajmer 77 (Prs 2, 3) (A I R V 41 C 75), *Mukan Kanwar* v. *Umrao Mal.* (Where Cl. (5) of the agreement arrived at between the parties provided " . . . . the properties movable or immovable, partitioned or unpartitioned, self-acquired or joint, left by the late Rai Bahadur which shall be the absolute property of party No. 2 to be utilized by him in the manner he may think fit, subject to his discharging the obligations mentioned above . . . ." and Cl. (3) contained the obligation to pay a certain maintenance allowance :

Held, that all the properties allotted to party No. 2 under the agreement became subject to the charge for payment of the maintenance) ✠ 1954 Cal 480 (Pr 6, 8) (A I R V 41 C 163) (D B), *Apcar Collieries Ltd.* v. *Radha Gobinda Roy.* (Payment of rent "in Company's sica"—Reference to company's sica held meant payment in current coin and not the equivalent to company's sica in current coin.) ✠ 1952 Nag 55 (A I R V 39, C 26, P 11) : I L R (1952) Nag 60, *Yadeorao Jageshwar* v. *Vithal Shamji.* (Even if the purpose of the gift is stated to be for maintenance of the donee, it does not necessarily follow that the estate given is limited to the life of the don e if the dispositive words are clear that an absolute estate is given.)

Add after Pt. 8 :

[Pt. 8a] As to construction of Hindu wills and applicability of technical rules of the English Courts, see the following case. *1949 F C 64 (A I R V 36, C 11, P 14, 15, 33, 34 and 56) : 1948 F C R 239 : I L R (1950) 1 Cal 17 (F C), Jiban Krishna Das* v. *Jitendra Nath Das.*

Add Pt. 15a as item (2a) after Pt. 15 :

[Pt. 15a] (2a) Per *Chandrasekhara Aiyar J.* — The technical rules of interpretation of provisos and exceptions with reference to their scope and legal effect adopted in construing statutes should not ordinarily be imported in interpreting deeds and documents executed by laymen. In ordinary deeds, a proviso may sometimes be in the nature of an explanation of the main clause or provision; and the Court must look not merely at the form of the language but its substance, the governing idea or purpose of the deed, the context and the surrounding circumstances to gather the real meaning or intention of the executant *1951 S C 293 (A I R V 38 C 50 Prs 20, 23) : 1951 S C R 1125 : I L R (1952) 2 Cal 209 (SC), Angurbala Mullick* v. *Debabrata Mullick.*

Add after Pt. 16 in the same para :

[Pt. 16a] If the operative part is clear and unambiguous, but there be a conflict between it and the intention expressed in the recitals, then the conflict cannot be put to rest by a forced construction on the operative part. In that case, the question is one of the rectification of the deed and not one of construction. *('49) ILR (1949) 1 Cal 498 (506), Yolanda Dorothy Wills* v. *Official Trustee of Bengal.*

Add Pt. 21a as item (4a) after Pt. 21 :

[Pt. 21a] (4a) In the case of a conveyance purporting to carry out a contract for the sale of land, if the terms of a conveyance are clear, they would override the contract, but if part of the conveyance must be rejected, it is legitimate to lean towards the rejection of that part which is inconsistent with the contract. *1950 P C 105 (A I R V 37 C 37 P 10), Krishnaswamy Ayyangar* v. *Perumal Goundan.*

SECTION 9

Note 2

Add in the Foot Note indicated :

4. 1952 Bom 425 (A I R V 39 P 10) (DB), *Narsingdas* v *Radhakisan* (Agreement to treat sale as mortgage No writing is necessary.) ✠ ('49) 1949 Trav-Co L R 13 (21), *Joseph A.* v. *Ouseph.*

Add after Pt. 5 :

[Pt. 5a] The same is the law in Travancore and oral sales of immovable property are permitted. *('49) 1949 Trav Co L R 18 (21), Joseph A.* v. *Ouseph.* (Agreement

to sell also need not therefore be in writing.)

[Pt 5b] "Charge" being not a transfer of property is not required to be in writing. *1950 Nag 117 (A I R V 37 C 41 P 35) : I L R (1949) Nag 102, Bapurao* v. *Narayan.*

SECTION 10

Note 1

Add in the Foot Notes indicated :

2. ('49) 1 Madh B L R 484 (486), *Abdul Sattar* v. *Abdul Rehman.*

[*See also* 1955 Mad 350 (Pr 26) ((S) A I R V 42 C 94), *Vencatachallam* v. *Kabalamurthy.* (Section has been enacted to encourage free alienation and circulation of property.)]

3. 1955 Mad 350 (Pr 26) ((S) A I R V 42 C 94), *Vencatachallam* v *Kabalamurthy.*

4. 1955 Mad 350 (Pr 26) ((S) A I R V 42 C 94), *Vencatachallam* v. *Kabalamurty.*

Note 3

Add after Pt. (4) :

[Pt. 4a] The Madras High Court has held that the principle of the section applies to partitions and compromises of disputed claims. *1955 Mad 350 (Pr 26) ((S) A I R V 42 C 94), Vencatachallam* v. *Kabalamurthy.*

Note 5

Add in the Foot Note indicated :

1a. ('49) 1 Madh B L R 484 (486), *Abdul Sattar* v. *Abdul Rehman.*

Note 6

Add in the Foot Notes indicated :

1a. 1955 Mad 350 (Pr 26) ((S) A I R V 42 C 94), *Vencatachallam* v. *Kabalamurty.*

4. *See also* 1955 Mad 350 (Pr 26) ((S) A I R V 42 C 94), *Vencatachallam* v. *Kabalamurthy.* (Whether the restraints in a particular case is absolute or partial has to be gathered from the intention of the transferor from the contents of the document)

8. 1955 Punj 49 (Pr 10) (A I R V 40 C 16), *Parmodh Singh* v. *Labh Singh.* (Compromise deed—Absolute estate—Restraint on alienation —Void)

Add as illustration (9) after Pt. 17a :

[Pt 17b] (9) If in an agreement for reconveyance the condition that the vendor was to take resale for his and his family use and not for speculative purposes, was intended to mean that the vendor although at the time of making the request for resale had no intention of acquiring it for the sake of disposing it of to a third party for profit, yet he could never thereafter dispose of the property as he liked, such a term would be void under the section. *('50) I L R (1950) All 32 (45) (DB), Arjun Singh* v. *Sahu Maharaj Narain*

Note 7

Add in the Foot Notes indicated :

1. See however ('49) 1 Madh B L R 484 (486), *Abdul Sattar* v. *Abdul Rehman.* (Covenant for reconveyance by transferee is not void — It is not a condition.)

4. *See also* ('49) 1 Madh B L R 484 (486), *Abdul Sattar* v. *Abdul Rehman.* (Covenant by transferee to reconvey property to transferor.)

Note 8

Add in the Foot Note indicated :

2. 1955 Mad 350 (Pr 26) ((S) A I R V 42 C 94), *Vencatachallam* v. *Kabalamurthy.*

Note 12

Add in the Foot Note indicated :

2. 1955 Mad 350 (Pr 26) ((S) A I R V 42 C 94), *Vencatachallam* v. *Kabalamurthy.* (Section does not apply to transfers by operation of law taking effect in invitum at a sale in execution of a decree.)

Add after Pt. 2 :

[Pt 2a] So also it has been held that the section does not apply to sales under the Companies Act. *1955 Mad 350 (Pr 26) ((S) A I R V 42 C 94), Vencatachallam* v. *Kabalamurthy.*

Note 14

Add after Pt. 3, at the end of last para :

[Pt. 4] Where upon an objection by collaterals of the donor to a gift in favour of a *pichhlag* son, an agreement was made between the parties that the donee or his descendants would not have right of sale or mortgage over the subject matter of the gift, it was held that the agreement amounted to a compromise and not a transfer to which S. 10 applied, and that therefore the restrictions on alienation contained therein were not hit by the section. *1953 Punj 282 (A I R V 40 C 123 Prs 5, 6 8) : I L R (1954) Punj 165 (DB), Gurdit Singh* v. *Babu.*

Add after Pt 4 as separate para :

[Pt. 5] See also the following case *1953 Sau 180 (A I R V 40 C 89 Pr 15)(DB), State of Saurashtra* v. *Memon Haji Ismail Haji* (Gift of immovable property under Muhammdan law — Donee gets title to it — Condition against alienation becomes repugnant to gift and is void).

Note 15

Add after Pt. 3 :

[Pt 4] In the undermentioned case, it was held that a consent decree passed by a Court of competent jurisdiction cannot be treated on the same footing as contract between the parties, though it is true that before a Court passes a consent decree, it can and should examine the lawfulness

and validity of the terms of the proposed compromise. But once that state is passed and a decree follows, different considerations arise. Thus, where a compromise decree contains a term against alienating certain property and gives the other party right to its possession on such alienation, the decree is not a nullity in spite of the fact that the term is opposed to S. 10. It is merely contrary to law and binds the parties thereto, unless it is set aside by taking proper proceedings. *1953 Bom 412 (A I R V 40 C 128 P 12) : I L R (1953) Bom 948 (D B), Govind Waman* v. *Murlidhar Shrinivas.* (1929 P C 289 [A I R V 16], C. H. Kinch v. E. K. Walcott, Rel. on; Case law discussed.)

Note 16

Add after Pt. 6 as separate para :

[Pt. 6a] In the following case a gift of property in favour of a *Pichhlag* son was objected to by the collaterals of the donor. An agreement was thereupon arrived at between the parties that the donee or his descendants will not have right of sale or mortgage over the subject matter of the gift. It was held that the agreement amounted to a compromise and not a transfer to which S. 10 applied and the restrictions on alienation therefore were not hit by the section. *1953 Punj 282 (A I R V 40 C 123 P 5, 6, 8) : I L R (1954) Punj. 165 (DB), Gurdit Singh* v. *Babu.* (Agreement held was not in any way contrary to the principles of equity or any provision of law.)

Add after Pt 8 :

[Pt. 8a] Covenants for reconveyance do not offend against perpetuity and depend upon the will of the person to whom the property is conveyed. *('49) 1 Madh BLR 484 (486), Abdul Sattar* v. *Abdul Rahman.*

[Pt. 8b] If in an agreement for reconveyance the condition that the vendor was to take resale for his and his family use and not for speculative purposes, was intended to mean that the vendor although at the time of making the request for resale had no intention of acquiring it for the sake of disposing it on to a third party for profit, yet he could never thereafter dispose of the property as he liked, such a term would be void under the section *('50) I L R (1950) All 32 (45) (D B), Arjun Singh* v. *Sahu Maharaj Narain.*

Note 17

Add after Pt. 7 :

[Pt. 8] A covenant in a lease deed which prohibits letting of a house is not infringed by letting a portion of it. *('47) 28 Mys L Jour 36 (60) : 52 Mys H C R 455 (D B), Gururajcahar* v. *Rangiah. (Obiter.)*

SECTION 11

Note 2

Add in the Foot Notes indicated :

2. 1955 Mad 350 (P 26) ((S) A I R V 42 C 94), *Vencatachallam* v *Kabalamurthy* ✣ 1955 NUC (Trav-Co) 1249 (A I R V 42), *Kathiru Kunju* v. *Muhammad Kunju* ✣ 1953 Sau 180 (A I R V 40 C 89 P 15) (DB), *tate of Saurashtra* v. *Memon Haji Ismail Haji* (Gift of immovable property under Muhammadan Law—Condition against alienation is void.) ✣ ('50) 1950-2 Mad L Jour 496 (498), *Ratnaswami Pillai* v. *Kathija Bivi Ammal.*

3. 1953 Punj 49 (P 10) (A I R V 40 C 16), *Parmodh Singh* v *Lab Singh.*

Add after Pt 5 :

[Pt. 5a] A deed of gift executed by the manager of a joint Hindu family conveyed absolutely with all rights to the General Secretary of the Theosophical Society, for the use and benefit of the local lodge of the Theosophical Society the land together with all trees, etc., thereon besides the incomplete building erected thereon by the Society. In the event of the site and building aforesaid not being required for the above purpose the property was to revert to the donor on the condition of his paying to the Society the then estimated value of the building alone. It was held that the deed having been executed by the Manager of the joint family, the reverter clause would operate to the benefit of the other members of the family The reverter clause was not at all one of repugnancy to the absolute estate created by the deed but was, if at all, one of defeasance. It was a covenant between the donor and the donee that the latter should reconvey to the former in a certain contingency The rule against perpetuity did not apply to agreements *1951 Mad 798 (A I R V 38 C 271, P 4, 5), A. Krishnarayan Kodgi* v. *S Sarvothama Kodgi.*

Note 3

Add in the Foot Note indicated :

1. 1953 Sau 80 (A I R V 40 C 89, P 15) (DB), *State of Saurashtra* v. *Memon Haji Ismail Haji.* (Muhammadan Law—Gift of immovable property—Condition against alienation is void.)

Note 7

Add at the end of the Note :

[Pt. 4] In the following case it was held

that the clause restricting alienation in a partition deed conferring only a life estate was not in derogation of an absolute grant but was a condition of the grant itself. *1952 Mad 166 (A I R V 39 C 76 P 2), Ammireddi Sooramma* v. *Ammireddi Venkataratnam.*

[Pt. 5] Where by the words used in a will, daughter of the testator is to take the property with absolute rights she takes it absolutely; a subsequent clause restricting her from selling the property for any purpose other than the debts of the testator is repugnant and invalid. So also the provision that after her death her grandson should get the property is at best a provision for devolution of the property after her death and cannot limit the absolute character of the estate given. *('50) 1950-2 Mad L Jour 496 (498), Ratnasami Pillai* v. *Kathija Bivi Ammal.*

[Pt. 6] It has been held that, the reservation of subordinate or tenancy right by the transferor is not repugnant to the transfer of the proprietary interest entitling the transferee to receive only the rent from the transferor. *1954 Cal 400 (P 13, 14) (A I R V 41 C 136) (DB), Bejoy Krishna* v. *Iswar Damodar.*

Note 8

Add in the Foot Note indicated :

1. 1953 Sau 180 (A I R V 40 C 89, P 15) (DB), *State of Saurashtra* v. *Memon Haji Ismail Haji.* (Gift of immovable property under Muhammadan Law — Donee gets title to it — Condition against alienation being repugnant to gift, is void — Donee acquires saleble title and his transferee also acquires equally good title.)

Note 9

Add in the Foot Note indicated :

1. 1953 Sau 180 (A I R V 40 C 89, P 15) (DB). *State of Saurashtra* v. *Memon Haji Ismail Haji.* (Gift under Muhammadan Law—Condition against alienation.) ✠ ('50) 1950-2 Mad L Jour 496 (498), *Ratnaswami Pillai* v. *Kathija Bivi Ammal.*

Add after Pt. 10 as new para :

[Pt. 11] Where under a gift-deed the donor unequivocally and unconditionally transfers all his rights over certain property to the donee with absolute powers to deal with the same from the date of gift, a subsequent clause in the deed to the effect that on the death of the donee the property shall not devolve on any of her heirs but will revert to the donor will be repugnant to the absolute estate created in favour of the donee and to the legal incidents of such estate and as such the provision will be ineffective and wholly void. *1953 Trav Co 115 (A I R V 40 C 39 P 3), Subramanian Asari* v. *Kanni Ammal.* (Such a provision cannot be said to be an agreement for the suspension or revocation of the gift within the meaning of S 126. Applicability of S. 126 indicated.)

Note 11

Add after Pt. 8 :

[Pt. 9] There must be a mention in the sale deed that the vendor had reserved any rights for "the beneficial enjoyment of his other property." Where *S* had sold a portion of the land to *A* reserving a passage in the portion sold, this passage is to be treated in joint ownership of *S* and *A*. Subsequently *S* sold the remaining portion of the land to *R* without specifically selling his rights in the passage, by specifically mentioning the fact in the sale deed. *R* cannot enforce the agreement between *S* and *A*. *1951 Ajmer 74 (A I R V 38 C 70 P 6, 8), B. D. Ramble* v. *Micheal K. Lal.*

SECTION 12

Note 1

Add after Pt. 2 :

[Pt. 3] The section does not invalidate conditions which are in derogation of the rights of the transferor. *1951 Pat. 488 (A I R V 38 C 136 P 10)=29 Pat. 713 (DB), Trustees of the Provident Fund of the Tinplate Company of India Ltd.* v. *Muktilall Agarwalla.* (Section 12 has no application to provision in Provident Fund Rules as regards forfeiture upon assignment or insolvency of the contributor.)

SECTION 13

Note 2

Add after Pt. 4 :

[Pt. 5] It was held that where the gift was made to persons as tenants-in-common with their descendants in equal shares, the fact that unborn children of donees share in the properties is immaterial so long as Ss. 13 and 14 are not offended. *1953 Trav. Co 89 (A I R V 40 C 29 Pr 3, 4) (DB), Korulla Geeverghese* v. *Krishnan Nair.*

Note 5

Add in the Foot Note indicated :

1. 1952 Cal 427 (A I R V 39 C 120 P 15, 16), *Rabindra Nath Deb* v. *Sushilchandra Deb.* (Case of will.)

Make the sentence "this . . . . this section" as Pt. 3 in para 2 of the Note and add the following case in the Foot Notes after Foot Note 2 :

3. *See* 1953 Trav-Co 89 (A I R V 40 C 29 P 3, 4) (DB), *Korulla Geeverghese* v. *Krishnan Nair.*

SECTION 14

Note 5

Add in the Foot Note indicated :

3a. 1953 Tra-Co 89 (AIR V 40 C 29 Pr 3, 4). (DB), *Korulla Geeverghese* v. *Krishnan Nair.* (Gift in favour of more persons than one, with their descendants, in equal shares, as tenants-in-common— The fact that unborn children of donees share in the properties is immaterial as long as Ss. 13 and 14 are not offended.)

Note 10

Add in the Foot Note indicated :

2. 1951 Mad 798 (A I R V 38 C 271 P 4, 5), *A. Krishnaraya Kodgi* v. *S Sarvothama Kodgi.* (A covenant between the donor and the donee that the latter should reconvey to the former in a certain contingency.)✠1951 Mad 767 (A I R V 38 C 256 P 5), *Rajammal* v. *Gopalaswami.* (An agreement to sell or an agreement to resell is not within the mischief of the rule against perpetuities.)

Add after Pt 2a.

[Pt 2b] Where a sale deed in respect of certain land contains a stipulation that the vendee would reconvey the property to the vendor in case he repays the purchase price to the vendee after two years but within fifteen years from the sale the benefit of such a contract of repurchase can be validly assigned in favour of a stranger who can enforce the same against the vendee. The rule against perpetuities cannot apply to such a contract for the obvious reason that the contract does not create any interest in immovable property. *1954 Assam 95 (A I R V 41 C 35 P 2), Rashid Ali* v. *Darparam Namasudra.*

Note 13

Make the last sentence "By the .... perpetuity" as Pt. 3 and add the following case in the Foot Note after Foot Note 2 :

3. *See* 1953 Trav-Co 89 (A I R V 40 C 29 P 3, 4) (DB), *Korulla Geeverghese* v. *Krishnan Nair.*

SECTION 15

Note 2

Add in the Foot Note indicated :

27. 1953 S C 7 (A I R V 40 C 3 P 14) : 1953 S C R 232 : I L R (1953) 1 All 896 (SC), *Raj Bajrang Bahadur Singh* v. *Thakurain Batchtrai Kuer.*

Note 4

Add after Pt. 6 :

[Pt. 7] Where a fund is bequeathed to *A* for life during her wifehood or widowhood and then to "all or any of the children of *B* who attain 21" and there is no child of *B* in existence when *A's* interest ceases, the class is not closed when the subsequently born first child of *B* attains 21 and the fund is not distributable. ('51) 1951-1 All E R 628 (631), *In re Bleckly* (English case)

Note 5

Add in the Foot Note indicated :

1. *See also* 1952 Cal 427 (AIR V 39 C 120 P 16), *Rabindra Nath Deo* v. *Sushil Chandra Deb.* (Case of a will.)

SECTION 13

Note 3

Add after Pt. 12 :

[Pt.12a] A charity founded as a perpetual charity can never come to an end, even though its objects may be altered, and, indeed, its name may be altered, according to due process of law. *(1954) 1954-1 All E R 227 (229):(1954) 1 W L R 238, In re Bagshaw.*

SECTION 19

Note 6

Add at the end of the Note :

[Pt. 9] Where an estate is to vest in a person on fulfilment of certain conditions, the intention being clear that it should not vest unless the condition is fulfilled, then strict compliance is necessary before the party claiming the estate under the instrument can assert that he has become the owner of the estate. *1954 Hyd 185 (Pr 23) (A I R V 41 C 61):I L R (1954) Hyd 250 (DB), Chinna Reddy* v. *Keshanna.*

Note 10a

Add at the end of the Note :

[Pt. 4] In the following Bombay case, where a testator bequeathed his estate to his wife for her life and on her death to his two sisters as owners, with a proviso that if a child were born to the wife, it was to be the owner of the properties, it was held that the two sisters took vested interest in the properties on the death of the testator which was liable to be divested by the birth of a child to the widow. *1950 Bom 289 (AIR V 37 C 82 P 9, 18, 19) : I L R (1951) Bom 203 (DB), Vithalbhai Gokalbhai* v. *Shivabhai Dhoribhai.*

SECTION 21

Note 3

Add in the Foot Note indicated :

1. 1954 Hyd 195 (Pr 22) (AIR V 41, C 61) : ILR (1954) Hyd 250 (DB), *Chinna Reddy* v. *Keshanna.* (Per Ansari J.)

SECTION 26

Note 2

Add in the Foot Note indicated :

1. ('49) 1949 All L Jour 566 (574) (DB), *Girja Prasad* v. *Narish Husain.* (Property transfer-

ied on condition that transferee shall finance litigation to recover it—Transferee failing to perform his agreement—Transferee is not entitled to get property, transfer being conditional and condition precedent not having been fulfilled.)

SECTION 28

Note 6

Add after Pt. 1 in the same para :

[Pt. 1a] It was, however, held in the following case that where the deed of gift and the deed of agreement, whereby the donor was entitled to revoke the gift upon happening of a specified event mentioned under S. 126 and also upon specified uncertain events mentioned in S. 31, were executed as two separate documents but on the same date, both formed part of the same transaction and must be read together and fell within the purview of Ss. 31 and 126. *1951 All 599 (AIR V 38 C 153 P 5, 6, 8, 12, 13), Jagat Singh* v. *Dungar Singh.*

SECTION 32

Note 3

Add in the Foot Note indicated :

6. (1953) 1953 1 All ER 308 (313), *Faith* v. *Allen.* (A testator devised his dwelling house and other property "to the eldest of the sons of F (except his son H) who should be a member of the Church of England and an adherent to the doctrine of that Church" and in case there was no such son of F, then on death of F the property was devised to W : *Held*, that the condition was void for uncertainty.)

Note 8

Add after Pt. 8 as new para :

[Pt. 9] Where a property was conveyed absolutely with all rights to a Theosophical Society for the use and benefit of the Society, with a condition that in the event of the property not being required for the above purposes, it would revert to the donor on his paying to the Society the then estimated value of the building, it was held that the reverter clause was not one of repugnancy to the absolute estate, but was, if at all, one of defeasance. It was also held that the clause in fact was not a clause of reverter equivalent to defeasance by way of an executory gift over but a covenant between the donor and the donee, that the latter should reconvey to the former in a certain contingency. *1951 Mad 798 (A I R V 38 C 271 P 4, 5), A. Krishnaraya Kodgi* v. *S. Sarvothama Kodgi.*

Note 9

Add in the Foot Note indicated :

3. 1951 Mad 798 (A I R V 38 C 271 P 4, 5), *A. Krishnaraya Kodgi* v. *S. Sarvothama Kodgi.*

SECTION 35

Note 2

Add in the Foot Note indicated :

2. 1954 Mad 556 (Pr 3) (A I R V 41 C 207) *Paru Kutiey Amma* v *Chhettath Navath Lakshmi Amma* + 1946-52 I. D. 39451 (All) (DB), *Parchand Bir Singh* v. *Raja Jwaleswari Pratap Narain Singh.*

Note 15

Add in the Foot Note indicated :

1. 1953 Mad 161 (A I R V 40 C 50 P 13), *Sulaiman Sahib* v. *Ibrahim*

SECTION 36

Note 2

Add after Pt. 7 :

[Pt. 7a] In the following Madras case, however, the principle of the section was applied to a private sale of agricultural land, which was under lease. *1951 Mad 601 (A I R V 38 C 169 P 4, 6), Poongavanam* v. *Subramanya, (1928 Rang 67 (2) (A I R V 15), Ma Hawa Bi* v. *Sein Kho*, Dissented from.)

Note 3

Add at the end of the Note :

[Pt. 3] The contract to the contrary must be between the transferor and the transferee. The section has no application as between one of the parties to the contract and a third person. *1954 S C 470 (Pr 50) (A I R V41 C 113) : 1955 S C R 313 (S C), E. D. Sassoon & Co. Ltd* v. *I. T. Commr., Bombay* (Per *S. R Das and Bhagawati JJ*) — *Held* there was contract to the contrary.)

Note 4

Add in the Foot Note indicated :

1. 1951 Mad 601 (A I R V 38 C 169 P 4, 6), *Poongavanam* v. *Subramanya.* (Sale of agricultural land under lease with yearly rent — Year expiring month after sale Purchaser is entitled to month's rent accruing after sale.)

SECTION 37

In Section 37

For the word 'Provincial' the word 'State' shall be substituted.

—*Substituted* by A. L. O. 1950.

Note 2

Add in the end of the para of the Note :

[Pt. 1] Neither the section nor its principle applies to a case of a division either of land or reversion as a result of partition. *('50) 86 Cal L Jour 198 (212, 213), Sm. Durgarani Devi* v. *Mohiuddin.*

Note 4

Add in the Foot Notes indicated :

2. ('50) 86 Cal L Jour 198 (213), *Sm. Durgarani Devi* v. *Mohiuddin.*

4. See however ('50) 86 Cal L Jour 198 (212, 213), *Sm. Durgarani Devi* v. *Mohiuddin.* (It was held that the section or its principle has

no application, where the severance is the result of a partition.)

Add after Pt. 4.

[Pt. 5] In the undermentioned Calcutta case it was held that the section deals with cases where the benefit of any obligation relating to the property as a whole passes from one to several owners of the property. On partition the benefit of the obligation does not so pass. All the co-sharers of the reversion are before the partition entitled to the benefit of the obligation. The co-owner of the reversion who as a result of partition acquires exclusive title to a portion of the reversion remains subject to the liability both before and after partition and his liability is not dependent upon the election of the lessee. *('50) 86 Cal L Jour 198 (212, 213), Sm. Durgarani Devi* v. *Mohiuddin.*

SECTION 38

Note 5

Add in the Foot Notes indicated :

1. *See also* 1952 Manipur 10 (A I R V 39 P 6), *Tomal Singh* v. *Agen Norotom Singh.* (In Manipur State, alienation by a Hindu widow of her husband's property will not be upheld, unless there is a certificate of sale from proper authority.)

4. 1950 Mad 606 (A I R V 37 C 254 P 3, 4) (DB), *Nagammal* v. *Varada Kandar* ✠ 1950 Nag 69 (A I R V 37 C 20 P 7, 12) : I L R (1950) Nag 795, *Tulsiram Sitaram* v. *Narayan Waman.*

8. 1953 All 406 (A I R V 40 C 188 P 12, 13) : I L R (1954) 2 All 675 (D B), *Pekhu Chamar* v. *Harish Chandra.* (Where the practical effect of a licence is the same as the effect of a sale or of a perpetual lease, it would be governed by the same rules of Hindu Law which prohibit the transfer by the members of a joint Hindu family without legal necessity — *Held* that an irrevocable licence to make constructions over the sir land belonging to a Hindu joint family granted without consideration or legal necessity by a member thereof is not valid.)

Note 7

Add after Pt. 2 :

[Pt. 2a] The validity of the alienations depends on the circumstances obtaining on the date of the transaction and not on subsequent events so that if in the circumstances that existed at the time of the alienation, the act would be regarded as a proper one by men of ordinary prudence, it would not be held invalid because of subsequent changes in the circumstances, such as rise in price owing to unforeseen happenings. *1950 Mad 606 (A I R V 37 C 254 P 3, 4) (D B), Nagammal* v. *Varada Kandar.*

Note 8

Add in the Foot Notes indicated :

3. *See also* 1955 Orissa 17 (Pr 18) ((S) A I R V 42 C 6) : I L R (1954) Cut 588 (D B), *Raja Rao* v. *Chiranjeevulu Rao.* (A bona fide alienee should not suffer when he has acted honestly and with due caution though he may himself have been deceived.)

8. 1950 Nag 69 (A I R V 37 C 20 P 7, 12) : I L R (1950) Nag 795 *Tulsiram Sitaram* v. *Narayan Waman.* (Circumstances should be such as to leave no other alternative but to effect a sale.)

Add after Pt. 4 :

[Pt. 4a] The question whether a manager or a limited owner of property should borrow money or sell property to obtain money to enable him to meet his necessity is one which the borrower himself must decide, and a transferee cannot be expected to show that what that person did was the only proper course which he could take. For, without entering on the management of the estate, a transferee would not know whether one course was preferable to another. *1952 Nag 60 (AIR V 39 C 29 P 22) : ILR (1950) Nag 679, Mahagu* v. *Narayan.*

[Pt. 4b] Existence of debts and the insufficiency of income to liquidate them would be sufficient to justify alienation even in the absence of pressure from the creditors. *1950 Mad 606 (A I R V 37 C 254 P 3, 4) (DB), Nagammal* v. *Varada Kandar.*

[Pt. 4c] But in order to justify the sale of property by the natural guardian of a Hindu minor on the ground of legal necessity what has to be shown is not merely that a large portion of the consideration was utilised for proper purposes but also that the alienation by making which the amount was realised, was itself justified. *1950 Nag 69 (A I R V 37 C 20 P 7, 12): I L R (1950) Nag 795, Tulsiram Sitaram* v. *Narayan Waman* ✠ *1951 Nag 403 (A I R V 38 C 126 P 16, 18) : ILR (1950) Nag 25, Amroo* v. *Babarao.*

Note 11

Add in the Foot Note indicated :

1. 1955 Orissa 17 (Pr 18) ((S) A I R V 42 C 6) : I L R (1954) Cut 588 (D B), *Raja Rao* v. *Chiranjeevulu Rao.* (A widow's alienee who seeks to charge the inheritance after the death of the widow has to prove that there was justifying necessity for the loan or that he made an enquiry into such necessity and satisfied himself that the widow was acting, in the particular instance for the benefit of the estate.) ✠ 1951 Nag 403 (A I R V 38 C 126 P 16, 18) : I L R (1950) Nag 25, *Amroo* v. *Babaroo.*

Note 12

Add in the Foot Note indicated :

1. 1951 Nag 403 (A I R V 38 C 126 P 7) : I L R (1950) Nag 25 *Amroo* v. *Babaroo.*

SECTION 39

Note 2

Add in the Foot Notes indicated :

1. 1951 All 141 (AIR V 38 C 16 P 19, 33, 36, 37): I L R (1953) 1 All 284 (FB), *Mahesh Prasad* v. *Mt. Mundar.* (E. G. Hindu widow's right to receive maintenance as against persons other than her own son, out of immovable property.)
2. 1951 All 141 (AIR V 38 C 16 P 19, 33, 36, 37): I L R (1953) 1 All 284 (FB), *Mahesh Prasad* v. *Mt. Mundar.* (No application to charge created by decree.)

[See however ('51) 1951 Nag L Jour (Notes) 166, *S. P. Tiwari* v. *Jamunabai.* (Even if the section applied to charge created by decree only bona fide parchaser for value without notice would be protected—Whether section applies to charge or not was not in issue.)]

Note 5

Add in the Foot Note indicated :

1a. 1955 N U C (Trav Co) 1912 (A I R V 42), *Sivathanu Pillai* v. *Muthamma Pachi Amma.* ✠ 1951 All 141 (AIR V 38 C 16 P 19, 33, 36, 37) : I L R (1953) 1 All 284 (FB), *Mahesh Prasad* v. *Mt. Mundar.* (Right of widow to maintenance is not charge on immovable property.)

Add after Pt. 9, in separate para :

[Pt. 10] In an undermentioned English case it was held that the deserted wife living with her children in the matrimonial house belonging to the husband has no equitable interests in the house which are capable of running with the premises, so as to bind them in the hands of the purchaser of the premises from the husband, even though the husband had undertaken before the Court of summary jurisdiction to allow the wife and the children to remain there rent free. *(1951) 1951 2 All E R 235 (237) : (1951) 2 K B 596, Thompson* v. *Earthy.*

Note 6

Add after Pt. 1, in the end of the para :

[Pt. 2] In India, there is no presumption of intended advancement, when a property is purchased in the name of the wife; the test is to see what is the source of the purchase money. *1953 Hyd 77 (AIR V 40 C 35 P 4, 5) : I L R (1953) Hyd 165 (DB), Jeevan Khatoon* v. *Mehtab Khatoon* ✠ *1951 Trav Co 195 (A I R V 38 C 79 P 2, 3) (DB), Achuthan Prabhakaram* v. *Parameswara Menon.* (There is nothing in law to prevent a separate acquisition being made in the name of a Marumakkathayee woman by her husband.)

Note 8

Make the first sentence as Pt. 1a1. and add the following cases in the Foot Notes before Foot Note 1a :

1a1. 1955 N U C (Trav Co) 1912 (A I R V 42), *Sivathanu Pillai* v. *Muthamma Pachi Amma.* (The right of maintenance is liable to be defeated by a transfer of the husband's property to a bona fide purchaser for value without notice.)

[*See* ('51) 1951 Nag L Jour (Notes) 166, *S. P. Tiwari* v *Jamunabai.* (Transfer during pendency of suit for making maintenance a charge on immovable property —Transferee must show that he was *bona fide* purchaser for consideration without notice.) ✠ ('50) 1950 Nag L Jour (notes) 13, *Tanyabai* v. *Tago.* (Compromise decree for maintenance—Charge on suit property—Bona fide purchase of property without notice—Decree is not executable against purchaser.) ✠ 1949 Pat 466 (A I R V 36, C 137, P 11, 12) : 28 Pat 336 (DB), *Mt. Bhagerna Kuer* v. *Ramdeni Rai.* (Statutory charge under O. 33, R. 10, Civil P. C., is subject to charge under maintenance decree)]

Add at the end of the first para in the note :

[Pt. 1b] It has been held in the undermentioned Case decided under the Hindu Law that the Hindu widow's right of maintenance is liable to be defeated by a transfer to a purchaser for value even with notice of the claim for maintenance unless the transfer was made with the intention of defeating the widow's right and the purchaser had notice of such intention. *1955 NUC (Trav Co) 1912 (AIR V 42), Sivathanu Pillai* v. *Muthamma Pachi Amma.*

SECTION 40

Note 1

Add in the Foot Notes indicated:

4. 1950 Cal 195 (AIR V 37 C 67 P 4): ILR (1951) 1 Cal 276 (DB), *Hooghly Bank Ltd., Calcutta* v. *Mahendra Nath* (Covenant by putnidar to submit collection papers yearly affects value of land and therefore is covenant running with land.)
9. ('48) I L R (1948) 1 Cal 492 (497), *Bhupati Bhusan Trivedi* v. *Birendra Mohan Singha Chaudhuri.*
16. 1952 Pat 409 (A I R V 39, P 16) (DB), *Jagdish Chandra* v *Muhamad Bukhtiyar.*

Delete the sentence "See also S. 108, cl. (c), for another instance" appearing after Pt. 9.

Add after Pt. 9 :

[Pt 9a] Sections 65 and 108(c) are also instances of covenants running with the land binding on the property in the hands of the transferee. *('48) I L R (1948) 1 Cal 492 (497), Bhupati Bhusan Tribedi* v. *Birendra Mohan Singha Chaudhuri.*

Add after Pt. 25:

[Pt. 25a] The same view of the doctrine in Tulk v. Moxhay was held in India.

Covenant must be one restricting or affecting the user of the land. and the remedy is not a remedy at law by way of specific performance under a species of implied privity, but a remedy in equity by injunction against the violation of the covenant. *1952 Pat 409 (A I R V 39, P 17) (DB), Jagdish Chandra* v. *Muhammad Bukhtiyar.*

Note 5

Add in the Foot Note indicated :

2. ('48) ILR(1948) 1 Cal 492(497), *Bhupati Bhusan Tribedi* v. *Birendra Mohan Singha Chaudhuri.* (A covenant to pay money by a vendee to the vendor and his successor is an affirmative covenant and does not run with the land.)

Read the word 'case' as 'cases' before Pt. 2.

Add after Pt. 2 :

[Pt. 3] See also the following case where the effect of amendment by Amending Act of 1929 is fully discussed. *('48) I L R (1948) 1 Cal 492 (497), Bhupati Bhusan Tribedi* v. *Birendra Mohan Singha Chaudhuri.*

Note 8

Add in the Food Notes indicated :

1. 1953 Mad 409 (A I R V 40 C 151 P 7), *Appa Rao* v. *Veeranna*

3. 1953 Mad 409 (A I R V 40 C 151 P 7), *Appa Rao* v *Veeranna.* (The title of the subsequent purchaser with notice of the prior agreement in favour of another is subject to the obligation under S. 91 of the Trusts Act. The person in whose favour there was a prior agreement can specifically enforce his agreement under S. 27 (b) of the Specific Relief Act and compel him to execute a sale deed in his favour.)

[*See also* 1955 Cal 21 (Pr 26) (A I R V 42 C 4) (DB), *Sital Chandra* v. *Mihilal Kolley.* (In the case of sale of land, with simultaneous agreement of reconveyance, the pre-emptor under S. 26-F of the Bengal Tenancy Act who takes a pre-emption order or, at any rate, institutes his pre-emption proceedings with notice of an agreement for resale, prior to or contemporaneous with the sale in question and otherwise valid and enforceable in law, bound by the same and cannot resist its enforcement by reason merely of sub- s. (7) of that section. To such a case the principle of S. 40, T. P. Act can be applied.)

Note 9

Add in the Foot Note indicated :

3. *See also* ('48) I L R (1948) 1 Cal 492 (497), *Bhupati Bhusan Tribedi* v. *Birendra Mohan Singha Chaudhuri.* (It is an affirmative covenant not running with land.)

Note 17

Add in the Foot Note indicated :

1. 1953 Mad 409 (A I R V 40 C 151 P 7), *Appa Rao* v. *Veeranna.*

Add after Pt. 4 :

[Pt. 5] But Ss. 55 (2), 65 and 108 (c) which are instances of covenants running with the land, are binding on the property in the hands of transferees irrespective of any question of notice *('48) I L R (1948) 1 Cal 492 (497), Bhupati Bhusan Tribedi* v. *Birendra Monan Singha Chaudhuri.*

Note 25

Add in the Food Note indicated :

4. 1954 Orissa 110 (A I R V 41 C 33 P 5, 7) : I L R (1954) Cut 1 (DB). *Radha Kamal* v. *Puri Municipality.* (An option to renew the lease runs with the land and the leasehold interest, and so both the lessors' and the lessees' successors in-title are bound. The leasehold interest having been severed by agreement to the parties, each of the assignees was ntitled to enforce the term providing for the renewal so far as his separated part was concerned irrespective of the others.)

Add after Pt. 1 in Item (1) :

[Pt. 1a] But an agreement reducing the rent by some of the cosharer landlords is not a covenant running with the land and therefore the transferee is not bound by the reduction. *1950 Pat 22 (A I R V 37 C 8, P 11): 28 Pat 844 (DB), Tarak Nath Dubey* v *Raghu Nandan Pandey.*

Add after Pt. 1a, as separate item (1A) :

[Pt. 1b] (1A) Covenant by putnidar to submit collection papers yearly. *1950 Cal 195 (A I R V 37, C 67, P. 4): I L R (1951) 1 Cal 276 (DB). Hooghly Bank Ltd., Calcutta* v. *Mahendra Nath.* (It affects value of land therefore is covenant running with land—Covenant binds assignees from parties.)

Add after Pt 5:

[Pt. 5aa] Or a covenant requiring a tenant to put up a building. *1954 Orissa 110 (A I R V 41, C 33, P 7): I L R (1954) Cut 1 (DB), Radha Kamal* v. *Puri Municipality* (Assignees of the lease incurred the liability to perform the covenant —The contention, however that every assignee of a part of the tenement is bound to put up buildings on the parcel of the land assigned to him is unreasonable and by the very nature of the thing is impossible of performance.)

Add after Pt. 5 as item (6) :

Pt. 5a] (6) A covenant by the lessor to pay the lessee cost of construction of buildings on determination of lease. *('51) 55 Cal W N 656 (660) (DB), Jamini Bala* v. *Administrator-General of West Bengal.*

Make the line "In other words . . . . . the reversion" after Pt. 6 as Pt. 6a1 and add the following case after Foot Note 6 in the Foot Notes :

6a1. 1954 Orissa 110 (A I R V 41 C 33 P 7) (DB), *Radha Kamal* v. *Puri Municipality* ✠

('50) 86 Cal L Jour 198 (206), *Sm. Durgarani Devi* v. *Mohiuddin.*

Make the first sentence "A covenant between ... no privity of contract" as Pt 6a2, in last but one para of the note and add the following case in the Foot Note before Foot Note 6a :

6a2. 1952 Pat 409 (A I R V 39 P 10) (DB), *Jagadish Chandra* v. *Muhammad Bukhtiyar.*

SECTION 41

Note 1

Add in the Foot Notes indicated :

5a 1955 N U C (All) 1698 (A I R V 42), *Deo Sharma* v. *Chartered Bank of India.*

6. 1951 Pepsu 101 (A I R V 38 C 41 P 11) (DB), *Lal Singh* v. *Shri Guru Granth Sahib.*

Note 2

Add in the Foot Notes indicated :

2. 1952 Kutch 55 (A I R V 39 P 11), *Karamshi Vershi* v *Ratanshi Nenshi.*

5. 1952 Nag 106 (A I R V 39 C 45 (7) P 29) : I L R (1953) Nag 684, *Sadiq Hussain* v *Co-operative Central Bank, Yeotmal.*

Add after Pt 2 in the same para :

[Pt. 2a] But a case of estoppel must be pleaded and cannot be made out by a Court of appeal in the absence of a specific pleading to that effect. *1952 Kutch 55 (AIR V 30, P 11), Karamshi Vershi* v. *Ratanshi Nenshi.*

Note 3

Add in the Foot Notes indicated :

1. 1955 N U C (All) 1698 (A I R V 42), *Deo Sharma* v *Chartered Bank of India.*

3. 1952 Nag 64 (A I R V 39 C 30 P 6), *Hussain Mohiuddin* v. *Phoolchand.* ✣ 1952 Trav-Co 479 (A I R V 39 P 5) (DB), *Souriyar Kuriyakose* v. *Raman Nair* (Default by *P* in payment of sircar tax—Revenue sale—*D* purchasing property benami for *P* – *D* to be ostensible owner —Property purchased by decree-holder in execution of decree against *D* – Decree-holder auction purchaser held protected.)

Note 7

Add in the Foot Note indicated :

1. 1952 Nag 106 (A I R V 39 C 45 (7) P 7) : I L R (1953) Nag 684, *Sadiq Hussein* v. *Co operative Central Bank, Yeotmal* ✣ 1949 Assam 17 (A I R V 36 C 12 P 11) : I L R (1949) 1 Assam 1 (DB), *Abdul Gafur* v *Nawab Ali* ✣ (' 9) 2 Sau L R 203 (205, 206), *Bhupatr. y Harilal* v. *Shamla Pitambar.*

Note 8

Add in the Foot Notes indicated :

5. 1952 Nag 106 (A I R V 39 C 45 (7) P 29) : I L R (1953) Nag 684, *Sadiq Hussein* v *Co-operative Central Bank Yeotmal* ✣ 1951 Nag 403 (A I R V 38 C 126 P 20) : I L R (1950) Nag 25, *Amroo* v. *Babarao.* ✣ 1952 Punj 284 (A I R V 39 P 8), *Narsingdas* v. *Sohan Lal* ✣ 1951 Pepsu 101 (A I R V 38 C 41 P 11) (DB), *Lal Singh* v. *Shri Guru Granth Sahib.* ✣ 1950 All 103 (A I R V 37 C 45 P 21) : I L R 1950 All 1001 (DB), *Anjuman Islamia* v. *Latafat Ali.*

8. 1952 Nag 106 (A I R V 39 C 45 (7) P 28) : I L R (1953) Nag 684, *Sadiq Hussein* v. *Co-operative Central Bank, Yeotmal.*

Add after Pt. 1 :

[Pt. 1a1] Similarly a person who has got indicia of ownership, such as title, possession or entries in records is an ostensible owner. *1952 Kutch 55 (AIR V 39, P 8), Karamshi Vershi* v. *Ratanshi Nenshi.*

Add after Pt. 1a. as separate para :

[Pt. 1b] It is necessary for the transferee to prove that his transferor was the ostensible owner on the date of the transfer and not at some date in the past. *1952 Nag 106 (A I R V 39, C 45 (7), P 28) : I L R (1953) Nag 684, Sadiq Hussein* v. *Co-operative Central Bank Yeotmal.*

Add after Pt. 7 :

[Pt. 7a] It has been held that the section contemplates possession of the vendor who conveys his interest to an innocent purchaser. Where all that person got by virtue of the sale was only a right to obtain possession and what was delivered to him was merely symbolical possession. *1955 Pat 189 (Pr 5) ((S) A I R V 42 C 43), Sheonandan Prasad Sao* v. *Ugrah Sao.*

Add after Pt. 9 :

[Pt 9a] or as agent. *1952 Nag 106 (A I R V 39, C 45 (7), P 28) : I L R (1953) Nag 684, Sadiq Hussein* v. *Co-operative Central Bank, Yeotmal.*

Add after Pt. 10 :

[Pt. 10a] Similarly ostensible ownership of co-sharer in the joint family house cannot be inferred from long occupation and sole enjoyment, in the absence of written record. *1950 Kutch 34 (A I R V 37, C 27, P 6), Ludhibai* v. *Rabji Nagshi.*

[Pt. 10b] The fact that the property is purchased in the name of the wife and stands in her name, cannot be taken to mean that she is the real owner of the property. The reason is that in India, where the doctrine of advancement is not recognised, property is generally purchased benami in the name of wife. *('52) 54 Pun L R 193 (197) (DB), Amarchand* v. *Lashkari Mal.* (Very slight evidence would be required to show that the purchase was benami in name of wife.)

Note 9

Add after Pt. 3 at the end of the same para :

[Pt. 3a.] It was held by the Supreme Court in the following case that where a person who has allowed another to occupy the position of an ostensible owner has a limited estate, the rule of S. 41 ap-

plies only during the lifetime of the limited owner and is not available to protect transferees against the claim of the reversioners. *1952 S C 207 (AIR V 39, P 23)*: *1952 S C R 793* : *ILR (1953) 2 All 195 (SC), Phool Kuer* v. *Prem Kuer.*

Add after Pt. 4 in the same para :

[Pt 4a] But in the following case it was held that the transferee of wakf property where the wakf was created by a registered deed, from the heirs of the dedicator, could not claim protection under the section against God. *1950 All 109 (AIR V 37, C 45, P 21)* : *I L R (1950) All 1001 (D B), Anjuman Islamia* v. *Latajat Ali.*

Note 10

Add in the Foot Note indicated :

9. *See also* 1952 Kutch 55 (A I R V 39 P 8), *Karamshi Vershi* v. *Ratanshi Nenshi.* (Sisters succeeding to their father s property—*A*, the paternal agnate allowed to take possession of property and manage the same as owner—*A* allowed to enter into agreement of sale in respect of portion of property—Other eldest sister living with him -Others living not far off—Sisters having other relations to watch their interest *A* held was ostensible owner of property by implied consent of sisters.)

Add after Pt. 2 in the same para :

[Pt. 2a1] Where the father purchases property benami in the name of his son who subsequently sells the same, and the father takes all steps to get the sale deed written and endorses his consent thereto the consent is an express consent. *('49) 1949 Nag L Jour (Notes) 196, Dattatraya* v. *Govind.*

Add after Pt. 2a :

[Pt. 2b] The dealings by the person claiming ostensible ownership must be such as to fix the real owner with notice that he was exercising acts of ownership over property. *1951 Kutch 85 (A I R V 38 C 57 P 8), Shankar Daji* v. *Naranji Nathubhai.*

Add after Pt 3 :

[Pt. 3a] But mere inaction or silence on his part when the name of the transferor was being mutated without anything more cannot be taken as consent either express or implied *1952 Orissa 75 (A I R V 39 C 16 P 17) (DB), Natabar Paricha* v. *Nimai Charan Misra.*

[Pt. 3b] Where one of the two joint and several executors appointed under a will to manage the estate of the deceased, executes the sale deed of an item of the property while the conduct of the other during the sale was such that an implied consent or at least his assurance that he was not opposed to the sale, such executor is estopped from subsequently challenging the sale, on the ground that one executor also could not execute the sale by himself. *('50 1950 Bur L R (H C) 163 (175) (DB). Essaf Golam Mahamed Piperdi* v. *Ariff Mohamed Bham.*

[Pt. c] A consent of a cosharer entitled to a portion to the ostensible ownership of the other cosharer in the joint family house cannot be inferred from the latter's long occupation and sole enjoyment, in the absence of a written record *1950 Kutch 34 (A I R V 37 C 27 P 6, 7) Ladhibai* v. *Rabji Nagshi.*

[Pt. 3d] Where there is no representation by conduct there cannot be implied consent. The mere fact that real owners came to know of the purchaser's conduct after he purchased the property is of no consequence. *1952 Nag 64 (A I R V 39 C 30 P 7 8), Hussain Mohiuddin* v. *Phoolchand.*

Add after Point 4 :

[Pt. 4a1] There must be something more than mere inaction, such as words or conduct on his part which induced the transferee to believe that the transferor was competent to make the transfer. *1952 Orissa 75 (A I R V39 C 16 P 17) (DB), Natabar Paricha* v. *Nimai Charan Misra.* (Mere inaction or silence of person interested during mutation proceedings when name of transferor was being mutated is not consent either express or implied.)

Add after Pt 5 in separate para :

[Pt. 5a] The material date for considering whether a particular person is an ostensible owner is no doubt the date of alienation. But inferences showing consent of the real owner can be made from previous as well as from subsequent conduct. *1952 Kutch 55 (A I R V 39 P 10), Karamshi Vershi* v. *Ratanshi Nenshi.*

Note 15

Add in the Foot Note indicated :

1. ('49) 28 Pat 542 (551) (DB), *Sonar Kapri* v. *Saligram.*

Note 21

Add in the Foot Notes indicated :

1. 1949 Assam 17 (A I R V 36 C 12 P 11, 12, 13, 20 & 21) : I L R (1949) 1 Assam 1 (DB), *Abdul Gafur* v. *Nawab Ali.*

3. 1954 Orissa 244 (Pr 19) (A I R V 41 C 77) (DB), *Dolgovind Mahapatra* v. *Anathbandhu.*

[See however 1952 Nag 64 (A I R V 39 C 30 P 7, 8), *Hussain Mohiuddin* v. *Phoolchand.* (The case was decided on *assumption* that the

principle of the section applied to execution sale. Even on this assumption, it was held on facts that the transferor was not protected.)

5. 1952 Punj 259 (A I R V 39 P 8), *Narsingdas* v *Sohanlal.*

Add after Pt. 6 :

[Pt 6a] Transferee cannot claim protection under the section in respect of wakf property, against God. *1950 All 109 (AIR V 37 C 45 P 21) : I L R (1950) All 1001 (DB). Anjaman Islamia* v. *Latafat Ali.*

Note 22

Add in the Foot Note indicated :

4. 1954 All 595 (Pr 9) (A I R V 41 C 233), *Union Bank Ltd. Utraula* v. *Mst. Ram Rati.* (Property originally belonging to deceased *A* — Partition between two sons of *A* and their mother, each getting one third share— Separate possessions— Partition registered— Death of one of sons — His widow remarrying other son on condition of his gifting his property to her— Gift executed—Sale of entire property in favour of third person— Vendee who had knowledge of partition and separate possession held could not get protection under S 41.)

Add after Pt. 4 :

[Pt. 4a] The section cannot be invoked when transfer is pendente lite and when the transferee knew of the claim of the real owner long before the transfer. *1952 Nag 106 (A I R V 39 C 45 (7) P 24) : ILR (1953) Nag 684. Sadiq Hussein* v. *Co-operative Central Bank, Yeotmal.*

Add after Pt. 5 :

[Pt. 5a] But where the transferee acts on mere inspection of revenue records, such as jamabandi which is not evidence of title, he cannot be said to act in good faith. *1952 Nag 106 (AIR V 39 C 45 (7) P 17, 20) : ILR (1953) Nag 684, Sadiq Hussein* v. *Co-operative Central Bank, Yeotmal.*

Add after Pt. 6 :

[Pt. 6a] Where the daughters who had succeeded to their father's estate allowed their paternal agnate to deal with the property as owner, and the purchaser of the property from the paternal agnate belonged to the same caste and knew the family of the daughter's father, it was held that in purchasing the property, the purchaser did not act in good faith. *1952 Kutch 55 (AIR V 39 P 11), Karamshi Vershi* v. *Ratanshi Nenshi.*

Note 23

Add in the Foot Notes indicated :

1. 1951 Nag 403 (A I R V 38 C 126 P 21) : I L R (1950) Nag 25, *Amroo* v. *Babarao.*

3. 1449 Cal 666 (A I R V 36 C 190 P 38 & 39), (DB), *Chandi Prasad Ganguly* v. *Gadadhar Singha Roy.*

4a. 1952 Nag 106 (A I R V 39 C 45 (7) P 14) : I L R (1953) Nag 684, *Sadiq Hussein* v. *Co-operative Central Bank, Yeotmal.* (The inspection of the Registration Index for 12 years prior to the date of enquiry is not sufficient, as a rule, to discharge the burden in case of mortgages, though it may be true in the case of sale transactions in some cases.) ✠ (50) 1950 Trav-C L R 121 (124, 125) (DB), *Velutha Kunju* v. *Neelacantan Nair.* (Ostensible owner mere trespasser— No title deeds produced — No protection, even if there is mutation in his favour if there is no enquiry in Registry office.)

5. 1952 Nag 106 (A I R V 39 C 45 (7) P 22) : I L R (1953) Nag 684, *Sadiq Hussein* v *Co-operative Central Bank, Yeotmal* (Representations by ostensible owner as to his title to the property long before its sale are not binding on the real owner.) ✠ 1952 Nag 64 (AIR V 39 C 30 P 7, 8), *Hussain Mohinuddin* v. *Phoolchand* ✠ 1951 Nag 403 (A I R V 38 C 126 P 21) : I L R (1950) Nag 25, *Amroo* v. *Babarao.* (Non-inspection of record of rights, where inspection would have disclosed that there was only an agreement to sell in favour of his transferor and that the property belonged to a minor.)

5a. 1949 Cal 666 (A I R V 36 C 190 P 38 & 39) (DB), *Chandi Prasad Ganguly* v. *Gadadhar Singha Roy.*

8. 1954 Orissa 244 (Pr 10) (A I R V 41 C 77) (DB), *Dolgovind Mahapatra* v. *Anathbandhu.*

9. 1952 Nag 106 (A I R V 39 C 45 (7) P 14): ILR (1953) Nag 684, *Sadiq Hussein* v. *Co-operative Central Bank, Yeotmal.* (Inspection of Registration index for 12 years prior to date of enquiry is not sufficient, as a rule to discharge the burden in case of mortgage transactions, though it may be true in case of sale transactions in some cases.) ✠ 1949 Assam 17 (A I R V 36 C 12 P 11, 13, 20 & 21) : I L R (1949) 1 Assam 1 (DB), *Abdul Gafur* v *Nawab Ali* (Laying down rule would fetter the discretion which the law confers on a Judge who is called upon to decide the question in the particular case before him)

[See however 1949 Cal 666 (A I R V 36 C 190 P 38 & 39) (DB), *Chandi Prasad Ganguly* v. *Gadadhar Singha Roy.* (The question whether action amounts to "taking reasonable care" is one of law.) ✠ ('49) 2 Sau L R 203 (205, 206), *Bhupatroy Harilal* v *Shanta Pitamber* (The question whether the transferee had acted with reasonable care is one of fact. But whether from the findings of the lower Courts it can be said that reasonable and sufficient inquiry was made by the transferee to attract the application of S. 41 is a question of law.)]

Add after Pt. 1 :

[Pt. 1a] It is futile to lay down a general rule or test of universal application for finding out what would amount to reasonable care on the part of a transferee in order that he should be able to claim protection under the section. The most that may be said is that a transferee should show that he acted like a reasonable man of business and with ordinary prudence. *1949 Assam 17 (A I R V 36*

C 12 Prs 11, 12, 13, 20 & 21) : I L R (1949) 1 Assam 1 (DB), Abdul Gafur v. *Nawab Ali* ✣ *1949 Cal 666 A I R V 36 C 190 P 38 & 39) (DB), Chandi Prasad Ganguly* v. *Gadadhar Singha Roy.* (Proposed transferor just acquiring her title from her son and grandson — Ordinary businessman would be suspicious about transferor's powers, for transfer to woman from son and grandson is very unusual — Transferee's first care would be to find out if transfer was a genuine transaction for consideration.)

Add after Pt. 4a :

[Pt. 4a1] A mere inspection of revenue record such as jamabandi, which is not evidence of title, is not a sufficient enquiry and the transferee who acts on an entry in the village record of rights as evidence of title of his transferor cannot be said to have acted like a reasonable man of business with ordinary prudence. *1952 Nag 106 (A I R V 39 C 45(7) P 17, 20): I L R (1953) Nag 684, Sadiq Hussein* v. *Co-operative Central Bank, Yeotmal.*

Add after Pt. 6 :

[Pt. 6a] Similarly a mere enquiry whether the property was subject to any mortgage and whether the transferor was in possession is not enough. *1949 Cal 666 (A I R V 36 C 190 Prs 38& 39) (DB), Chandi Prasad Ganguly* v. *Gadadhar Singha Roy.*

Note 24

Add in the Foot Notes indicated :

2. ('49) 28 Pat 542 (550) (DB). *Sonur Kapri* v. *Saligram.* (A plea cannot be allowed to be raised for first time in second appeal when it had not been raised in the lower Courts and no issue had been framed.)
4. See however 1952 Kutch 55 (A I R V 39 P 11), *Karamshi Vershi* v. *Ratanshi Nenshi.* (Case of estoppel must be pleaded.)

Note 24a

Add at the end of the note :

[Pt. 2] If the property which is sold is subject to a mortgage the purchaser will be bound by the mortgage which subsisted at the date of the transfer by the ostensible owner. *1955 N U C (All) 1698 (A I R V 42), Deo Sharma* v. *Chartered Bank of India.*

Note 25

Add in the Foot Notes indicated :

1. 1952 Nag 106 (A I R V 39 C 45 (7) P 7): I L R (1953) Nag 684, *Saliq Hussien* v. *Co-operative Central Bank, Yeotmal* ✣ ('49) 1949 Nag L Jour (Notes) 101, *Ramcharanlal* v. *Fidali.* (Purchaser from members of joint family — Purchaser should show what enquiries he made and how he became satisfied of non-existence of other members.)
2. 1952 Punj 300 (A I R V 39 P 21) (DB), *Amarchand* v. *Laskari Mal.* (Very little evidence would be required to show the benami character of purchase in name of wife) ✣ 1950 Orissa 143 (A I R V 37 C 23 P 10) (DB), *Amruti Dei* v. *Soradamoni Dei*
3. 1952 Orissa 75 (A I R V 39 C 16 P 12, 17) (DB), *Natabar Paricha* v. *Nimai Charan Misra.* (*Held*, on facts, the vendee did not make reasonable inquiries of his vendor's title as required by the section.)

SECTION 43

Add in synopsis after N. 7.

7a. Applicability of S. 43 to transfers of expectations and possibilities - *See* S. 6, N. 7.

Note 2

Add in the Foot Notes indicated :

3. 1951 Pat 315 (A I R V 38 C 69 P 6) (DB), *Abdul Kabir* v. *Jamila Khatun.*
[*See also* 1955 N U C (Pat) 242 (A I R V 42), *Mt. Sundarbati Kuer* v. *Muhammad Alam.* (The rule of law which underlies S. 43 is that, as between the transferor and the transferee, the transferor cannot plead subsequent title to the land transferred, if he had induced the transferee to pay money for the transfer).]
14. 1955 All 288 (Pr 16) ((S) A I R V 42 C 85) (FB), *Ganga Baksh Singh* v. *Madho Singh* ✣ 1955 Mys 8 (Pr 11) ((S) A I R V 42 C 5), *B. V. Sundariah* v. *B. R. Ramasastry* ✣ 1955 N U C (Pak) 1950 (A I R V 42), *Gulam Muhammad Shah* v. *Fateh Muhammad Shah* ✣ 1954 Mad 861 (Pr 9) (A I R V 41 C 284) : I L R (1954) Mad 791 (DB), *Sankari Ammal* v. *Ramchandra Ayyar.*
15. 1952 Nag 29 (A I R V 39 C 15 P 7, 8): I L R (1952) Nag 629, *Ganeshdas* v *Kamlabai.*
16. 1952 Nag 29 (A I R V 39 C 15 P 12): I L R (1952) Nag 629, *Ganeshdas* v *Kamlabai* ✣ 1951 Nag 241 (A I R V 38 C 61 P 23) : I L R (1951) Nag 12, *Kisan* v. *Sitaram.*

Add after Pt. (13) :

[Pt. 13a] In the under-mentioned case the rule in the section has been held to be only an extension of the law of specific performance of contracts. *1955 Mys 8 (P 7) ((S) A I R V 42 C 5), B. V. Sundariah* v. *B. R. Ramasastry.*

Note 4

Add in the Foot Notes indicated :

1. *See also* 1954 All 452 (Pr 4) (AIR V 41 C 61), *Sheo Ram* v. *Gauri Shankar* (In order to get the benefit of S. 43, one of the conditions which must be satisfied is that the contract of transfer was entered into by a person who was competent to contract.)
3. *See also* 1954 Mad 604 (A I R V 41 C 220 P 33) : I L R (1954) Mad 80 (FB), *Subbiah Goundan* v. *Ramaswami Goundan* (In case of transfers of property by an insolvent during his insolvency such transfers are retrospectively validated by reverter under S. 37 of the Provincial Insolvency Act and if the conditions of S 43 of the Transfer of Property Act are fulfilled they may also be supported under

that section. 1933 All 449 (A I R 20), Rup Narain Singh v. Par Gopal Tewari, Relied on.)

Add after Pt. 4 :

[Pt. 5] In the following case the section was held to apply to a case of a sale which was forbidden under the law then existing, but which bar was subsequently removed by the change in law. *('50) I L R (1950) All 311 (315), Hori Lal* v. *Ka yan.* (Sale of land not comprised in occupancy holding forbidden by U P. Act 12 of 1881, becoming saleable under U. P. Act 3 of 1926)

[Pt. 6] Where two out of three trustees transfer the trust property by way of sale, it is not a case of the two conveying trustees having acquired an interest, which they did not possess at the time of the sales. But the sales themselves are invalid transactions. Since the transactions at their inception are in violation of the law relating to transfer of trust properties would not confer any rights on the transferees which would enable them to claim any interest accrued to the transferors and invoke the aid of S 43. *('54) I L R (1954) Mad 537 (565) (DB), Janakirama Ayyar* v. *Nilakanta Ayyar.*

Note 5

Add in the Foot Note indicated :

1. 1955 All 283 (Pr 16) ((S) A I R V 42 C 85) (FB), *Ganga Baksh Singh* v. *Madho Singh* ✣ 1955 N U C (Pak) 1950 (A I R V 42), *Gulam Muhammad Shah* v *Fateh Muhammad Shah*

Add at the end of the note :

[Pt. 2] Where a reversioner has joined in the execution of a deed of gift executed by a Hindu widow the fact that he purports to be one of the donors will not affect his interest under S. 43 The principle laid down in S 43 will not debar the reversioner from claiming the property if succession opens in his favour. *1955 All 288 (Pr 16) ((S) A I R V 42 C 85) (FB , Ganga Baksh Singh* v. *Madho Singh.*

Note 7

Add in the Foot Notes indicated :

1. 1955 N U C (Orissa) 1859 (A I R V 42), *Krishnachandra* v. *Rabindra Narayan Das* ✣ 1953 Mad 637 (A I R 40 C 250 (3) : I L R (1953) Mad 427 (FB). *Juma Musjid Marcara* v. *Kodimani Andra Deviah* (Where the transferor in fact purports to transfer an expectancy or property which he had no right to transfer *without making any representation* that he had authority to transfer, S. 43 will not help ; ✣ ('49) 1949 Bur L R (HC) 625 (627, 630, 631), *H. C. Das* v. *U Ngwe Gaing,* (No inducement — Section does not apply)
2. 1952 All 301 (A I R V 39 C 90 (21) : 7), *Girja Shanker* v. *Jagannath.* (Transferee need not immediately give notice to transferor that he proposes to hold him bound by the agreement) ✣ 1952 Nag 29 (A I R V 39 C 15 P 10) : I L R (1952) Nag 629. *Ganeshdas* v. *Kamlabai.*
3. 1952 Nag 29 (A I R V 39 C 15 P 6) : I L R (1952) Nag 629, *Ganeshdas* v *Kamlabai.*
6. ('54) I L R (1954) Mad 537 (565) (DB), *Janakirama Ayyar* v. *Nilakanta Ayyar.*
7. 1952 Nag 29 (A I R V 39 C 15 P 12, 13): I L R (1952) Nag 629 *Ganeshdas* v. *Kamlabai* ✣ 1951 Nag 241 (A I R V 38 C 61 P 23) : I L R (1951) Nag 12, *Kisan* v. *Sitaram.*
8. 1951 Assam 20 (A I R V 38 C 8 P 13a): I L R (1950) 2 Assam 1 (DB), *Jainur Ali* v *Mt. Chafina Bibi* (Per *Ram Labhaya J.*—The section does not lay down that the erroneous representation must mislead the transferee before he can claim the interest of the transferor acquired after the transfer, and that the conduct of the transferor alone is to be considered)
12. See however 1953 Bom 101 (A I R V 40 C 33 P 7), *Fatehchand Tarachand* v. *Parashram Maghammal.* (The rule of English law as stated in *Holroyd* v *Marshall,* (1862) 10 H L C 191 : 33 L J Ch 193 and *Collyer* v. *Isaacs* (1881) 19 Ch D 342 : 51 L J Ch 14 applies to India—It is true that in India, the law does not recognise any distinction between legal estates and equitable estates, but the rule that a transfer of property which is to come into existence in future, operates upon the property when it comes into existence does not depend upon recognition of any distinction between legal and equitable estates.)

Add before Pt. 1 in the beginning of the first para in Note :

[Pt. 1a] The word 'option' shows that law has only specified one of the various remedies open to the transferee. The transferee can repudiate the contract or he may elect to ask for damages. This he can do under the general law. The relief provided in the first paragraph of this section is additional and it enables him to get at the property itself. *1952 Nag 29 (A I R V 39 C 15 P 10): I L R (1952) Nag 629, Ganeshdas* v. *Kamlabai.*

Add after Pt. 2 :

[Pt. 2a] It need not be in any particular form It can be by word of mouth or by a document. *1952 Nag 29 (A I R V 39 C 15 P 6): I L R (1952) Nag 629, Ganeshdas* v. *Kamlabai*

[Pt 2b] It can be express or implied. *1951 Assam 20 (A I R V 38 C 8 P 13a): I L R (1950) 2 Assam 1 (DB), Jainur Ali* v. *Mt. Chafina Bibi.*

Add after Pt. 7 :

[Pt. 7a.] Where the previous sale is by a registered deed, S. 3 imputes constructive notice of the sale deed and its contents to the subsequent transferee and, therefore, he must be deemed to have taken the sale with the full knowledge that he was

buying a defective title : *1952 Nag 29 (A I R V 39 C 15 P 14) : I L R (1952) Nag 629, Ganeshdas* v. *Kamlabai.*

Note 7a

After Note 7 add the following :

"7a. Applicability of S. 43 to transfer of expectations and possibilities— See S. 6 Note 7.

Note 9

Add in the Foot Notes indicated :

5. 1955 Mys 8 (Pr 14) ((S) AIR V 42 C 5), *B. V. Sundariah* v. *B R. Ramasastry.* (*A* and his sons *B* and *C* who were minors, formed a joint Hindu family. On 1-11-1939 *A* and *B* on their own behalf, and *A* as guardian for *C*, executed a sale deed of certain joint family property in favour of *D* in consideration of *D* paying certain debts binding on the family. Among other debts so paid, *D* paid off certain a ount to a Society *E* who held the property on mortgage. In 1944 when *A* was the president of the Society *E*, *A* got an application from *C* requesting *E* to accept the amounts due from him and convey the property to him A sale-deed was thus executed by *E* in favour of *C* on 1-10-44 of the same property. *D* being dispossessed in 1947 sued *A B* and *C* for possession, *C* contested the suit on the basis of his sale deed

Held, that *A* and *B* were clearly under the belief that they could convey the property to *D* and that if the latter paid off the society he would become the absolute owner and that there was no need for a sale deed from society; that as *A* made such a representation to the plaintiff *D* which the plaintiff was led to believe on account of the position held by *A* vis-a vis the society, Section 43 clearly applied to the case + 1950 Assam 59 (A I R V 37 C 21 P 35) : I L R (1949) 1 Assam 59 (DB), *Gouri Kanta Bhuiya* v. *Kali Kanta Bhattchariya*" (Prior mortgagee purchasing mortgaged property in execution of final decree in redemption suit against him — Puisne mortgagor suing for redemption of prior mortgage — Prior mortgagee ordered to reconvey property to mortgagor on deposit of redemption money by puisne mortgagee —Mortgagor executing sale deed of property before property was reconveyed to him — Subsequent acquisition of title by mortgagor — Purchaser held could enforce sale deed.)

7. 1955 N U C (Pat) 242 (A R V 42), *Mt. Sundarbati Kuer* v. *Muhammad Alam.* (Mortgagor having no title to property mortgaged — Title subsequently acquired to portion of property — Enforcement of mortgage against such portion is valid.)

Add after Pt. (10) as a separat para :

[Pt. 11] After a decree for possession on the basis of a usufructuary mortgage was passed, the equity of redemption was brought to sale by the Official Receiver and purchased by one *N* in 1933 without executing a sale deed After *N's* death his wife *C* sold it to *S* on 30-9-47. It was then realised that there was no legal transference of title from the Official Receiver to *N* and therefore from *C* to *S*. So *C* obtained a sale deed from the Official Receiver on 7-3-1949. It was held that neither *N* nor his wife *C* had any legal and conveyable title on 30-9-1947, when *C* purported to sell the equity of redemption to *S* The subsequent sale deed executed by Official Receiver in 1949 did not clothe *S* with title with effect from 1947 because under S. 43, Transfer of Property Act, it was the interest and title that *C* acquired in 1949 that the sale in favour of *S* by *C* in 1947 could operate and not before 7-3-1949 *1954 Mad 861 (Pr 4, 7, 8, 12) (AIR V 41 C 288) : I L R (1954) Mad 791 (DB), Sankari Ammal* v. *Ramchandra Ayyar.*

Note 10

Add in the Foot Note indicated :

2. 1951 Pat 315 (A I R V 38 C 69 P 6) (DB), *Abdul Kabir* v. *Jamila Khatun* + ('50) 1950 B r L R (HC) 163 (176) (DB), *Essof Golam Mohamed Piperdi* v *Ariff Mohamed Bham.* (Joint and several executors — sale of property by one alone — Such executor subsequently acquiring probate in his name, effect being that title vested in him alone — There is feeding of estoppel.)

Note 11

Add after Pt. 3 :

[Pt. 3a] A pre-emptor who has obtained a decree for pre-emption and deposited the pre-emption amount in Court but who is unable to obtain possession of the property due to defect in title of the vendor, is entitled to obtain possession from the vendor by invoking the benefit of S. 43 when the latter subsequently becomes the owner of the property and enters into possession. It cannot be contended in such a case that the contract of sale does not subsist when the decree for pre-emption has been passed. The right of pre-emption is a right of substitution, and the effect of a decree for pre-emption is to substitute the pre emptor for the vendee. All rights available to, and all duties cast upon, the vendee, are taken over by the pre-emptor. Rights which were available against the transferee or vendee will also be available to the vendor against the pre-emptor. *1954 All 452 (Pr 4, 5) (AIR V 41 C 61), Shiv Ram* v. *Gauri Shankar.*

Note 12

Add in the Foot Note indicated :

3. 1954 Mys 142 (Pr 4) (A I R V 41 C 59) : I L R (1953) Mys 530, *Shivapadagowda* v. *Anniahchar* (Principle of section does not apply to cases of involuntary sales) + 1952 All 287 (AIR V 39 C 90 (17) P 3, 4), *Kamata Raj* v. *Nandkishore.*

Note 13

Add in the Foot Note indicated:

1. 1952 Nag 29 (A I R V 39 C 15 P 7, 8) : I L R (1952) Nag 629, *Ganeshdas* v. *Kamlabai.*

Add after Point 1 :

[Pt. 1a] It is not necessary that he should have notice of *the exercise* of the option by the first transferee. *1952 All 301 (A I R V 39 C 90 (21) P 7), Girja Shankar* v. *Jagananth.*

[Pt. 1b] It is not necessary to establish that the second transferee had known that the transferor's title was defective on the date of the first transfer and that the transferor later acquired interest which he had previously purported to transfer. *1952 All 301 (A I R V 39 C 90 (21) P 7), Girja Shankar* v. *Jagannath.*

Add after Pt. 2 in the same para :

[Pt. 2a] In the undermentioned case it was held that from the mere fact that the first mortgage of property, part of which was acquired by the mortgagor subsequently, was registered, it cannot be assumed that the second mortgagee of the share mortgaged previously but acquired subsequently, had notice of the first mortgage specially when the first mortgage qua the subsequently acquired share in the property was bad and conveyed merely an equitable interest, and the second mortgage was not made subject to the first mortgage and there was no mention in the second mortgage deed of the first mortgage. *1952 All 301 (AIR V 39 C 90 (21) P 7), Girja Shankar* v. *Jagannath.*

[Pt. 2b] But the subsequent transferee must be deemed to have had notice of the existence of the option, if he had knowledge of the previous the transaction. *1952 All 301 (A I R V 39 C 90 (21) P 7), Girja Shankar* v. *Jagannath.*

Add after Pt 2b as separate para :

[Pt. 2c] If there is no subsisting equity in favour of the first transferee in the shape of the option mentioned in the first paragraph, the equity mentioned in the second paragraph does not come into play. *1952 Nag 29 (A I R V 39 C 15 P 7, 8) : I L R (1952) Nag 629, Ganeshdas* v. *Kamlabai.*

SECTION 44

Note 4

Add in the Foot Note indicated :

3. ('40) 8 J and K L R 34 (36). *Habib Kuttoo* v. *Pt Sham Lal Bhatt* (Transfer of interest in agricultural holding—Suit is cognizable by Civil Court and not by a Revenue Court.)

Add after Pt. 3 in the same para :

[Pt. 3a] Where there is no partition between the co-sharers of a tenancy right, a transferee from one of them is not entitled to a declaration of his title to and khas possession of a specified plot of land forming a part of the tenancy. *1950 Assam 1 (A I R V 37 C 1 P 10 & 11) = I L R (1949) 1 Assam 40 (D B), Bolaram* v. *Dandiram Kumar.*

Add after Pt. 5 :

[Pt. 5a] A stranger transferee from such a co-sharer in exclusive possession of any portion of an undivided holding not exceeding his own share, will also have the same rights. *1950 Pepsu 5 (A I R V 37 C 3 P 3) : 1 Pepsu L R 312, Ohanan Singh* v. *Santa Singh.*

Note 6

Add in the Foot Note indicated :

1. 1952 Mad 419 (A I R V 39 P 28) : ILR (1952) Mad 835 (F B), *Peramanyakam Pillai* v. *Sivaraman.* (('90) I L R 13 Mad 275, Venkatarama v. Meeralabai held still good law.)

Note 8

Add in the Foot Notes indicated :

1. 1955 N U C (Orissa) 1119 (A I R V 42), *Bhikari Behara* v. *Dharmananda Natia.* (The stranger-purchaser could not be allowed to take forcible possession by evading the provisions of S 44, T P. Act and if he had contravened and obtained possession, the plaintiffs were entitled to the protection of law and could evict defendant the stranger-purchaser.) ✠ 1952 Cal 253 (A I R V 39 C 75 (26) P 7) : I L R (1951) 2 Cal 263, *Lal Behari Samanta* v. *Gourhari Dawn.* (In a suit by other co-sharers against the defendant, transferee, for an injunction in terms of this para. the declaration of right of joint possession is bad in law.)
3. 1955 N U C (Orissa) 1119 (A I R V 42), *Bhikari Behara* v *Dharmananda Natia.* ✠1952 Cal 253 (A I R V 39 C 75 (26) P 10) : I L R (1951) 2 Cal 263, *Lal Behari Samanta* v. *Gourhari Dawn.*
[*See also* 1950 Cal 111 (A I R V 37 C 33 P 13) : I L R (1951) 1 Cal 103 (D B), *Boto Krishna Ghose* v. *Akhoy Kumar Ghose.* (Upon transfer of share to member, house does not cease to be one belonging to undivided family.)]

Add after Pt. 2 as separate para :

[Pt. 2a] Para. 2 of the section does not, however, create a positive right in favour of the members of the family. The provisions are of a negative nature and it is on proof of sufficient defence that the Court will not forcibly put the stranger in joint possession. Therefore, a suit by a member who has still an interest in the dwelling house belonging to an undivided Hindu family impleading only the stranger transferee for permanently restraining the latter from taking joint possession, is misconceived and is not maintainable. *1951*

Cal 412 (AIR V 38 C 110 P 14, 18, 20), Jogendra Nath v. *Adhar Chandra.*

2a See however 1952 Cal 253 (A I R V 39 C 75 (26) P 12) : I L R (1951) 2 Cal 263, *Lal Behari Samanta* v. *Gourhari Daun.* (Co-sharers are given a right under para. 2 of this section to ask for an injunction restraining the stranger transferee from exercising any rights of joint possession in respect of the joint family dwelling house — NOTE. — 1951 Cal 412 (A I R V 38 C 110), *Jogendra Nath* v. *Adhar Chandra*, was not brought to the notice of his Lordship.)

Add after Pt. 3 as separate para :

[Pt. 3a] The fact that certain co sharers did not exercise the right under S 44 on a previous occasion will not debar them from exercising that right on a subsequent occasion upon a new transfer under deed of a share of dwelling house. *1952 Cal 253 (A I R V 39 C 75 (26) P 7) : I L R (1951) 2 Cal 263, Lal Behari Samanta* v. *Gourhari Dawn.*

Note 9

Add in the Foot Note indicated :

1. 1955 N U C (Cal) 25 (A I R V 42), *Basanta Kumar Sen* v. *Gour Hari De.*

Add after Pt. 1 :

[Pt. 1a] A big tank appertaining to a dwelling house is also a part of it. *1952 Cal 253 (A I R V 39 C 75 (26) P 8) : I L R (1951) 2 Cal 263, Lal Behari Samanta* v. *Gourhari Dawn.*

Add after Pt. (2) :

[Pt. 2a] A garden or open land and/or a tank cannot by itself, that is, apart from or independently of any hut or structure, reasonably constitute a "house" or a "dwelling house." Once they are dissociated from this last quoted physical component by partition or otherwise they do not retain their original character and, considered separately or apart from the "house" or "dwelling house" proper, they are no longer a "dwelling house" either on the theory of convenience or physical affinity or appurtenance or on the theory of physical integrity or parts or components. *1955 N U C (Cal) 25 (AIR V 42), Basanta Kumar Sen* v. *Gour Hari De.*

Add after Pt. 5 :

[Pt. 5a] It may be that if a permanent and irrevocable lease is granted to a third party a question may arise as to whether the character of the house as a dwelling house, in so far as the owners are concerned, still survives. No such question can possibly arise where what has been created is nothing more than a tenancy of the ordinary kind. *1953 Cal 257 (A I R V 40 C 94 P 6): I L R (1954) 1 Cal 384 (DB), Dulal Chandra* v. *Gosthabehari Mitra.*

SECTION 45

Note 6

Add after Pt. 12 as separate para :

[Pt. 12a] In the undermentioned case from Travancore-Cochin, it was held that under the general law of transfer when a transfer is made in favour of more persons than one, the transferees take as tenants-in common in equal shares unless a contrary intention is expressed in the deed of transfer, that under S. 17, Travancore Nayar Regulation (1 of 1088) the presumption is in favour of tenancy-in-common in the case of gift by the father or husband and that it must therefore be all the more so when the gift is made by father and his brother. *1953 Trav-Co 89 (A I R V 40 C 29 P 3, 4) (DB), Korulla Geverghese* v. *Krishnan Nair.*

SECTION 48

Note 3

Add in the Foot Note indicated :

2. 1950 Ajmer 59 (AIR V 37 C 73 P 8), *Chouth Mal* v *Hiralal.* (Agreement to sell land executed in favour of *A* — Subsequently mortgage of same land executed in favour of B — Later on sale deed executed in favour of *A* — Mortgage held must have its effect as against subsequent sale though agreement to sell was executed before mortgage.)

Note 14

Add in the Foot Notes indicated :

1. *See also* 1954 Mad 197 (AIR V 41 C 82 P 6), *I. T. Officer, Salem* v. *Indian Insurance and Banking Corporation.* (Crown debts cannot for all purposes be put into the category of unsecured debts—They occupy a special and privileged category of their own.)

2. *See also* 1954 Mad 197 (AIR V 41 C 82 P 6), *I. T. Officer, Salem* v. *Indian Insurance and Banking Corpoation.* (It is only a secured debt, that is, one in respect of a strictly specified security which can have priority over a Crown debt. The rents and profits collected by a receiver appointed by a Court in a simple mortgage suit in prosecution of an equitable remedy open to the mortgagee, do not constitute part of the security as such. Although such rents and profits can be deemed by the mortgagee in priority to other simple creditors, they cannot be appropriated by the mortgagee in priority over a Crown debt such as Income-tax: 1934 Rang 321 (A I R V 21) (DB), Ma Joo Tean v. Collector of Rangoon, Doubted; 1940 Mad 703 (AIR V 27), Sambasiva Chettiar v. Secretary of State, Foll.)

SECTION 50

Note 1

Add after Pt. 2 as separate paras :

[Pt. 3] The section contemplates payment of rent in good faith for *the same tenancy* to a wrong person. Where a sub-

tenant pays rent to the tenant who is his immediate landlord in respect of the contractual sub tenancy without the knowledge that he had become a statutory tenant directly under the landlord such payment cannot be relied upon by him as a payment to the landlord in respect of the statutory tenancy. *1951 Cal 394 (AIR V 38 C 98 P 12) (DB), Narendra Krishna Bose* v. *Great Eastern Hotel, Ltd.*

[Pt. 4] It has been held that this section is subject to the doctrine of *lis pendens* contained in S. 52. If, therefore, the tenant makes any payment to the mortgagor during the pendency of the suit for redemption he does so at his own risk and he cannot claim protection under this section. *1954 Sau82 (Pr 4) (A I R V 41 C 35), Tribhovandas Bechardas* v. *Mangaldas Hargovindas.*

Note 2

Add in the Foot Note indicated :

8. 1955 N U C (Cal) 931 (AIR V 42), *Naba Kumar Singhe* v. *Jamini Ghose.* (Even though S. 72 of the Bengal Tenancy Act may not apply to the case of tenants of a darpatnidar whose tenancy is annulled after an 'astam' sale, the tenants may claim relief in regard to payments bona fide made by them to the outgoing landlords under S. 50, T. P. Act.)

SECTION 51

Note 1

Add in the Foot Notes indicated :

1. *See also* 1953 Trav-Co 349 (A I R V 40 C 129 P 7) (DB), *Sirkar* v. *Mahadeva Iyer.* ("What is affixed to the soil belongs to the soil" is not a maxim of general jurisprudence and does not represent the law of India.)

8. *See also* 1953 Pepsu 45 (A I R 40 C 24, P 4), *Milkhi Ram* v. *Jiwan Singh.*

10 1952 Mys 117 (AIR V 39 P 5) : I L R (1952) Mys 384, *Sidde Gowda* v *Nadakala Sidda Naika* ✣ 1951 Ajmer 18 (A I R V 38 C 12 P 4), *Panchu Lal* v *G. Daniel.*

11. ('51) 1951 Nag L Jour (Notes) 85, *Ramdhar* v. *Dularibai.*

Add at the end of the Note as a separate para:

[Pt. 14] The question of improvements made by a stranger-purchaser in the homestead purchased by him from one of the coparceners cannot be decided in a suit brought by the coparceners for declaration of their title and for recovery of possession. It can be gone into when the stranger purchaser sues for partition of the homestead and the coparceners seek their remedy under S. 4 of the Partition Act (1893). *1955 N U C (Orissa) 1119 (A I R V 42), Bhikari Behara* v. *Dharmananda Natia.*

Note 4

Add in the Foot Note indicated :

1. 1952 Mys 117 (A I R V 39 P 5) : I L R (1952) Mys 384, *Sidde Gowda* v. *Nadakala Sidda Naika.*

Note 6

Add in the Foot Note indicated :

1 1953 All 449 (A I R V 40 C 208 P 14) (DB), *Lalta Prasad* v. *Brahmanand.*

Add after Pt. 3 :

[Pt. 4] A contrary view has, however, been taken in the undermentioned Allahabad case that considerations of equity do not arise in the case of auction sale. *1953 All 449 (AIR V 40 C 208, P 14) (DB), Lalta Prasad* v. *Brahmanand.*

Note 7

Add after Pt. 7 :

[Pt. 8] The making of constructions over sir land was held not to be an improvement of the land as sir land, the constructions being of no use to the proprietor of the land who would presumably use it for the purpose of cultivation. *1953 All 406 A I R V 40 C 188 P 16) : ILR (1954) 2 All 675 (DB), Pheku Chamar* v. *Harish Chandra.*

[Pt. 9] It has been held that "improvement" connotes an idea of permanence namely, some permanent benefit which would accrue to the reversioner or remainderman *1954 Cal 345 (Pr 5, 8) (A I R V 41 C 115) Bimal Chandra Das* v. *Manmatha Nath Das.*

Note 8

Add in the Foot Notes indicated.

2. 1952 Orissa 239 (A I R V 39 P 13), *Manohar Naik* v. *Brija Mohan.*

2a. 1952 Orissa 239 (A I R V 39 P 13), *Manohar Naik* v. *Brija Mohan* ✣ ('51) 1951 Nag L Jour (Notes) 85, *Ramdhar* v. *Dularibai*

3. 1952 Orissa 239 (A I R V 39 P 13), *Manohar Naik* v. *Brija Mohan* ✣ ('51) 1951 Nag L Jour (Notes) 85, *Ramdhar* v. *Dularibai.*

4. 1952 May 117 (A I R V 39 P 6) : I L R (1952) Mys 384, *Sidde Gowda* v. *Nadakala Sidda Naika* ✣ 1952 Orissa 239 (A I R V 39 P 13), *Manohar Naik* v. *Brija Mohan* ✣ ('51) 1951 Nag L Jour (Notes) 85, *Ramdhar* v. *Dularibai.*

8. 1955 All 339 (S) A I R V 42 C 97 P 67) (DB), *Ram Charan* v. *Bhagwan Dei.* (Sale certificate standing in name of transferor showing that he had purchased property and not only mortgagee rights therein—It is a circumstance which might lead transferee to believe that he was absolutely entitled to property.) ✣ 1955 Hyd 101 (Pr 10) (A I R V 42 C 25) : I L R (1954) Hyd 822, *Jahangir Begum* v. *Gulam Ali Ahmed.*

13. 1955 Hyd 101 (Pr 10) (AIR V 42 C 25) : ILR (1954) Hyd 822, *Jahangir Begum* v *Gulam Ali Ahmed.* Where the plaintiff wrote a letter to the defendant that he was agreeable to sell the

land to a third person saying that the agreement was only nominal in his name and that the sale was to be in favour of the defendant.

Held, that the defendant rightly believed in good faith that he became entitled to the property.) ✠ 1953 Pepsu 45 (A I R V 40 C 24 P 6), *Milkhi Ram* v. *Jiwan Singh*. (Vendee purchasing ancestral land from Jat with sanction of Collector—Expenditure incurred bona fide for its improvement—Suit by minor for possession—Failure to prove necessity for full amount—Setting aside of sale—Vendee has right to compensation) ✠ 1955 All 339 ((S) AIR V 42 C 97 P 67.) (DB) *Ram Charan* v. *Bhagwan Dei*. (Where the sale certificate standing in the name of the transferor showed that the transferor had purchased the property and not only the mortgagee rights therein it is a circumstance which might lead the transferee to believe that he was absolutely entitled to the property.)

14. 1953 All 406 (A I R V 40 C 188 P 16 : I L R (1954) 2 All 675 (DB), *Pheku Chammar* v. *Harish Chandra*. (Licensees making constructions over sir land—*Held* it was impossible to say that they believed in good faith that they were absolutely entitled to the property.)

Add Pt. No. (7a) at the end of the first para of the Note : and add the following case in the Foot Note as 7a :

7a. *See* 1952 Orissa 239 (AIR V 39 P 13), *Manohar Naik* v. *Brija Mohan*.

Add after Pt. 11 :

[Pt 11a] Where a transferee purchases property from a limited owner without making any inquiry, the negligence may be of such a gross type as to lead to an inference of want of good faith. But where some inquiry has been made and the transferee has been misled by a wrong view of law it cannot be held that he was grossly negligent. *1952 Orissa 239 (AIR V 39, P 13), Manohar Naik* v. *Brijamonan.*

Note 9

Add in the Foot Notes indicated :

1. *See also* 1953 All 406 (AIR V 40 C 188 P 16) : I L R (1954) 2 All 675 (DB), *Pheku Chammar* v. *Harish Chandra*. (Licensees making constructions over sir land—*Held* it was impossible to say that they believed in good faith that they were absolutely entitled to the property.)

3. 1952 Nag 98 (A I R V 39 P 16) : I L R (1951) Nag 895 (DB), *Subhan Ramji* v. *Madhorao Narayanrao*

Add after Pt. 7 :

[Pt. 8] According to the law in the State of Travancore-Cochin a tenant who effects improvements in the property, though there is no provision in that behalf contained in the lease deed but the making of such improvements is not prohibited, is entitled to claim value therefor and retain possession of the property until such value is paid to him. *1954 Trav Co 471 (Pr 3) (A I R V 41 C 168) : I L R (1954) Trav-Co 841 (FB), Eipu Varkey* v. *State.*

Note 10

Add in the Foot Notes indicated :

1. 1955 Ajmer 23 (Prs 4, 5) (A I R V 42 C 24), *Panchulal* v. *P. William Sawayer* ✠ 1952 Mys 117 (A I R V 39 P 5) : I L R (1952) Mys 334, *Sidde Gowda* v. *Nadakala Sidda Naika* ✠ 1952 Trav-Co 195 (A I R V 39 P 14) (DB), *Raman Pillai* v. *Ramakrishna Pillai*. (He may be entitled to value of improvements if he comes into possession and makes improvement bona fide.) ✠ 1951 Ajmer 18 (A I R V 38 C 12 P 4), *Panchu Lal* v. *Daniel*

4. 1950 All 535 (A I R V 37 C 219 P 5), *Dhilloo Pandey* v *Mt Sheoraji* (Encroachment on plaintiff's land by construction - Suit for possession of land by plaintiff after demolition of construction — Court has no power to grant decree for damages instead of decree for possession of land.)

6. *See also* 1953 Trav-Co 349 (A I R V 40 C 129 Prs 7, 8) (DB), *Pheku Chammar* v. *Harish Chandra*. (Proceedings in ejectment have invariably recognised the right of a trespasser to remove the improvements he had made — Such right denied to the trespasser — Order awarding compensation to him was held proper.)

Add after Pt. 3 :

[Pt. 9] Under S. 9, Travancore Land Conservancy Act (4 of 1091) the Government have the power to eject a trespasser from the Government land and the trespasser so ejected will undoubtedly have a right to remove the improvements he had effected, unless the right to remove the improvements had been lost by an unequivocal order of forfeiture passed by the State under the section. Where no such order is passed the rights of parties have to be determined without reference to the provisions of the Act. *1953 T C 349 (A I R V 40 C 129, P 6) (DB), Sirkar* v. *Mahadeva Iyer.*

Note 11

Add in the Foot Note indicated :

1. *See also* 1953 Pepsu 45 (A I R V 40 C 24 P 6), *Milkhi Ram* v *Jiwan Singh* (Vendee purchasing ancestral land from Jat with sanction of Collector — Expenditure incurred bona fide for its improvement—Suit by minor for possession — Failure to prove necessity for full amount — Setting aside of sale — Vendee has right to compensation)

Note 18

Add in the Foot Notes indicated :

2. 1951 Ajmer 18 (A I R V 38 C 12 P 4), *Panchu Lal* v *G Daniel.*

4. ('51) I L R (1951) Trav-Co 282 (285) (DB), *P. Matha Panickan* v. *Ouseph.* (The fruit-bearing trees have to be valued on the basis of the yield thereof. The normal rule for "dropping" is that one-fourth of the total number of nuts on a tree has to be deducted The normal rule would seem to be one-fourth in respect of maintenance as well.)

Note 19

Add in the Foot Note indicated :

1. 1952 Mys 117 (A I R V 39 P 6) : I L R (1952) Mys 384 *Sidde Gowda* v *Nadakala Sidda Naika*. (The amount of expenditure made has occasionally very little to do with the question of value of improvement.)

Note 22

Add in the Foot Notes indicated :

1. *See also* ('51) 1951 Nag L Jour (Notes) 85, *Ramdhar* v. *Dularibai*
6. *See also* ('51) 1951 Nag L Jour (Notes) 85, *Ramdhar* v. *Dularibai*
11. 1951 Pat 600 (A I R V 38 C 168 P 6) (DB), *Chhedi Manjhi* v. *Mahipal Bahadur Singh*.
19. *See also* 1951 Pat 600 (AIR V 38 C 168 P 6) (DB), *Chhedi Manjhi* v. *Mahipal Bahadur Singh*. ('99) I L R 21 All 496 (PC) *Beni Ram* v. *Kundanlal*, Foll.)
23. 1951 Pat 600 (A I R V 38 C 168 P 6) (DB) *Chhedi Manjhi* v. *Mahipal Bahadur Singh*. (Where due to doubtful character of the structures it was difficult for the landlord to take prompt action for the removal of the structures, the mere erection by the tenant of permanent structures upon the land in the knowledge of and without interference by the lessor will not suffice to raise the equitable right against the latter.)

SECTION 52

In section 52,

(i) For the words "in the Provinces, or established beyond the limits of the Provinces" the words "within the limits of Part A States and Part C States or established beyond such limits" were *substituted*—A. L. O. 1950.

(ii) For the words "within the limits of Part A States and Part C States" the words "within the limits of India excluding the State of Jammu and Kashmir", shall be *substituted*. —*Substituted* by the Part B States (Laws) Act, III of 1951 (S. 3 and Sch.) [1-4-1951]

Note 1

Add in the Foot Notes indicated :

1. *See also* 1954 Sau 82 (Pr 4) (A I R V 41 C 35), *Tribhovandas* v. *Mangaldas*. (The rule of lis pendens is based not on the doctrine of novice but on expediency, that is, necessity for final adjudication.)
2. ('50) 1950 Trav-Co L R 23 (29) (DB), *T. Natarajaier* v. *Narayana Nadar*.
12 1953 Mad 71 (A I R V 40 C 23 P 8) (DB), *Arunachalam* v *K. N. Lingiah & Bros*. (Charge created by compromise decree—Purchase during pendency of suit is hit by lis pendens even though purchase is for value without notice of charge.) ✠ ('50) 55 Mys H C R 174 (178) (DB), *Kempe Gowda* v. *Ramchandra Setty*.

Note 2

Add after Pt. 2.

[Pt. 2a] Principles underlying S. 52 apply in Travancore-Cochin, though Act does not. *1951 Trav-Co 187 (A I R V 38 C 73 P 4), Narayanan* v. *Sankaran*. ✠ *1955 NUC (Trav-Co) 1043 (AIR V 42), Karuna Karan Pillay* v. *Raman Pillay*.

[Pt 2b] The principles of the section applied in Gondal State even though the T. P. Act did not apply. *(46-52) I D 39598 (Sau), Nurmamad Suleman Kureshi* v. *Surya Kant Sakarchand*.

Note 4

Mark new Pt. 1a at the end of the first sentence of the note and *add* the following case in the foot notes before Foot Note 1 :

1a 1949 Bom 367 (AIR V 36 C 96 P 11, 12, 14): ILR (1949) Bom 480 (DB), *Digambarrao Deshpande* v. *Ranga Rao Desai*. (Once a judgment is duly pronounced by a competent Court in regard to the subject-matter of the suit in which the doctrine of lis pendens applies that decision is *res judicata* and binds not only the parties thereto but also the transferees pendente lite from them.) ✠ ('51) I L R (1951) Trav-Co 32 (38), *Kesavan Madhavan* v *Mohammad Noohu Ahima Beevi*.

Note 6a

Add in the Foot Note indicated :

1. 1953 Mad 71 (A I R V 40 C 23 P 8) (DB), *Aruna Chalam* v. *K. N. Lingiah & Bros*. (Charge created by compromise decree—Decree not satisfied—Purchase of property during suit is hit by rule of lis pendens irrespective of the fact that the purchaser is a *bona fide* purchaser without notice.)

Note 7

Add in the Foot Notes indicated :

1 1955 N U C (Nag) 1236 (A I R V 42), *Rambai Harikisan* v. *Champalal* ✠ 1952 Pat 9 (A I R V 39 C 5 P 5, 7, 9): 30 Pat 317, *Dirpal Singh* v. *Karnam Chand Mahton*. (Holding sold after payment of landlord's fee and before landlord commenced execution of rent decree—Landlord purchasing the holding at the execution sale acquires no title) ✠ 1951 Pat 613 (A I R V 38 C 174 P 4, 5, 10), *Narayan Prasad Sukul* v *Raj Kishore Mishra* (Right to property existing in stranger even before institution of suit — Fact that title to property in pursuance of the right was perfected during pendency of suit does not affect the right.) ✠ 1950 Orissa 210 (A I R V 37 C 37 P 5) : I L R (1950) Cut 486 (D B), *Sheik Bikala* v *Sheik Ali* ✠ ('46-52) I D 39627 (All), *Khurshed Jehan Begam* v. *Roshan Jehan Begam*. (When application under S. 11, U. P. Enc. Est. Act, presented, sale under S 24, U.P. Enc. Est. Act, not confirmed—But when Judge considering "sufficient cause," sale found confirmed—Confirmation operates retrospectively with result that on date of presentation property is transferred and title vested in auction purchaser—Lis pendens does not apply.)
4. ('49) 27 Mys L Jour 61 (67, 69) (DB), *Subbiah Setty* v. *Krishnamurthy*. (Suit on mortgage before suit for maintenance was instituted against mortgagor—Sale held in mortgage suit during pendency of maintenance suit is not affected by charge created in the maintenance suit.)

See also F N 5 in Note 31.

5. See also F N 6 in Note 31.

Note 9

Add in the Foot Note indicated :

6. 1953 Trav-Co. 573 (A I R V 40 C 223 P 2), *Lakka Devassya* v *Eapen Thomman.* (Where the suit was for redemption of the mortgage in favour of the 1st defendant and not for the redemption of the sub-mortgages granted by the 1st defendant, it did not mean that the plaintiff was redeeming the sub-mortgage directly and therefore the transfer of possession by sub-mortgagees in favour of the transferee's transferee of the mortgage right could not be a transfer which could be vitiated by the pendency of the proceeding which was only for the redemption of the mortgage.)

Note 10

Add in the Foot Note indicated :

8. 1955 N U C (Pat) 231 (A I R V 42), *Anjani Kumar* v. *Mt. Sanjoga Kuer.*

Note 11

Add in the Foot Notes indicated :

11. 1953 Mad 71 (A I R V 40 C 23 P 8) (D B), *Arunachalam* v. *K. N Lingiah & Bros.* (Charge created by compromise decree — Decree not satisfied —Purchase of property charged is hit by rule of lis pendens irrespective of whether the transaction is *bona fide* or not.) ✠ ('46 52) I D 39601 (T C) (DB) *Ahammathu Muthaliyar* v. *Chaithu Chikkendhar* (Lis continues until a sale certificate is issued to purchaser at auction sale in execution of the mortgage decree)

12. 1955 N U C (Pat) 231 (A I R V 42), *Anjani Kumar* v. *Mt Sanjoga Kuer.*

See also ('45-52) I D 39595 (Sau), *Nurmamad Suleman Kureshi* v. *Suryakant Sakarchand* (Principle of lis pendens applies in Gondal State though T. P. Act is not in force.)

13. ('50) 55 Mys H C R 174 (179) (DB), *Kempe Gowda* v. *Ramchandra Setty*

13b. 1951 Orissa 306 (A I R V 38 C 75 P 16) : I L R (1949) Cut 335 (D B), *Tirthabasi Ghose* v. *Bhuyani Trinayani Dasi*

Add after Pt. 13b as separate para:

[Pt. 13c] Even in the case of a decree creating only declaratory charge and not an executable charge the lis continues until the possibility of enforcing the charge by a separate suit remains. *1950 Mad 396 (A I R V 37 C 178 P 3), Rajgopala Chetty* v. *Abdul Shukkoor.*

[But see 1951 All 141 (A I R V 38 C 16 P 67) : I L R (1953) 1 All 231 (F B), *Mahesh Prasad* v. *Mt. Mundar.*]

Note 12

Add in the Foot Note indicated :

4. 1951 Nag 194 (A I R V 38 C 45 P 18) : I L R (1951) Nag 241, *Madholal* v. *Gajrabi.* (Where the aution sale takes place after the rejection of objection under O. 21 R. 58 but before the institution of suit under O 21, R. 63 it would be affected by the doctrine of lis pendens)

Note 13

Add in the Foot Notes indicated :

21. 1955 N U C (Pat) 231 (A I R V 42), *Anjani Kumar* v. *Mt. Sanjoga Kuer* ✠ 1951 Nag 194 (A I R V 38 C 45 P 18): I L R (1951) Nag 241, *Madholal* v. *Gajrabi* ✠ ('50) 55 Mys H C R 171 (179) (DB), *Kempe Gawda* v. *Ramachandra Setty* ✠ ('46 52) I D 39605 (T C) (D B), *Ahammathu Muthaliyar* v. *Chaithu Chikkendhar* (The burden of proving collusion is on the party alleging it.)

24. 1954 Mys 26 (A I R V 41 C 11 P 10): I L R (1953) Mys 332, *Earamma* v. *Nathegowda.* (Where during the pendency of a collusive maintenance suit by a wife against her husband a person *bona fide* purchases property of the husband, the charge subsequently created in favour of the wife on such property cannot be allowed to prevail over the purchaser's superior rights.)

Add after Pt. 20 :

[Pt. 20a] The rule of lis pendens will prevail, no matter whether the suit is contentious or not unless there is collusion. *('46-52) I D 39606 (T C) (DB), Ahammathu Muthaliyar* v. *Chaithu Chikkendhar.*

Add at the end of the Note :

[Pt. 28] A suit may be collusive in its very inception or a decree may be obtained by collusion in a suit which was honestly begun. *1955 Trav-Co 3 (Pr 7) ((S) AIR V 42 C 3) : I L R (1954) Trav-Co 794 (DB), Lakshmi Ganapakiam* v. *Thynes Nadar.* (When the parties to a suit enter into an agreement for the express purpose of defeating the rights of a transferee *pendente lite* and a decree is passed in terms of the agreement to doctrine of *lis pendens* will not apply to the case. 7 Trav L R 42, Sankaran Padmanabhan v. Sakaran Eraviar; ('28) 18 Trav L J 478, Chellakannu v. Kochan and ('28) 18 Trav L J (S N) 147, Dissented from.)

Note 14

Add in the Foot Notes indicated :

2. 1952 Pat 9 (A I R V 39 C 5 P 5) : 30 Pat 317 (DB), *Durpal Singh* v. *Karamchand Mahton.* (To make lis pendens act as notice to purchaser suit must relate specifically to estate and not to money secured on it.) ✠ 1951 Orissa 41 (AIR V 38 C 16 P 7) : I L R (1950) Cut 195, *Giridhari* v. *Abdul Khan.* (Suit for rent commenced as a money suit—No prayer for declaration or enforcement of statutory charge created by S. 71, Orissa Tenancy Act—Execution of decree is not of necessity and of essence a proceeding relating to any right in immovable property—Decree is only money decree and enforceable as such until occupancy holding is attached.)

5. 1950 Bom 278 (A I R V 37 C 80 P 17) : I L R (1950) Bom 114 (DB), *Ganpatrao Vishwanathappa* v. *Bhimrao Sahibrao.* (Attachment of the joint family property in execution of a money decree obtained against the father alone—Partition taking place between father and sons after date of attachment—S. 52 has no application to the partition.)

11. 1951 All 141 (A I R V 38 C 16 P 21, 55, 67) : I L R (1953) 1 All 284 (F B), *Mahesh Prasad* v. *Mt. Mundar.* (1943 Oudh 354 (A I R V 30)

(FB), *Abdul Ghaffar Khan* v. *Ishtiaq Ali*, Dissent; 1939 All 687 (A I R V 26), *Indra Narain* v. *Mohammad Ismail*, Overruled.)

Mark new Pt. 1a at the end of the first sentence in the Note and add the following case in the Foot Notes before Foot Note 1.

1a. ('50) 55 Mys H C R 174 (195) (DB), *Kempe Gowda* v *Ramchandra Setty*. (It is not enough if the property is specified without the right to it being directly in issue.)

Add after Pt. 11 :

[Pt. 11aa] The charge, however, to attract the provisions of this section must be a charge within the meaning of S 100 of the Act *1951 Orissa 41 (A I R V 38 C 16 P 9) : I L R (1950) Cut 195 (DB), Giridhari* v. *Abdul Kuan*. (Charge declared by S. 14, Orissa Tenancy Act, is not such charge.)

[*See also* 1952 Pat 9 (A I R V 39 C 5 P 6) : 30 Pat 317 (DB), *Dirpal Singh* v. *Karamchand Mahton*. (Charge referred to in S. 65, Bihar Tenancy Act, is not such a charge as is defined by S. 100, T. P. Act.)]

Add after Pt. 11a :

[Pt. 11b] Under the Easements Act, an easement is a right or interest in immovable property *1955 Andhra 199 (Prs 3, 4) ((S) A I R V 42 C 73*, *Addanki Ramanamma* v *Ramavarapu Anthamma* (Respondent obtained a decree against appellant's vendor for injunction restraining him from interfering with his right to drain off water through his lands and appellant purchased property after passing of the decree—*Held*, that the terms of S. 52 applied.)

Add after Pt. 13 :

[Pt. 13a] Where a security bond for due performance of decree is executed not by any surety, but by the judgment-debtor himself and is accepted by the Court at a time when the decree is being enforced against his person, it is perfectly competent for the execution Court to enforce the liability that is created under the bond as accepted by Court. Persons who have taken the subsequent hypothecation bond from the judgment-debtor are not entitled in law to any notice of the proceedings in execution based on the order on the security bond and the rights acquired by these persons are clearly affected by the rule of lis pendens. *1953 Trav.Co 364 (A I R V 40 C 140 P 6) (DB), Subramania Nadar* v *Esakkimadan Nadar*.

Add after Pt. 17 :

[Pt 17a] The Calcutta High Court held that a suit for rent was only a money suit and therefore though the decree created a first charge it did not render the suit one in which a right to immoveable property was directly and specifically in question. *1951 Cal 221 (A I R V 38 C 42 P 15, 16) : I L R (1951) 1 Cal 283 (DB), Nrisingha Bose* v. *Nil Ratan*.

Note 15

Add in the Foot Note indicated :

3. 1952 Mad 59 (A I R V 39 C 29 P 2), *Kunhi Koya Thangal* v. *D. Ahmad Kutty*. (Standing timber is not immovable property as defined in S. 3—Scope of S. 52 cannot be enlarged by introducing into it in an indirect manner the definition of immoveable property in General Clauses Act.)

Note 16

Add in the Foot Note indicated :

1. ('51) 1951 Nag L Jour (Notes) 157, *Shamrao* v *Nathu* ✠ ('46-52) I D 39611 (Pat) (DB), *Bishun Ahir* v. *Nathuni Singh*.

[*See also* 1953 Trav-Co 573 (A I R V 40 C 223 P 2), *Lakka Devassya* v. *Eapen Thomman*. (Where the suit is for redemption of the mortgage in favour of defendant No. 1 and not for the redemption of the sub-mortgages granted by defendant No. 1 it does not mean that the plaintiff was redeeming the sub-mortgages directly and therefore transfer of possession by sub-mortgagee cannot be vitiated.)]

Note 18

Add in the Foot Notes indicated :

1. 1954 Sau 82 (Pr 4) (A I R V 41 C 35), *Tribhovandas Bechardas* v. *Mangaldas Hargovindas*.
3. ('50) 1950 Trav-Co L R 636 (640) (DB), *Thommanthony Madachi* v. *Parvathi Lakshmi*. 'Fact that property was attached under money-decree before institution of the mortgage suit does not save the sale under the money-decree held during the pendency of the mortgage suit from the operation of the rule.)
4. 1954 Trav Co 38 (A I R V 41 C 13 P 6) (DB), *Sankaran Nambudiri* v. *Narayanan Nambudiri*. (Suit on mortgage pending — Subsequent mortgage—Properties sold in execution of decree obtained in suit—Property goes to auction-purchaser free of charge created during pendency of suit.) ✠ (46-52) I D 17073 (Pat) (DB), *Khartar Sah* v. *Deoniti Prasad*. (Transferee, if he apprehends that mortgagor will not protect his interest, must take steps in accordance with law to get himself substituted or added as party. If he keeps aloof and allows mortgagor to represent his interests he will be bound by order passed—Mortgagee decree-holder is not bound to implead him as party.)
6. 1954 Trav-Co 38 (A I R V 41 C 13 P 6) (DB), *Sankaran Nambudiri* v. *Narayanan Nambudiri*. (Suit on mortgage pending — Subsequent mortgage—Properties sold in execution of decree obtained in suit—Property goes to auction purchaser free of charge created during pendency of suit.)
11. 1952 Orissa 64 (A I R V 39 C 14 P 11) : ILR (1952) Cut 277 (DB), *Mahimuddin Shaik* v. *Panu Sahani*.
14. ('52) 1952 I D A 597 (Pat) (DB), *Murlidhar Marwari* v. *Bibi Azizunnissa*. (Preliminary mortgage award passed against minor son and

daughter of deceased member of Co-operative Society is not one without jurisdiction because no guardian was appointed. Even if invalid and not binding on the minors after it has become merged in final award where they were duly represented, minors cannot question validity of preliminary award. Transferees of their interest during the interval between the two awards, being representatives, also cannot do so.)

Add after Pt. 7 as separate para :

[Pt. 7a] Where the property is sold under a mortgage-decree the decree-holder who has not disclosed, in the sale proclamation, the existence of another incumbrance on the property in his favour, will be estopped from contending that the purchase having been made during the pendency of the suit on that other mortgage is affected by *lis pendens. 1953 Pat 58 (A I R V 40 C 18 P 14) : 31 Pat 722 (DB), Rajkishore Lal* v. *Sultan Jehan.*

Note 19

Add in the Foot Note indicated :

1. 1955 N U C (Pat) 1537 (A I R V 42), *Dulhin Girja Kumari* v. *Kedarnath Sah.*

Note 20

Add in the Foot Notes indicated :

1. 1955 N U C (Pat) 2 1 (A I R V 42), *Anjani Kumar* v *Mt. Sanjoga Kuer* ✣ 195 All 14: (A I R V 8 16 rs 1, 55) : I L R (953) 1 All 284 (FB) *Mahesh Prasad* v. *Mt. Mundar.* (194 Oudh 354 (AIR V 30) (FB). *Abdul Ghaffar* v. *Ishtiaq Ali, Dissented from*; 1939 All 687 (A I R V 26), *Indra Narain* v *Mohammad Ismail, OVERRULED.*) ✣ ('51) 1951 Nag L J (Notes) 166, *S. P. Tiwari* v. *Jamunabai.*

6. 1951 All 141 (A I R V 38 C 16 Pr 67) : I L R (1953) 1 All 284 (FB), *Mahesh Prasad* v. *Mt. Mundar.* (Suit for maintenance—Decree specifically creating charge on specific immovable property is not merely a declaratory decree but is executable — Transferee of property whether with notice or otherwise is bound by decree until it is fully satisfied — 1943 Oudh 354 (AIR V 30) (FB), Abdul Ghaffar v Ishtiaq Ali *Dissented from*; 1939 All 687 (A I R V 6), Indra Narain v. Mohammad Ismail, *OVERRULED.*) ✣ 1951 Orissa 30 (A I R V 38 C 75 P 16) : I L R (1949) 1 Cut 336 (DB), *Tirthabasi Ghose* v. *Bhuyani Trinayani Dasi.*

Substitute the following new Point for Pt. 8 in the note :

[Pt. 8] The doctrine of *lis pendens* affects a transfer pending a suit for maintenance, in which a charge on properties has been asked for and granted by the decree, irrespective of the fact whether the suit was one by a Hindu wife against her husband or by a Hindu widow against her husband's coparcener. An alienation made by the husband pending such a suit by his wife is affected by *lis pendens.* ***('51) 1951-1 Mad L J 143 (145), Subbayya*** v. *Rama Lakshmi.* (Decisions in 1927 Mad 502 (AIR V 14), Rattamma v. Seshachalam Sarma, *Dissented from*; 1927 Mad 403 (A I R V 14), Official Receiver of Cuddapah v. Subbamma and 1939 Bom 403 (A I R V 26), Gangubai Pandurang v. Pagubai Narayan, *held obiter*; 1930 Mad 824 (A I R V 17), Seetharamanujacharyulu v. Venkata Subbamma; 1935 Mad 86 (A I R V 22), Ramaswami Pillai v. Trichinopoly Co-operative Credit Bank, Ltd. and 1936 Mad 84 (A I R V 23), Laksmidevamma v. Subba Rao, *Rel. on.*)

Note 27

Add in the Foot Notes indicated :

2. 1950 Assam 119 (A I R V 37 C 47 P 50) : I L R (1950) 2 Assam 225, *Bhupindra Narayan* v. *Mt. Tarupriya Debya* ✣ ('50) 1950 Trav-Co L R 23 (50) (DB), *T. Natarajaier* v. *Narayana Nadar.*

8. 1953 Trav-Co 573 (A I R V 40 C 223 P 2), *Lakka Devassya* v. *Eapen Thomman.* (Transfer of possession pendente lite will be a transfer of property within S. 52.)

Add after Pt 7 :

[Pt. 7a] Surrender to a person having no title cannot operate as a surrender. It will, however, operate as an assignment and if it does operate as an assignment, it would not be vitiated by *lis pendens* unless the transfer is given by a defendant in the suit, the proceedings in which operate as *lis pendens 1953 Trav-Co 12 (A I R V 40 C 2 Pr 5), Philipose E. J.* v. *Karunakara Nair.*

Note 28

Add in the Foot Note indicated :

1. 1949 East Punj 93 (A I R V 36 C 39 Prs 6, 10) : I L R (1949) East Punj 305 (FB), *Wazir Ali Khan* v. *Zahir Ahmad Khan.* (Transfer before suit to person having equal or superior right of pre-emption — Transferee can resist suit by another pre-empt on on the strength of his own pre-emptive right irrespective of whether transfer to him was made in recognition of his superior pre-emptive right or not — Form of transfer, so long as it can be shown that transferee acquired full title of vendee, is immaterial.)

Note 29

Add in the Foot Note indicated :

1. 1951 Pat 61 (A I R V 38 C 174 Prs 4, 5, 10) (DB), *Narayan Prasad Sukul* v. *Rajkishore Mishra* ✣ ('52) 1952 Nag L J (Notes) 69, *Udhavjee* v. *Brijlal.*

Note 30

Add in the Foot Note indicated :

1 1951 Mad 687 (A I R V 38 C 217 Pr 10) (DB), *Official Receiver, East Tanjore* v. *Sait Jessasingh.*

Note 31

Add in the Foot Notes indicated :

1. 1955 N U C (Pat) 1597 (A I R V 42), *Dulhin Girja Kumari* v. *Kedarnath Sah* ✣ 1955 N U C

(Trav.-Co.) 1043 (A I R V 42), *Karuna Karan Pillay* v. *Raman Pillay* ✠ 1952 Orissa 64 (A I R V 39 C 14 P 11) : I L R (1952) Cut 277 (D B), *Mahimuddin* v. *Panu Sahani.*

2. 1955 N U C (Pat) 1597 (A I R V 42), *Dulhin Girja Kumari* v. *Kedarnath Sah* ✠ 1955 N U C (Trav.-Co) 1043 (A I R V 42), *Karuna Karan Pillay* v. *Raman Pillay* ✠ 1954 Trav-Co 299 (A I R V 41 C 106 P 8) (D B), *Avidayamma Palavesom* v. *Paramartha Lingom Nadar* (Where, during the pendency of a suit for possession of property, a suit for money is filed against one of the plaintiffs in the former suit and in execution of the decree obtained therein the property in dispute in the former suit is purchased by the decree-holder and possession thereof is obtained, the transfer of possession is clearly affected by the rule of *lis pendens* and cannot affect the rights of the plaintiff in the former suit who was not a party to the money suit to recover possession of the property as per the decree passed in his suit.) ✠ 1952 Orissa 64 (A I R V 39 C 14 P 11) : I L R (1952) Cut 277 (D B), *Mahimuddin Shaik* v *Panu Sahani* ✠ 1952 Trav-Coch 102 (A I R V 39 C 45 P 4) : 1950 T C L R 665 (D B), *Krishna Menon* v. *Ouseph Michael* ✠ 1951 Cal 481 (A I R V 38 C 136 P 3) : I L R (1949) 1 Cal 378 (D B), *Goberdhan Banerjee* v. *Sukhomoy Bhowani Prasad* ✠ 1951 Nag 194 (AIR V 38 C 45 P 19) : I L R (1951) Nag 241, *Madholal* v *Gajrabai* ✠ ('51) 1951 Nag L Jour (Notes) 166, *S. P. Tivari* v. *Jamuna Bai* ✠ 1950 Orissa 210 (A I R V 37 C 37 P 4) : I L R (1950) Cut 486 (D B), *Sheik Bikala* v. *Sheik Ali*

4. *See* ('50) 1950 Trav-Coch L R 636 (640) (D B), *Thommanthony Madachi* v. *Parvathi Lakshmi.* (Attachment of property under money decree before institution of mortgage suit—Sale during pendency of suit on mortgage is affected by *lis pendens* in spite of attachment effected before institution of mortgage suit.)

5. 1950 Mad 189 (A I R V 37 C 80 P 4), *Girlam Rasool Sahib* v *Hamida Bibi* ✠ 1950 Orissa 210 (A I R V 37 C 37 P 5) : I L R (1950) Cut 486 (D B). *Sheik Bikala* v. *Sheik Ali.*

See also F N 4 in Note 7.

6. See also F N 5 in Note 7.

Add after Pt. 7 :

[Pt. 8] Where the properties are brought to sale in pursuance of the same decree and there is no independent proceeding initiated, during the pendency of which the sale in favour of one of the parties took place, the principle of *lis pendens* has no application *1953 Mad 692 (A I R V 40 C 261 P 5) : I L R (1953) Mad 1009 (D B), D. Chakravarthi Iyengar* v. *Gangadhara Mudaliar.*

Note 32

Add in the Foot Notes indicated :

1. 1955 N U C (Trav-Co) 1043 (A I R V 42) *Karuna Karan Pillay* v. *Raman Pillay* ✠ 1952 Trav-Coch 270 (AIR V 39 P 18) (D B), *Kesavan Karunakara* v. *Raman Kesava.* (Sale effected under Travancore Revenue Recovery Act (1 of 1068).) ✠ 1952 Trav-Coch 96 (A I R V 39 C 40 P 5) : I L R (1951) Trav-Co. 554 (D B), *Raman Nair* v. *Lakshmi Amma* ✠ 1952 Tran-Coch 61 (A I R V 39 C 22 P 7) : 1950 T C L R 333, *Krishnan Karthavu* v. *Kumaraswami Nambudiripad* (Sale held under Travancore Revenue Recovery Act (1 of 1068).) ✠ 1954 Tra-Co 122 (A I R V 41 C 57 P 5, 6) (D B), *Neelakantaru Narayan* v. *Govinda Pillai.* (Compulsory sale for arrears of Jennikarom under Travancore Jenmi and Kudiyan Act (5 of 1071).)

2. 1952 All 298 (A I R V 39 C 90 (19) P 5), *Ram Narain* v. *Salig Ram.* (Revenue sale under S. 162, U. P. Land Revenue Act (1901) — Sale during pendency of mortgage suit — Doctrine of *lis pendens* affects the sale — Purchaser's claim cannot prevail over the claim for possession by purchaser in mortgage suit) ✠ 1950 Orissa 36 (A I R V 37 C 5 P 10) : I L R (1949) 1 Cut 559 (D B), *Udayanarayan* v. *Radhashyam.* (Rent decree under S. 199, Orissa Tenancy Act — Mortgage suit on the holding pending — Execution sale under rent decree before passing of final decree in mortgage suit — Decree-holder purchaser gets only right of redemption which is barred on confirmation of sale under final decree.)

3. 1952 Nag 341 (A I R V 39 P 23): I L R (1952) Nag 211 (F B), *Maulbax* v. *Sardarmal.* (Purchaser in sale held under S. 157, C. P. Land Revenue Act, during pendency of mortgage suit in respect of that property is bound by the decree in view of S. 52 of T. P. Act.) ✠ 1952 Orissa 64 (A I R V 39 C 14 P 12, 23) : I L R (1952) Cut 277 (D B), *Mahimuddin Shaik* v. *Panu Sahani* (Rent sale of tenancy holding subject to Orissa Tenancy Act pending execution of mortgage decree against holding—Purchaser at rent sale is not affected by *lis pendens* by reason of provisions embodied in S. 220 of the Tenancy Act.)

Add after Pt. 2 :

[Pt. 2a] It hat been held that property which is sold for the realisation of the arrears of income-tax after the preliminary mortgage decree and during the pendency of the mortgage suit is hit by the doctrine of lis pendens and is therefore, subject to the rights of the mortgagee who obtains a decree on the basis of his mortgage. *1955 N U C (All) 1698 (A I R V 42), Deo Sharma* v. *Chartered Bank of India.*

Note 35

Add in the Foot Notes indicated :

1. 1955 N U C (Bom) 912 (A I R V 42) (DB), *Himatsing Dhansing* v *Sonu Devising* ✠ 1954 Hyd 185 (Prs 17, 26) (A I R V 41 C 61) : I L R (1954) Hyd 250 (DB), *Chinna Reddy* v. *Keshanna.* (Per Ansari, J.) ✠ 1951 Cal 481 (A I R V 38 C 136 P 3) : I L R (1949) 1 Cal 378 (DB), *Goberdhan Banerjee* v. *Sukhomoy Bhowani Prasad* (Only the title acquired by such a transfer would be inferior to the title acquired under the decree or order which is eventually passed in the suit.) ✠ ('50) 55 Mys H C R 174 (180) (D B), *Kempe Gouda* v. *Ramachandra Setty.*

2. 1954 Hyd 185 (Prs 17, 26) (A I R V 41 C 61): I L R (1954) Hyd 250 (D B), *Chinna Reddy* v. *Keshanna.* (Per Ansari J.) ✠ 1953 Nag 236 (AIR

V 40 C 94 P 4) : I L R (1952) Nag 150, *Narayanrao Amritrao* v. *Chunnilal Sitaram.*

3. 1954 Hyd 185 (I rs 17, 26) (A I R V 4 C 61) : I L R (1954) Hyd 250 (D B), *Chinna Reddy* v. *Keshanna.* (Per Ansari J.)

12. 1955 N U C (Trav-Co) 1655 (A I R V 42), *Lekshmi Amma Karthiyayani Amma* v. *Janaki Pillai.* (Suit against lessee for recovery of possession — Partition of property leased among lessors — Recovery of possession by one sharer from lessee — Such recovery is not affected by 'lis pendens.') ✠ ('51) 1951 Nag L Jour (Notes) 39, *Syed Shakkur Hussain* v. *Mt. Huwast.* (Suit by *A* against *H* decreed while it was held that *H* was entitled to two annas share in a mouza — Transfer of that share by *H* during pendency of appeal to his wife was held valid as it did not affect any party to suit *H* having been ultimately found entitled to the property in the appeal also.)

Add after Pt. 14.

[Pt. 14a] *A* brought a suit to enforce the contract for sale in his favour, dated the 7th December 1943. The suit was brought on the 15th of August 1944, and when the suit was pending *B* brought his suit for redemption on the basis of purchase from the original mortgagor on the 30th of January 1945. A filed written statement on the 12th of May 1945. Clearly, therefore, *A* knew what *B* was claiming. In spite of that he did not choose to make B a party to his suit. He chose, however, to proceed against the vendor and obtained an 'ex parte' decree, by which a saledeed was executed in favour of *A* on the 19th of September 1946.

It was held that in such circumstances *A* could not now say that he was entitled to defeat the claim of the subsequent purchaser *B* on the doctrine of 'lis pendens' *1955 N U C (Pat) 1596 (A I R V 42), Jaleshwar Singh* v *Gorakh Singh.*

Note 36

Add in the Foot Note indicated :

1. 1953 Trav-Coch 12 (AIR V 40 C 2 P 5), *Philipose E J.* v. *Karunakara Nair,* (A surrender of property when made to a person having n title may operate as an assignment and if it does so it would not be vitiated by lis pendens unless the transfer is given by the defendant in the suit.) ✠ 1949 Mad 886 (A I R V 36 C 399 P 14): ILR (1949) Mad 904 (DB), *P. Ammanna* v. *B. Ramakrishna Rao* (Necessary party not joined before passing of decree—Transfer by him during execution proceeding to which he was made party not affected by the section.)

Note 37

Add in the Foot Notes indicated :

1. [*See also* 1954 Trav-Co 38 (A I R V 41 C 13 P 6) (DB), *Sankaran Nambudiri* v. *Narayanan Nambudiri.* (Suit on mortgage pending — Subsequent mortage of same property — Property sold in execution of decree obtained in suit — Property goes to auction-purchaser free of charge created during pendency of suit—Some items of such property coming back to mortgagor by compromise—Liability again fastens to such property.)]

8. ('50) 1950 Trav-Co L R 23 (25) (D B), *T. Natarajaier* v. *Narayana Nadar* ✠ ('50) 55 Mys H C R 174 (184) (D B), *Kempe Gowda* v. *Ramachandra Setty* (The words "other party" are to be understood not as applying to a party other than or apart from or besides the transferor but a party between whom and the transferor there is a contest which would be affected by the alienation—It is not any party to a suit under any decree passed in his favour who can invoke it.)

Add after Pt. 1 :

[Pt. 1a] "Other party" means a party between whom and the transferor there is a contest which would be affected by the alienation and not any party in the suit the decree in which is in his favour. *('50) 55 Mys H C R 174 (184) (D B), Kempe Gowda* v. *Ramachandra Setty.*

Add after Pt. 3 as separate para :

[Pt. 3a] The auction-purchaser in a mortgage suit is a representative of the decree-holder and for the purposes of the doctrine of lis pendens is arrayed on the same side as the decree-holder and the purchase by him is not affected by another decree obtained by the decree-holder in a suit which was pending at the time of the purchase. *1953 Pat 58 (A I R V 40 C 18 P 3, 14): 31 Pat 722 (D B), Rajkishore Lall* v. *Sultan Jahan.* (Decree-holder not disclosing existence of another incumbrance on the property in his favour in sale proclamation — he is estopped from contending that purchase is affected by lis pendens on account of the pending suit on the undisclosed encumbrance.)

Note 38

Add in the Foot Notes indicated :

1. 1955 Trav Co 3 (P 7) ((S) A I R V 42 C 3) : ILR (1954) Trav-Co 794 (DB) *Lakshmi Gnanapakiam* v. *Thynes Nadar* ✠ 1954 Mad 592 (AIR V 41 C 218 P 5) : I L R (1955) Mad 519 (DB), *Manjammal* v. *Eswaramurthi Gounder* ✠ 1952 Trav Coch 308 (A I R V 39 C 1 (DB), *Venkiteswara Pai* v. *Kunju Vava*
2. 1954 Mad 592 (A I R V 41 C 218 P 5) : I L R (1955) Mad 519 (DB), *Manjammal* v. *Eswaramurthi Gounder.*
3. 955 N U C (Pat) 2?1 (A I R V 42), *Anjani Kumar* v. *Mt Sanjoga Kuer.*
4. 1954 Mad 592 (A I R V 41 C 218 P 5) : I L R (1955) Mad 519 (DB), *Manjammal* v *Eswaramurthi Gounder* (The alienee, if he is not impleaded as a party and does not object to any compromise behind his back between his alienor and the other party to the suit, would be bound by the compromise reached between them, unless thereafter he would be able to establish in a separate suit that the compromise was collusive and fraudulent.)

5. (50) 45 Mys H C R 174 (194) (D B), *Kampe Gowda* v. *Ramachandra Setty*.

Note 39

Add in the Foot Notes indicated :

1. ('50) 1950 Nag L Jour (Notes) 28, *Goverdhandas* v. *Deorao*.
2. ('50) 85 Cal L Jour 81 (88), *Monoranjan Bhattacharjee* v. *Satya Charan Law* (Tenant subletting pending suit for his ejection—Subletting cannot prevail against decree for possession which the landlord may subsequently obtain.)

Add after pt (4) at the end of the paragraph.

[Pt. 4a] Hence, in spite of the provisions of S. 65 A, the mortgagor cannot lease out the mortgaged property during the pendency of the suit for redemption to the prejudice of the mortgagee's or auction-purchaser's right. The mortgagor cannot for the same reason accept any advance rent. If, the tenant makes any payment to the mortgagor during the pendency of the suit he does so at his own risk. He cannot claim protection under *S. 0. 1954 Sau 82 (Pr 4) (A I R V 41 C 35), Tribhovandas Bechardas* v. *Mangaldas Hargovin Das*.

Note 40

Add in the Foot Notes indicated :

1. ('52) 1952 Nag L Jour (Noaes) 66, *Sayaram* v. *Seth Chunnilal*. (It is open to transferee pendente lite to get himself added as party under O. 22, R. 10, Civil P. C., but there is no obligation on decree-holder to bring him on record.)

[*See also* 1953 Trav C 364 (A I R V 40 C 140 P 6) (D B), *Subramania Nadar* v. *Esakkimaden Nadar*. (Where a security bond for due performance of a decree is given to the judgment-debtor himself and accepted by the Court at a time when the decree was being enforced against his person it directly comes under S. 47, Civil P. C. — Persons who have taken the subsequent hypothecation bond from the judgment-debtor are not entitled in law to any notice of the proceedings in execution.)]

2. 1953 Nag 236 (A I R V 40 C 94 P 4) : I L R (1952) Nag 150, *Narayanrao Amritrao* v *Chunnilal Sitaram*. (Hence the remedy of the plaintiff who has, in execution of his decree against the defendant, purchased the property is to proceed against the purchaser under S. 47, Civil P. C., and not by a separate suit.)
4. [See however 1952 Orissa 64 (A I R V 39 C 14 P 12, 23) : I L R (1952) Cut 277 (DB), *Mahimuddin Shaik* v. *Panu Sahani*. (Tenancy holding subject to Orissa Tenancy Act sold at rent sale—Purchaser is not within the meaning of S 47, Civil P. C the representative of tenant whose holding it was but takes it free of all encumbrances by reason of S. 220 of Act—Consequently *lis pendens* does not apply to sale.)]
5. 1952 Assam 111 (A I R V 39 P 11, 12, 16 22): I L R (1952) 4 Assam 247, *Hurmat Ali* v. Matlib Ali. (A transferee pendente lite is a representative of the transferor, the party to the suit and is also a person bound by the decree within the meaning of O 21, R. 35, Civil P. C., read with S. 52, T. P. Act, even though he is not made a party to the suit or appeal—So also an order for delivery of the property can be passed in favour of the successful party notwithstanding the fact that the transferee is not impleaded in the proceedings for restitution. In case of resistance, action can be taken under O. 21, R. 98, Civil P. C. The transferees could raise such objections only as were open to their transferor under O. 21, R. 102, Civil P. C. Case law discussed.)

Note 41

Add in the Foot Note indicated :

4. 1950 Ajmer 29 (AIR V 37 C 38 P 37), *Kishan Lal* v. *Mool Chand*. (Applicant not prepared to furnish security for any loss arising to other party from grant of injunction — Injunction cannot be granted.)

SECTION 53

Note 3

Add in the Foot Note indicated :

2. *See also* 1953 Tra Co 321 (AIR V 40 C 119 P 6) : I L R (1953) Trav-Co 326 (DB), *Abubaker* v. *Kanju Muhammad*. (*Held* that the relevant clause of the Kuri Vaimpu meant that the kuri assets shall in the first instance be applied to discharge the liabilities of the kuri transaction. It did not create any property interests over the said assets in favour of the non-prized subscribers or even create a charge or a trust in their favour. No doubt if the kuri assets were alienated in such a way as to defeat or delay the non-prized or unpaid prized subscribers such alienations would be voidable at the instance of such subscribers. The law does not go beyond that.)

Note 4

Add in the Foot Note indicated :

2. 1955 Pat 270 (Pr 29, 30) ((S) AIR V 42 C 66): I L R 34 Pat 133 (DB), *Bibi Kubra Begam* v. *Jainandan Prasad*. (Not only in Muhammadan Law but in laws of all civilised communities it is cardinal principle that it is one's first duty to arrange for the payment of one's debts before gifts are made or wakfs are created.)

Note 5

Add in the Foot Notes indicated :

2. 1955 Pat 270 (Pr 19) ((S) A I R V 42 C 66) : I L R 34 Pat 133 (DB). *Bibi Kubra Begum* v. *Jainandan Prasad* ✣ 1953 Cal 251 (A I R V 40 C 52 P 11) (DB), *Purna Chandra* v *Sarojendra Kumar* (To attract the provisions of S. 53 it must proceed on the footing that title has passed and not that the document itself or the transaction was a sham one.) ✣ 1952 All 83 (A I R V 39 C 25 P 4, 5) (DB), *Ram Rao Singh* v *Ajodhya Pd. Singh* ✣ 1951 Mys 103 (A I R V 38 C 36 P 3) : I L R (1951) Mys 407 (DB), *Bommarayigowda* v. *Kalegowda*.
3. 1954 Manipur 1 (Pr 5, 6) (AIR V 41 C 1), *Manihar Bibi* v. *Rakha Singh* ✣ 1951 All 443 (A I R V 38 C 93 P 17) (DB), *Raj Koer* v. *Rajendra Bahadur Singh*. (Donor not divesting himself of title in property gifted — S. 53 has no application.)
6. 1954 Manipur 1 (Pr 6) (AIR V 41 C 1), *Manihar Bibi* v. *Rakha Singh* ✣ 1953 Mys 22 (AIR V 40 C 10 P 6) : I L R (1953) Mys 152, *Ken-*

chegawda v. *P. Chaniya* ✣ 1953 Mad 545 (AIR V 40 C 209 P 12), *Tirupathi Mudali* v. *Lakshmana Mudali.*

8. 1952 Vind-Pra 69 (A I R V 39 P 21), *Laxmi Bai* v. *Lal Chand.*

11a. 1950 Bom 278 (A I R V 37 C 90 P 14):ILR (1950) Bom 114 (DB), *Ganpatrao Visawanathappa* v. *Bhimrao Sahibrao.* (Where the intention to separate is clear, whatever the motive with which the separation was effected, the division of the status must be given full effect, and as long as that is so, what will pass in the execution sale to which the sons were not made parties when the sales took place after the partition is the interest of the father alone.)

11b. 1950 Bom 247 (A I R V 37 C 68 P 14) (DB), *Jivram* v. *Kantilal.* (Partition of joint property after the execution of a mortgage binding on all the members of the joint Hindu family — No provision for the payment of the mortgage-debt —Partition is fraudulent.)

19. 1955 Pat 270 (Pr 21, 23, 24, 35) ((S) A I R V 42 C 66) : I L R 34 Pat 133 (DB), *Bibi Kubra Begum* v *Jainandan Prasad.*

21. ('52) I D A 1796 (Pat) (DB), *Kameshwar Singh* v. *Homeshwari Bahuassin.* (There being no fraud upon the findings, principle of S. 53 could not be invoked.)

Note 6

Add in the Foot Notes indicated :

1. 1951 All 443 (AIR V 38 C 93 P 38) (DB), *Raj Koer* v *Rajendra Bahadur Singh.*

9. 1955 Pat 270 (Pr 25) ((S) A I R V 42 C 66) : I L R 34 Pat 133 (DB), *Bibi Kura Begam* v *Jainandan Prasad* ✣ 1954 Nag 129 (AIR V 41 C 51 P 24, 26):I L R (1953) Nag 937, *Rambilas Sitaram* v. *Ganpatrao Pandharinath* (Transfer by sale in favour of father-in law—Property worth much more than price stated — Consideration being payment of mortgage-debt which had not become due — No legal necessity for alienation—Subsequent payments towards mortgage made by transferors who continued in possession—Story of lease not believed — *Held*, that *prima facie* case of intention to defeat and defraud creditors was made out—Transfer held not in good faith or for consideration.)

[*See also* 1955 N U C (All) 6 (A I R V 42), *Ganga Prasad* v *Lala Sohanlal.* (The mere fact that the transfer of equity of redemption was effected a day before the mortgagee filed his suit for recovery of the mortgage money would not make the transaction fraudulent)]

15. 1955 Pat 270 (Pr 25) ((S) A I R V 42 C 66) : I L R 34 Pat 133 (DB), *Bibi Kubra Begum* v. *Jainandan Prasad* ✣ 1951 All 443 (A I R V 38 C 93 P 38) (DB), *Raj Koer* v *Rajendra Bahadur Singh.* (*Obiter* — Transfer of his other property by the mortgagor when the mortgaged property is not sufficient to satisfy the mortgage debt.)

17. 1950 Ajmer 41 (A I R V 37 C 57 P 5, 6), *Mt. Phoosi* v. *Radhey Shyam.*

23. ('49) 1 Pepsu L R 193 (204) (DB), *Zora Singh* v. *Nauhar Chand.*

42. ('49) 1 Pepsu L R 198 (204) (DB), *Zora Singh* v. *Nauhar Chand.*

46. ('52) I D A 17097 (Pat) (DB), *Kameshwar Singh* v. *Homeshwari Bahuassin.* (Purchase by wife does not necessarily raise presumption of fraud or collusion.)

Put Pt. (5a) at the end of the first sentence under the sub-heading "(A) Intention" "the mere fact that a transfer .... to prejudice the creditors by such transfer" and add the following case in the Foot note :

5a. 1955 Pat 270 (Pr 25) ((S) AIR V 42 C 66) : I L R 34 Pat 133 (DB), *Bibi Kubra Begum* v. *Jainandan Prasad* (The Court must consider whether the transferor had the intention to defeat or delay the creditors on the date of transfer and not whether creditors have been defeated since.)

Note 7

Add in the Foot Notes indicated :

1. 1953 Hyd 77 (AIR V 40 C 35 P 4, 5) : I L R (1953) Hyd 165 (DB), *Jeevan Khatoon* v. *Mehtab Khatoon*

2. 1949 Cal 204 (AIR V 36 C 52 P 5, 6, 8), *Kalipada Mondal* v. *Kali Charan Mondal.* (Real intention of parties should be examined to declare a benami document as fraudulent.)✣('50) 1950 Ker L T Tim 502 (04) (DB). *Ananchapermal Nadar* v. *Arunachalam Boothalingam.* (Fraudulent transfer and fictitious or benami transfer — Distinction drawn.)

Add after Pt. 2 :

[Pt. 3] The onus of proving the benami nature is on the person who alleges a transaction to be benami *1952 Nag 246 (A I R V 39 C 66 P 9) : I L R (1951) Nag 334, Narayan* v. *Guru Prasad.*

Note 8

Add in the Foot Notes indicated :

1. 1955 Pat 270 (Pr 19) ((S) A I R V 42 C 66) : ILR 34 Pat 133 (DB), *Bibi Kubra Begum* v. *Jainandan Prasad.*

[*See also* 1953 Trav-Co 321 (A I R V 40 C 119 P 6) : ILR (1953) Trav-Co 326 (DB) *Abubaker* v. *Kunju Muhammad* (*Held* that if the kuri assets were alienated in such a way as to defeat or delay the unprized or unpaid prized subscribers such alienations would be voidable at the instance of such subscribers)]

2. 1955 Pat 270 (Pr 19) ((S) A I R V 42 C 66) : ILR 34 Pat 133 (DB), *Bibi Kubra Begum* v. *Jainandan Prasad.* ✣ 1952 Trav Co 105 (AIR V 39 C 47 P 22) (DB), *Anantha Raman* v. *Arunachalam Panikker.* (The unchallengeability of the deed by parties to the deed is not one personal to the executant alone It would extend to all those who claim the properties through him as also to persons claiming under such persons.)

3. 1954 Nag 129 (A I R V 41 C 51 P 30) : ILR (1953) Nag 937 (B) *Rambilas Sitaram* v. *Ganpatrao Pandharinath.* (The effect of the declaration under S. 53, T. P Act, is that the transaction does not affect the creditors' right to recover their claims from the property transferred. The declaration still leaves the deed operative between the parties thereto and does not amount to cancelling or setting aside the deed because the creditors have no title or interest in the property to set aside the deed as between the parties thereto.)

4. 1954 Mad 173 (A I R V 41 C 68 P 3), *Kallubandi Nanjamma* v. *Kethe Rangappa.* (When a transfer is declared void as against creditors under S. 53 the result is not to annul it altogether, but only to render it inoperative as against

creditors and that too only to the extent necessary to satisfy their claims; and subject to their claims the transaction is valid and enforceable.)

Note 9

Add in the Foot Notes indicated :

4. 1950 Trav-Co 60 (AIR V 37 C 30 P 4) (FB), *Isabi* v *Abdulla*. (Where *A*, a co-sharer, transfers his share to his wife *B* who sues for partition thereof, other co-sharer defendants cannot raise the plea that the transfer was a sham transaction intended to defraud *A*'s creditors.)

4a. 1952 Trav-Co 105 (A I R V 39 C 47 P 22) (DB), *Anantha Raman* v. *Aruna halam Panikker* (The unchallengeability of the deed by parties to the deed is not one personal to the executant alone. It would extend to all those who claim the properties through him as also to persons claiming under such persons.)

7. 1953 Pat 129 (A I R V 40 C 68 P 10) : 31 Pat 787, *Rupai Deti* v *Bamdeb Das*.

8. See however 1949 Cal 204 (A I R V 36 C 52 P 5, 6, 8), *Kalipada Mondal* v. *Kali Charan Mondal*. (Benami deed created with primary intention to recover possession from another—Intention to deceive Court only secondary—Document held not fraudulent—Rule against participation in fraudulent deed does not operate against real owner suing the benamidar.)

11. 1953 Mad 545 (A I R V 40 C 206 P 11), *Tirupathi Madali* v. *Laskmana Mudali* ✠ 1952 Vind-Pra 69 (A I R V 39 P 15), *Laxmi Bai* v. *Lal Chand*.

Add after Pt. 12 :

[Pt. 13] It has been held in the undermentioned case that the plaintiff cannot, without setting aside the sale deed, recover the property transferred, upon a mere declaration of his title. *1953 Mad 545 (AIR V 40 C 206 P 13, 14), Tirupathi Madali* v. *Lakshmana Mudali*.

Note 10

Add in the Foot Note indicated :

4. 1954 Mad 173 (A I R V 41 C 68 P 5), *Kallubandi Nanjamma* v. *Kethe Rangappa* ✠ 1951 Mys 103 (A I R V 38 C 36 P 4) : I L R (1951) Mys 407 (DB), *Bommarayigowda* v *Kalegowda* ✠ 1951 All 443 (AIR V 38 C 93 P 41, 42) (DB), *Raj Koer* v. *Rajendra Bahadur Singh*. (Obiter —Particularly when the auction takes place in pursuance of a mortgage decree)

Note 11

Add in the Foot Notes indicated :

3 1954 Mad 173 (A I R V 41 C 68 P 7), *Nanjamma* v. *Rangappa*.

4. 1954 Mad 173 (A I R V 41 C 68 P 7), *Kallubandi Nanjamma* v. *Kethe Rangappa*. ✠ 1954 Trav-Co 404 (Prs 5, 6) (A I R V 41 C 142) (DB), *State* v. *Narayani Parvathi*.

Note 13

Add in the Foot Notes indicated :

1. 1955 Pat 270 (Pr 4) ((S) A I R V 42 C 66) : I L R 34 Pat 133 (DB). *Bibi Kubra Begum* v *Jainandan Prasad*. ✠ 1954 Mad 173 (AIR V 41 C 68 P 4) *Kallubandi Nanjamma* v. *Kethe Rangappa*. (A creditor having the right to avoid a transfer under S. 53 can do so by any act which shows clearly and unambiguously an intention to avoid it. The right to avoid does not depend on the ability to establish fraud in a court of law, though its practical worth will be nothing without it.) ✠ 1951 Trav-Co 237 (AIR V 38 C 95 P 4) : ILR (1951) Trav-Co 294 & 788 (DB), *Pothan Ouseph* v. *Eipe Annamma*.

2. 1954 Mad 173 (A I R V 41 C 68 P 4), *Kallubandi Nanjamma* v *Kethe Rangappa*. (When the creditor agrees to take a sale deed of the property in discharge of the amount due to him he avoids the transfer intended to defeat him.)

3. 1951 Trav-Co 237 (AIR V 38 C 95 P 4) : ILR (1951) Trav Co 294 and 788, *Pothan Ouseph* v. *Eipe Annamma*.

[*See also* 1955 Pat 270 (Pr 24) ((S) AIR V 42 C 66) : I L R 34 Pat 133 (DB), *Bibi Kubra Begum* v. *Jainandan Prasad*. (A creditor may manifest his intention to avoid the transaction by attaching the property transferred.)]

Note 14

Add in the Foot Notes indicated :

1. 1954 Manipur 1 (Pr 10) (AIR V 41 C 1), *Manihar Bibi* v *Rakha Singh* ✠ 1951 All 443 (AIR V 38 C 93 P 42) (DB), *Raj Koer* v. *Rajendra Bahadur Singh*. (Obiter)

2. 1955 Pat 270 (Pr 24) ((S) AIR V 42 C 66): ILR 34 Pat 133 (DB), *Bibi Kubra Begum* v. *Jainandan Prasad*. ✠ 1954 Manipur 1 (Pr 10) (AIR V 41 C 1), *Manihar Bibi* v. *Rakha Singh*. ✠ 1953 Cal 251 (A I R V 40 C 92 P 46) (DB), *Purna Chandra* v *Sarojendra Kumar*.

Note 15

Add in the Foot Note indicated :

2. 1954 Nag 129 (A I R V 41 C 51 P 27) : I L R (1953) Nag 937 (DB), *Rambilas Sitaram* v. *Ganpatrao Pandharinath*.

Note 16

Add in the Foot Note indicated :

2. ('52) I D A 17095 (Pat) (DB), *Kameshwar Singh* v. *Homeshwari Bahuassin*. (No lack of *bona fides* on part of purchaser—Sale cannot be characterised as not in good faith, even though the effect of that purchase was to defeat the rights of creditor.)

Note 18

Add in the Foot Notes indicated :

1. 1952 Nag 106 (AIR V 39 C 45 (7) P 26, 27) : ILR (1953) Nag 684, *Sadiq Hussein* v. *Co-operative Central Bank, Yeotmal*.

3 ('49) 28 Pat 97 (101) (DB), *Mathura Singh* v. *Bibi Heyatunisa*.

Note 19

Add in the Foot Notes indicated :

3a. 1952 Sau 47 (AIR V 39 P 5, 8) (DB), *Damodar Hirji* v. *Padamshi Gordhandas*. (Mortgage for pre-existing debt—Creditor aware of precarious financial position of debtor at time of mortgage—Plea of good faith can stand.)

5. 1952 Sau 47 (AIR V 39 P 5, 8) (DB), *Damodar Hirji* v. *Padamshi Gordhandas* (Mortgage for pre existing debt almost equal to the value of the property — Creditor away of precarious financial position of debtor—Plea of good faith can stand.)

Note 24

Add in the Foot Notes indicated :

9. 1952 I D A 17094 (Pat) (DB), *Kameshwar Singh* v. *Homeshwari Bahuassin*.

[*See also* 1952 All 226 (A I R V 39 C 89 P 2) (FB), *Fazal-ul-Rahim Khan* v. *Nawal Kishore.* (Suit under Civil P C., O. 21, R. 63 for declaration that sale by judgment-debtor is in fraud of creditors—Plaintiff being sole creditor of judgment-debtor — Suit as brought is in representative capacity.)]

14 1951 Mys 103 (A I R V 38 C 36 P 4) : I L R (1951) Mys 407 (D B), *Bommarayigowda* v. *Kolegowda.* (A suit by auction purchaser to enforce the rights acquired by virtue of the court-sale alleging that the settlement deed by the judgment debtor was executed with intent to defraud the decree-holder need not be a representative one under S 53.)

Add after Pt. 2 :

[Pt. 2a] It is not necessary that in order that a transfer may be in fraud of creditors there should be more than one creditor. *1951 Tra-Co 237 (A I R V 38 C 95 P 2)*: *I L R (1951) Tra Co 294 & 788 (DB)*, *Pothan Ouseph* v. *Eipe Annamma.*

Add after Pt. 16 :

[Pt. 16a] It has also been held by Patiala and East Punjab States Union High Court that the Courts in Patiala and East Punjab States Union are not bound by the last paragraph of S. 53 (1) and hence a suit by a creditor to have an alienation effected by his debtor with the intent of delaying and defeating his creditors declared void which is not representative is not bad or defective. *('49) 1 Pepsu L R 198 (211) (DB)*, *Zora Singh* v. *Nauhar Chand.*

Add at the end of the Note :

[Pt. 18] Unless there is a clear averment that the suit as being filed on behalf of the plaintiff and all other creditors of the debtor, the suit cannot be regarded as one under the provisions of S. 53. *1954 Cal 440 (Pr 3) (AIR V 41 C 147) (DB)*, *Ramdhonedas Bulakidas* v. *Orambala Dassi.* (A mere allegation in the plaint that the lease and the kobala executed by the debtor are fraudulent transactions intended to defeat the claim of the creditor merely indicates the motive for the execution of the lease and the kobala.)

Note 29

Add in the Foot Note indicated :

1. 1952 Sau 47 (A I R V 29 P 8) (DB), *Damodar Hirji* v. *Padamshi Gordhandas.*

Note 30

Add in the Foot Note indicated :

2. 1952 Sau 47 (A I R V 39 P 5, 8) (D B), *Damodar Hirji* v. *Padamshi Gordhandas.* (The fact that a mortgage of the only property was made to one of the creditors, who was a relative of the debtor in consideration of pre-existing debts, (almost equal to the value of the property) even though the creditor had notice of the debtor's precarious financial circumstances may be complete answer to a suit against the creditor under S. 53, T. P. Act. But when the creditor's good faith is questioned under S. 53, Provincial Insolvency Act, the fact that he had notice of the financial position of the debtor and that he made no contemporaneous advance would be sufficient to destroy his plea of good faith. Such a mortgage in favour of the creditor is voidable against the receiver.)

Note 32

Add in the Foot Notes indicated :

1. 1954 Mad 173 (A I R V 41 C 68 P 5), *Kallubandi Nanjamma* v. *Kethe Rangappa.*

6. 1954 Mad 173 (A I R V 41 C 68 P 6), *Kallubandi Nanjamma* v. *Kathe Rangappa.*

Note 34

Add in the Foot Notes indicated :

1a. 1954 Nag 129 (A I R V 41 C 51 P 13): I L R (1953) Nag 937 (D B), *Rambilas Sitaram* v. *Ganpatrao Pandharinath* (Plaintiff must plead and prove circumstances to discharge this onus. *Held*, that the two facts, viz., that the sale took place during the pendency of the suit and that no appreciable attachable property was left were not sufficient to discharge the initial onus, particularly in view of the sale price being only about 4 per cent. of the vendor's indebtedness to the creditor.) ✠ 1950 Kutch 57 (A I R V 37 C 45 P 2), *Chana Hadu* v. *Mankubai* ✠ ('50) 1950 Ker L Tim 502 (505) (DB), *Anancha-perumal Nadar* v. *Arunachalam Boothalingam.*

3. 1950 Kutch 57 (A I R V 37 C 45 P 2, 8), *Chana Hadu* v. *Mankubai.* (Transfer of immovable property by person in favour of his daughter, who was child widow, living on maintenance, during pendency of money suit against transferor is significant.)

5 1954 Nag 129 (A I R V 41 C 51 P 13) : I L R (1952) Nag 937 (D B), *Rambilas Sitaram* v. *Ganpatrao Pandharinath* (It is not sufficient to bring out circumstances which create suspicion. The decision must rest on legal grounds established by legal testimony.) ✠1952 I D A 17097 (Pat) (D B), *Kameshwar Singh* v. *Homeshwari Bahuassin.* (The purchase by the wife in the circumstances of the case may be suspicious, but suspicion is not proof. Fraud, like any other charge of a criminal offence, whether made in a civil or criminal proceedings must be established beyond reasonable doubt.)

7. 1954 Nag 129 (A I R V 41 C 51 P 13, 27) : I L R (1953) Nag 937 (DB), *Rambilas Sitaram* v. *Ganpatrao Pandharinath.* (If the plaintiff makes out a *prima facie* case of fraudulent intention, the burden shifts on to the transferee to prove his good faith—Mutation of names by itself is not sufficient to discharge the onus that lies on the transferee.) ✠('50) 1950 Ker L Tim 502 (505) (DB), *Ananchaperumal Nadar* v. *Arunachalam Boothalingam.*

Note 35

Add in the Foot Note indicated :

1. 1954 Nag 129 (A I R V 41 C 51 P 31) : I L R (1953) Nag 937 (D B), *Rambilas Sitaram* v. *Ganpatrao Pandharinath.* (A suit for declaration under S. 53, T. P. Act is governed by Art. 120, Limitation Act and the starting point of limitation under Art. 120, Limitation Act is the date on which circumstances entitling the

plaintiff to have his interest guarded first comes to his knowledge, as the right to sue then accrues to him.) ✣1951 Mad 388 (A I R V 38 C 108 P 5). *Marthandu Rao* v. *Chenna Basappa.*

SECTION 53-A

Add in the Synopsis after Item 16: 16a. Registration of instrument during pendency of suit —*See* Section 52 Note 29.

Note 3

Add in the Foot Notes indicated :

14 1955 Hyd 101 (Pr 4) (A I R V 42 C 25): ILR (1954) Hyd 822 : *Jahangir Begum* v. *Gulam Ali Ahmed.* (Section 53-A has imported in a modified form the English doctrine of part performance.) ✣1950 SC 1 (A I R V 37 C 1 P 16) : 1950 S C R 75 (S C), *Maneklal* v. *H. J. Ginwalla & Sons.*

15 [*See also* 195. SC 469 (AIR V 38 C 63 P 23): 1952 S C R 43 (SC), *Collector of Bombay* v. *Municipal Corporation of the City of Bombay.* (Per *Chandrasekhara Aiyar J.*)]

19. 1951 S C 469 (A I R V 38 C 63 P 12) : 1952 S C R 43 (S C). *Collector of Bombay* v. *Municipal Corporation of the City of Bombay.* (Grant of lease by Government in 1865 — No formal grant executed as required by Statute 22 and 23 Vic. C. 41 — Per *Patanjali Sastri J.* — "The principles underlying *Ramsden* v. *Dyson* and *Madison* v. *Alderson* can no more prevail against the statutory provisions regarding the disposition of property or the making of contracts by Government than against the provision of the Transfer of Property Act requiring registered instruments for effecting certain classes of transactions".

Note 4

Add in the Foot Note indicated .

4. 1951 Nag 403 (A I R V 38 C 126 P 12): I L R (1950) Nag 25, *Amroo* v. *Babarao.* (Right to retain possession on ground of part performance is no longer based on equity—It now rests on express provisions of S 53-A.)

Add after Item 3 Pt. 4 the following Item and point :—

[4] [Pt. 5] What S. 53 A requires is as follows :—

(a) that there is a writing signed by or on behalf of the transferor from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty; (See Notes 9 and 9-A.)

(b) that the transferee has in part performance of the contract taken possession of the property or any part thereof or that the transferee, being already in possession, continues in possession in part performances of the contract; (see Note 10.)

(c) that the transferee has done some act in furtherance of the contract; (see Note 10) and

(d) that the transferee has performed or is willing to perform his part of the contract; (see Note 11.)

Whether a contract is specifically enforceable or not is not a matter which must be taken into consideration for granting relief under this section. *1952 Nag 244 (A I R V 39 C 65 P 5, 6)*: *I L R (1949) Nag 959, Sobharam* v. *Totaram.*

Note 5

Add in the Foot Note indicated :

3. 1955 Hyd 101 (Pr 8) (AIR V 42 C 25) : I L R (1954) Hyd 822, *Jahangir Begum* v *Gulam Ali Ahmed* ✣ 1955 Vind Pra 15 (Pr 3) (A I R V 42 C 7), *Chhotelal* v. *Ram Pratap Ram.* (In considering whether S. 53-A has retrospective effect or not, it is not the date of the making of the contract but the date on which the suit is filed, that is relevant. In this sense S. 53-A has retrospective effect.) ✣ 1953 Sau 56 (A I R V 40 C 24 P 8) (DB), *Karshan Jeram* v. *Harkha Hari* ✣ 1953 Ajmer 19 (A I R V 40 C 20 P 5), *Fateh Mohd. S.* v. *Ghosia Bibi.* (Transfer before Act — Suit brought after coming into force of Act.)

[*See also* 1955 Madh B 49 (Pr 11) (A I R V 42 C 14) : ILR (1954) Madh B 237 (DB), *Pannalal* v. *Labhchand* (Section 54, Gwalior Transfer of Property Act would, apply to all suits instituted after the Act came into force in 1945 in the former Gwalior State although the transaction was effected before its enactment.)]

Note 5 Page 823— After the sentence "It is submitted . . . . to the former" add :

[Pt 3a] This view is now supported by the undermentioned decision of the Supreme Court. *1950 S C 1 (A I R V 37 C 1 P 16) : 1950 S C R 75 (SC). Maneklal* v. *H. J. Ginwalla & Sons.* (Lease of 1917—Suit for ejectment brought against lessee in 1933—"There can be no manner of doubt that the defence under S. 53A is available to a person who has an agreement of lease in his favour though no lease has been executed and registered.") ✣*1951 Mys 126 (A I R V 38 C 48 P 5) : I L R (1951) Mys 414 (DB), Narayana Rao* v. *Karibasappa.* (Retrospective effect can be given to S. 53A : 51 Mys H C R 148 (FB) held no longer good law in view of 1950 S C 1 (AIR V 37 C 1) : 1950 S C R 75 (SC), *Maneklal* v. *H. J. Ginwalla & Sons.*)

Note 6

Add in the Foot Notes indicated :

2. 1953 Hyd 97 (A I R V 40 C 37 P 3) : I L R 1952 Hyd 110, *Mahommed Sadruddin Khan* v. *Gulam Mohiuddin.* ✣ 1951 Bom 127 (A I R V 38 C 25 P 6, 10) : (ILR (1951) Bom 692 (DB), *Ramchandra Annappa* v. *Subraya Fimmaya.*

5. 1950 All 700 (704) (A I R V 37 C 274 P 10) : I L R (1952) 2 All 703 (DB), *Mt. Jileba* v. *Mt. Parmesra.*

Add after Pt. 1 :

[Pt. 1a] A mortgage is a transfer of immovable property Hence this section applies to ,usufructuary mortgage where the mortgagee in part performance of the contract has taken possession of the property. *('50) 1950 Bur L R (HC) 80 (87, 88), Ko U Mar* v. *Ma Saw Myaing.* (Mortgagor not entitled to sue for possession without offering to pay mortgage-money.) ✣ *1950 Trav Co 81 (A I R V 37 C 38 P 3) (DB). Ayyankunhi* v. *Krishnan.* (Mortgage with possession—Mortgagee retaining portion of mortgage security and surrendering rest to mortgagor in pursuance of arrangement between parties to extinguish mortgage—Subsequent deed of arrangement not registered --Suit by mortgagor to redeem mortgage barred by doctrine of part performance.)

After Pt. 2 add the following :

[Pt. 2a] A formal lease is not necessary to attract the application of S. 53A. All that is required is that an agreement in writing signed by the transferor can be gathered from the evidence. *1950 S C 1 (5) (AIR V 37 C 1 P 18) : 1950 S C R 75 (SC), Maneklal Mansukhbhai* v. *Hormusji Jamshedji Ginwala & Sons.*

Add after Pt. (3) :

[Pt. 3aa] It has been held that S. 53A has no application to a case where the document upon which a party relies is not a contract of transfer by the lessor but is a kabuliat executed by the lessee. *1954 Cal 207 (A I R V 41 C 75 P 3) (DB), Ram Abatar Mahato* v. *Sm Shanta Bala Dasi.*

Add after Pt. 3a :

[Pt. 3b] A relinquishment of a right in property amounts to a transfer within the meaning of this section. *1953 Hyd 114 (A I R V 40 C 42 P 14) : I L R (1952) Hyd 449 (456) (DB), Lakshmibai* v. *Bhojya.*

After Pt. 4 add the following :

[Pt. 4a.] The section does not apply to a partition of property as there is no transfer within the meaning of this section. *1950 Assam 129 (A I R V 37 C 49 P 8, 14) (DB), Gopinath Sarma* v. *Hangsanath Sarma.* ✣ *1951 Mad 213 (217) (A I R V 38 C 43 P 10) : I L R (1951) Mad 607 (DB), Radhakristnayya* v. *Sarasamma.* ✣ *1954 Sau 46 (A I R V 41 C 24 P 6) (DB), Smt. Zaveri* v. *Jitu.*

Note 8

Add in the Foot Note indicated :

1. ('50) 1950 Bur L R (H C) 80 (87), *Ko U Ma* v. *Ma Saw Myaing.* (Mortgage is transfer of immovable property.)

Note 9

Add in the Foot Notes indicated :

1. 1953 Ajmer 47 (A I R V 40 C 50 P 4), *Gulab Chand Subh Karan* v. *Madholal Sadha Sukh.* (Para 1 of S. 53A also envisages the execution of some contract.) ✣ 1952 Nag 246 (A I R V 39 C 66 P 19) : 1 L R (1951) Nag 334, *Narayan* v. *Guru Prasad.* ✣ 1951 Nag 171 (AIR V 38 C 34 P 19 to 21) : I L R (1950) Nag 618, *Balkrishna* v. *Rangnath.* (Possession delivered to mortgagee in satisfaction of debt under oral agreement—Subsequent sale of same property—Suit for possession by vendee — Mortgagee cannot resist possession.) ✣ 1950 Assam 10 (110) (AIR V 37 C 42 P 19) (DB), *Dharameshwar Sarma* v. *Lakhayadhar.* (Mere admission though in writing by vendor before Revenu authorities in mutation proceedings that land had been sold to vendee cannot be regarded as a written contract between the parties.)
2. 1950 S C 1 (A I R V 37 C 1 P 18, 19) : 1950 S C R 75 (S C), *Maneklal Mansukhbhai* v. *H. J. Ginwala & Sons.* (It was held in this case that terms of lease could be gathered from Government resolution containing summary of arrangement to grant lease to defendant—1944 Bom 105 (AIR V 31), *H J. Ginwalla & Sons* v. *Maneklal Mansukhbhai*, Reversed.)

In Pt. 6 read :

"Case" for "cases" and from foot-note 6 *omit* 1944 Bom 105 (107) (A I R V 31), *H. J. Ginwalla & Sons* v. *Maneklal Mansukhbhai* with its parallel citation and foot-note remark.

Note 9a

Add in the Foot Note indicated :

1. 1955 NUC (All) 1705 (AIR V 42), *Municipal Board, Lucknow* v *Lala Gurdayal.* ✣ 1955 N U C (Cal) 92 (AIR V 42), *Pankuj Kumar* v. *Bejoy Kumar.* (Where no written document signed by the plaintiffs from which the terms necessary to constitute the transfer can be ascertained has been proved, S. 53A is of no avail to the defendant.) ✣ 1955 N U C (Orissa) 712 (A I R V 42), *Jagannath Jee* v. *Mohan Maharana.*

Add after Pt. 1 :

[Pt. 1a] When the terms of an oral contract or disposition of property are reduced to the form of a document the document takes the place of the oral contract or agreement and thus there comes into existence a contract or agreement in writing. *1951 Nag 285 (AIR V 38 C 81 P 7) : ILR (1950 Nag 799 (DB), Mt. Radhabai* v. *N. J. Nayadu.*

Note 10

Add in the Foot Notes indicated :

1. 1952 Orissa 118 (A I R V 39 C 31 P 7) : I L R

(1950) Cut 143 (DB), *Nila Padhan* v. *Gokulananda Padhi.* (Defendant has to establish that there was delivery of possession.) ✣ 1950 Assam 129 (A I R V 37 C 49 P 15) (DB), *Gopinath Sarma* v. *Hanganath Sarma.* (Per *Ram Labhaya J.*—Transferee not in possession — It is not necessary to consider whether any other such act has been done)

[*See also* 1955 Pat 126 (Pr 10) ((S) A I R V 42 C 25) (DB), *Babulal Mandal* v. *Abala Bala.* (When it is found that the defendant is not in possession of the suit land, there is no question of protecting his possession under S. 53-A.)]

2. 1955 Hyd 101 (Pr 7) (A I R V 42 C 25): I L R (1954) Hyd 322, *Jahangir Begum* v. *Gulam Ali Ahmed.* (The acts of part performance, if they preceded the contract, cannot be evidence of part performance.) ✣ 1955 Madh B 93 (Pr 2) ((S) (A I R V 42 C 29), *Kukaji* v. *Basantlal.* (The act of part performance must not be act preparatory to the completion of the contract and that acts introductory to and previous to the agreement cannot be treated as acts of part performance.) ✣ 1950 F C 1 (7) (A I R V 37 C 1 P 15) : 1949 F C R 484 (FC), *China Subba Rao* v. *Mattapalli Raju.* (Pending redemption suit mortgagor executing agreement to sell mortgaged property to mortgagee — Suit dropped — No sale deed executed—Mortgagee never in possession of mortgaged property—S. 53A held had no application.) ✣ 1950 Assam 129 (A I R V 37 C 49 P 10, 16) (DB), *Gopinath Sarma* v. *Hangsanath Sarma.* (On the question whether payment of consideration is an act done in furtherance of contract Thadani, C J., is of opinion that it is not, while Ram Labhaya J. expressed his opinion that it is.)

3. 1955 Madh B 49 (Pr 14) (A I R V 42 C 14) : I L R (1954) Madh B 237 (DB), *Pannalal* v. *Labhchand.* (If a connection is established by evidence between the payment and the contract, then the payment would be an unequivocal act referable to and in furtherance of the alleged contract.) ✣ 1955 Mys 38 (Pr 7) ((S) AIR V 42 C 15), *Chikkannaswamy* v. *Hayat Khan.* (If a mortgagee purchaser under an unregistered deed of sale has paid either the whole or part of the consideration, the same can be said to be in pursuance of the contract of sale.) ✣ 1954 Ajmer 70 (Pr 7) (A I R V 41 C 70), *Mohanlal* v. *Prithvi Raj.* ✣ 1953 Mad 925 (A I R V 40 C 363 P 5), *Gopalan* v. *Kanaran.* ✣ 1952 Raj 141 (A I R V 39 P 2) : I L R (1951) 1 Raj 918, *Ratanlal* v. *Kishanlal.*

4. 1955 Madh B 49 (Prs 12, 13) (AIR V 42 C 14): I L R (1954) Madh B 237 (DB), *Pannalal* v. *Labhchand.* ✣ 1955 N U C (Orissa) 712 (A I R V 42), *Jagannath Jee* v. *Mohan Maharana.* (Defendant already in possession — It must be established that he continued to remain in possession in part performance of contract — Finding that defendant is in possession is not enough.) ✣ 1951 Nag 171 (AIR V 38 C 34 P 21): ILR (1950) Nag 618, *Balkrishna* v. *Raghunath.* (Case of mortgagor and mortgagee.) ✣ 1953 Hyd 114 (AIR V 40 C 42 P 15) : ILR (1952) Hyd 449 (459) (DB), *Lakshmibai* v. *Bhoja* ✣ ('50) 1950 Nag L Jour (Notes) 61, *Maitoo* v. *Nathu.* (Possession must be by actual or constructive delivery by transferor—Forcible taking of possession is not contemplated.)

5. 1955 Madh B 49 (Prs 12, 13) (A I R V 42 C 14) : ILR (1954) Madh B 237 (DB), *Pannalal* v. *Labhchand.*

Add after Pt. 6 :

[Pt. 7] The section envisages a case in which the transferee has obtained possession and has performed his part of the contract. Paragraph 1 of the section envisages the execution of some contract also. Therefore if only the step of registration has not been taken the contract remains only partly performed and the transferee can take advantage of the section. *1953 Ajmer 47 (A I R V 40 C 50 P 4), Karan* v. *Madholal Sadha Sukh.*

[Pt. 8] It has been held that the interest which the mortgagor can transfer when the mortgage is usufructuary cannot be regarded as identical with the property and so in cases of sale of equity of redemption in a usufructuary mortgage if the mortgagee pleads part performance he must show some distinct overt act besides his possession which he had as usufructuary mortgagee in furtherance of the contract. *1954 Madh B 128 (Pr 4) (AIR V 41 C 59), Bapuji* v. *Kukaji.*

[Pt. 9] Where a usufructuary mortgagee gets a rent note executed in respect of the house usufructuarily mortgaged to him, it is in assertion of his rights in pursuance of the mortgage and the requirements of second clause of the section are satisfied. *1954 Ajmer 70 (Pr 9) (A I R V 41 C 70), Mohanlal* v. *Prithvi Raj.*

Note 11

Add in the Foot Note indicated :

1. 1955 N U C (Orissa) 712 (A I R V 42), *Jagannath Jee* v. *Mohan Maharana.* (Where the defendants were not willing at any time to do their part of the contract, they are not entitled to the protection under S. 53A.) ✣ 1952 Nag 246 (A I R V 39 C 66 P 19) : I L R (1951) Nag 334, *Narayan* v. *Guru Prasad* ✣ 1952 Nag 244 (A I R V 39 C 65 P 7) : I L R (1949) Nag 959, *Sobharam* v. *Totaram.* (Making a false plea that a certain obligation under the contract has been discharged shows an unwillingness on the part of the transferee to abide strictly by the contract entered into between him and the transferor.) ✣ ('46-52) I D 39726 (Assam) (DB), *Bebai Nath* v. *Mt. Kemari Katoni.* (Vendee not ready and willing to perform his part of the contract—Section does not apply.)

Note 12

Add in the Foot Note indicated :

1. ('54) I L R (1954) Mad 537 (563) (DB), *Janki Rama Ayyar* v. *Nilakanta Ayyar.* (Two out of three trustees are not alone and solely entitled to the trust properties, and though they are competent to contract they are not entitled to these properties and therefore there

is no valid contract, the foundation upon which the doctrine of part performance could be rested.) ✣ 1954 Pat 41 (A I R V 41 C 16 P 5), *Tarak Chandra Dutta* v. *Jagdish Chandra Deo* ✣ ('51) 1951 Nag L Jour (Notes) 82, *Manihar* v. *Pt Ramkrishna.* (Lease in perpetuity of *sir* land on 6-7 1940 without sanction of Revenue Officer — Lease being invalid doctrine of part performance does not apply.) ✣ ('49) 1949 Nag L Jour (Notes) 207, *Huderam* v. *Musle* (Contract for sale by non-manager co-parcener of entire family property—No legal necessity — Purchaser put in possession—Purchaser cannot resist possession by other co-parceners—Doctrine of part performance would not apply to case.)

Add after Pt. 4 :

[Pt. 5] Sale of immovable property, of a value less than one hundred rupees, is complete by delivery of the property, in spite of there being an unregistered deed of sale. Where, therefore, the transferee's claim is that he has become the owner of such a property which he claims for himself by virtue of a contract of sale and delivery of property, S. 53A has no application. *1951 Hyd 42 (A I R V 38 C 6 P 5) (DB), Nagayya Baliah* v. *A. Sayanna.*

Note 13

Add in the Foot Notes indicated :

1. [*See* 1950 Cal 23 (A I R V 37 C 6 Pr 13) : ILR (1950) 2 Cal 443 (DB), *Ram Protap Kayan* v. *National Petroleum Co. Ltd.* (Per *P. N. Mitra J.* — "What their Lordships lay down is that the only right conferred on the transferee is the right to protect his possession and not that the section confers a right only on the transferee.")]

2. 1955 Madh B 49 (Pr 11) (A I R V 42 C 14) : I L R (1954) Madh B 237 (DB). *Pannalal* v. *Labhchand* ✣ 1955 Punj 22 (Pr 13) (S) (A I R V 42 C 7) (DB), *Mt. Santi* v *Sudh Ram* ✣ 1955 NUC (Cal) 44 (A I R V 42), *Bhabatarini Dassi* v. *Monomohan Palsai* ✣ 1955 NUC (Madh B) 203 (A I R V 42), *Ghasilal* v. *Deebai* (In a suit for possession of the property mortgaged, the mortgagee in possession under an invalid mortgage is entitled to retain possession until the mortgage-debt is paid off) ✣ 1954 Mad 702 (Pr 7) (A I R V 41 C 233), *Ettapparambath Atiyandi Pakkirichi Umma* v *Kaiprath Kalandan* ✣ 1954 Pepsu 42 (A I R V 41 C 41 P 2) : I L R (1953) Patiala 319, *Mt. Chambi Devi* v. *L. Gora Lal* ✣ 1954 Trav Co 10 (A I R V 41 C 5 P 23) (DB), *T. V. Kochuvareed* v *V P Mariappa Gounder*, (Property in possession of lessee in furtherance of the terms of an unregistered lease—Lessee performing his part under the contract and such performance acquiesced in by the transferor — *Held*, lessee and his assignee were entitled to resist attempt to recover possession by a person having a subsequent contract for sale in his favour by the transferor.) ✣ 1952 Nag 244 (245) (A I R V 39 C 65 P 5) : I L R (1949) Nag 959, *Sobbaram Jiwan* v *Totaram.* (Whether a contract is specifically enforceable or not is not a matter which must be taken into consideration for granting relief under S. 53-A.)

3. 1954 Mad 702 (Pr 7) (A I R V 41 C 233), *Ettapparam Bath Atiyandi Pakkirichi Umma* v. *Kaiprath Kalandan* ✣ 1954 Pepsu 42 (A I R V 41 C 23 P 2 : ILR (1953) Patiala 319, *Mt. Chambi Devi* v. *L. Gora Lal.* (The doctrine of part performance does not enable a person who has lost possession to sue for recovery of it.) ✣ 1952 Orissa 143 (AIR V 39 C 37 P 6) : ILR (1949) 1 Cut 705 (DB), *Padmanabha Panda* v. *Appalanarasamma.* (Transferee as plaintiff cannot avail himself of benefits of doctrine of part performance of confract for sale as against invasion on his rights by attaching creditor of the transferor. 1944 Oudh 212 (AIR V 31), Ewaz Ali v. Firadus Jehan; 1939 All 601 (AIR V 26), Ramchunder v. Maha Raja Kunwar, Dissented from) ✣ 1951 Nag 160 (AIR V 38 C 24 P 10) (DB), *Hari Prosad Agarwalla* v. *Abdul Haq* ✣ 1949 Kutch 13 (14, 15) (AIR V 36 C 12 P 10), *Jadeja Versalji Abhesangji* v *Shah Khimji* ✣ 1949 Pat 464 (AIR V 36 C 13 P 5) : 28 Pat 351 (DB), *Bajrang Gope* v. *Rupnarain Mahton.* (Provisions of S. 53A, T. P. Act cannot be availed of by the plaintiff who has to prove his title in a suit for ejectment.)

[But see 1953 Ajmer 18 (AIR V 40 C 20 P 6), *Fateh Mohd. S.* v *Ghosia Bibi.* (Plaintiff can invoke aid of S. 53A : 1944 Oudh 212 (AIR V 31), Ewaz Ali v. Firadus Jehan; 1940 All 340 (AIR V 27), Municipal Board, Etah v. Moradhuj, 1933 Bom 381 (AIR V 20), Suleman Haji Ahmed Umar v. P. N. Patel, Foll.)]

8. 1950 Cal 23 (27) (AIR V 37 C 6 P 14) : I L R (1950) 2 Cal 443 (DB), *Ram Protap Kayan* v. *National Petroleum Co. Ltd* (The section secures the result of enabling the transferor to enforce his contractual rights against the transferee in respect of the property.)

In F. N. 8—After the foot note remark to 1941 Bom 346 (A I R V 28), Bechardas v. Ahmedabad Municipality *add*;—Note : This view of Broomfield, J. is dissented from by P. N. Mitra J. in *1950 Cal 23 (A I R V 37 C 6 P 17) : I L R (1950) 2 Cal 443 (DB), Ram Protap Kayan* v. *National Petroleum Co. Ltd.*

13. 1955 Hyd 101 (Pr 5) (AIR V 42 C 25) : ILR (1954) Hyd 822, *Jahangir Begum* v. *Gulam Ali Ahmed* ✣ 1951 Nag 403 (4 6) (AIR V 38 C 126 P 22) : ILR (1950) Nag 25. *Amroo* v. *Babarao.* (Section 53A does not create new form of transfer.) ✣ ('50) 1950 All W R 417 (445), *Mohd. Sher Khan* v. *Special Manager, Court of Wards, Mahewa Estate.* (Dispute above lease between lessee and third person—Section 53A does not apply)

14. 1951 Nag 403 (405) (AIR V 38 C 126) P 13) : ILR (1950) Nag 25, *Amroo* v. *Babarao* ✣ 1950 Orissa 217 (AIR V 37 C 39 P 3) : I L R (1950) Cut 107 (DB), *Maglu Meher* v. *Sukru Meher.*

Page 830; In the paragraph beginning with the words 'It is submitted", *omit* line 10, namely, "enforce his . . . . incompleteness" which is same as line 12.

In the sentence that follows Pt. 2, *place* pt. (2a) after the words "bar on the trans-

feror" and *insert* as foot-note 2a the following :

2a. 1952 Assam 28 (AIR V 39 C 18 P 8) (DB), *Bidyaran Kalita* v. *Birdatta Kalita* (Usufructuary mortgage— Unregistered endorsement on mortgage by mortgagor relinquishing his interest in mortgaged land in favour of mortgagee for a sum below Rs. 100— Registration — Mortgagee continuing in possession in part performance of contract can claim benefit of S. 53A to resist suit for redemption.)

Add after Pt. 7 at the end of para beginning with the words "It is submitted" and ending with the words "under this section" :

[Pt. 7aa] Thus it has been held that a suit under O. 21, R. 63, Civil P. C., should be deemed to be a defensive proceeding in continuation of the proceeding under O. 21, R. 58 of the Code of Civil Procedure and hence, the plaintiff in such a suit can invoke the aid of S 53A, Transfer of Property Act. *1953 Ajm 47 (AIR V 40 C 50 P 5), Gulab Chand Subh Karan* v. *Madholal Sadha Sukh.*

Add after Pt. 7aa :

[Pt. 7a] See also the undermentioned case, *1949 Nag 410 (414) (A I R V 36 C 165 P 18) : I L R (1949) Nag 534, Bhulkhoo Ghaslya* v. *Mst. Hiriyabai.* (Section 53A gives part-performer right to resist dispossession, and if in point of fact, he is forcibly ejected, he has his remedy.)

Add after Pt. 10 :

[Pt. 10a] Or for possession of the property leased on the expiry of the period. *1950 Cal 23 (AIR V 37 C 6 P 18) : I L R (1950) 2 Cal 443 (DB), Ram Protap* v. *National Petrcleum Co.* (The terms of the section indicate that they cannot be conditions precedent to the enforcement of the transferor's right)+*1953 Cal 349 (A I R V 40 C 130 P 17, 20), Muralidhar Kuthia* v. *Tara Dye (1950) Cal 23 (AIR V 37 C 6) : I L R (1950) 2 Cal 443 (DB), Ram Protap* v. *National Petroleum Co.*, Foll.)

[Pt. 10b] It has been held that where there is no lease signed by the lessor as required by this section and the lessee has entered into possession under an agreement to pay rent, the agreement would bind the parties only so long as the parties retain the agreement. Once however the agreement comes to an end, the lessee's liability to pay rent will cease. *1955 NUC (All) 1705 (AIR V 42), Municipal Board, Lucknow* v. *Lala Gurdayal.*

Add after Pt. 14 :

[Pt. 15] In the case of a benami transfer the real transferee is entitled to claim the benefit of the section. *1955 Hyd 101 (Pr 5) (AIR V 42 C 25) : I L R (1954) Hyd 822, Jahangir Begum* v. *Gulam Ali Ahmed.*

Add at end of the Note as a separate para:

[Pt. 16] Even in a case where the Court comes to the conclusion that there has been part performance of a contract of sale it cannot use that finding as a proof of the factum of sale. *1954 Pepsu 133 (Pr 11) (AIR V 41 C 55) : I L R (1953) Patiala 508 (DB), Jangir Singh* v. *Rulia.*

Note 14

Add in the Foot Note indicated :

2 1954 Pepsu 133 (Pr 10) (AIR V 41 C 55) : ILR (1953) Patiala 508 (DB), *Jangir Singh* v. *Rulia.*

In point (3-4) change the word 'case' into 'cases' and add the following to the Foot Note indicated :

3-4. 1954 Bom 153 (AIR V 41 C 41 P 7, 11, 14, 15) : I L R (1954) Bom 194 (DB), *Ranchhod Ramnarayan* v. *Manurai.*

Note 14a

Add in the Foot Note indicated :

1. 1951 Pat 613 (AIR V 38 C 174 P 10 (DB), *Narayan Prasad Sukul* v. *Rajkishore Mishra.* (Contest between prior and subsequent lessees who had taken property on lease from lessor.)

Add after Pt. 5 :

[Pt. 5a] The person claiming under the transferor is a person who claims under a title derived subsequently to the date of the transfer and not anterior to the said date. *1953 S C 503 (A I R V 40 C 124 P 14), Hemraj* v. *Rustomji.*

Note 15

Add in the Foot Notes indicated :

1. 1953 S C 503 (AIR V 40 C 124 P 14), *Hemraj* v. *Rustomji.* (Defendant held was not a transferee for value who had paid money in good faith.)

2. 1955 Madh B 93 (Pr 5) ((S)AIR V 42 C 29), *Kukaji* v. *Basantilal.* (Where the person pleading the doctrine of part peformance fails to prove that the subsequent transferee was not a *bona fide* transferee for value and that he had notice of the transaction in his favour, any right which such person might have got under the prior deed cannot affect the rights of subsequent transferee.) ✠ 1954 Madh B 128 (Pr 3) (AIR V 41 C 59), *Bapuji* v. *Kukaji* ✠ 1952 Orissa 103 (AIR V 39 P 3) (DB) *Malla Sasirekhamma* v. *Garibham Suramma.*

[*See* 1952 Nag 244 (AIR V 39 C 65 P 8) ; I L R (1949) Nag 959, *Sobharam Jiwan* v. *Totaram.*]

Add after Pt. 2 :

[Pt. 3] When actually and as a matter of fact the transferee has notice, the informality of the manner in which he acquired

that notice or information is not material. The main thing is that the transferee should know; it does not matter how he knows it So long as it is credible information, which a person of ordinary prudence will take notice of, he will be bound by it. *1953 Mad 925 (A I R V 40 C 363 P 3), Ananthoth Gopalan* v. *Eram Veettil Kanaran.*

Note 16

Add in the Foot Notes indicated :

3. 1950 S C 1 (5) (AIR V 37 C 1 P 18) : 1950 S C R 75 (SC), *Maneklal Mansukhbhai* v. *H. J. Ginwala & Sons* ✣ 1951 Nag 285 (A I R V 39 C 81 P 9, 11) : I L R (1950) Nag 791 (DB), *Mt. Radhabai* v. *N. J. Nayadu.* (Written agreement to lease for a term exceeding one year signed by lessor only – Agreement is admissible under S 53A.) ✣ 1951 Pat 277 (AIR V 38 C 56 P 19) : 29 Pat 628 (DB), *Girija Nandan Singh* v. *Girdhari Singh* ✣ 1950 Cal 23 (AIR V 37 C 6 P 20, 21) : I L R (1950) 2 Cal 443 (DB), *Ram Protap* v. *National Petroleum Co.*)

[*See also* 1955 Madh B 4 (Pr 11) (AIR V 42 C 14) : I L R (1954) Madh B 237 (DB), *Pannalal* v. *Labhchand.* (After the introduction of S. 53-A, S. 49, Registration Act was also amended so as to enable S 53-A being used in supersession of S 49. But from this it does not follow that if it had not been amended, an unregistered deed of contract would not have been admissible for the purposes of S 53-A.]

5. 1954 Trav.Co. 10 (A I R V 41 C 5 P 23) (DB), *T. V. Kochuvareed* v. *V. P. Mariappa Gounder.* (Suit for specific performance by person having a contract for sale in his favour – Property in possession of lessee from promisor in furtherance of the terms of an unregistered lease executed before contract for sale was made —Lessee performing his part under the contract and such performance acquiesced in by transferor – Plaintiff having knowledge of that fact even prior to date of suit agreement — *Held* that lessee and his assignee were entitled to resist plaintiff's attempt to recover possession by ejecting them and rely for that purpose on the strength of the unregistered deed and also that the document was not inadmissible in evidence.)

[*See also* 1955 Vind Pra 15 (Pr 6) (A I R V 42 C 7) *Chhotelal* v. *Ram Pratap Ram.* (Under the existing law gover ing procedure in the State of Vindhya Pradesh there is no provision which makes the unregistered document inadmissible in evidence for purposes of proving part performance.)

After Pt 5 add the following :

[Pt. 5a] Where the original agreement though in possession of the transferor is not produced even after notice to him, secondary evidence of the same can be adduced by the transferee in support of his defence of part performance. *1950 S C 1 (4, 5) (A I R V 37 C 1 P 16) : 1950 S C R 75 (SC), Maneklal Munsukhbhai* v. *H. J. Ginwala & Sons.* (1944 Bom 105 (A I R V 31), H. J. Ginwalla & Sons v. Maneklal Mansukhbhai, Reversed.)

Add after Note 16a :

16b. Registration of instrument during pendency of suit.—See Section 52, Note 29.

Note 17

Add in the Foot Note indicated :

2. 1952 Nag 115 (117) (A I R V 39 C 45 (9) P 8) : I L R (1952) Nag 604, *Deochand* v. *Mst. Parwatibai.*

In Pt. 2 *place* figure 1a after the words a 'ground of claim' and in the foot-notes *insert* the following :

1a. 1950 S C 1 (AIR V 37 C 1 P 16) : 1950 S C R 75 (SC), *Maneklal Mansukhbhai* v. *H. J. Ginwala & Sons.* ('In cases of lease the Legislature has recognised that the equity of part performance is an active equity as in English law and is sufficient to support an independent action by the plaintiff ")

Add after the sentence after Pt 2 :

[Pt. 3] Thus the defence under S. 53A is available to a person who has an agreement of lease in his favour though no lease has been executed and registered. *1950 S C 1 (4) (AIR V 37 C 1 P 16) : 1950 S C R 75 (SC), Maneklal Mansukhbhai* v. *Hormusji Jamshedji Ginwala & Sons* ✣ *1953 Hyd 97 (A I R V 40 C 37 P 3) : I L R (1953) Hyd 110, Mahommed Sadruddin Khan* v. *Gulam Mohiuddin.*

Note 18

Add in the Foot Notes indicated :

1. *See also* 1955 Vind Pra 15 (Pr 4) (AIR V 42 C 7), *Chhotelal* v. *Ram Pratap Ram* (The defence of part performance was, therefore, open in State of Vindhya Pradesh even before the application of Transfer of Property Act exactly in the same manner as it is open now.) [But see 1950 Kutch 64 (AIR V 37 C 53 P 7), *Gangabai Ratonshi* v. *Malbai* (Principle of S. 53-A is not applicable when it is in conflict with any statute in Kutch.)]

2. *See also* 954 Madh B 12 (Pr 2) (AIR V 41 C 59), *Bapuji* v. *Kukaji.* (So far as the Gwalior State territory of Madhya Bharat State is concerned the principle embodied in S 53-A had been applied even before the Transfer of Property Act was made applicable in Gwalior State.)

Add after Pt. 5 :

[Pt 6] In a decision by the Judicial Commissioner of Kutch it has been held that the principle of S. 53-A which gives the right to a defendant to defend his possession by using an unregistered document against the vendor would not apply in Kutch as the Kutch law prohibited any such use of the document and expressly rendered such a document inoperative in a Court in Kutch. *1950 Kutch 64 (AIR V 37 C 53 P 9), Gangabai Ratonshi* v. *Malbai.* (T. P. Act not made applicable to

Kutch—1931 P. C. 79 (A I R V 18) (PC) Ariff, G. H. C. v. Jadunath Majumdar and 1934 P C 235 (AIR V 21) (PC), Pir Bux v. Mohomed Tahar, Rel. on.)

Note 19

Add in the Foot Note indicated :

1. 1955 Hyd 101 (Pr 9) (AIR V 42 C 25) : I L R (1954) Hyd 822, *Jahangir Begum* v. *Gulam Ali Ahmed.* (The doctrine embodied in S. 53-A would apply even where the vendee's suit for specific performance has become barred.) ✣ 1951 Nag 403 (.05) (A I R V 38 C 126 P 12) : I L R (1950) Nag 25, *Amroo* v. *Babarao.*

Note 20

Add in the Foot Note indicated :

1. 1951 Pat 602 (A I R V 38 C 139 P 8) (DB), *Sailajananda* v. *Lakhichand Sao* ✣ ('51) 1951 Nag L Jour (Notes) 82, *Manohar* v. *Pt. Ramkrishna.*

Add after Pt. 1 :

[Pt. 2] The defendant claiming the benefit of the doctrine of part performance must raise the plea in his written statement. *1955 Madh B 93 (Pr 4) ((S) AIR V 42 C 29), Kukaji* v. *Basantilal.*

Volume II

SECTION 54

Insert above Synopsis of S. 54—

As to exemption from operation of paras. 2 and 3 in Himachal Pradesh *see* Gaz. India, 1951, Pt. II, Sec. 3, P. 2040 (S. R. O. 1873).

Add in the Synopsis after Item 10 :

10a.—Sale or gift.

10b.—Sale or hire purchase agreement.

Note 1

Add after Pt. 2 :

[Pt. 2a] A sale ordinarily means a voluntary act, the transferring of property voluntarily by the seller to the buyer at a price. The term cannot include a compulsory sale as it is a contradiction in terms. *1951 Cal 151 (A I R V 38 C 30m P 17, 24) : I L R (1952) 1 Cal 263, Calcutta Electric Supply Corporation, Ltd.* v. *Commr. of Income tax, West Bengal.*

Add after Pt. 9 and before the sentence. "The Act does not apply to the Punjab . . . ."

[Pt 9a] In areas where Transfer of Property did not apply it has been held that before an oral sale can be allowed to be established in a Court of law, the Court must be convinced of one of two things, *viz.*, that the entire consideration had been paid by the purchaser to the vendor or the possession of the property in question is made over from the one to the other. It is then and then only the Court can reasonably come to the conclusion that there has been a transfer of ownership of the property intended to be sold. Other rules enacted in S. 54 are in the nature of technical provisions of law which should be extremely dangerous to apply where the Act is not in force. *1955 Raj 70 (Pr 5) (AIR V 42 C 23) : I L R (1954) 4 Raj 705 (DB), Sampat Raj* v. *Pokar.*

Note 3

Add in the Foot Notes indicated :

4. [See however 1951 Nag 129 (AIR V 38 C 25B Prs 7, 13 14, 16) : I L R (1949) Nag 625 (DB), *Kashinath Appa Shankar Appa* v. *Ramji Nanaji Loba.* (Settlement of debt by Debt Conciliation Board — Claim of Rs. 11,000 conciliated for Rs. 6,000 — Debtor executing sale deed of his fields in favour of creditor for the amount — Transaction held voluntary transfer giving rise to right to pre-empt)]

Add at the end of the note as separate para :

[Pt. 9] A sale by the official liquidator under the Companies Act is governed by the provisions of this section and has to be by a registered instrument to pass title to the purchaser. *('50) 1950 Nag L Jour (Notes) 30, Dalmia Jain & Co.* v. *Messrs. R. S H Verma.* (Title on registration relates back to execution.)

Note 4

Add in the Foot Note indicated :

3. 1955 N U C (Assam) 622 (A I R V 42), *Mt. Gul Bibi* v. *Mt. Mimsani.*

Add after Pt 3 :

[Pt. 3aa] The Nagpur High Court has also taken the same view. *1951 Nag 428 (A I R V 38 C 132 P 9) : I L R (1949) Nag 426 (DB), Zainab Bi* v. *Jamal Khan*

Add after Pt. 3a :

[Pt. 3b] The Madras High Court also has taken the same view. *1952 Mad 671 (A I R V 39 P 16, 21, 26) : I L R (1952) Mad 1010 (DB), Masum Vali Saheb* v. *Illuri Modin Sahib.*

[Pt. 3c] The Allahabad High Court also has taken a similar view overruling its earlier decisions 1936 All 600 (A I R V 23) (D B), Kulsum Bibi v. Shiam Sunder and 1937 All 25 (A I R V 24) (DB), Kulsum Bibi v. Bashir Ahmad, to the contrary effect. *1951 All 86 (A I R V 38 C 12 P 42, 49) : I L R (1952) 1 All 477 (FB), Ghulam Abdus* v. *Mt. Razia Begum.* (A transfer may have all the attributes of a true 'hiba-bil-ewaz' known to Muhammadan law, and it may also be treated as such; but if it falls within the

purview of S. 54, T. P. Act, and is not effected in the manner provided therein, it will be inoperative and ineffectual in law. The delivery of possession under such a transfer will also be ineffectual as against the real owner of the property.)

Note 5

Add in the Foot Notes indicated :

3. 1949 Mad 884 (A I R V 36 C 393 P 12), *Gopala Krishnamurthi* v. *Madireddi*.

4. (*See also* 1951 Nag 171 (AIR V 38 C 54 Prs 8, 11) : I L R (1950) Nag 618, *Balkrishna Gopal* v. *Rangnath Hanmant*. (Extinguishment of mortgage by transfer of property can be effected only by a sale, gift or exchange. So long as the title of the mortgagor to the property transferred is not in dispute the transaction is not a compromise of a disputed title. The property when it is of more than Rs 100 in value has to be transferred only by a registered instrument in order to transfer title.)]

5. 1952 All 200 (A I R V 39 C 77 Prs 12, 17, 18) (DB), *Mt. Qayumunissa* v. *Rashidul Malik*. (Condition of repurchase embodied in deed itself is not necessarily conclusive on the question, whether the transaction is mortgage by conditional sale or sale with condition of repurchase — Intention of parties has to be gathered from deed and surrounding circumstances. ✣1952 I D A 1117 (All), *Ram Charan* v. *Baij Nath*. (Document styled sale deed stating that possession had been handed over to vendee and that vendee was entitled to have mutation made in his favour — Consideration said to be financial assistance to vendor, in litigation pending against property, tentatively valued — Transaction held out and out sale.) ✣ 1951 Nag 403 (A I R V 38 C 126 P 14) : I L R (1950) Nag 25, *Amrao* v. *Babarao*. (Document described as an agreement and stamped as such, and without words of conveyance therein and clearly stating that a sale deed will be executed in future must be regarded as an agreement and not a conveyance.) ✣ 1951 Pat 454 (AIR V 38, C 123, P 101), *Rajkumar Singh* v *Uchit Tatwa*. (Non-delivery of document of sale and non-delivery of possession are not of much importance for the purposes of determining what was the intention of the parties in a case where the suit has been filed nine days after the sale.) ✣ 1950 All 632 (A I R V 37 C 249 P 9) : I L R (1953) 1 All 265 (DB), *Sahadeo Singh* v. *Munshi Kuber Nath Lal*. (Where there is intention to transfer ownership immediately a condition for reversion of ownership to vendor on the failure of vendee performing his part does not detract from transaction being a completed sale. If such a condition is void under law it would be ignored but will not affect the effect of the sale deed.) ✣('50) 1950 Nag L Jour (Notes) 83, *Khupchand* v *Narayan*. (Land intended to be conveyed — Deed reserving to the vendor half interest in only one of trees standing on land— Held right to fruits of other trees was transferred to purchaser.) ✣('49) 1949 All L Jour 566 (574, 575, 577) (DB), *Girja Prasad* v. *Nazish Husain* (Heirs of *A* entering into agreement with *B*—*B* agreeing to finance heirs to recover properties left by *A*—*B* to become owner of certain property in lieu of his aid — Agreement called agreement of partnership—On construction of document held parties intended that title to property should be conveyed under document and further document was not contemplated.)

10. 1953 Nag 167 (A I R V 40 C 57 P 6) : I L R (1952) Nag 644 (647) (DB), *Shewantabai* v. *Vishwasrao Govindrao*

13. 1 950 All 632 (A I R V 37 C 249 P 2) : I L R (1953) 1 All 265 (DB), *Sahdeo* v. *Kuber Nath*. [*See also* ('49) 1949 All L Jour 566 (574, 575, 577) (DB), *Girja Prasad* v. *Nazish Husain*. (*B* financing heirs of *A* to recover properties left by *A* and to become owner in lieu of his aid — Held on construction of document that parties intended title to be conveyed without any further document.)]

14. 1950 All 632 (A I R V 37 C 249 P 2) : I L R (1953) 1 All 265 (DB), *Sahdeo Singh* v *Kuber Nath Lal* ✣ 1950 Pat 85 (A I R V 37 C 24 P 4), *Pradyamon Prasad Sinah* v. *Mahadeo Singh* ✣('49) 1949 All L Jour 566 (575), *Girja Prasad* v. *Nazish Husain*. (Per *Desai J.*)

Add after Pt. 9 :

[Pt. 9a] In determining the question as to the nature of a transaction the Court should not be led away merely by the ostensible appearance given to it by the words used by the parties, but should make an attempt to go behind the phraseology for the purpose of ascertaining the real intention of the parties. In other words, it is not the garb with which the parties choose to clothe the transaction that should guide the Courts, but it is the spirit permeating the transaction that should be the determining factor of its real nature. *1954 All 195 (A I R V 41 C 108 P 10), Central Finance & Housing Co., Ltd.* v. *British Transport Co.* (Held, that the transaction in question was in reality a transaction of sale and not a hire purchase agreement.)

Add after Pt 14 as separate para :

[Pt. 15] A decree for specific performance of a contract to sell property merely declares the rights of the decree-holder to have a transfer of the property executed in his favour and such a decree by itself is not effective to transfer title. Hence, so long as the sale-deed is not executed in favour of the successful party either by the defendant himself or by Court, the title continues to remain where it was before the passing of such decree. *1953 Nag 167 (A I R V 40 C 57 P 11) : I L R (1952) Nag 644 (649) (DB), Shewantabai* v. *Vishwasrao Govindrao.*

Note 8

Add in the Foot Note indicated :

2. 1952 I D A 1719 (Assam), *Ali Husain* v. *Nazar Ali Sarkar*

[*See also* 1953 Bom 145 (A I R V 40 C 46 Pr 4) ILR (1953) Bom 253 (DB), *Jibhaoo Harisingh*

v *Ajab Singh.* (Oral sale of property in value above Rs 100 by delivery of possession accompanied by giving *vardi* to village officer who effected mutation in favour of vendee — There is no sale)]

Note 10a

Add after Note 10 :

10a. Sale or gift. — [1] See S. 122 Note 16 and the undermentioned case : *1954 Punj. 116 (A I R V 41 C 55 P 7), Bakshi Ram* v. *Dewat Ram.* (The vendors were a Christian Mission. They wanted to help Christians who had been serving them Property worth Rs. 8 000 was alleged to be sold for Rs. 190. No money was paid before the Registrar. There was evidence that no money was received from the alleged transferee as price but he had only to pay some subscription—*Held*, that the transaction was a gift and not a sale)* *1954 Pat 280 (Pr 10) (A I R V 41 C 96) (DB), Devji Shivji* v. *Kasandas Ramji.* (Whatever mig t be the original motive behind a deed, if it purports to be a deed of transfer and consideration has been paid for it, it must be treated as an effective deed of transfer and cannot be regarded as a deed of gift.)

Note 10b

Add after Note 10a :

10b. Sale or hire purchase agreement

[Pt. 1] An agreement styled as a hire purchase agreement was entered into between *A* and *B*. Under the agreement *B* agreed to take on hire a bus belonging to *A* and was liable to pay the hire of the bus by twelve monthly instalments starting from 1.7 1941 to 1.6-1942. The total amount of the instalments to be paid was Rs. 1320, which was equal to the value of the bus. After payment of the instalments the hirer was to become the absolute owner of the bus. If the hirer *B* made any default in payment of any of the instalments it was open to *A* to terminate the agreement and to take possession of the bus. On the other hand, B was also given the right to terminate the agreement only if the bus was surrendered in the same order and condition in which it was hired 'fair wear and tear excepted." In case *B* chose to terminate the agreement he was liable not only to deliver the bus but further to pay a sum of Rs. 1500 on acccunt of depreciation in the value of the bus. In addition to that he was to forfeit the amount of instalments already paid. It was held that the transaction was in reality a sale and not a hire purchase agreement. The so called right of termination given to the hirer was illusory and was deliberately inserted into the agreement for the purpose of giving it a deceptive appearance and concealing the fact that the transaction was an out and out sale. *1954 All 195 (A I R V 41 C 108 Pr 14), Central Finance & Housing Co., Ltd.* v. *British Transport Co.*(Principles determining the nature of transaction laid down.)

Note 11

Add in the Foot Notes indicated :

1. 1949 Nag 389 (AIR V 36 C 158 P 6, 7, 9, 11): I L R (1949) Nag 849 (DB), *Balram Nasare* v. *Mahadeo Panduji.* (Where a proprietor holding sir rights parts with only occupancy rights in a field and not ownership outright and the parties agree that a specified rent shall be paid in respect of those fields, then whatever the parties may choose to call the transaction, in law the transfer amounts to a lease.)
2. 1952 Nag 45 (A I R V 9 C 22 P 20) : I L R (1949) Nag 699 (DB), *Onkar Laxman* v. *Namdeo Bhagwan.* (Auction sale by co-operative Bank— Under conditions of sale title to property was not to pass unless sale deed was executed— Auction purchaser taking only lease of property purchased instead of a sale deed — Lease authorized — Transaction held not sale so as to give rise to right of pre-emption.)
3. ('49) 7 J & K L R 224 (227), *Ghauri Shankar* v. *Sardar Gobind Singh* (Land transferred by deed styled Bainama Mauras – Transferee called occupancy tenant in the deed and granted heritable and transferable rights — Transferor barred from evicting transferee under any circumstance — Transferee made liable for annual rent equivalent to land revenue and two annas in the rupee—Held that transaction was lease and not sale.)

Note 11a

Add after Pt. 1 as a separate para :

[Pt 2] As to the distinction between a sale and relinquishment see the undermentioned case : *1954 Bom 95 (A I R V 41 C 23 Pr 8) : I L R (1953) Bom 1281 (DB), Provident Investment Co., Ltd* v. *Commr. of I. T., Bombay City.* (A sale or a transfer presupposes the existence of the property which is sold or transferred. It presupposes the transfer from one person to another of the right in property. On the other hand, relinquishment means the extinction of a right or the destruction of a property, and if the property is destroyed or the right is extinguished, there is nothing left to transfer or to sell.)

Note 12

Add in the Foot Notes indicated :

5. 1951 All 86 (A I R V 38, C 12 P 20) : I L R (1952) 1 All 477 (FB), *Ghulam Abbas* v. *Mt. Razia Begum.*
9. 1952 I D A 17117 (All), *Ram Charan* v. *Baij Nath* (Sale for financial assistance in litigation, tentatively valued.)

13. *See also* 1950 All 632 (AIR V 37 C 249, P 3) : I L R (1953) 1 All 265 (DB), *Sahdeo Singh* v. *Munshi Kuber Nath Lal.* (Sale in consideration of vendee filing suit at his own expense and recovering possession of property - Suit compromised by payment of cash to defendant —Transaction is not a sale and at any rate not a pre e ptible sale because consideration for sale is expenses not ascertained and labour the value of which is incapable of ascertainment.)]

Add after Pt. 2 :

[Pt. 2a] The mere fact that the sale deed untruly recites the payment of consideration cannot render the document invalid. *1952 Bom 56 (AIR V 39 C 7 P 1) (DB), Chandrashankar Manishankar* v. *Abhia Mathur.*

Add after Pt 5 :

[Pt. 5a] Where however the property is given in lieu of dower and not in consideration of the bride's relinquishment of the dower the transaction which is only a unilateral transaction is a gift and not a sale. *1952 Hyd 3 (AIR V 39 C 2 P 9): ILR (1952) Hyd 7 (DB), Hashim* v. *Aminabi.*

Note 13

Add before Pt. 1 :

[Pt. 1a] The price may be paid or promised wholly or in part. *1952 Bom 56 (A I R V 39 C 7 P 1) (DB), Chandrashankar Manishankar* v *Abhia Mathur* ✣ *1953 Trav-Co 161 (AIR V 40 C 54 Pr 9) (DB), Pazhaniappa Chettiyar* v. *South Indian Planting and Industrial Co Ltd.* (A sale is nonetheless a sale whether the price be paid down or the price be promised to be paid.)

Note 14

Add in the Foot Notes indicated :

1. 1952 Bom 56 (A I R V 39 C 7, P 1) (DB), *Chandrashankar Manishankar* v. *Abhia Mathur* ✣ ('49) 1949 Nag L Jour (Notes) 59, *Puranshan* v. *Lalman.*

[*See also* 1954 Punj 116 (A I R V 41 C 55 P 7), *Bakshi Pam* v. *Dewat Ram* (Property worth Rs. 8000 sold for Rs. 90—Price not paid before Registrar—No evidence that price was paid by vendee but that he had paid only some subscription to the vendor which was a Christian mission—Transaction held was not a sale but a gift.)]

2. 1954 Bom 518 (Pr 15) (AIR V 41 C 136) (DB), *Pramod C. Bhat* v *Kanwar Raj Nath* ✣ 1953 Orissa 315 (AIR V 40 C 92 P 42) : ILR (1953) Cut 343 (DB), *Chandrasekhar* v *Pitambari Dibya.* (Mere non-payment of con ideration will not arrest the passing of the title as sale may be effected for price paid or promised.) ✣ 1950 All 632 (A I R V 37 C 249 P 2) : I L R (1951) 1 All 265 (DB), *Sahdeo Singh* v. *Kuber Nath Lal,* (Sale may be complete though full price has not been paid) ✣ ('49) 1949 Nag L Jour (Notes) 59, *Puranshan* v. *Lalman.*

3. 1952 Bom 56 (A R V 39 C 7 P 1) (DB), *Chandrashankar Manishankar* v. *Abhia Mathur.*

[*See also* 1955 Cal 101 (Pr 14) ((S) A I R V 42 C 26) (DB), *Prasanta Kumar Sur* v. *International Contractors Ltd.* (The ordinary rule governing vendors and purchasers is that the payment of the consideration is to be simultaneous with and at the time when the conveyance is executed by the vendor. In any particular case, however, the parties may agree to deviate from the ordinary rule.)]

11. 1953 Orissa 315 (A I R V 40 C 92 P 42) : I L R (1953) Cut 343 (DB), *Chandrasekhar* v. *Pitambari Dibya.*

12. 1953 Pat 331 (AIR V 40 C 115 P 8), *Girish Narayan* v. *Akhtar Hussain.* (Under the terms of sale deed vendee was to pay certain amount to vendor's creditors out of the consideration and balance was to be paid at time when registration receipt was handed over to vendee. There was a further agreement to the effect that the husband of the vendor would execute a jamanatnama in favour of the vendee so as to compensate her in case there was any defect found in the vendor's title to the properties. Neither the registration receipt nor the sale-deed was handed over to the vendee, and she did not get possession of the properties covered by the deed—*Held*, that it was manifest from the recitals in the deed and from the facts that the intention of the parties was that title should pass on the payment of the consideration money, which was to be paid at the time of the passing of the registration receipt. As no consideration had been paid either to the vendor or to her creditors no title had passed.)

13. 1953 Orissa 315 (A I R V 40 C 92 P 42) : I L R (1953) Cut 343 (DB), *Chandrasekhar* v. *Pitambari Dibya* ✣ 1951 Pat 454 (A I R V 38 C 125 P 8), *Rajkumar Singh* v. *Uchit Tatwa.*

14. 1950 Pat 288 (A I R V 37 C 71 P 5), *Motilal Sahu* v. *Ugrah Narain.*

15. 1953 Orissa 315 (AIR V 40 C 92 P 42) : ILR (1953) Cut 343 (DB), *Chandrasekhar* v, *Pitambari Dibya.* (To gather the intention of the parties the Court is bound to look to the terms of the contract and not to speculate as to the intention from evidence *de hors* the instrument. The only evidence that the Court will look into is that afforded by what the parties have said and evidence aliunde is not admissible to prove their intention if the language employed is unambiguous. 1947 Pat 1 (A I R V 34 C 1), Pirtam Singh v. Jagannath Sarawgi, Relied on. But, if the recital is clear that the receipt of consideration and the transfer of title should be simultaneous. or that the sale is made in exchange for the price and the vendee is made the owner and put in possession after realization of the entire consideration the only inference should be that one is dependent on the other. If the recital about the receipt of consideration is proved to be incorrect, a latent ambiguity arises and if the circumstances show that the consideration was not, in fact, paid it would follow that the intention of the parties was not to effect a transfer of ownership by the mere execution or registration of the document: 1949 Pat 361 (AIR V 36 C 105) : 27 Pat 422, Md. Murtaza Hussain v. Abdul Rahman; 1950 Pat 288 (A I R V 37 C 71), Motilal Sahu v. Ugrah Narain; 1952 Pat 263 (AIR V 39), Panchoo Sahu v. Janki Mandar (DB), Rel. on.)

16. 1952 Pat 263 (A I R V 39 P 6, 7, 8) (DB), *Panchoo Sahu* v. *Janki Mandar* (Sale-deed — Question whether title passes on execution and registration of deed or on payment of consideration depends upon intention of parties to be gathered from deed itself.) + 1950 Pat 288 (AIR V 37 C 71, P 5), *M tilal Sahu* v. *Ugrah Narain.*

Note 15

Add in the Foot Note indicated :

2. 1950 Pat 85 (A I R V 37 C 24, P 4), *Pradyamon Prasad Singh* v. *Mahadeo Singh.*

Note 16

Add in the Foot Note indicated :

1. 1954 Pat 280 (Pr 10) (A I R V 41 C 96) (DB), *Devji Shivji* v. *Karsandas Ramji.* (Want of adequate consideration would not of itself affect the title of the vendee.)

Note 17

Add in the Foot Notes indicated :

1. 1953 Bom 145 (A I R V 40 C 46 P 4) : I L R (1953) Bom 253 (DB), *Jibhaco Hari Singh* v. *Ajab Singh.* (Oral sale of property in value above Rs. 100 by delivery of possession accompanied by giving *vardi* to village officer who effected mutation in favour of vendee—Sale is invalid.) + 1951 Nag 171 (AIR V 38 C 34 P 11):ILR (1950) Nag 618, *Balkrishna* v *Rangnath.* (Transfer of part of mortgaged property in satisfaction of debt — If value of property is more than Rs. 100, transfer to pass title must be by a registered instrument—Mere delivery of possession is not sufficient to transfer title.) + 1952 I D A 17119 (Assam), *Ali Hussain* v *Nazar Ali Sarkar.* (Land sold for Rs 250 Sale-deed not registered — Mutation subsequently attested in favour of transferee — Mutation cannot be substitute for sale deed.)

4. 1949 Nag 410 (A I R V 36 C 165 P 13):I L R (1949) Nag 654, *Bhulkhoo Ghasiya* v. *Mt. Hariyabai* + ('48) 7 J & K L R 158 (151), *Soba* v. *Abdulla Joo.*

10. ('50) 950 Nag L Jour (Notes) 30, *Dalmia Jain and Co.* v. *Messrs R. S H. Verma.*

Add after Pt. 11 as a separate para :

[Pt. 12] For the purposes of pre-emption under S. 176, Berar Land Revenue Code, it is not necessary that the sale should be by a registered deed as required by S. 54, T. P. Act. For that purposes, a sale is effected in fact where the seller has received consideration from the buyer and put him in possession, although the execution of an instrument of sale was omitted fraudulently to evade the law of pre-emption. *1953 Nag 182 (A I R V 40 C 64 P 17, 18, 19) : I L R (1952) Nag 636 (DB), Radha Kishan Laxminarayan* v. *Shridhar Ramchandra* + *1952 Nag 45 (A I R V 39 C 22 P 13) : I L R (1949) Nag 699 (DB), Onkar Laxman* v. *Mamdeo Bhagwan.*

Note 18

Add in the Foot Notes indicated :

2. But see 1954 Nag 109 (AIR V 41 C 42 P 30) : I L R (1952) Nag 37 (48), *Ghanaram* v. *Paltoo.* (Owner remains owner of property even after the execution of lease—What he transfers after leasing out is not a mere abstract right but property.)

3. But see 1954 Nag 109 (AIR V 41 C 42 P 30) : ILR (1952) Nag 37 (48), *Ghanaram* v. *Paltoo.* (Sale of property under lease need not necessarily be by registered instrument—Where value of property is less than Rs. 100 sale may be effected by delivery of possession.)

Note 19

Add in the Foot Notes indicated :

13. 1949 Pat 504 (AIR V 36 C 198 P 2) : 27 Pat 202 (DB), *Jagannath Prasad Singh* v *Chhata Sah.* (Oral sale by the mortgagor to the usufructuary mortgagee in possession of the property mortgaged for Rs. 96 passes title to the usufructuary mortgagee.)

[*See also* 1954 Nag 109 (A I R V 41 C 42 P 30) : ILR (1952) Nag 37 (48), *Ghanaram* v. *Paltoo.* (Co-owner still remains the owner after execution of mortgage or lease of the property—Transfer of his interests is a transfer of property and not a mere transfer of abstract rights which he possessed in the property before he executed the mortgage or lease)]

14a. 1950 Assam 107 (A I R V 37 C 42 P 18, 35, 36) (DB), *Dharameshwar Sarma* v. *Lakhayadhar* (Ram Labhaya A. C. J., contra.)

Add after Pt. 4 :

[Pt. 4a] A permission to plant trees on land and have access to gather their fruits is a mere licence and not a sale of intangible property. *1952 Nag 321 (A I R V 39 P 5): ILR (1954) Nag 172 Balaji Bhumayya* v. *Misrilal Chandmal.* (No registration is required—*1938 Nag 377 (AIR V 25) (DB), Mulji Sickka and Co.* v. *Nurmohammad*, distinguished.)

Add after Pt. 18a as separate para :

[Pt. 18b] The residuary interest of the lessor in the property he has leased out is tangible property. *1954 Nag 109 (A I R V 41 C 42 P 30); I L R (1952) Nag 37, Ghanaram* v. *Paltoo.* (The sale of such a property, the value of which is less than one hundred rupees, may be effected by delivery of possession under S. 54.)

Add after Pt. 19 as separate paras :

[Pt. 20] A patta right is intangible and the sale of such right can be effected only by a registered document. *1950 Hyd 58 (AIR V 37 C 16 P 5) : ILR (1951) Hyd 283 (DB), Kandkurs Anthya* v. *Korakola Gattadu.*

[Pt. 21] The interest of a partner in a partnership is an "intangible thing" but is not "immovable property" within the meaning given to it by the General Clauses Act, 1897. It is moveable property and its sale does not come within the second clause of S. 54. *1950 Nag 89 (AIR V 37 C 29 P 5, 6) : I L R (1950) Nag 355 Firm Sahebram* v. *Purushottamlal.*

Note 21

Add in the Foot Notes indicated :

1. 1954 Orissa 31 (32) (A I R V 41 C 9 P 1) (DB), *Parikhit Thapa* v. *Nidhi Thapa* + 1955 N U C (Orissa) 438 (A I R V 42), *Sudarson Raut* v. *Jairam Sahu* + 1949 Nag 410 (AIR V 36 C 165 P 13) : ILR (1949) Nag 534, *Bhulkhu Ghasiya* v. *Mt Hiriyabai.* (Property worth not more than Rs. 100—Vendee acquires complete title by mere delivery to him of the property—Fact that there is in addition an unregistered sale deed can ot affect the good title acquired by him) + ('50) 1950 Bur L R (HC) 119 (122, 123), *Daw Yin* v. *U Sein Kyu.* (Delivery must be actu l delivery at time of sale— Mere constructive delivery of possession is not sufficient for the purposes of this section.)

[*See also* 1955 N U C (All) 260 (A I R V 42), *Mazhar Husain* v. *Babu Aziz Ali* (Plaintiff selling trees for Rs 90 to defendant—Agreement to reconvey property sold to plaintiff within ten years on payment of Rs. 90 also executed—Plaintiff suing for possession of property on payment of Rs. 90—Proper course for plaintiff held was to have instituted suit requiring defendant to re onvey property on receipt of Rs. 90—Decree for possession however held could be passed as property was worth Rs. 90 and was tangible)]

1a. [*See also* ('50) 1950 Bur L R (HC) 119 (122, 123), *Daw Yin* v. *U Sein Kyu* (Sale of property worth less than Rs. 100—Sale deed unregistered—In order to make out title for the vendee the sale must be by actual delivery at the time of sale—Mere constructive delivery is not sufficient)]

7. 1951 Hyd 42 (A I R V 38 C 6 P 3) (DB), *Nagayya Baliah* v. *A. Sayanna* (Document though not registered can be looked into for ascertaining whether there was a contract for sale and whether party was in possession in pursuance to that contract) + ('48) 7 J & K L R 118 (161). *Soba* v. *Abdulla Joo.*

9. 1954 Orissa 31 (A I R V 41 C 9 P 1) (DB), *Parikhit Thapa* v. *Nidhi Thapa.* (Existence of unregistered document is not a bar under S. 91, Evidence Act from proving the transaction of sale by actual delivery—The document itself is admissible for the purpose of proving the terms of the contract between the parties : 1928 Mad 546 (A I R V 15), *Kuppuswami Goundan* v. *Chinnaswami Goundan,* Dissented; 1929 Pat 620 (A I R V 16), *Keshwar Mahton* v. *Sheonandan Mahton*; 1943 Bom 431 (A I R V 30) *Tribhovan Hargovan* v. *Shankar Desai*; 1925 All 206 (1) (A I R V 12), *Daya Ram* v *Sita Ram.* and 1936 Mad 301 (AIR V 23), *Mohd Gosukani* v. *Md. S. Maracayar*, Rel on.) + 1954 Nag 109 (A I R V 41 C 42 P 31): ILR (1952) Nag 37 (48), *Ghanaram* v. *Paltoo* + 1951 Hyd 42 (AIR V 38 C 6 P) (DB), *Nagayya Baliah* v. *A. Sayanna* + 1949 Nag 410 (AIR V 36 C 165 P 13) : I L R (1949) Nag 534, *Bhulkhoo* v. *Mt. Hiriyabai.*

[*See also* ('50) 1950 Bur LR (C) 119 (122, 123), *Daw Yin* v. *U Sein Kyu.* (Sale of land worth less than Rs. 100 Sale deed not registered — Vendees suit for possession cannot succeed when he alleges only that he was in possession already at the time of sale deed but neither pleads nor proves that the sale was by delivery of possession.)]

10. [*See also* ('50) 52 Mys H C R 443 (445) (DB), *Bale Madappa* v. *Nanjappa.*]

Add after Pt. 11 as separate paras :

[Pt. 12: When an oral sale which is set up, would be valid, if proved, its proof or a finding that it has been proved would necessarily involve a finding as to validity. In such a case when the sale is held proved the finding cannot be challenged in second appeal on the ground that the Court had failed to give a definite and express finding on the point whether the sale was for a consideration which was below Rs. 100. *1952 Assam 52 (AIR V 39 C 33 P 5 10,13)(SB), Sehopanid Shah* v. *Chandilal Tewari.*

[Pt. 13] Notwithstanding the provisions of this section every transfer of an occupancy holding or a portion thereof by sale is compulsorily registrable under S. 31, Orissa Tenancy Act, even though the property is less than Rs. 100 in value. In the absence of registration title does not pass to the transferee. *1951 Orissa 11 (A I R V 38 C 4 P 4, 5) : I L R (1950) Cut 322 (DB), Paramananda Das* v. *Sarkar Rath.*

Note 22

Add in the Foot Notes indicated :

2. 1952 Bom 437 (A I R V 40 C 137 P 4) : I L R (1953) Bom 1071 (FB) *Bhikhabhai* v. *Chimanlal.*

5. 1953 Bom 437 (A I R V 40 C 137 P 4, 10) : ILR (1953) Bom 1071 (FB), *Bhikhabhai Nanabhai Patel* v. *Chimanlal Maganlal Shah* (Where a mortgagor sells the mortgaged property to a sub-mortgagee in possession as the sub-mortgagee is already in possession no further possession can be given to him and hence, even assuming that the equity of redemption constitutes a tangible immovable property, the sub-mortgagee can acquire title to the property only if he obtains a registered instrument.)

1955 N U C (Orissa) 438 (A I R V 42), *Sudarsan Rout* v *Jairam Sahu* (Where the vendee is already in possession of the property sold, a registered document is compulsory to pass the title to the vendee, especially when there is an absence of a declaration of renouncement by the vendor, or of any evidence to the effect that the vendor did any overt act by which he got the name of the vendee recorded in any of the public papers.)

7. 1954 Nag 109 (AIR V 41 C 42 P 19, 23, 29) : I L R (1952) Nag 37 (43, 44 47), *Ghanaram* v. *Paltoo* + 1949 Nag 410 (A I R V 36 C 165 P 13): I L R (1949) Nag 534, *Bhulkhoo Ghasiya* v. *Mt. Hiriyabai.*

Add after Pt. 8.

[Pt. 8a] But it is not necessary that delivery of possession should be contemporaneous with the execution of the sale deed ; the sale would be valid even if possession of property is delivered some time after its execution. *1949 Nag 410 (A I R V 36 C 165 P 12, 13, 14) : I L R (1949) Nag 534, Bhulkhoo* v. *Mt. Hiriyabai.*

Note 23

Add in the Foot Notes indicated :

2. *See also* 1950 All 632 (A I R V 37 C 249 P 3) : I L R (1953) 1 All 285 (DB), *Sahdeo Singh* v. *Munshi Kuber Nath Lal*

3. 1954 Trav Co 10 (AIR V 41 C 5 P 4, 5) *T. V. Kochuvareed* v. *V. P Mariappa Goundar*

6. 1954 S C 44 (A I R V 41 C 16 P 18) : 1954 S C R 310 (SC), *Satyabrata Ghose* v. *Mugneeram Bangur & Co.* (The obligations of the parties to a cantract for sale of land are the same as in other ordinary contracts and consequently the doctrine of frustration is applicable.) ✣ 1954 Trav Co 10 (A I R V 41 C 5 P 45) (DB), *T. V. Kochuvareed* v. *V. P Mariappa Gounder* (Until a sale-deed is actually brought into existence by act of parties for under a decree of Court, the party who has contracted for the purchase cannot be said to have acquired an onwership over the property. Hence he cannot until then sustain a claim for recovery of mesne profits from the lessee of the person who has contracted to sell as the lessee's possession under the subsisting lease cannot be said to be wrongful.) ✣ 1953 Mad 409 (A I R V 40 C 151 P 7), *Appa Rao* v. *Veeranna* (Agreement to sell does not prevent owner from executing a sale to third party—Third party who purchases with notice of prior agreement is subject to obligation created by S. 91, Trusts Act, and can be compelled to execute sale-deed in enforcement of prior agreement by party in whose favour it is. But until that is done the person who can enforce the agreement acquires no title.) ✣ 1951 Mad 767 (AIR V 38 C 256 P 5), *Rajammal* v. *Gopalaswami* (Because of this fact the rule of perpetuities, which does not apply to mere personal contracts, does not affect such a contract as it does in England where under the law of contracts such a contract creates an interest in the property agreed to be sold.) ✣ 1950 Ajmer 59 (A I R V 37 C 73 P 8), *Chouth Mal* v. *Hiralal*. (Mortgage held must have its effect as against subsequent sale though agreement to sell was executed before mortgage.)

7. ('50) I L R (1950) All 32 (41) (DB), *Arjun Singh* v *Sahu Mahraj Narain.*

16 1955 Raj 70 (Pr 5) (AIR V 42 C 23) : I L R (1954) 4 Raj 705 (DB), *Sampat Raj* v *Pokar* ✣ ('49) 1949 Trav-Co L R 18 (21), *Joseph A.* v. *Ouseph*. (Agreement which may be oral can also be specifically enforced.)

17 1955 N U C (Mys) 949 (A I R V 42), *R. M. Khalimulla* v. *Syed Hamid Sab.* (Where a vendor executes a plain paper document in which it is stated that he has sold the house in dispute for Rs. 2000, received Rs. 600 and would execute a registered sale deed, the document can be construed as an agreement to sell by the execution of a registered sale deed.) ✣ ('50) I L R (1950) All 32 (41) (DB), *Arjun Singh* v. *Sahu Mahraj Narain*

21 1952 Trav-Co 467 (A I R V 39 P 6) : I L R (1952) Trav Co 201 (DB), *Kochuponchi Varughese* v. *Ouseph Lonan.*

22. 1954 Trav.Co 10 (A I R V 41 C 5 P 45), *Kochuvareed* v. *Mariappa.*

[*See also* 1952 Tripura 28 (A I R V 39 P 7, 10, 11, 12). *Hara Krishna* v. *Ram Surat Pandey.* (Contract found to be one for sale of land by boundary though it mentioned area also Vendee is not entitled to refuse to complete the bargain on the ground of actual area being less than that mentioned in the agreement or on the ground that necessary permission from Collector to sell entire area was not obtainable by the vendor and recover earnest money and damages from the vendor.)]

Add after Pt. 2 as separate para :

[Pt. 2a] An out and out sale will not, because of want of registration or any other defect in the document of sale, become an agreement to sell *('48) 7 J & K L R 158 (160)*, *Soba* v. *Abdulla Joo.*

Add after Pt. 12 as a separate para :

[Pt. 12a] A dispute arising subsequent to the contract for sale of property about a particular clause in the deed during the negotiations about the form the deed should take, cannot affect the completeness of the contract already made, nor can it amount to repudiation when it is not persisted in and the vendee later expresses his readiness and willingness to perform the contract "agreed to". *1954 S C 75 (A I R V 41 C 22 P 32) : 1954 S C R 360 (SC), Durga Prasad* v. *Deep Chand.*

SECTION 55

Note 1

Add in the Foot Note indicated :

7. 1952 Kutch 10 (AIR V 39 C 5 P 8), *Kunvarji Velji* v. *Umarshhi Hansraj* ✣ 1950 East Punj 74 (A I R V 37 C 14 P 26) (DB), *Dogarmal* v. *Govind Saroop.*

Add Pt. No. '1a' after the words 'para 2' in the 10th line of the Note and the following case in the Foot Note after Foot Note 1 :

1a. 1951 All 93 (A I R V 38 C 13 P 116) : I L R (1950) All 1033 (FB), *Deepchandra* v. *Ruknuddaula.* (The Full Bench of the Allahabad High Court has, however, held that Para 2 applies both to a contract for sale as well as to a conveyance. See also Note 9.)

Add after Pt. 12 :

[Pt. 13 In a suit between a transferor and a transferee arising out of a sale of property held by the transferor on annual patta from Government, the rights of the parties to the sale are governed by the Transfer of Property Act in the absence of a statutory provision prohibiting transfer. *1951 Assam 20 (A I R V 38 C 8 P 8) : I L R (1950) 2 Assam 1 (DB), Sheikh Jainur Ali* v. *Mt. Chafina Bibi.*

Note 2

Add in the Foot Notes indicated :

5. 1950 East Punj 218 (AIR V 37 C 61 P 10, 11) (DB), *Madan Mohan* v. *Jawala Prasad.* (Mortgage of the type in the case was held not such an incumbrance as could not be discovered by using ordinary care.)

13. 1952 Madh B 145 (AIR V 39 P 4), *Munnalal* v. *Zamaklal.*

14. 1953 Mad 628 (AIR V 40 C 247 P 8, 9) (DB), *Ahmad Hussain Sahib* v *Gani Veeri Chettiar*. (Particular area in property sold included in Town Planning Scheme—Assuming that scheme is a material defect in sellers' title, purchaser can discover it with ordinary care)

15. *See also* 1955 All 24 (Pr 11) ((S) A I R V 42 C 8) (DB), *Sampat Ram* v. *Baboolal*. (The usual thing when a person purchases property is to find out from the Municipal office whether there are any arrears of taxes due and further to find out from the registration office whether there are any encumbrances)

24. 1950 Lah 10 (A I R V 37 C 23 P 26) : Pak L R (1950) Lah 1 (DB), *Jodha Mal* v *Associated Hotels of India Ltd* (Section 55, T P. Act and S. 20, Contract Act—Distinction between—Reasoning under S 20, Contract Act cannot be used in support of a reasoning under S. 55, T. P. Act.)

28a. 1953 Mad 769 (AIR V 40 C 294 P 32) : ILR (1952) Mad 682 (DB), *Delli Gramani* v. *Ramchandran*.

30. 1953 Mad 769 (AIR V 40 C 294 P 28) : I L R (1952) Mad 682 (DB), *Delli Gramani* v. *Ramchandran*.

32 *See also* 1953 Mad 769 (A I R V 40 C 294 P 28) : ILR (1952) Mad 682 (DB), *Delli Gramani* v. *Ramchandran*.

33 1953 Mad 769 (AIR V 40 C 294 P 28) : ILR (1952) Mad 682 (DB), *Delli Gramani* v. *Ramchandran*.

Add after Pt 32 as a separate para :

[Pt 32a] Where the seller knew that the representation that he made in the sale deed that he was owner at the time and was in possession of the property was false and on the strength of that representation he received consideration for the document it is a case of fraudulent misrepresentation and the principle of caveat emptor cannot apply. Therefore the purchaser is entitled to a decree against the seller for the refund of purchase money *1953 Trav-Co 236 (A I R V 40 C 80 P 2) (DB), Ouseph Varkkey* v. *Ouseph Chacko*

Add after Pt. 33 :

[Pt. 33a] If *A* has mortgaged his property to *B* by a registered deed and then sells it to *C*, representing that the property was unencumbered, and later on the property is lost to *C* by reason of the sale of the property in execution of *B's* decree then *A* is guilty of the offence of cheating as *C* was made to part with money on a misrepresentation made by *A*. The doctrine of constructive notice cannot be imported into criminal law for the purpose of determining whether a person is guilty of the offence of cheating or not. It is the intention which is important and not whether a man is under a legal duty to disclose or suppress facts within his knowledge. *1954 Punj 31 (A I R V 41 C 18 P 4) : 1954 Cri L J 299 (DB), Kuldip Singh* v. *State.*

Note 3

Add in the Foot Notes indicated :

13. 1952 Madh B 145 (AIR V 39 P 4), *Munnalal* v *Zamaklal*.

14. 1952 Madh B 145 (AIR V 39 P 4), *Munnalal* v. *Zamaklal*.

Add after pt. 19 :

[Pt 19a] It is only at the time of the execution of a sale deed that the necessity of an examination of title deeds arises. Where it is merely the stage of drawing up a deed of agreement it can scarcely be said that such a contract would be subject to the production and examination of title deeds. *1955 N U C (Pat) 1595 (A I R V 42, Gouri Shankar Jhunjhunwala* v. *Baldeo Sahujee.*

Add after Pt 24 as separate para :

[Pt. 24a] This clause is silent as to the place of production of the documents of title. The seller is not bound to produce to the buyer documents of title at the residence of the buyer or at the office of the buyer's Advocates. *1953 Punj 231 (A I R V 40 C 95 P 18, 19) (DB), Sunder Singh Sahib* v. *Hans Raj Sial.*

Add after Pt. 24a :

[Pt 24b] Where an agreement for sale provided for the completion of sale within four months, that is, on or before 23.5.1947 and the agreement also recited that the seller was full and absolute owner of the property without any defect in title, but the buyer did not make any request for examination of deeds of title till 16.5.1947, it was held that in the circumstances the buyer must be taken to have accepted the title of the seller before he made the request for the production of documents of title on 16 5 1947. *1953 Punj 231 (AIR V 40 C 95 P 20) (DB), Sunder Singh Sahib* v. *Hans Raj Sial.* ((1852) 51 E R 770: 16 Beav 239, Pegg v. Wisden, Rel. on.)

Note 4

Add in the Foot Notes indicated :

1. *See also* 1953 Punj 231 (A I R V 40 C 95 P 20) DB), *Sunder Singh* v. *Hans Raj*. (*1852-51* E R 770 : 16 Beav 239, *Pegg* v. *Wisden*, Rel on.)

2 *See also* 1955 N U C (Nag) 15 8) (AIR V 42) *Maniklal Ramchandra* v. *Balmukund Rampratap* (Where there was no repudiation of the contract by the purchaser, the entire consideration was already received by the seller and the only thing remained was for the seller to execute the sale deed in favour of the purchaser, the mere fact that the purchaser questioned the sellers about their marketable title would not lead to an inference that he was not ready or he was unwilling to perform his part of the contract.)

Note 5

Add in the Foot Note indicated :

6. *See also* 1955 N U C (All) 1280 (A I R V 42),

Mazhar Husain v. *Babu Aziz Ali.* (Plaintiff selling t ees for Rs 90 to defendant—Agreement to reconvey property sold to plaintiff within ten years on payment of Rs 90 also executed—Plaintiff suing for possession of property on payment of Rs. 90—Proper course for plaintiff held was to have instituted suit requiring defendant to reconvey property on receipt of Rs. 90—Decree for possession however held could be passed as property was worth Rs. 90 and was tangible.)

Add after pt 5a as a separate para :

[Pt. 5b] If the seller insists on the purchaser to execute a meaningless indemnity bond, which in law he cannot do and makes that a condition for executing the sale deed which he is bound to execute, the mere fact that he does so by way of abundant caution cannot justify his action in law or save him from the consequences of such unreasonable conduct. *1954 Mys 145 (Pr 6) (A I R V 41 C 60) : I L R (1954) Mys 274 (DB), Himantharaju Setty* v. *Corporation of Bangalore.*,

Add after Pt. 11.

[Pt. 11a] Where the buyer accepts an unregistered deed and fails to get the conveyance properly registered he is bound to have recourse to statutory remedy provided by the Registration Act before coming into the Court for the equitable relief of specific performance. *1953 Hyd 225 (A I R V 40 C 106 P 9) : I L R (1953) Hyd 259 (DB), Madho Rao* v. *Patelba.*

Add after pt (13) after the sentence : "It has been held. . . . in favour of his nominee" :

[Pt. 13a] This view has been followed by the Mysore High Court. *1954 Mys 145 (Pr 7) (A I R V 41 C 60) : I L R (1954) Mys 274 (DB), Himantharaju Setty* v. *Corporation of Bangalore.*

Note 6

Add in the Foot Note ind cated :

5. *See also* 1950 Cal 333 (AIR V 37 C 120 P 14), *Sashi Bhusan* v. *Rai Chand.* (Where a vendor who has agreed to sell his property being a trustee for the purcha er fails to protect the property from injury or wrongful occupation by trespassers the purchaser will be entitled to an allowance by way of compensation to be deducted from the purchase-money.)

Note 7

Add in the Foot Notes indicated :

2. *See also* 1955 N U C (Andhra) 17 (A I R V 42) *Gogineni Ramakrishnayya* v. *Vennan Viraraghaviah.* (Suit for specific performance of an agreement for sale of certain land or in the alternative for recovery of damages decreed. *Held* that subsequent suit for mesne profits from the said land was not maintainable as the plaintiff was not entitled to the rent and profits until the conveyance was executed in his favour.) ✠ 1955 N U C (All) 1260 (A I R V 42),

Mazhar Husain v. *Babu Aziz Ali.* (Plaintiff selling trees for Rs 90 to defendant—Agreement to reconvey property sold to plaintiff within 10 years on payment of Rs. 90—Plaintiff suing for possession of property on payment of Rs. 90—Proper course for plaintiff held was to have instituted suit requiring defendant to reconvey property on receipt of Rs 90—Decree for possession however held could be passed as property was worth Rs. 90 and was tangible)

5. 1950 Cal 333 (A I R V 37 C 120 P 27), *Sashi Bhusan* v. *Rai Chand.* (Therefore, suit for specific performance of an agreement to sell and hand over possession can be brought by buyer along with such person.)

6. 1950 Cal 333 (A I R V 37 C 120 P 14), *Sashi Bhusan* v. *Rai Chand.*

14 1951 Mad 410 (AIR V 38 C 140 P 6), *Gurisala Vaddandam* v. *Venkatarameswara Rao.*

Add after pt. 2 :

[Pt. 2a] A contrary view is, however, taken in the undermentioned case that under this clause, unless there is a contract to the contrary, giving delivery of possession to the buyer by the seller is an incident of a contract for sale and the right to recover possession springs out of the contract which is being specifically enforced and not as a result of the execution and completion of the conveyance. *1955 Cal 267 (268, 269) (Pr 4 6) (A I R V 42 C 71) (DB), Subodh Kumar* v. *Hiramoni Dasi.* (When there is a decree directing the contract to be specifically performed it included a direction upon the vendor to give delivery of possession to the purchasers.)

Add after pt. 4 .

[Pt 4a] It has however been held in the undermentioned case that it is not necessary in a suit for specific performance either to separately claim possession or for the Court to pass a decree for possession. The decree for specific performance, which provides that the property shall be sold to the plaintiff by the defendants and the sale deed shall be executed within a certain time, failing which the Court will have the sale deed executed by a person nominated by it, implies that delivery of possession shall be given in accordance with the provisions of S. 55 (1) *(f)* of the Transfer of Property Act. Where therefore a decree for specific performance of a contract of sale is silent as to the relief of delivery of possession even though claimed in the suit, the executing Court is still competent to deliver possession. *1954 All 643 (Prs 2, 4) (A I R V 41 C 250) (DB), Balmukand* v. *Veerchand.*

Note 8

Add in the Foot Notes indicated :

2. 1954 Nag 65 (Pr 17) (A I R V 41 C 38) :

I L R (1953) Nag 579, *S. K. Buty* v. *Shriram Hari*. (Buyer is not bound to pay municipal taxes to be paid by seller for period prior to date of sale.)

7. *See also* 1954 Nag 65 (Pr 13) (A I R V 41 C 28): I L R (1953) Nag 579, *S. K. Buty* v. *Shriram Hari*. (Owner of land bound to construct works of development in accordance with agreement with Improvement Trust in consideration of its sanctioning construction of buildings — If expenses for construction of development works are to be incumbrances on property, then owner of land is bound to discharge them before he sells the land unless there is agreement to contrary with buyer.)

8a. 1952 Mys 120 (A I R V 39 P 4 & 5): I L R (1953) Mys 29 *Muninarayana Reddy* v. *Chinnaswami Gounder*. (Sale purported to be without encumbrance—Buyer knowing existence of charge on property for government loan and by subsequent letter undertaking to pay it—*Held* sale was subject to encumbrance and buyer not entitled to reimbursement.)

Give New Pt. No. '1a' to the word 'seller' in the 9th line of the Note and add the following case in Foot Notes after foot-note 1 :

1a. 1950 P C 99 (A I R V 37 C 36 P 10) : 77 Ind App 156 (PC) *Govindram Gordhandas Saksaria* v. *State of Gondal*. (*A* contracting with *B* to sell certain property—The fact that trustees of the property and not *A* is the conveying party does not affect *A*'s liability under the clause — *A* is 'seller' within this clause.)

Give New Pt. No. '2a' before the word 'and' in item (2) of the note on page 887 and add the following case in Foot Notes after foot-note 2.

2a. 1949 Cal 510 (A I R V 36 C 139 P 24): I L R (1951) 1 Cal 331, *Arun Prokash Boral* v. *Tulsi Charan Bose*. (Contract to sell free of encumbrance—Delay caused by vendor — Default to pay interest on existing mortgage of property since date of contract—Suit for specific performance—Plea of hardship caused by payment of interest is no defence as it is self-induced.)

Add after Pt. 13a :

[Pt. 13b] A trespasser's possession or occupation is a liability or impediment within the ordinary meaning of the word 'encumbrance' *1950 Cal 333 (A I R 37 C 120 P 17)*, *Sashi Bhusan* v. *Raichand*. (Hence, where property is sold with all rights free from all incumbrances seller is bound to give vacant possession of property which is occupied by trespasser.)

[Pt. 13c] See also the under-mentioned case. *1954 Nag 65 (Pr 13) (A I R V 41 C 28)*: *I L R (1953 Nag 579, S. K Buty* v. *Shriram Hari*. (Owner of land bound to construct works of development in accordance with agreement with Improvement Trust in consideration of its sanctioning construction of buildings — If expenses for construction of development works are to be incumbrances on property. then the owner of land is bound to discharge them before he sells the land unless there is an agreement to the contrary with the buyer.)

Add after Pt. 16 :

[Pt. 17] Where the terms of the contract for sale operate to substitute the date of possession for the date of sale that would otherwise be the determining date for the obligation arising under S. 55 (1) (g), there is a contract to the contrary. *1950 P C 99 (A I R V 37 C 36 P 10)*: *77 Ind App 156 (P C)*, *Govindram Gordhandas Saksaria* v. *State of Gondal*.

[Pt. 18] Mere use of the word "net" in the price in a sale contract may not be sufficient to exclude the application of S 55 (1) (g). *1950 P C 99 (A I R V 37 C 36 P 10)* : *77 Ind App 156 (P C)*, *Govindram Gordhandas* v. *State of Gondal*

Note 9

Add in the Foot Notes indicated :

12. 1952 I D A 11000 (Mad). *Somasundaram Chettiar* v. *Komarappa Chettiar*.

13. 1951 S C 75 (A I R V 41 C 22 P 32): 1954 S C R 360 (SC), *Durga Prasad* v. *Deep Chand*. (Vendee's insistence on a specific form of warranty of title to be inserted in the sale deed subsequent to the contract for sale cannot affect the contract.) ✣ 1951 All 93 (A I R V 38 C 13 P 112) (FB) *Deepchandra* v. *Ruknuddaula*. (Per Agarwala and Wanchoo JJ.)

14. 1951 All 93 (A I R V 38 C 13 P 112) : I L R (1950) All 1053 (FB), *Deepchandra* v *Ruknuddaula*. (Per Agarwala and Wanchoo JJ.)

15. 1950 Nag 223 (A I R V 37 C 69 P 10): I L R (1950) Nag 467, *Mt Saraswatibai* v. *Madhukar*.

17. 1952 I D A 11000 (Mad), *Somasundaram Chettiar* v. *Komarappa Chettiar*. (The principal of caveat emptor applies to court-sales; but where a person sells a property purchased by him in court sale as his own, and not the right, title and interest he acquired in the property in the court sale, he is bound by the terms of implied covenants for title.) ✣ 1950 East Punj 74 (A I R V 37 C 14 P 11) (DB), *Dogarmal* v. *Govind Saroop*. (Per *Kapur J.* — Even if S. 55 (2) is read as a rule of justice, equity and good conscience, it is not enforceable by a person who has taken a transfer in invitum.)

18. 1952 I D A 11000 (Mad), *Somasundaram Chettiar* v *Komarappa Chettiar*.

19. 1950 Mad 621 (A I R V 37 C 254 P 3) (DB), *Ramamurthi Ayyar* v. *Kuppuswami Ayyar*. (Clause in sale deed held to be one of indemnity.) ✣ 1950 East Punj 74 (A I R V 37 C 14 P 13) (DB), *Dogarmal* v. *Govind Saroop* (Suit for return of purchase money based not on breach of implied covenant of title but merely on breach of express covenant contained in deed of sale — It is not open to plaintiff to take advantage of S. 55 (2) even if that were held to be rule of equity.)

24. 1953 Mad 769 (AIR V 40 C 294 P 31): I L R (1952) Mad 682 (DB), *Delli Gramani* v *C. R. Ramchandran*. (Decision in 1916 Mad 526 (AIR V 3), *Venkatareddy* v. *Ahmed Saheb*, approved but reasoning not approved.)

25. 1953 Mad 529 (AIR V 40 C 199 Pr 3), *Venkataswami* v *Venkayya* ✣ 1950 Bom 401 (AIR V 37 C 117 P 11) (DB), *Gulabchand Daulatram* v. *Suryajirao Ganpatrao.* (There is no justification for the assumption that covenant for title and covenant for quiet enjoyment are broken when title to property terminates by reason of absence of authority of vendor either initial or supervening to transfer.) ✣ ('50) 28 Mys L Jour 165 (170) (DB), *Ramaraje Urs.* v. *Adinarayana Setti* (A mere claim for possession is not enough to constitute a disturbance of possession so as to constitute breach of covenant for quiet enjoyment.)

29. ('48) I L R (1948) 1 Cal 492 (497), *Bhupati Bhusan Tribedi* v. *Birendra Mohan Singhachaudhuri.*

37. *See also* 1950 Bom 401 (A I R V 37 C 117 P 21, 25) (DB), *Gulabchand Daulatram* v. *Suryajirao Ganpatrao.* (Breach of covenant for quiet enjoyment entered into by a vendor who sells property in contravention of the provisions of S. 40, Proviso 3, Bombay Court of Wards Act.)

43. ('50) 28 Mys L Jour 165 (169) (DB), *Ramaraje Urs* v. *Adinarayana Setti.*

45. *See also* ('50) 28 Mys L Jour 165 (169) (DB), *Ramaraje Urs* v. *Adinarayana Setti.*

46. *See also* 1952 Punj 298 (AIR V 39 P 61) (DB), *Mahomed Ismail* v. *Hakim Syed Hussain.* (A sale deed executed by *A* and *B* showed that the real seller was *A* and *B* only had a right of repurchase. The concluding portion of the deed was, "we the vendors, i. e., I the executant No. 1 will be answerable, if by any reason the property or part thereof goes out of possession of the vendee." *B* was executant No 1. The whole tenor of the deed showed that both *A* and *B* were answerable if the vendee in any way had to part with property sold — *Held* that under S 55, both *A* and *B* were answerable if it was found that the vendors had no title to the property and if by that reason the vendee had to suffer.) ✣ ('50) 28 Mys L Jour 165 (171) (DB), *Ramaraje Urs* v. *Adinarayana Setti.*

50. 1953 Mad 529 (A I R 40 C 199 Pr 6) DB), *Polavarapu Venkataswami* v. *Nalluri Venkayya.*

51. 1953 Mad 529 (A I R V 40 C 199 P 6) (DB), *Polavarapu Venkataswami* v. *Nalluri Venkayya* (It is always open in case of breach of covenant of title or quiet possession for the buyer to have two causes of action, to recover the consideration paid together with interest on basis of failure of consideration or to recover damages on the breach of covenant by reason of the indemnity implied in the covenan of title.)

56. 1953 Mad 529 (A I R V 40 C 199 P 6) (DB), *Venkataswami* v. *Venkayya.* (It is always open in case of breaches of covenant of title or quiet possession for the plaintiff to have two causes of action, to recover the consideration paid together with interest on the basis of failure of consideration or to recover damages on the breach of covenant by reason of the indemnity implied in the covenant of title. When the plaintiff has recourse to the latter he must be given the property or its value on the date when he makes the demand by instituting a suit.) ✣ ('50) 28 Mys L Jour 165 (171) (DB), *Ramaraje Urs* v. *Adinarayana Setti.* (In the case of a breach of covenant for title the measure of damages is the difference between the value of the thing as it is and its value as it was warranted to be. Where the defect in title is so complete as to pass nothing to the vendee, the purchase money is generally taken to be the measure of damages.)

58b. 1950 Nag 229 (A I R V 37 C 69 P 13) : I L R (1950) Nag 461, *Mt. Saraswatibai* v. *Madhukar* ✣ ('49) 1949 Nag L Jour (Notes 12), *Bhagwan* v. *Seth Dhannalal.*

Add after Pt. 1a at the end of the 1st para. of the Note :

[Pt. 1b] It has been held by the Allahabad High Court that this para. applies to both completed sale as well as a contract for sale. *1951 All 93 (A I R V 38 C 13 P 116) : I L R (1950) All 1033 (F B), Deepchandra* v. *Ruknuddaula* ✣ *1942 All 39 (41) (A I R V 29) (DB), Raghubir Saran* v. *Kunj Behari.*

Delete the case along with the foot-note remark : 1942 All 39 (42) (AIR V 29), *Raghubir Saran* v. *Kunj Behari* given as 'But See' case to Foot Note 1.

Add new Pt. No. 10a after the words "and something more" after pt. 10 and add following case in Foot Notes after foot note 10 :

10a. 1950 East Punj 74 (A I R V 37 C 14 P 26) (DB), *Dogarmal* v. *Govind Saroop.*

Add after Pt. 42 as a separate para :

[Pt 42a] Where in a suit to recover deposit paid under a contract of sale of land it was found that the vendor had derived his title from a bequest by which the testator had devised a parcel of land supposed to contain 'about' a stated number of acres regarding the boundaries of which there was a litigation which had ended against the vendor it was held that the absence of any evidence that the vendor had ever possessed or exercised any right over the land in suit afforded ample jurisdiction for holding that the vendor failed to offer a good title to the land and there was a breach of contract on his part. *P. C. A No 42 of 1951, D/ 5-10-1953 (PC), Margaret Young Horne* v. *Roderick Alexander Ferguson.*

Add after Pt. 53 :

[Pt. 53aa] *Burden of proof:*— In a suit based upon negligence and refusal of vendor to perform his part of contract by passing good title the burden is on the vendor to show that he has good title to the whole of the land that he agreed to sell. *P. C. A. No. 42 of 1951, D/- 5-10-1953 (PC), Margaret Young Horne* v. *Roderick Alexander Ferguson.*

Add after Pt. 67 :

[Pt. 68] The mere refusal on the part of vendor to give a warranty of title does not disentitle the purchaser to a decree for

specific performance. *1951 All 93 (A I R V 38 C 13 P 134) : I L R (1950) All 1033 (FB) Deepchandra* v. *Ruknuddaula.*

Note 11

Add in the Foot Notes indicated :

13. 1952 Mad 678 (A I R V 39 P 3) (DB), *D. S. Duraiswamy Naidu* v. *A. M. Muhammed Abbas Sahib.*

14. 1952 Mad 678 (A I R V 39 P 3) (DB), *D. S. Duraiswamy Naidu* v. *A. M. Muhammed Abbas Sahib.*

15a. *See also* 1953 Mad 370 (A I R V 40 C 129 P 3) (DB), *Radha Krishna Ayyar, K. R* v. *Subramania Ayyar, T. S.* (Vendor however held could not demand refund of balance of amount that would remain, after paying off mortgage amount as reduced, when vendee had actually paid more than amount deposited, towards the principal and also interest.)

Note 12

Add in the Foot Notes indicated :

1. 1949 All 555 (A I R V 36 C 202 P 7 & 8) : I L R (1949) All 692 (DB), *Raja Ram* v. *Chheda.* (Sale-deed executed in respect of certain village for fixed consideration — Along with sale-deed agreement executed providing that if as result of settlement proceedings income of village increased above Rs 1500, vendee would be liable to pay certain extra amount towards sale price of property—Extra amount being part of purchase money held would be deemed to be charge on property sold.)

7. 1952 Sau 72 (A I R V 39 P 1, 5) *Jeychand* v. *Mang Keshavji.*

8. ('51) 1951 All L Jour 750 (751) (DB), *Tasawar Ali* v. *Indrabir Singh* & ('50) 1950 Trav Co L R 477 (483) (DB), *Nani Amma Janaki Amma* v. *Chandy Varghese.*

10. 1952 Mad 678 (A I R V 39 P 3) (DB), *D. S. Duraiswamy Naidu* v. *A. M. Muhammed Abbas Sahib.*

26. ('50) 1950 Trav-Co L R 140 (143, 144) (DB), *Sreenivasa Ayyar* v. *Madhavan Nayar.*

27. ('46-52) I D 39871 (All), *Bhagwati Prasad* v. *Bhagwan Prasad.* (*A* executing usufructuary mortgage for Rs. 504 over two properties in favour of *B*—*A* then selling one of the properties to *C* for Rs. 680—Rs. 504 left with *C* for discharging mortgage of *B*—*C* not paying amount to *B*—Suit by *A* for recovery of the amount—*A* held was entitled to charge under S. 55 (4) (b)—As *A* was kept out of possession of property not sold to *C* by *C's* failure to discharge mortgage *A* held was entitled to decree for compensation on basis of loss of profits.)

28. ('46-52) I D 39871 (All), *Bhagwati Prasad* v. *Bhagwan Prasad.*

29. ('50) 1950 Trav-Co L R 140 (143, 144) (DB), *Sreenivasa Ayyar* v. *Madhavan Nayar.*

32. *See also* 1955 N U C (Cal) 748 (A I R V 42), *Manindra Nath Bhanja* v. *Hemchandra Naskar.* (If it is found that there is a transaction merely to secure the vendor's lien by taking some security or bond under Section 55 (4) (b), T. P. Act then the case will not be hit by the Bengal Money-lenders Act. But, if on the other hand, it was really in the nature of an investment, over and above being a security for the unpaid purchase money, then it was a loan under the Bengal Money-lenders Act.)

Note 14

Add in the Foot Note indicated :

1. 1954 Trav Co 427 (Pr 2, 8) (A I R V 41 C 147) : I L R (1954) Trav Co 609 (F B), *Rama Panicker Rama Panicker* v. *Kunji Amma Kalliyani Amma,*

In Pt. 5 read the word 'case' as 'cases' and add the following case in the foot note :

5. 1955 Pat 201 (Pr 9) (A I R V 42 C 47) (DB), *Zakir Sadagar* v. *Dolegobind Ghose.*

7. *See also* 1954 Mad 729 (Pr 3) (A I R V 41 C 298), *Sitharama Holla* v. *Srinivasa Somayaji.* (Mortgagor selling mortgaged property—Part of consideration retained by vendee for paying off the mortgage—Suit on mortgage in which subsequent mortgagee was impleaded—Subsequent mortgagee, paying off earlier mortgage and getting mortgagor's right to recover unpaid purchase money attached before judgment—Attachment made absolute later—Properties brought to sale by him and purchased by himself—Right to unpaid purchase money sold in execution of personal decree obtained by the subsequent mortgagee—*Held*, that the proceeding taken for getting the personal decree and the execution proceeding in which the right at the sale was sold were perfectly legal and as such the purchaser of the right was entitled to recover the amount from the property which has come to the hands of the purchaser from the subsequent mortgagee.)

8. 1953 Mad 370 (A I R V 40 C 129 P 3) (DB), *Radha Krishna Ayyar, K. R.* v. *Subramania Ayyar, T. S.* (Debt reduced under Madras Act 4 of 1938—Amount paid by vendee far in excess of amount left with him—Vendor however held was not entitled to claim any money as balance of unpaid purchase money.)

Add after Pt. (5) but before the sentence. "The principle underlying the proviso .... in order to safeguard himself".

[Pt. 5aa] Under the proviso to cl. (5) a buyer may retain out of the purchase money the amount of any encumbrances on the property existing on the date of the sale and shall pay the amount so retained to the persons entitled thereto, where the property is sold free from encumbrances in the absence of a contract to the contrary. This is a statutory right which the buyer possesses and there need not be any express agreement to this effect. *1955 Pat 201 (Pr 10) (A I R V 42 C 47) (DB), Zakir Sadagar* v. *Dolegobind Ghose*

Add new point No. (5a) after the words "safeguard himself" in line 2 from top on p. 916 and add the following case in the foot notes after f. n. 5 :

5a. 1953 Y D P 1393 (All) (D B), *Bashir Ahmad* v *Daya Shankar.* (Purchase-money left with vendee—Amount to be paid to mortgagee—Vendee cannot withhold payment on the ground that he has received a notice from the Official Receiver informing about the attachment of the property in connection with the insolvency proceeding started against the husband of the vendor mortgagor.)

Add after Pt. 14 as a separate para :

[Pt 14a] Where the property sold is subject to a usufructuary mortgage, the existence of a statutory charge can arise only if there is a contract between the vendor and the vendee that the latter would pay the consideration into the hands of the vendor who would redeem the usufructuary mortgage on the property and deliver it free of encumbrance to the vendee. In such a case, it can be said that there is really a vendor's lien but such a statutory lien cannot be said to exist where the agreement is that the vendee should himself discharge the mortgage and recover possession of the property. In the latter case, the purchase price left with the vendee for payment of the usufructuary mortgage is not money due to the vendor under S. 55 (5) (b) and hence no statutory charge or vendor's lien on the property can arise in respect of that amount. The same result follows if the question is looked at by applying the principle laid down by the Privy Council in 31 All. 583; for, if the usufructuary mortgage becomes barred by time or the mortgagee gives up his right to a portion of the property the benefit thereof will go only to the vendee and not to the vendor. *1954 Mad 508 (A I R V 41 C 188 P 9)* : *I L R (1954) Mad 484, Vinaitheertha Thevar* v. *Viswanatha Ayyar.*

Note 15

Add in the Foot Notes indicated :

1. 1954 All 348 (A I R V 41 C 155 P 3, 5, 6), *Mst. Sudama Devi* v. *Ramkishun Lal.* (Sale of mortgaged property by mortgagor — Portion of consideration left in hands of vendee for discharge of mortgage and other debts of mortgagor — Mortgagee cannot recover amount from vendee as no trust is created in his favour.) ✣ 1949 Nag 319 (A I R V 36 C 124 P 35) : I L R (1949) Nag 122 (DB), *Gajadhar Prasad* v. *Rishab Kumar.*
3. 1954 All 348 (A I R V 41 C 155 P 3, 5, 6), *Sudama Devi* v. *Ramkishun Lal.*
4. 1954 All 348 (A I R V 41 C 155 P 3, 5, 6), *Sudama Devi* v. *Ramkishun Lal.*
7. 1952 Mys 109 (A I R V 39 P 7, 8) : ILR (1952) Mys 316 (DB) *Devaraje Urs* v. *Ramakrishniah. M.* (Suit will be governed by Art. 116, Limitation Act, if the obligation to pay arises directly under registered instrument.)

Note 18

Add in the Foot Notes indicated :

2. 1954 Mad 508 (A I R V 41 C 188 P 11): I L R (1954) Mad 484, *Vinaitheertha Thevar* v. *Vishvanatha Ayyar.* (Sale subject to usufructuary mortgage— Agreement that vendee should himself discharge mortgage and recover possession — If usufructuary mortgage becomes time barred or the mortgagee gives up his right to a portion of property the benefit thereof will go to vendee Hence there is no vendor's lien.) ✣ 1953 Punj 110 (A I R V 40 C 42 P 10) : I L R (1952) Punj 219, *Narain Singh* v. *Bachan Singh.* (Sale of property — Part of purchase money left with purchaser for payment to previous mortgagee — Extinction of mortgage as a result of operation of Punjab Restitution of Mortgaged Lands Act — Seller has no right to participate in the benefits which purchaser might get by non-payment.)
5. 1955 Pat 254 (Pr 10) ((S) AIR V 42 C 61) (DB), *Ramlal Singh* v. *Harihar Prasad.* (*Held*, that upon a proper construction of the sale deed the purchaser must be held to be in the position of trustee for the unpaid purchase money and was liable to refund the excess amount in his hands with respect to the mortgage money payable to the mortgagee. As there was a fiduciary relationship between the parties as regards the unpaid purchase money, there was a duty cast upon the purchaser to refund any benefit which he had derived after the passing of the Bihar Money-lenders Act.) ✣ 1953 Mad 370 (A I R V 40 C 129 P 3) (DB), *Radha Krishna Ayyar, K. R.* v. *Subramania Ayyar, T. S.* (Debt reduced under Madras Act 4 of 1938 — Vendor held was not entitled to claim any money as balance of unpaid purchase money when vendee had paid more than the amounts left with him.)

Note 20

Add in the Foot Notes indicated :

1. 1953 Bom 145 (A I R V 40 C 46 P 15) : I L R (1953) Bom 253 (DB), *Jibhaoo Harisingh* v. *Ajab Singh.* (The creation of a charge under S. 55 (6) is not at all dependent upon the buyer not coming into possession of the property intended to be sold. Under the section, a charge arises immediately the purchase price is paid by the buyer to the seller provided he has not improperly declined to accept delivery.)
4. 1953 Bom 145 (A I R V 40 C 46 P 22) : I L R (1953) Bom 253 (DB), *Jibhaoo Harisingh* v. *Ajab Singh.* (A sale of property the value of which was more than Rs. 100 was effected by handing over of possession to the other party and by giving of a vardi to the village officer. Held, that in cases of such oral sales which are invalid, the purchaser has a charge on the property for the amount paid by him in advance as purchase money and this charge is not affected by the fact that he is in possession of the property. Therefore, the purchaser had a charge on the property intended to be sold, and of which he was in possession.)
10. 1952 Bom 67 (A I R V 39 C 10 P 7), *Abdul Hamid* v. *Mohomed Ali.*
10a. 1952 Bom 67 (A I R V 39 C 10 P 7), *Abdul Hamid* v. *Mohomed Ali.*
14. 1952 Madh B 145 (AIR V 39 P 4), *Munnalal* v. *Zamaklal.*

[See however 1950 Lah 106 (A I R V 37 C 31 P 42) : Lah L R (1950) Lah 1 (DB), *Jodhamal* v. *Associated Hotels of India Ltd.* (Agreement of sale of property at Lahore by *A* to *B* — Subsequent notice under S. 36, Punjab Town Improvement Act, 1922, for acquisition of property in question — *A's* title is not rendered

defective—*B* held not entitled to repudiate contract and recover earnest money.)]

15. 1952 Bom 67 (A I R V 39 C 10 P 7), *Abdul Hamid* v. *Mohomed Ali.*

18. *See also* ('50) I L R (1950) Nag 625 (631) (DB), *Jamai Majri Coal Co. Ltd., Chindwara* v. *S. N. Lokras.*

24. 1952 Cal 93 (A I R V 39 C 35 P 9), *Naresh Chandra Guha* v. *Ramchandra Samanta.*

25. 1955 Orissa 20 (Pr 7) ((S) A I R V 42 C 7 (DB), *T. Ranganayakamma* v. *S. R. Subudhi* ✣ 1955 Orissa 11 (Pr 5) ((S) A I R V 42 C 4): I L R (1954) Cut 526 (DB), *Jagannadhayya* v. *Ramanatha Mohapatra* ✣ 1952 Cal 93 (A I R V 39 C 35 P 9) *Naresh Chandra Guha* v. *Ram Chandra Samanta.*

26. 1955 Orissa 20 (Pr 7) ((S) A I R V 42 C 7) (DB), *T. Ranganayakamma* v *S. R. Subudhi.* (It is not correct to say that the right of the vendee to the refund of a sum deposited as part of the purchase price must necessarily extend to a right to the refund of the earnest money also.) ✣ 1955 Orissa 11 (Pr 5) ((S) A I R V 42 C 4): I L R (1954) Cut 526 (DB), *Jagannadhayya* v. *Ramanatha Mohapatra* ✣ 1952 Cal 93 (AIR V 39 C 35 P 9), *Naresh Chandra Guha* v. *Ram Chandra Samanta.*

27. 1955 Orissa 20 (Pr 7) ((S) A I R 42 C 7) (DB), *T. Ranganayakamma* v. *S. R. Subudhi.* ✣1955 Orissa 11 (Pr 5) ((S) A I R 42 C 4): I L R (1954) Cut 526 (D B), *Jagannadhayya* v. *Ramanatha Mohapatra.* ✣ 1955 N U C (Ajmer) 333 (A I R V 42), *Ratanlal Sharma* v. *Mithanlal.* (Breach of contract for sale by vendee — Vendor is entitled to forfeit the earnest money even though the agreement does not contain a clause for forfeiture but on the other hand has a condition that on the vendor's failure to get the sale deed executed within the stipulated period, he would refund the earnest money with interest.) ✣ 1952 Cal 3 (A I R V 39 C 35 P 9), *Naresh Chandra Guha* v. *Ram Chandra Samanta* (This liability exists, notwithstanding Ss. 64, 65 and 74 of the Contract Act, and is not affected by any of the said provisions) ✣1952 Punj 380 (A I R V 39 P 4), *Ruldu Ram* v. *Bhuri Lal.* (Contract for sale—Part of property destroyed by fire—Vendee not prepared to take sale is not entitled to return of earnest money.) ✣('50) I L R (1950) Nag 625 (631) (D B), *Jamai Majri Coal Co. Ltd., Chindwara* v. *S. N. Lokras.* (Bidder being aware of all the defects in property put up to sale successfully bidding and depositing percentage required of him—Deposit can be validly forfeited if sale falls through by his default—That resale resulted in bid for larger sum is not a plea open to him nor is it necessary that there should have been forfeiture clause.)

28. 1952 Cal 93 (A I R V 39 C 35 P 9), *Naresh Chandra Guha* v. *Ram Chandra Samanta.*

29. 1955 Orissa 11 (Pr 5) ((S) A I R V 42 C 4): I L R (1954) Cut 526 (D B), *Jagannadhayya* v. *Ramanatha Mohapatra.* (It depends on the parties as to whether the sum paid was intended to be the one or the other or a combination of both.)

33. 1955 Orissa 11 (Pr 5) ((S) AIR V 42 C 4): ILR (1954) Cut 526 (DB), *Jagannadhayya* v. *Ramanatha Mohapatra,* (If the vendor resells the property and claims to recover the loss arising on such resale the deposit is to be taken into account in diminishing the deficiency.) ✣1952 Cal 93 (AIR V 39 C 35 P 22), *Naresh Chandra Guha* v. *Ram Chandra Samanta.*

36. 1952 Bom 67 (A I R V 39 C 10, P 9), *Abdul Hamid* v *Mohomed Ali.* ✣1952 Nadh B 145 (A I R V 39 P 4 , *Munnalal* v *Zamaklal.*

Add new Pt. No. 3a after the words "has been accepted" in line 3 of the second paragraph on p. 926 and add the following case in the foot notes after F. N. 3 :

3a. 1952 Kutch 10 (A I R V 39 C 5 P 8), *Kunbarji Velji* v. *Umarshi Hansraj.*

On p. 932 in first line for ' Home v. Smith 28 ' read "Home v. Smith 28a".

Add after the sentence :

' As observed . . . . his own wrong."

[Pt. 28b] Where, however, the seller is responsible for the breach of the contract, the buyer is entitled to get back the amount of earnest money paid by him. *1955 Nag 38 (Pr 11) ((S) A I R V 42 C 10) (DB), Dwarkaprasad Poddar* v. *Miss Kathleen Florence Burns.* ✣*1955 Orissa 11 (Pr 5) ((S) A I R V 42 C 4) I L R (1954) Cut 526 (D B), Jagannadhayya* v. *Ramanatha Mohapatra.*

Add after Pt. 33 :

[Pt. 33a] But it has been held that where a part payment is made and the buyer commits default in performance he can recover the purchase price that he has paid subject to the right of the seller to set off a certain sum for damages against the purchaser. *1955 Orissa 11 (Pr 5) ((S) A I R V 42 C 4) : I L R (1954) Cut 526 (D B), Jagannadhayya* v. *Ramanatha Mohapatra.*

Note 22

Add in the Foot Notes indicated :

1. 1952 I D A 11000 (Mad), *Somasundaram Chettiar* v. *Komarappa Chettiar.* ✣1950 Nag 229 (A I R V 37 C 69 P 13) : I L R (1950) Nag 467, *Mt Saraswatibai* v. *Madhukar.*

3 1952 Punj 298 (AIR V 39 P 6) (DB), *Mahomed Ismail* v. *Hakim Syed Hussain,* (Indemnity clause in the contract if ambiguous would be construed in favour of vendee) ✣1952 I D A 11000 (Mad). *Somasundaram Chettiar* v. *Komarappa Chettiar.* ✣1950 Nag 229 (A I R V 37 C 69 P 13) : I L R (950) Nag 467, *Mt. Saraswatibai* v *Madhukar.* ✣('49) 1949 Nag L Jour (Notes) 12, *Bhagwan* v. *Seth Dhannalal.*

SECTION 56

Add in Synopsis after Item 13 :

13a. Who can claim right under this section —*See* Note 7.

Note 1

Add in the Foot Note indicated :

8. 1955 Mad 439 (Pr 2) (A I R V 42 C 118) (DB). *Subbarama Reddiar* v. *Raghava Reddi.* (Notwithstanding the amending Act which came into force by the time of the institution of the suit, the rights of the parties are governed by the original S. 56 under which the purchaser of any portion of the hypothecated property did

not have the right of marshalling as against the mortgagee.)

Note 7

Add in the Foot Note indicated :

2. 1955 N U C (Pat) 230 (AIR V 42), *Jagat Missir* v. *Sital Prasad Missir.* (Section does not apply to involuntary sales.) ✣ 1953 Pat 193 (A I R V 40 C 64 P 3) (DB), *Lachminarayan* v. *Janmaijai.*

Add after Pt. 3 :

[Pt. 3aa] The Patna High Court is also of the same view. *1953 Pat 193 (A I R V 40 C 64 P 3) (DB), Lachhminaraym* v. *Janmaijai Mahton.* (The equitable principle underlying the section can be invoked by an auction purchaser of property in execution of a money decree provided only if he makes out a case that he was a bona fide purchaser for value of the property without notice of the prior mortgage.) ✣ *1955 N U C (Pat) 230 (A I R V 42), Jagat Missir* v. *Sital Prasad Missir.* (In order that the principle of marshalling should be extended in favour of an auction purchaser, it is necessary for him to show that he is a 'bona fide' purchaser for value of the property without notice of the prior mortgage.)

Add after Pt. 4 at the beginning of second paragraph :

[Pt. 4a] The right conferred by this section can be claimed only by the purchaser from the mortgagor and not by any subsequent transferee from such purchaser from the mortgagor. *('46 52) I D 39901 (All), Padmawati* v. *Sheo Prasad.*

Add at the end of the first paragraph :

[Pt. 4aa] It has been held in the following case that if the auction-purchaser does not state in his application as to whether he had purchased only the equity of redemption on the entire mortgaged property or whether he had any notice of the mortgage or not, the principle of marshalling will not apply in his case. *1955 N U C (Pat) 230 (AIR V 42), Jagat Missir* v. *Sital Prasad Missir.*

Note 8

Add in the Foot Note indicated :

1a. 1950 Mad 224 (AIR V 37 C 101 P 3) (DB), *Mangayya* v. *Achayamma.* (A 'contract to the contrary' cannot be implied from a bare promise by the vendee from mortgagor to pay off the mortgage debt. The Court would have to consider in every case, upon an examination of the contract itself whether expressly or by necessary implication, it was a contract to the contrary.)

Add after the first sentence, viz. ' The right of marshalling . . . . contrary."

[Pt. 1aa] 'A contract to the contrary' contemplated by this section is not precisely that contemplated by S. 82. A contract to the contrary as contemplated by this section is not necessarily as between mortgagor and mortgagee but it may be as between the mortgagor and a purchaser from him. *1950 Mad 224 (A I R V 37 C 101 P 3) (DB), Mangayya* v. *Achayamma.*

Add after Pt. 1a :

[Pt. 1b] The right of marshalling can be taken away from the vendee if it is proved that the intention was to extinguish the entire mortgage and release the property from the mortgage, but if there was no such intention evidenced by any contract the right is not defeated or lost. *1952 All 163 (AIR V 39 C 57 P 13, 15) (DB), E. Tulsi Ram* v. *Maiku Lal.* (Portion of consideration left with vendee not sufficient to discharge mortgage—*Held*, there was no contract to contrary.)

[Pt. 1c] Thus, where the three vendees under three different sale deeds promised to pay a certain sum of money to the mortgagee in part discharge of the mortgage debt and it was contemplated that the whole mortgage debt would be discharged if all the three vendees did pay as they promised to do, but no provision was made in the three sale deeds as to what was to happen in case the money was not paid promptly, it was held that since the parties did not contemplate the possibility of the property being brought to sale and a question arising as to the priority of the sale of the various items, it was not possible to spell out of the three sale deeds themselves any "contract to the contrary" within the meaning of this section. *1950 Mad 224 (A I R V 37 C 101 P 5) (DB), Pedapati Mangayya* v. *Garapali Achayamma.*

Add after Pt. 2 :

[Pt. 3] An indemnity clause in the sale-deed to the effect that if any part of the property should go out of the vendee's possession due to the claim of any one, the vendee should be entitled to recover the loss from the vendor personally and from his other properties does not amount to a "contract to the contrary." *1952 All 163 (AIR V 39 C 57 P 13) (DB), Tulsi Ram* v. *Maiku Lal.*

Note 10

Add in the Foot Notes indicated :

3. 1955 Pat 108 (Pr 1) (AIR V 42 C 18), *Braj Kishore Rai* v. *Ramraj Rai.*

8. 1955 Pat 108 (Pr 1) (AIR V 42 C 18), *Braj Kishore Rai* v. *Ramraj Rai.*

Note 12

Add in the Foot Note indicated :

4. 1955 Mad 208 (Prs 4, 6) ((S) AIR V 42 C 53), *Kuppuswami Goundar* v. *K. Muthuswami Goundan.* ✠ 1955 Pat 108 (Pr 1) (A I R V 42 C 18), *Brajkishore Rai* v. *Ramraj Rai* ✠ ('46-52) I D 39902 (All), *Padmawati* v. *Sheo Prasad.* (Even though S. 56 cannot be invoked by the decree-holder, or by the transferee of the mortgaged property in execution proceedings, the execution Court always has the discretion to order the sale of the various items covered by the mortgage in a particular order in order to avoid injustice being done to any party.)

5, 1955 Pat 108 (Pr 1) (A I R V 42 C 18), *Brajkishore Rai* v. *Ramraj Rai.*

Note 13a

Add after Note 13 :

13a. Who can claim right under this section – See Note 7

Note 14

Add in the Foot Note indicated :

2. 1955 Pat 108 (Pr 1) (A I R V 42 C 18), *Brajkishore Rai* v. *Ramraj Rai.*

SECTION 57

In section 57, for the word "Provincial the word 'State' shall be substituted.

—Substituted by A. L. O. 1950.

SECTION 58

In section 58, for the word 'Provincial' the word 'State', shall be substituted.

—Substituted by A. L. O. 1950.

Add the following after the last entry in foot note 'h' under S. 58 :

"Guntur, *see* Fort St. Geo. Gazette, 1949, Pt. I, p. 1356"

Add in Synopsis after Item 37a :

"37b. Chitham.

37c. Vatantar mortgage."

Note 2

Add after Pt. 10 as a separate para :

[Pt. 11] The definition of 'transfer of property' in S. 5 or of 'mortgage' in this section makes no reference to the locus to which the property belongs. Hence, a mortgage-deed cannot be challenged on the mere ground that a part of the property embraced by it was outside British India. *1951 All 431 (A I R V 38 C 85 P 5) (DB), Prithi Singh* v. *Ganesh Pd. Singh.*

Note 3

Add as a separate para :

[Pt. 3] It has been held in the undermentioned case that it is possible to create a mortgage apart from what is provided for in the Transfer of Property Act. Thus where at a time when the Transfer of Property Act was not in force in Travancore the decree in a suit for recovery of property and mesne profits allowed the defendant to retain possession, of the property till she got the amount that was declared to be due to her or to surrender possession of the property and claim the amount with interest, and further she was also allowed to appropriate the profits from the property till she was paid her amount or till she surrendered possession of the property and claimed the amount with interest thereafter it was held that a mortgage was created on which the plaintiff could file a suit for redemption. *1955 Trav-Co. 130 (Prs 7, 9) ((S) A I R V 42 C 47) (DB), Bhageerathi Pillai* v. *Narayanan Prabhakaran.*

Note 4

Add in the Foot Notes indicated :

2. 1952 Bom 454 (AIR V 39 P 7, 10) : ILR (1952 Bom 1090 (DB), *Prahlad Dalsukhrai* v. *Magahlal Muljibhai.* (What the mortgagee acquires under the transaction is a mortgagee's interest in specific immovable property which can, even in the case of usufructuary mortgage, only be immovable property and not movable property : 1933 All 577 (A I R V 25 (SB), Fateh Singh v. Raghubir Sahai, Foll. ✠ 1949 Lah 264 (A I R V 36 C 53 P 3) (DB), *Moizuddin* v. *Uttam Chand.* (Mortgage debt constitutes immovable property.)

7a. 1952 Hyd 5 (A I R V 39 C 3 P 4, 5) : I L R (1952) Hyd 351, *Vishwanatha* v. *Fatima Bi.* (Subsequent oral agreement allowing usufructuary mortgagee to remain in possession for a further period in lieu of interest on debt incurred subsequent to mortgage—It amounts to an additional usufructuary mortgage and not a charge.)

9. *See also* ('48) ILR (1948) 1 Cal 492 (497, 498), *Bhupati Bhusan* v. *Birendra Mohan.* (An agreement to pay annuity to a person and his descendants from generation to generation making it a charge over property, creates a charge and not a mortgage.)

Add after pt. 2 :

[Pt. 2a] In other words, the owner of the bundle of rights transfers some of those rights to the mortgagee, and the remainder of them still remain with him and can be transferred. *1952 Pat 469 (AIR V 39 P 11) (DB), Thakur Prasad* v. *Rajkubar Prasad.*

Add after Pt. 8 as a separate para :

[Pt. 8a] See also the undermentioned case to the same effect. *('48) ILR (1948) 1 Cal 492 (498), Bhupati Bhusan* v. *Birendra Mohan.*

Note 5

Add after Pt. 5 in separate para :

[5a] A sub-mortgagee has no privity of estate or privity of contract with the original mortgagor. So far as the sub-mortgagee is concerned the privity of estate and privity of contract are between

the mortgagee and the sub-mortgagee and as such the sub-mortgage can be put an end to by redemption or by release only by the original mortgagee *1953 T C 271 (AIR V 40 C 98 Pr 3)*, *Gouri Pillai* v. *Lakshmi Pillai*.

Add after Pt. 5a.

[5b] If the person representing the mortgagor wants to redeem the original mortgage, he can terminate the sub-mortgage by making the sub-mortgagee also a party to that suit. But the mortgagor has no right to directly terminate the sub-mortgage independent of the mortgage. *1953 Tra Co 271 (A I R V 40 C 98 P 3)*, *Gouri Pillai* v. *Lakshmi Pillai*.

Add after Pt. 5b.

[5c] There is also no merger of the sub-mortgage on the mortgagor's acquiring the rights under the sub-mortgage. Such merger is possible only if there is no intermediate charge subsisting. *1953 Tra. Co 271 (A I R V 40 C 98 P 3)*, *Gouri Pillai* v. *Lakshmi Pillai*.

Note 6

Add in the Foot Note indicated :

4. 1950 Kutch 83 (A I R V 37 C 69 P 3), *Kanibai* v. *Khimji Hirji*. (Unless plaintiff shows that compensation would not afford adequate relief or that he has actually advanced money on the promised mortgage.)

Note 9

Add in the Foot Notes indicated :

12. 1955 Pat 189 (Pr 4) ((S) A I R V 42 C 43), *Sheonandan Prasad Sao* v. *Ugrah Sao*. (The parti land attached to the house, used for business carried on in house, held should be considered as part of house which was mortgaged.) ✠ 1953 Mad 764 (AIR V 40 C 291 P 3, 4) : ILR (1953) Mad 566 (FB), *Crompton Engineering Co. Madras* v. *Chief Controlling Revenue Authority, Madras*. (Reference to the premises described in the document as bearing door No. 27, Thiruvottiyur High Road as also to the stock in trade was obviously to "specified" property within the meaning of S. 2 (17), Stamp Act.) ✠ 1951 Kutch 4 (A I R V 38 C 2 P 4), *Devidan Malani* v. *Shamji Vishram*. (Property described as "My 1/4th share in Giras in Nakhatrana" without giving boundaries—Valid Chittam mortgage.)

Add after Pt. 14 :

[Pt. 14a] See also the undermentioned case. *1949 Pat 505 (A I R V 36 C 154 P 7) : 28 Pat 303 (DB)*, *Khelawan Singh* v. *Ramnandan Prasad Singh*. (Conveyance of property to mortgagee in satisfaction of his mortgage — Indemnity clause providing that in case mortgagee was put to loss for defect in title he was entitled to realise it from "entire movable and immovable property of me and all my heirs and representatives" — Stipulation held did not create mortgage.)

Add after Pt. 17 :

[Pt. 17a] A life insurance policy is neither immovable nor movable property and therefore cannot be the subject of mortgage. *('50) 54 Cal W N 710 (712)*, *Pioneer Bank Ltd.* v. *Bamandev Banerjee*.

Note 11

Add in the Foot Notes indicated :

1b. *See* 1952 Sau 107 (A I R V 39 P 5), *Trivedi Pranshankar* v. *Jayaguru Raghunath*.

4. 1952 Sau 107 (AIR V 39 P 5), *Trivedi Pranshankar* v. *Jayaguru Raghunath*.

7. 1952 Sau 107 (AIR V 39 P 5), *Trivedi Pranshankar* v. *Jayaguru Raghunath*.

8a. 1952 Madh B 196 (A I R V 39 P 4) : I L R (1952) Madh B 136 (DB), *Kesrimal* v. *Bansilal* ✠ 1949 Nag 68 (A I R V 36 C 148 P 10) : ILR (1949) Nag 243, *Jagannath Ganganarayan Maheswari* v. *Fatechand Ratanchand Oswal*. (A I R Commentary on T. P Act Referred to.)

9. 1954 Madh B 6 (A I R V 41 C 6 P 6), *Padam Singh* v. *Ram Krishnan Daulat* ✠ 1952 Madh B 196 (A I R V 39 P 4) : I L R (1952) Madh B 136 (DB), *Kesrimal* v. *Bansilal* ✠ 1952 Sau 107 (A I R V 39 P 5), *Trivedi Pranshankar* v. *Jayaguru Raghunath*. (Mortgage of machinery — Mortgagor remaining in possession paying interest equal to rent—Transaction is hypothecation and not pledge.)

11. 1954 Madh B 6 (AIR V 41 C 6 P 6), *Padam Singh* v. *Ramkrishnan Daulat*.

12. 1954 Madh B 6 (AIR V 41 C 6 P 6), *Padam Singh* v. *Ram Krishnan Daulat*.

Add after Pt. 8 as a separate para :

[Pt. 8aa] A mortgagor of movable property is entitled to sue for redemption. *1949 Nag 368 (A I R V 36 C 148 P 7) : ILR (1949) Nag 243, Jagannath Ganganarayan Maheswari* v. *Fatechand Ratanchand Oswal*.

Add after Pt. 12 :

[Pt. 12a] It is also not an equitable mortgage. It is after all a security intermediate between a simple loan and a mortgage which wholly passes property in the thing conveyed. *1954 Madh B 6 (AIR V 41 C 6 P 6)*, *Padam Singh* v. *Ram Krishnan Daulat*.

Note 12

Add in the Foot Note indicated :

1. 1954 Trav-Co 7 (A I R V 41 C 4 P 7) : I L R (1952) Trav-Co 438 (DB), *Raman Pillai* v. *Bhagavathi Pillai*.

Note 13

Add in the Foot Note indicated :

8. 1955 Cal 194 (Pr 18) ((S) A I R V 42 C 51 (DB), *Durga Prosad* v. *Mario Galstaun*.

Note 15

Add in the Foot Note indicated :

1. 1955 N U C (All) 1695 (A I R V 42), *Gopi Nath* v. *Bhanu Shanker Yasjnik*.

Note 17

Add in the Foot Note indicated :

2. *See also* ('49) 2 Sau L R 146 (149), *Thaker Nalji Kalidas* v. *Pandya Jethalal Ramji.* (Suit on mortgage bond and not on subsequent khata where principal amount with interest had been capitalized — Amount shown in khata cannot be considered as principal amount.)

Note 18

Add in the Foot Notes indicated :

1. 1950 Mad 146 (AIR V 37 C 68 P 11), *Ramannujulu Naidu* v. *Gajaraja Ammal.* (Sale of property by *A* to *B* on assumption that title vested in *A*—*B* mortgaging back same property for full sale price — *B* and not *A* found to have title to the property — Mortgage is devoid of consideration and is unenforceable.)

9. 1953 Mad 603 (A I R V 40 C 235 P 4), *Sriramulu Naidu* v. *Jambulingam Pillai.* (Article 83, Limitation Act, applies to the suit.)

Add after Pt 12 :

[Pt 12aa] Where under the terms of a simple mortgage the mortgagee deducts a certain sum of money from the principal sum of money to be advanced, towards the first year's interest in advance, there is no reduction of the principal to that extent and the mortgagee would be entitle to interest on the entire amount. *1953 Sau 84 (Pr 6) (A I R V 40 C 38) (DB), Haji Abdulla Haji Umar* v. *Daud Mahomed.*

Note 21

Add in the Foot Note indicated :

1. 1954 All 314 (A I R V 41 C 148 P 3, 4) *Gulab Singh* v. *Hira Lal.* (If a suit brought by the other co sharers for a declaration that the mortgage was not binding on their share is decreed, the property furnished as security for loan is evidently rendered insufficient and the mortgagee is entitled to sue under S. 68.)

Add after Pt. 4 as a separate para :

[Pt. 5] Where a mortgage is executed by several Muhammadan co-owners the mere fact that some of them are minors and pardanashin ladies, who had not executed the deed in accordance with law cannot make the execution by the rest invalid. The mortgage would be valid and binding against the rest. The reason is that the liability of the mortgagors being joint and several the mortgagee can realise the whole of the debt from any one of them. *1951 All 618 (A I R V 38 C 164 P 6, 7) (DB), Keka* v. *Sirajuddin.*

Note 31

Add in the Foot Notes indicated :

32b. 1952 All 716 (AIR V 39 P 41, 104) : I L R (1952) 2 All 200 (FB), *Debi Singh* v. *Jagadish Saran Singh.* (Per *Beg J.*—Per *Agarwala J.* : The word 'ostensible' in S 58 (c) has two meanings : (a) that the object bears a certain form or appearance without suggesting that it is or is not that of which it has the superficial appearance; and (b) that the object bears a certain appearance but is not really that of which it bear the appearance.)

34. 1955 Vindh Pra 4 (Pr 3) (AIR V 42 C 3), *Nanhku Babulal* v. *Mitlal.* (A document which is essentially a simple mortgage with an express personal covenant to pay does not cease to be a simple mortgage and becomes a mortgage by conditional sale merely because it contains a term under which the mortgaged property is to be deemed to have been sold outright on failure of payment of the principal money with interest by a certain date.)

35. 1954 Trav-Co 142 (A I R V 41 C 51 P 9) : I L R (1953) Trav-Co 993, *Narayanan* v. *Kochupennu.*

Add after Pt. 29 as a separate para :

[Pt. 29a] In Kutch, in the case of a mortgage by conditional sale, executed in St. 1867, there is no right of redemption after the expiry of the specified time limit. *1949 Kutch 10 (A I R V 36 C 9 P 11), Jadeja Godji Modji* v. *Jadeja Bhansangji Jagatsinghji.*

[Pt. 29b] The Kutch Government order forbidding conditional sale does not apply to deed made before St. 1914. *1949 Kutch 10 (A I R V 36 C 9 P 7), Jadeja Godji Modji* v. *Jadeja Bhansangji Jagatsinghji.*

Note 32

Add in the Foot Note indicated :

1. ('46-52) I D 39789 (Nag), *Maroti Parashram* v. *Fattelal Jethamal* ✠ (49) 1949 Bur L R (HC) 58 (61), *Maung Zaw Ynyun* v. *Ma Mai Kha.* (However, the conduct of a creditor may amount to a dispensation with the literal compliance of the conditions set out in the agreement.)

Note 33

Add in the Foot Notes indicated :

1. 1954 Nag 193 Pr 17) (AIR V 41 C 62) (DB), *Shri Narayan Rambilas* v. *Bhaskar Waman* ✠ 1 52 Punj 181 AIR V 39 C 69 P 12), *Hans Raj* v. *Mat Ram* ✠ 1952 I D A 1714) (Nag), *Harya* v. *Punjaji* ✠ 1953 Mys 105 (Pr 2) (AIR V 40 C 48) : ILR (19 2) Mys 247 (DB), *Hayath Saheb* v. *Bharamanna* ✠ 1950 Nag 198 (AIR V 37 C 5 P 6) : ILR (1950) Nag 719, *Bhaiyalal* v. *Kishorilal.*

3. 1954 S C 345 (Pra 5, 6) (AIR V 41 C 83): 1955 S C R 174 (SC), *Chunchun Jha* v. *Ebadat Ali* ✠ 1954 Nag 193 (Pr 1?) (AIR V 41 C 62) (DB), *Shrinarayan Rambilas* v. *Bhasker Waman.* (When the question is whether a transaction is a sale or a mortgage, it is an inviolable rule that upon such a question the Court must find the substance behind the form. But where the oral evidence is unreliable and contradictory the Court cannot safely depart from the written evidence of the documents) ✠ 1950 All 430 (AIR 37 C 163 P 6), *Bidha Ram* v. *Chidda.*

4. 1954 S C 345 (Pr 7) (AIR V 41 C 83) : 1955 S C R 174 (S C), *Chunchun Jha* v. *Ebadat Ali.* (If on the face of it an instrument clearly purports to be a mortgage, it cannot be turned into

Jammu & Kashmir Srinagar.

a sale by reference to a post of extraneous and irrelevant considerations.) ✠ 1950 All 430 (AIR V 37 C 163 P 6), *Bidha Ram* v. *Chhida.*

6, 1952 I D A 17147 (Nag), *Mt. Sugrabi* v. *Md. Ibrahim* ✠ 1953 Mys 105 (Pr 2) (AIR V 40 C 48) : ILR (1952) Mys 247 (DB), *Hayath Saheb* v. *Bharamanna* ✠ 1950 All 430 (A R V 37 C 163 P 6), *Bidha Ram* v. *Chhida.* (Courts should not go by language used in deed)

8 1951 Pat 327 (AIR V 38 C 75 P 4, 7) (DB), *Manikchand Raut* v. *Baldeo.* (Mortgage containing agreement to sell at the end of stipulated period amounts to a clog and is void.)

14. 1954 Nag 193 (Pr 15) (AIR V 41 C 62) (DB). *Shrinarayan Rambilas* v. *Bhaskar Waman,* ((1900) ILR 24 All 149 (PC), Balkishen Das v. W. F. Legge, Foll) ✠ 1952 All 200 (AIR V 39 C 77 P 13) (DB), *Mt. Qayumunissa* v. *Rashidul Malik* ✠ 1946 52 I D 39945 (Nag), *Ram Rao* v. *Radhabai.* (Absence of specific allegation of execution of sale deed due to fraudulent misrepresentation or that executant was prevented by fraud from knowing its nature—Oral evidence is inadmissible to show it a mortgage and not sale.) ✠ 1946-52 I D 39789 (Nag), *Maroti Parashram* v *Fattelal Jethmal* ✠ 1946-52 I D 39944 (Nag), *Ram Rao* v. *Radhabai.*

17. 1954 S C 345 (Pr 6) (AIR V 41 C 83) : 1955 S C R 174 (SC). *Chunchun Jha* v. *Ebadat Ali.* ((1858) 44 E R 944 : 2 De G & J 97, Alderson v. White, Rel. on)

23. 1954 Nag 193 (Pr 27) (AIR V 41 C 62) (DB), *Shrinarayan Rambilas* v. *Bhasker Waman* ✠ 1952 Mad 11 (AIR V 39 C 2 P 7) : ILR (1952) Mad 604 (DB), *Krishnamurthy* v. *Venkateswaran* ✠ 1952 Punj 181 (AIR V 39 C 69 P 10), *Hans Raj* v. *Mat Ram.*

25. 1954 Nag 193 (Pr 20) (AIR V 41 C 62) (DB), *Shrinarayan Rambilas* v. *Bhasker Waman.* (1924 P C 226 (AIR V 11) (P C), Narasingerji v. Parthasaradhi Rayanam Garu, Foll.)

26. 1954 Nag 193 (Pr 37) (AIR V 41 C 62) (DB), *Shrinarayan Rambilas* v. *Bhasker Waman.*

27. 1952 Mad 11 (AIR V 39 C 2 P 7) : ILR (1952) Mad 604 (DB), *Krishnamurthi* v. *Venkateswaran* ✠ 1952 Punj 181 (AIR V 39 C 69 P 10), *Hans Raj* v. *Mat Ram.*

28 1952 Mad 11 (A I R V 39 C 2 P 7) : I L R (1952) Mad 604 (DB), *Krishnamurthi* v. *Venkateswaran* ✠ 1952 Punj 181 (AIR V 39 C 69 P 10), *Hans Raj* v. *Mat Ram.*

29. 1954 Nag 193 (Pr 37) (AIR V 41 C 62) (DB), *Shrinarayan Rambilas* v. *Bhasker Waman.* (Held period of five years fixed for repurchase was not abnormally short) ✠ 1950 Nag 198 (AIR V 37 C 58 P 9) : ILR (1950) Nag 709, *Bhaiyalal* v. *Kishorilal.* (A short period such as 2 years is indicative of sale rather than of mortgage) ✠ 1952 Punj 181 (AIR V 39 C 69 P 10), *Hans Raj* v. *Mat Ram.* (Short period indicative of sale)

30. 1952 Mad 11 (AIR V 39 C 2 P 7) : I L R (1952) Mad 604 (DB), *Krishnamurthi* v. *Venkateshwaran.*

31. 1953 Mys 105 (Pr 4a) (AIR V 40 C 48) : ILR (1952) Mys 247 (DB), *Hayath Saheb* v. *Bharamanna.*

32b. 1954 Nag 193 (Pr 35) (AIR V 41 C 62) (DB), *Shrinarayan Rambilas* v. *Bhasker Waman* ✠ 1952 Punj 181 (AIR V 39 C 69 P 10), *Hans Raj* v. *Mat Ram.*

38. 1954 Nag 193 (Pr 38) (AIR V 41 C 62) (DB), *Shrinarayan Rambilas* v. *Bhasker Waman.* (Test about relationship of debtor and creditor between the parties applied.) ✠ 195 Bhopal 18 (AIR V 40 C 9 P 10), *Chhuttu* v. *Kayan Khan.* (The following circumstances, viz., (1) a contemporaneous agreement to reconvey; (2) agreement forming the terms of the consideration of the transaction of sale; (3) a fairly long period of five years for repayment and reconveyance; and (4) possession continued with the defendant transferor clearly indicate the relationship between the parties to be of a debtor and creditor leading to the irresistible conclusion that the intention was to mortgage the property by conditional sale and the rent was intended to cover interest.) ✠ 1954 Trav-Co. 165 (AIR V 41 C 62 P 4) : ILR (1953) Trav-Co 871 (DB), *George Mathai* v. *Mathew Daniel.* (There were three mortgages in favour of the same individual in respect of the same property. Possession had been given under the first mortgage deed. The third mortgage deed contained an express stipulation that in case of failure to repay the loan on the third mortgage within a period of two years, the deed shall be deemed to be a sale deed and the total amount due to the mortgagee on all the three mortgages shall be treated as the consideration for the sale—*Held,* that both the previous two and the third subsequent deed must be read together and the mortgagee should be treated as having held the mortgaged property as a mortgagee in possession under a mortgage in the form of a mortgage by conditional sale: 1924 P C 102 (AIR V 11), Mirza Abid Hussain v. Mt. Kuniz Fatima, Foll.) ✠ 1954 Trav-Co. 142 (AIR V 41 C 51 P 8) : I L R (1952) Trav-Co 999 (DB), *Narayanan* v. *Kochupennu.* (In form the deed was not one of absolute conveyance nor was there a provision for repurchase. The document, styled itself an *otti,* there was mention of a specific sum as debt and the right of redemption was expressly reserved though limited to a specified period. The document further stated that for that specified period the executee should remain in possession and enjoy the property as *ottidar.* Provision was also made as to how the amount should be realised in case the property was lost or found inadequate for the debt. In that event the executee was given liberty to proceed against the remaining properties in the decree — *Held,* that the parties intended only to create a mortgage and not anything more. The absence of a personal covenant in the deed was not an indication that the parties intended to create a sale. The deed did not evidence a sale with a condition of repurchase but was a mortgage by conditional sale.) ✠ 1952 Mad 11 (AIR V 39 C 2 P 8): ILR (1952) Mad 604 (DB). *G. Krishnamurthy* v. *K. Venkateshwaran* ✠ 1952 I D A 17148 (Nag), *Rajabhau* v. *Sitaram.* (Sale deed providing for repayment of consideration within 3 years—Property worth Rs. 5200 sold for Rs. 3000—*Held* mortgage.) ✠ 1951 Orissa 362 (A I R V 38 C 87 P 24, 27, 47) : I L R (1951) Cut 231 (FB), *Nilamoni Bewa* v. *Mrutunjaya Pradhan.* (Condition that on repayment within certain time of consideration money buyer to return the land together with the Kabala—On failure of payment, buyer to possess and enjoy from

generation to generation and after getting his name duly mutated in the Sherista of Zamindar to use the land in any way—Difference in the operative words of conveyance of ownership used in earlier portion and later portion of the document indicating detraction from full ownership prior to the stipulated time—Transaction held to be a mortgage and not a sale.) ✠ 1951 Pat 327 (A I R V 38 C 75 P 5) (DB), *Manik Chand Raut* v. *Baldeo* ✠ 1950 All 430 (A I R V 37 C 163 P 5, 9), *Bidha Ram* v. *Chhidda*. (Conditional sale of house worth Rs. 1200 for Rs. 150—Vendor continuing in possession on payment of rent—Stipulation for reconveyance on repayment within three years contained in same deed—*Held* document was mortgage and not sale.) ✠ 1949 Pat 505 (A I R V 36 C 155 P 7, 8, 9): 28 Pat 286 (DB), *Kuer Mahabirsingh* v. *Bigan Sahpun*. (Deed providing that if the vendor paid back consideration from his private fund within certain date he would be entitled to take back property sold—In case vendee objects vendor to deposit amount in Government Treasury and to take back possession after notice to vendee through Court—Vendee not allowed to transfer property during period of conditional sale—In case of vendor's failure to pay back consideration within prescribed period vendee to have full rights in property—*Held* a mortgage by conditional sale and not an out and out sale with condition of re-purchase.)

39. 1952 Punj 181 (A I R V 39 C 69 P 15), *Hans Raj* v. *Mat Ram* ✠ 1952 I D A 17147 (Nag), *Mst. Sugrabi* v. *Md. Ibrahim*. (Ostensible sale of property for consideration which was equal to its market value—Vendee put in possession—Agreement to reconvey it repayment made within five years—Vendee not to sell or mortgage for the aforesaid period—Nothing to show relationship of debtor and creditor *Held* sale and not mortgage.) ✠ 1953 Mys 105 (Pr. 6) (A I R V 40 C 48) : I L R (1952) Mys 247 (DB), *Hayath Saheb* v. *Bharamanna*. (Document described as conditional sale—Consideration almost equal to value of property—Period of repayment 4 years—Agreement to reconvey in same deed—Evidence of previous negotiation between parties for sale of property to discharge existing debt—*Held* document was conditional sale and not mortgage.) ✠ 1946-52 I D 39929 (Nag). *Rajeshwar* v. *Suganchand*. (Sale deed not containing agreement to resell—Oral agreement alleged—Amount alleged to be intended to to be realised from property—Transaction is not mortgage.)

40. 1953 Punj 292 (A I R V 40 C 129 P 6) (DB), *Soshil Kumar* v. *Madan Gopal*. (Registered sale-deed conveying house absolutely to vendee—Subsequent unregistered agreement to reconvey house at any time within five years—Transaction does not amount to mortgage by conditional sale but is an absolute sale—Agreement to reconvey though of itself does not require registration still when it is sought to modify the terms of registered sale-deed by such agreement requires registration.) ✠ 1946-52 I D 39944 (Nag). *Ramrao* v *Radhabai* ✠ 1950 Hyd 51 (A I R V 37 C 13 P 1) : I L R (1951) Hyd 189 (DB), *Rajjulal* v. *Jalaluddin*.

41. 1950 Hyd 51 (A I R V 37 C 13 P 1) : I L R (1951) Hyd 189 (DB), *Rajjulal* v. *Jalaluddin*.

44 1953 Mad 830 (AIR V 40 C 315 P 3) : I L R (1953) Mad 1196 (DB), *Rechuri Suryaprakasa Rao* v. *Gottumukkala Venkatraju* (1946 Mad 456 (A I R V 33 C 232) (DB), *Venkata Subb Rao* v. *Veeraswami*. Foll.) ✠ 1952 All 200 (A I R V 39 C 77 P 13, 17, 18) (DB), *Qayumunissa* v. *Rashidul Malik* ✠ 1953 Mys 105 (Pr 2) (A I R V 40 C 48) : I L R (1952) Mys 247. *Hayat Saheb* v. *Bharamanna*.

45. 1954 S C 345 (Pr 8) (A I R V 41 C 83) : 1955 S C R 174 (SC), *Chunchun Jha* v. *Ebadat Ali* ✠ 1952 All 200 (A I R V 39 C 77 P 2, 17, 18) (DB), *Mst. Qayumunnissa* v. *Rashidul Malik* ✠ 1953 Mys 105 (Pr 2) (A I R V 40 C 48) : I L R (1952) Mys 247, *Hayat Saheb* v. *Bharamanna*. ✠ 1946-52 I D 39789 (Nag), *Maroti Parashram* v. *Fattelal* ✠ 1950 Nag 198 (A I R V 37 C 58 P 6) : I L R (1950) Nag 719. *Bhaiyalal* v. *Kishorilal* (*Prima facie*, an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase.)

46. 1954 S C 345 (Pr 20) (A I R V 41 C 83) : 1955 S C R 174 (SC), *Chunchun Jha* v *Ebadat Ali*. (*Held*, on construction of the document and taking everything into consideration that the deed was a mortgage by conditional sale under S. 58 *(c)*) ✠ 1954 Nag 193 (Pr 18) (A I R V 41 C 62) (DB), *Shrinarayan Rambilas* v. *Bhaskar Waman*, (The cardinal test which is to be applied in all such cases is whether the relation of a debtor and creditor is preserved between the vendor and the vendee) ✠ 1952 All 200 (A I R V 39 C 77 P 13) (DB). *Mst Qayumunissa* v. *Rashidul Malik*. (Held that transaction was an out and out sale and not a mortgage.) ✠ 1950 Nag 198 (A I R V 37 C 58 P 6) : I L R (1950) Nag 719. *Bhaiyalal* v. *Kishorilal*.

Add after Pt. 8 :

[Pt 8a] A mere delay in launching the suit for redemption will not make the transaction a sale which from its very inception was a mortgage. *1951 Orissa 362 (A I R V 38 C 87 P 45)* : *I L R (1951) Cut 281 (FB), Nilamoni Bewa* v. *Mrutunjaya Pradhan* (Per *Ray C. J.* —*Das J.*, was, however, of the view that delay in seeking redemption is a circumstance which must call for scrutiny. Unexplained delay must receive its due weight as one of the relevant circumstances, by way of conduct where such conduct is admissible.)

Add after Pt. 16a at the end of the para :

[Pt. 16b] See also the undermentioned case to the same effect decided after the above Privy Council decision. *1952 Pat 431 (A I R V 39 P 6, 7) (DB), Bhagwat Rai* v. *Ramasis*.

Add after Pt. 16b as a separate para :

[Pt. 16c] It has been held that evidence of an oral agreement as to the condition of reconveyance is admissible and is not excluded by S. 92, Evidence Act. *1953 Nag 337 (Pr 2) (A I R V 40 C 145), Lakhmichand* v. *Yasodabai.*

Add as item No (5a) after Pt. 28 :

(5a) [Pt. 28a] Where however, possession was handed over to the purchaser in furtherance of an agreement to guarantee interest, it was held that the handing over of possession indicated a mortgage rather than a sale. *1954 Nag 193 (Pr 36) (AIR V 41 C 62) (DB), Shrinarayan Rambilas* v. *Bhasker Waman.*

Add after item (12) and after Pt 32d :

(13) [Pt. 32e] An express provision for the postponement of mutation of the grantees's name in the landlord's papers till after the time for repayment expires, is decisive of the transaction being a mortgage. *1951 Orissa 362 (A I R V 38 C 87 P 15, 32 48) : I L R (1951) Cut 281 (FB), Nilamoni Bewa* v. *Mrutunjaya Pradhan.* (But in cases of transfer of occupancy holdings before they were made transferable by Orissa Tenancy (Amendment) Act, 1938, postponement of mutation is inconclusive.)

Add after item (13) :

(14) [Pt. 32f] A covenant for refund of the consideration money with interest on dispossession or disturbance of possession of the vendee not attributable to the vendor's defective title is indicative of a mortgage, rather than a sale, whereas such a covenant in the case of dispossession due to vendor's title is inconclusive. *1951 Orissa 362 (AIR V 38 C 87 P 15, 34, 48) : I L R (1951) Cut 281 (F B), Nilamoni Bewa* v. *Mrutunjaya Pradhan.*

After Pt. 42, under the heading "Effect of Proviso', add after the first sentence :

[Pt 42a] The proviso now expressly provides that where the agreement to reconvey is not embodied in the same document which effects or purports to effect the sale the transaction shall not be deemed to be a mortgage *1952 I D A 17146 (Nag) (DB), Sitaram* v. *Laxminarayan* (Sale and agreement to reconvey on same day on different papers — They cannot be regarded as one document for purposes of proviso.) ✠ *1954 S C 345 (Pr 8) (A I R V 41 C 83) : 1955 S C R 174 (SC), Chunchun Jha* v. *Ebadat Ali* (Under the proviso if the sale and the agreement to repurchase are embodied in separate documents then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not.) ✠ *1954 Nag 193 (Pr 18) (A I R V 41 C 62) (DB), Shrinarayan Rambilas* v. *Bhaskar Waman* ✠ *1952 Mys 56 (AIR V 39 P 3): ILR (1951) Mys 427 (DB), Tendala Muniswamappa* v. *Nanjundachari.* ✠ *1946-52 I D 39948 (Nag), Ramrao* v. *Md. Ismail.* (Sale of land to secure loan with separate agreement to reconvey — Vendor remaining in possession as lessee — Transaction is not mortgage by conditional sale in view of proviso) ✠ *1946-52 I D 39789 (Nag), Maroti Parashram* v. *Fattelal.* ✠ *1953 Nag 337 (Pr 2) (A I R V 40 C 145) Lakhmichand* v. *Yasodabai* ✠ *1951 Orissa 362 (A I R V 38 C 87 P 13) : I L R (1951) Cut 281 (FB), Nilamoni Bewa* v. *Mrutunjaya Pradhan.* ✠ *1950 Nag 198 (A I R V 37 C 58 P 6) : I L R (1950) Nag 719, Bhuiyalal* v. *Kishorilal.* ✠ *1950 Nag 22 (A I R 37 C 8 P 14) : I L R (1949) Nag 933 (DB), Govindsa Marotisa* v. *Ismail.*

Add after Pt. 47 :

[Pt. 47a] A Full Bench of the Orissa High Court has held that where the document which effects or purports to effect the ostensible sale contains the third condition mentioned in the section, viz., "on such payment being made the buyer shall retransfer the property to the seller," it is to be presumed a mortgage and the party who asserts to the contrary must prove it. Ray C. J. was also of the opinion, though the observation is obiter, that if a document contained either the first or the second condition mentioned in the section, the transaction evidenced by the document must conclusively be held to be one of mortgage by conditional sale and not an out and out sale. Das J. was, however, of the opinion that even in such cases the true nature of the document would depend upon the intention of the parties to be gathered from the other terms of the document and by the surrounding circumstances. *1951 Orissa 362 (A I R V 38 C 87 P 14, 15, 31, 32, 34 & 43) : I L R (1951) Cut 281 (FB), Nilamoni Bewa* v. *Mrutunjaya Pradhan.*

[*See also* ('49) I L R (1949) 1 Cut 776 (779) (DB), *Gouri Pradhan* v. *Bhagaban Pradhan.* (The proviso makes the transaction prima facie a mortgage by conditional sale where the terms of repurchase are made a part of the same docu-

ment which figures as deed of sale. In case of difficulty of construction or of ambiguity the presumption should be that the transaction is a mortgage by conditional sale and the onus of proof that it is an absolute sale lies on the party who asserts it)]

Add after Pt. 47a :

[Pt. 47b] In *Debi Singh* v. *Jagdish Saran Singh* the question came up for decision before a Full Bench of the Allahabad High Court. It was held by the majority (Agarwala and Chandiramani JJ.) that the effect of the addition of the proviso was to lay down a conclusive statutory test and that if a deed effecting or purporting to effect a sale contained any one of the three conditions mentioned in the clause it is in every case a mortgage by conditional sale irrespective of the intention of the parties Beg J.; however, took a contrary view and held that the effect of the proviso was merely to limit the Court's power to enquire into the question whether the transaction is a mortgage only to cases where the condition is embodied in one document and to bar it in cases of multiple documents. *1952 All 716 (AIR V 39 P 156) : ILR (1952) 2 All 200 (FB), Debi Singh* v. *Jagdish Saran Singh.*

[Pt. 47bb] The Supreme Court has not held that persons who, after the amendment, choose not to use two documents do not intend the transaction to be a sale unless they displace that presumption by clear and express words; and if the conditions of S. 58 (c) are satisfied then the deed should be construed as a mortgage. In view of these observations the majority view in the Allahabad decision must be held to be overruled. *1954 S C 345 (Pr 8) (AIR V 41 C 83) : 1955 S C R 174 (SC), Chunchun Jha* v. *Ebadat Ali.*

Add as a separate para :

[Pt. 47c] The proviso is not retrospective and therefore the statutory test laid down therein is applicable only to transactions after the amendment. *1952 All 716 (A I R V 39 P 7) : I L R (1952) 2 All 200 (F B), Debi Singh* v. *Jagdish Saran Singh. (1935 Rang 212 (A I R V 22), Ma Sein Nyo* v. *Maung San Pe and 1947 Pat 345 (A I R V 34 C 116) : 25 Pat 666, Jaggarnath Singh* v. *Butto Krishto, Rel. on.)*

Add after Pt. 47c :

[Pt. 47d] Proviso under S. 58 (c), T. P. Act, was not added to the section in the Bhopal T. P. Act and as such in order to raise a plea of the transfer being a mortgage, it was not necessary that the condition of reconveyance should have been embodied in the document of sale itself. *1953 Bhopal 18 (A I R V 40 C 9 P 9), Chhuttu* v. *Kayan Khan.*

Note 35

Add in the Foot Notes indicated :

1. 1953 Kutch 4 (A I R V 40 P 7), *Nandvana Jatashankar* v. *Jiva Vasan.* (The vatantar transaction in Kutch has all these characteristics and thus amounts to a usufructuary mortgage.)

6a. 1955 NUC (Pepsu) 257 (A I R V 42) (DB), *Waryam Singh* v. *Deota Tulsi.* (Mere possession of the land does not make the mortgage a usufructuary one so as to make the mortgage-money an interest bearing loan unless it is shown that the income of the land was to be appropriated towards payment of interest or partly towards payment of the principal and partly towards interest.)

7. 1951 Trav-Co 154 (A I R V 38 C 53 P 2) (DB), *Pothen Uthuppan* v. *Nilkanta Iyer.* (Even if the mortgagor agrees to receive only a portion of the rent.)

7a. 1953 Trav Co 63 (AIR V 40 C 22 P 2) : I L R (1953) Trav-Co 696 (DB) *Ittaman* v. *Bhaskara Menon.* (Mortgage with possession and lease back under two different deeds — Held that parties intended the right and liabilities arising out of the two deeds to be separate and distinct in themselves and therefore the two deeds could not amount to a simple mortgage.)

11a. 1952 Mad 856 (A I R V 39 P 7), *Subbaraya Sarma* v. *Subramanyam* ; 1950 Ajmer 59 (AIR V 37 C 73 P 7), *Chauth Mal* v. *Hiralal.* (Deed mentioning delivery of possession though no actual delivery of possession given.)

16. 1954 Trav-Co 7 (A I R V 41 C 4 P 7) ; I L R (1952) Trav-Co 438 (DB), *Raman Pillai* v. *Bhagavathi Pillai.* (Under a deed the different branches of the tarwad had to pay particular amounts to *A* as value of improvements due to him and he was allowed to be in possession of the properties till he was paid those amounts. If the amount payable by each branch was not paid within 4 years the right to recover possession of the property allotted to the share of that branch was to be forfeited and *A* was to acquire full right to the same—*Held*, that the deed amounted to a usufructuary mortgage as defined in Section 58 (d) of the Transfer of Property Act, in favour of *A*.)

25. *See also* 1955 NUC (Andhra) 3608 (AIR V 42) *Godugunuri Padmanabhachari* v. *Annamraju Sitapathi Rao.* (*Held*, that though the deed of usufructuary mortgage did not say whether the usufruct should be appropriated towards principal or interest, the recital therein clearly indicated that the intention of the parties was that it should be appropriated only towards the principal.)

26. But see ('49) 53 Cal W N 96 (97, 98), *Towahir Ali* v. *Md. Moniruddin.* (In the absence of a plain expression that the rents and profits of the land were to be appropriated toward interest, the intention of the parties that they were to be so appropriated could not be taken into account.)

28. 1953 Madh B 9 (A I R V 40 C 6 P 13) : ILR (1953) Madh B 104, *Amarji Nagaji* v. *Joravar Singh* ✣ 1952 Assam 19 (AIR V 39 C 10 P 15) : ILR (1950) 2 Assam 444 *Rupeswari Chautini* v. *Giridhari Chulia.* (Presence of personal covenant either express or implied makes it an anomalous mortgage.)✣1950 Assam 18 (AIR V 37 C 7 P 9) : I L R (1949) 1 Assam 167, *Rahimuddin Chaudhary* v. *Nagan Chand Das.* (Mortgage with possession containing stipulation for repayment within specified time — It is not out and out usufructuary mortgage but anomalous mortgage.)

30. *See also* ('49) 53 Cal W N (1 D R) 62 (64, 65). *Haji Rahimuddin* v. *Nasimaddi Sheikh* (Usufructuary mortgage creates a liability.) ✣ ('49) 53 Cal W N (1 D R) 15 (17), *Mallick Tasenaddin Sheikh* v. *Asiraddi.* (Even a usufructuary mortgage creates a liability which is to be wiped out in some manner or other in accordance with the contract between the parties before the mortgagor can get back possession. The question whether such a liability amounts to a debt or not under S. 2 (8), Bengal Agricultural Debtors Act is to be decided by the Board and is not open for investigation by a Civil Court.)

33. 1951 Trav-Co 154 (A I R V 38 C 53 P 3) (DB), *Pothen Uthuppan* v. *Nilkanta Iyer.*

34a. 1953 Mad 13 (A I R V 40 C 5 P 8) : I L R (1952) Mad 993 (DB), *Ramakkamal* v. *Subbarathnam Iyer* ✣ 1952 Assam 19 (A I R V 39 C 10 P 15): ILR (1950) 2 Assam 444, *Rupeswari Choutini* v. *Giridhari Chulia* ✣ 1952 Mad 856 (A I R V 39 P 10), *Subbaraya Sarma* v. *Subramanyam.*

Add after Pt. 14 :

[Pt. 14aa] or for recovery of the mortgage-money under S. 68, clause (d) of the Act. (See also S. 68 Note 5) *1952 Mad 856 (AIR V 39 P 10), Subbaraya Sarma* v. *Subramanyam.*

After Pt. 17, under the heading "Appropriation of rents and profits," in (c) add figure 17a at the end of the words "in lieu of principal" and the following as foot note :

17a. *See* 1950 Ajmer 59 (AIR V 37 C 73 P 6, 7), *Chouth Mal* v. *Hiralal.* (There may be a usufructuary mortgage providing for the utilization of the profits towards the mortgage money and the interest. It is not necessary for the validity of a usufructuary mortgage that some amount should remain outstanding as principal.)

Note 36

Add in the Foot Notes indicated :

3. *See* ('50) 1950 All L Jour 453 (454), *Bhagwati Prasad* v. *Ram Avadh.* (In the case of a real zarpeshgi lease the lessor is entitled to recover possession after the expiry of the fixed period without payment of anything. In the case of the lease disguised as a mortgage the sum originally borrowed or whatever may be found to be due on accounting must be paid back before the lessee is asked to quit. 12 Lah 161, Rel. on.)

4. ('49) I L R (1949) 1 Cal 487 (494), *Satish Chandra Nag* v. *Riyasat Hossain*

9. 1953 Madh B 9 (A I R V 40 C 6 P 13) : I L R (1953) Madh B 104, *Amarji Nagaji* v. *Jorawar Singh.* (Mortgage with possession — Mortgagee to remain in possession for 12 years and appropriate income determined at a certain amount towards discharge of debt—Debtor binding himself to pay mortgage debt with interest in case debt was not discharged — Held it was an anomalous mortgage and not a zuri-i-peshgi lease.) ✣ 1952 Pat 312 (A I R V 39 P 15), *Ramautar Mahton* v. *Lalak Bihari Singh.* (A mortgage deed is always executed by a mortgagor. Where, therefore, a person on payment of a *Zarpeshgi* amount takes settlement of a land by executing a registered Kabuliyat and agrees to pay annual rent, the Kabuliyat does not confer on such person the status of a mortgagee and the landlord cannot get possession of the land on paying the *Zarpeshgi* amount to him.)

Note 37

Add in the Foot Notes indicated :

1. 1955 N U C (Mad) 695 (A I R V 42), *Katavath Mammu Kutti* v. *Pathinharayil.* (The kanom partakes of the nature of both a mortgage and a lease.)

[*See also* 1954 Trav-Co 392 (Pr 4) (A I R V 41 C 137) (DB), *Naraynan Namburi* v. *Ouseph.* (Giving of the name 'possessory mortgage' to a document which otherwise satisfies the requirements of a kanam and which is itself a renewal of an earlier demise which is a kanam cannot operate to convert the transaction into a possessory mortgage) ✣ (1954) 1 M L J 439 (441, 443), *Katavath Mammu Kutt* v. *Patinharayil Cheira Chathu Kump.* (Nature of kanom explained)✣ 1952 Trav-Co 433 (AIR V 39 P 14) : I L R (1952) Trav-Co 336 (F B), *Sanku Krishnan* v. *Hari Prabhu.* (Main features of distinction between kanom and an ordinary usufructuary mortgage pointed out)]

2. 1953 Trav-Co 273 (A I R V 40 C 100 P 3) *Mariamma* v. *Raman.* (Distinction between kanom tenure and possessory mortgage pointed out.)✣1951 Mad 187 (AIR V 38 C 18 P 9) : ILR (1952) Mad 92 (FB), *Parvathi, P.* v. *N. Makkam Amma.*

4. 1953 Trav-Co 273 (AIR V 40 C 100 P 2), *Mariamma* v. *Raman* ✣ ('50) '950 Trav-Co L R 137 (138, 139) (DB), *Israel Chellappan* v. *Padmanabha Pilla.* (Where the kuzi kanom deed contains an express provision that whenever the property is redeemed on demand being made by the mortgagor the mortgagee will be paid the mortgage amount as well as the value of his improvements, the mortgagor could demand redemption at any time before 12 years.)

5. 1951 Mad 187 (A I R V 38 C 18 P 9) : I L R (1952) Mad 92 (FB), *Pravathi* v. *Makkam Amma.*

Add after Pt. 4 :

[Pt. 4a] He is entitled to hold even aftet the expiry of term fixed as long as the kanom amount remains unpaid whether it pleases the landlord or not. *('49) 1949 Trav-Co L R 50 (54) (D B), Parameswaran Namboothiripad* v. *Variathu.*

Add after Pt. 6 as a separate para :

[Pt. 6a] Where a document described as kanom kuzhikanam contains all the terms that are generally found in a kanom deed, the fact that parties agreed to one or more

terms that are nct ordinarily found in a kanom deed does not make it any the less a kanom. *1950 Mad 612 (AIR V 37 C 258 P 3)*, *Madhavi Amma* v. *Kalathil Sucheela.*

Add after Pt. 7 :

[Pt. 8] See also the undermentioned case. *1952 Mad 176 (A I R V 39 C 84 P 6)*, *Raman Nambudiri* v. *Karthiya Yani.* (On the expiry of a prior kanom the parties executed a document titled 'panayam kychit' and an amount of Rs. 250 was fixed by the parties as purapad payable on the date of the execution of the document. The document, however, did not make it clear whether Rs. 250 payable on the date of its execution were paid as a renewal fee but in the account books of the parties the amount was shown to be 'avakasam'—*Held* that it was not a kanom but a usufructuary mortgage.)

Note 37b

Add after Note 37a :

37b. Chitham.

[Pt. 1] It is a kind of anomalous mortgage prevalent in Kutch. Its main incidents are (i) interest in some specified property is transferred as a security for the loan; (ii) it contains a stipulation that if the mortgagor failed to pay within the time stipulated the mortgagee is entitled to take possession of the property and enjoy it till redemption. *1952 Kutch 65 (A I R V 39 P 7)*, *Bhagwanji Jetha* v. *Thacker Parshottam Lalji.*

[*See also* 1951 Kutch 4 (A I R V 38 C 2 P 4), *Devidan Malani* v. *Shamji Vishram* (Chitham mortgages are not defined anywhere; S. 584 of the Digest of Local Laws and Customs merely describes the incidents of these mortgages and refers to model forms of conveyances printed at pages 160 and 161. These forms are, however, merely illustrative and it cannot be said that a conveyance, which otherwise fulfils the conditions of a mortgage, is invalid as a mortgage merely because it does not conform to these forms.)]

[Pt. 2] The difference between *chitham* and a simple mortgage is that in *chitham* on failure to pay the mortgage amount on due date, the mortgagee becomes entitled to recover possession and to enjoy the usufruct, either in lieu of interest or otherwise as might have been agreed between the parties, till the mortgagor chooses to redeem. *1952 Kutch 65 (AIR V 39 P 4)*, *Bhagwanji Jetha* v *Thacker Parshottam Lalji.*

[Pt. 3] A chitham being in its nature an anomalous mortgage, the question whether it contains a personal liability to pay has to be determined with reference to the terms of the deed itself. *1952 Kutch 65 (A I R V 39 P 6)*, *Bhagwanji Jetha* v. *Thacker Parshottam Lalji.*

[Pt. 4] A provision in a Chitham mortgage that in case of default to pay within the stipulated time the mortgagee is entitled to remain in possession as a vatantar mortgagee till redemption by the mortgagor negatives, by implication, a personal liability. It cannot be construed to give an option to the mortgagee either to take vatantar or to sue for recovery of mortgage-money. *1952 Kutch 65 (A IR V 39 P 7)*, *Bhagwanji Jetha* v. *Thacker Parshottam Lalji.*

Note 37c

Add after Note 37b :

37c. Vatantar Mortgage.

[Pt. 1] This kind of mortgage is prevalent in Kutch. Section 645 of the Digest of Local Customs which is regarded as authoritative and binding in Kutch says that in a vatantar transaction, a person lends money on (security) of immovable property; the property remains in possession of the lender, the lender uses the property or enjoys its rent or profit in lieu of interest; the property is returned to the borrower on payment of the principal amount borrowed. These characteristics of a vatantar prima facie show that it is a mortgage transaction. Vatantar is thus a transfer of interest, as distinguished from ownership, in specific immovable property as security for loan and is not a transaction called mortgage by conditional sale as property is not ostensibly sold. Further, a vatantar has all the principal characteristics of a usufructuary mortgage and thus amounts to a usufructuary mortgage. *1953 Kutch 4 (A I R V 40 C 3 P 4 to 7)*, *Nandvana Jata Shankar* v. *Jiva Vasan*; *1953 Kutch 8 (A I R V 40 C 5 P 7)*, *Jeevandas Iqji* v. *Jadeja Karubha Dujajee.*

[Pt. 2] Though in some vatantar transactions time limit called *bandhi* is provided, it is not universal and cannot, therefore, be regarded as characteristic of the transaction. It is merely a covenant entered into by the parties to these particular transactions and cannot convert it into an anomalous mortgage. *1953 Kutch 4 (AIR V 40 C 3 P 8)*, *Nandavana Jata Shankar* v. *Jiva Vasan.*

Note 38

Add in the Foot Note indicated :

27. 1954 Bom 81 (A I R V 40 C 17 P 3): I L R (1953) Bom 1153, *Petro Antonio* v. *Goolbar Nadirshaw*. (The mortgage may provide that on the mortgagor committing a certain default the mortgagee would be entitled to enter into actual possession. In such a case the stipulation amounts to the permission being withdrawn or the licence being terminated on the default taking place. Under such circumstances the mortgagee is entitled under S. 41, Presidency Small Cause Courts Act (1882) to institute proceedings, for ejectment. (1881) 6 Q.B.D. 345, Heath v. Pugh, Relied on.)

Note 39

Add in the Foot Notes indicated:

77. 1950 S C 272 (A I R V 37 C 20 P 3, 4, 6) : 1950 S C R 548 (S C), *Rachpal Maharaj* v. *Bhagwandas Daruka*.

78. 1950 S C 272 (A I R V 37 C 20 P 3, 4, 6) : 1950 S C R 548 (S C), *Rachpal Maharaj* v. *Bhagwandas*.

87. *See* 1953 Cal 208 (A I R V 39 C 71 P 7), *Nityananda Ghose* v. *Rajpur Chaya Bani Cinema Ltd.* '(By the combined operation of S. 96 and S. 58 (b) an equitable mortgage must be held to be a mortgage where the mortgagor binds himself personally to pay the mortgage-money.)

Add after Pt. 42 and item (6) :

[Pt. 42a] (7) Land revenue receipts for a holding are merely evidence of the persons having been in possession and are not documents of title. *('49) 1949 Bur L R (H C) 553 (559), V.R.A. Veerappa Chettyar* v. *U Po Nge*.

[Pt. 42b] (8) A counterfoil for alienee from the Register of Reports of Alienations of Land, Lower Burma, which is only an acknowledgment by the Thugyi of a report of alienation having been received by him cannot be regarded as a document of title to the immovable property. The mere fact that there is a reference in it to a registered deed of gift cannot convert the Thugyi's acknowledgment of receipt into a document of title. *('49) 1949 Bur L R (H C) 553 (555), V. R. A. Veerappa Chettyar* v. *U Po Nge*.

[Pt. 42c] (9) A life insurance policy. *('50) 54 Cal W N 710 (712), Pioneer Bank Ltd.* v. *Bamandev Banerjee*.

Note 40

Add in the Foot Notes indicated :

3. 1954 Mys 177 (Pr 5) (A I R V 41 C 74) (DB), *Hutchappa* v. *Mallappa*. (A mortgage deed after reciting that a sum of Rs. 650 was received from the mortgagee and that the properties were left in his possession for a period of two years, stated that immediately after the expiration of the said period the mortgagor would pay the amount to the mortgagee and in case of default the mortgagee may continue to be in possession of the properties—*Held* that mortgagee under such a mortgage had a right to sue for realisation of the mortgage debt by by sale of the mortgaged property.)

5. 1953 Mad 13 (AIR V 40 C 5 P 7) : ILR (1952) Mad 993 (DB), *Ramakkamal* v. *Subbarathnam Iyer*. (Mortgage with possession—Mortgagee to enjoy property in lieu of interest—Mortgagor entitled to pay mortgage amount within four year and get back property but in case of default mortgagee to continue in possession as mortgagee till redemption — Mortgagor also stipulating to pay on demand the principal with interest at specified rate from date of default to date of payment—Mortgage held anomalous.) ✠ 1951 Orissa 147, (AIR V 38 C 39 P 4), *Narendra Bhoi* v. *Bhagaban Das*. (Where the mortgagee is put in possession of the mortgaged property in lieu of interest and besides, there is a personal covenant by the mortgagor to pay the mortgage amount through the sale of his other properties and further the mortgagor holds himself primarily liable for the mortgage debt, the mortgage is an anomalous mortgage.)

6. 1950 Assam 107 (A I R V 37 C 42 P 21) (DB), *Dharmeshwar Sarma* v. *Lakhayadhar*. (Possession given to the mortgagee—Provision that if the mortgagor failed to pay the mortgage money within the stipulated period the mortgagee would be entitled to enjoy the mortgage land as security—Mortgage is anomalous.)

Add before Pt 5 and after item (7) :

8. Chitham mortgage prevailing in Kutch and Saurashtra—As to the incidents of such mortgage see Note 37b.

Note 41

Add in the Foot Notes indicated :

3. 1953 Mad 13 (AIR V 40 C 5 P 7) : ILR (1952) Mad 993 (DB), *Ramakkamal* v. *Subbarathnam Iyer* ✠ 1952 Assam 19 (A I R V 39 C 10 P 15) : I L R (1950) 2 Assam 444 (DB), *Rupeswari Choutini* v. *Giridhari Chulia*. (Usufructuary mortgage with stipulation to redeem by payment of mortgage debt at the end of five years—Mortgagee to remain in possession in lieu of interest—Mortgage is anomalous.) ✠ 1950 Assam 107 (A I R V 37 C 42 P 21) (DB), *Darmeshwar Sarma* v. *Lakhayadhar* ✠ 1950 Assam 18 (AIR V 37 C 7 P 9) : I L R (1949) 1 Assam 167 (DB), *Rahimuddin Chaudhary* v. *Nayan Chand Das*. (Mortgage with possession containing stipulation for repayment within specified time—It is not usufructuary mortgage but anomalous mortgage.) ✠

5. 1953 Mad 13 (AIR V 40 C 5 P 7) : ILR (1952) Mad 993 (DB), *Rammakkamal* v. *Subbarathnam Iyer* ✠ 1952 Mad 856 (AIR V 39 P 10, 11), *Subbaraya Sarma* v. *Subramanyam* ✠ 1950 Assam 18 (A I R V 37 C 7 P 9) : I L R (1949) 1 Assam 167 (DB), *Rahimuddin Chaudhary* v. *Nayan Chand Das*.

9. 1953 Madh B 9 (A I R V 40 C 6 P 13) : I L R (1953) Madh B 104, *Amarji Nagaji* v. *Joravarsingh*. (Where under a deed possession was given to the creditor on the understanding that he was to retain the land for a period of 12 years and appropriate the income determined at Rs. 100 a year towards the discharge of the debt and in the same document the debtor also bound himself to pay the mortgage debt with interest at a specified rate in the event of the debt not being repaid, it was held that the deed was an anomalous mortgage.)

Note 44

Add in the Foot Note indicated :

1. ('49) I L R (1949) 1 Cal 487 (494), *Satish Chandra Nag* v. *Riyasat Hossain* (Question whether transaction is lease or mortgage has to be determined according to intention of parties expressed in document.)

SECTION 59

Insert in remark [a] under S. 59—

For exemption from the operation of this section in Himachal Pradesh, *see* Gaz. India, 1951, Part II-Sec. 3, P. 2040 (S. R. O. 1873.)

Note 2

Add after Pt. 3 :

[Pt. 3a] Prior to the passing of the Transfer of Property Act, there was no provision of law that the mortgage deed should be attested and, therefore, the special rule of proof in regard to documents required by law to be attested did not apply to a mortgage executed prior to the year 1882. In case of such a mortgage it would be enough to prove that it was executed by the mortgagor in favour of the mortgagee mentioned in the deed. *1955 NUC (Andhra) 3608 (AIR V 42), Godugunuri Padmanabhachari* v. *Annamraju Sitapati Rao.*

Add after Pt. 9.

[Pt. 9aa] The Act does not apply to Kutch and though the Courts may follow it in spirit in matters not provided for by a statute of Kutch, the formalities prescribed by that Act cannot be imported in Kutch. *1946-52 ID 40005 (Kutch), Karu Keshavji* v. *Galalchand Gopalji.* (In Kutch, there is no statutory requirement by which chitham documents are required to be attested.)

[Pt. 9aaa] The technical provisions regarding attestation of mortgage deeds were also held inapplicable in the former State of Bikaner where Transfer of Property Act was not in force. *1955 Raj 39 (Pr 5) (AIR V 42 C 13) (DB), Bithaldas* v. *Chandratan.*

[Pt. 9aaaa] It was so held in the case of Vindhya Pradesh also. *1955 Vind Pra 6 (Pr 9) (A I R V 42 C 5), Nathulal* v. *Phool Chand.* (The Transfer of Property Act, 1882, came into force in Vindhya Pradesh on 15th May 1949.)

Note 4

Add in the Foot Notes indicated :

6. 1953 Pat 134 (A I R V 40 C 43 P 2) (DB), *Souna Kumhar* v. *Chamlu Pahan.* (Usufructuary mortgage) ✻ 1952 Hyd 5 (A I R V 39 C 3 P 4, 5) : I L R (1952) Hyd 351, *Vishwanatha* v. *Fatima Bi.* (Subsequent oral agreement allowing usufructuary mortgagee to remain in possession for a further period in lieu of interest on debt of Rs. 500 incurred subsequent to mortgage — It is an additional usufructuary mortgage.)

7. 1952 Hyd 5 (AIR V 39 C 3 P 5) : I L R (1952) Hyd 351, *Vishwanatha* v. *Fatima Bi.*

Note 8

Add in the Foot Notes indicated :

19. 1955 NUC (Assam) 588 (A I R V 42), *Moslet Hussain* v. *Kukari Ravani.* (Neither the proviso to S. 68 nor S. 70 of the Evidence Act can assist the mortgagee, where the mortgagor alleges that the mortgage deed was not duly attested.)

21. 1946-52 I D 40009 (Nag), *Lachman Prasad* v. *Pt. Laxman Prasad.* (Mortgage deed not attested by two persons—S. 68 of Evidence Act is of no assistance.)

Add after Pt. 2a in separate para :

[Pt. 2b] A party to a document could be a valid attesting witness also for the same document. Thus, where *A* signs as an executant of a mortgage deed under a power of attorney from *B*, *B* is the executant of the deed and though physically a different person from *A*, *B* cannot be treated as an attesting witness of the deed. *1954 Mad 126 (A I R V 41 C 48 P 10), Gomathy Ammal* v. *Krishna Iyer.*

Add after Pt. 14 :

[Pt. 14a] Where the defendant admits that the document executed by him was an instalment bond and vehemently opposes that it was a mortgage deed or was intended to operate as such the plaintiff must prove the attestation. *1946-52 I D 40008 (Nag), Lachhman Prasad* v. *Pt. Laxman Prasad.*

Note 13

Add after Pt. 3 :

[Pt. 4] A mortgage bond becomes an effective document after its due execution and registration—Delivery of the same is not an essential part of it unless it is specifically agreed to between the parties to the deed that title would not pass unless the deed is delivered. *1951 Pat 566 (AIR V 38 C 160 P 7) : 30 Pat 391 (DB), Ram Rup Singh* v. *Jang Bahadur Singh.* (1944 Pat 3 (A I R V 31), Sultan Ahmad v. Maksad Hussain, *Rel. on.*)

Note 14

Add in the Foot Note indicated :

1b. 1952 Pepsu 56 (AIR V 39 C 34 P 2) : 2 Pepsu L R 619, *Harichand* v. *Kartar Singh.*

SECTION 59-A

Note 2

Add in the Foot Note indicated :

1. *See also* 1954 Mad 650 (Pr 12) (A I R V 41 C 226) : I L R (1954) Mad 664 (D B), *Karup-*

pannan Servai v. *Daivasigamania Pillai.* (Section 59-A is only statutory recognition of what had been already laid down as the law.)

Note 3

Add in the Foot Note indicated :

1. *See also* 1949 Ajmer 52 (A I R V 36 C 25 P 5), *Kishan Lal* v. *Gouri Shankar.* (Purchaser from mortgagor can plead want of consideration.)

Delete the full stop after Pt. 1a and add [Pt. 1aa] "and the word 'mortgagee' would include a purchaser of the mortgagee rights' ;

Add the following as foot note :

1aa. 1952 Bom 217 (AIR V 39 P 9) (DB), *Motilal Fulchand* v. *Gita Rama.*

Add after Pt. 3 :

[Pt. 3a] In a case decided by that Court after the amendment it has been held that a mortgagee for the purpose of redemption would include all persons who derive title from him and it is immaterial whether that title is derived by sale *in invitum* or by private treaty or whether it is by act of parties or by operation of law. *1954 Mad 650 (Pr 12) (A I R V 41 C 226) : I L R (1954) Mad 664 (DB), Karuppannan Servai* v. *Daivasigamania Pillai.*

SECTION 60

Note 3

Add in the Foot Note indicated :

2. 1951 Punj 404 (A I R V 38 C 119 P 11) : ILR (1950) Punj 271 (DB), *Som Nath* v. *Desai.*

Note 3, lines 3 and 4, after the words "In case arising in these provinces, where there is no specific provision of law applicable" place a figure a1. and before foot-note 1 of the same Note insert the following :

a1. Such as the Redemption of Mortgages (Punjab) Act, 1913 (2 of 1913).

In Pt. 2, place figure 1a after the words "North-West Frontier Province" and add the following as foot-note :

1a. 1949 P C 330 (A I R V 36 C 83 P 11) (PC), *Ghulam Sarwar Khan* v. *Abdul Wahab Khan.* (The general principle that the mortgage security is indivisible except by the agreement between the mortgagee and the mortgagor is applicable to the North-West Frontier Province.)

Add after Pt. 2 :

[Pt. 2a] and Saurashtra. *1951 Sau 53 (A I R V 38 C 26 P 4), Jagjiwan Popat* v. *Jilubha Dhirubha.*

[Pt. 2b] and Travancore also. *1955 Trav-Co 130 (Prs 7, 9) ((S) A I R V 42 C 47) (DB), Bhageerathi Pillai* v. *Narayanan Prabhakaran.* (Mortgage created by operation of law—*Held* suit for redemption could lie.)

Note 4

Add in the Foot Note indicated :

1a. 1953 All 620 (A I R V 40 C 310 P 5) : I L R (1954) 1 All 691 (DB), *Sita Ram Singh* v. *Gaya Prasad.* (Though a mortgage may not be a self-liquidating mortgage in the first instance, it may become a self-liquidating mortgage at a later stage, e.g , by virtue of statutory provisions such as those contained in the Debt Redemption Act reducing the rate of interest and providing that the usufruct shall be calculated and its excess over the interest will be taken in satisfaction of the principal amount.)

Note 5

Add in the Foot Notes indicated :

6. 1954 Mad 193 (AIR V 41 C 79 P 8), *Dhanammal* v. *Raju Gramani.* (Usufructuary mortgage deed of 1882 fixing period for payment of mortgage money)

8. ('51) 29 Mys L Jour 51 (53) (D B), *Kasi Radhakrishna* v. *Subbarama Sastri.* ✠ 1949 East Punj 389 (A I R V 36 C 97 P 5), *Shib Narain* v. *Chitru.*

11. 1955 Cal 194 (Pr 22) ((S) A I R V 42 C 51) (DB), *Durga Prosad* v. *Mario Galstaun*

16. 1955 Cal 194 (Pr 23) ((S) A I R V 42 C 51) (DB), *Durga Prosad* v. *Mario Galstaun.*

17. 1952 Trav-Co 286 (A I R V 39 P 2) : I L R (1951) Trav-Co 414 (DB), *Omanakutty Amma* v. *Podian Nadar.* (Mortgage styled as Otti and Kuzhikanom — Provision to pay compensation for trees planted, on redemption—Mortgagee to surrender property on demand on redemption—Mortgagee does not get right to be in possession for twelve years — Redemption suit can be filed any time after execution of deed.) ✠1951 Trav-Co 170 (AIR V 38 C 61 P 5) (DB), *Savarimuthu Nadar* v. *Marthanadan Nadar* ✠ ('50) 1950 Trav-Co L R 137 (138, 139) (DB), *Israel Chelliappan* v. *Padmanabha Pillai.*

21. 1954 Mys 187 (Pr 6) (A I R V 41 C 81), *Paremajalu* v. *Pattangeri.*

Add after Pt. 18 :

[Pt. 18a] See also the undermentioned cases : *1951 Trav.Co 71 (A I R 38 C 21 Prs 6 7) : 1949 Trav.Co L R 264 (FB), Kurien* v. *Lakshmi Amma.* (Mortgage—Term for renewal — Effect—*Held* there was no renewal — Suit for redemption held not premature.) ✠*1952 Trav-Co 386 (A I R V 39 P 2) (DB), Krishnaru Narayanaru* v. *Krishnaru Parameswararu.* (Superior mortgage for certain period—Direction to redeem pre-existing mortgage—Suit to redeem such mortgage after such period was over — Maintainability of suit.) ✠*('51) I L R (1951) Trav-Co 282 (284) (D B) Matha Panickan* v. *Ouseph.* (Pandarapattom lands — Irredeemable tenure—Malabar law.)

Add after Pt. 19 :

[Pt. 19a] Section 7 of the U. P. Debt Redemption Act, 1940, provides that a mortgage may be redeemed at any time after the commencement of that Act. It was held that the effect of the section was that from the commencement of the Act all mortgages which had not become due on the date of commencement, become due on that date. *1951 All 392 (A I R V 38*

C 69 P 22) (D B), Mohammad Khan v. *Mohammad Salim.*

Note 7

Add after Pt. 3 :

[Pt. 3a] It has been held by Travancore-Cochin High Court that where the mortgage consideration consists of paddy, in spite of a suit or a decree for redemption, the mortgage continues to subsist until redemption is sought to be enforced by tender of the redemption price. It is only at the moment of such tender that the mortgage is sought to be extinguished and it is only then that the paddy portion of the redemption price becomes payable. *1954 Trav.Co 473 (Pr 19) (AIR V 41 C 169)*: *I L R (1954) Trav-Co 427 (FB), Ouseph Ouseph* v. *S. Thomman.* (('49) 1949 Ker L T 187, Lukkachacko v. Neelakantan Moothathu, Overruled.)

Note 10

Add in the Foot Note indicated :

3a. *See also* 1952 Trav-Co 92 (A I R V 39 C 39 P 6) : 1950 Trav-Co L R 393 (DB), *Beevathumma* v. *Lakshmi Amma.* (Usufructuary mortgage and lease back to mortgagor—Interest clause in lease deed — Mortgage and lease held did not form one transaction—Mortgagee could not demand interest on mortgage-money.)

Note 17

Add after Pt. 2 :

[Pt. 2a] A mortgagee in possession is bound to surrender possession only to a person entitled to redeem and not to any person who institutes a suit for redemption. He is entitled to be in possession of property mortgaged to him and to retain that possession until redeemed by the person competent to do so. *1955 N U C (Trav.Co) 1075 (AIR V 42), Rudra Warrier* v. *Neelacanta Kurup.* (A wayfarer cannot offer the mortgage money and seek redemption from a mortgagee.)

Note 22

Add in the Foot Notes indicated :

1. 1952 Kutch 1 (A I R V 39 C 1 P 7), *Bhailal Ganpatram* v. *Keshavji Motichand.* (From the fact that no objection was raised on behalf of the heirs of the mortgagors to the property being sold as of the ownership of the mortgagee it cannot be inferred that the property was sold to the mortgagee by the mortgagor and the equity of redemption was extinguished.)

1a. 1954 Punj 86 (A I R V 41 C 4) P 6) : I L R (1954) Punj 355. *Sugha Singh* v. *Nighaya Ram.* (Mortgage of occupancy rights in favour of landlord — Mutation in favour of landlord — Right of redemption in mortgagor is not defeated.)

6. 1955 Mys 33 (Pr 8) ((8) A I R V 42 C 15), *Chikkannaswamy* v. *Hayat Khan.* (Though the mortgagee may choose to keep it alive for his own defence against a puisne mortgagee.)

7. 1952 Kutch 1 (A I R V 39 C 1 P 6a), *Bhailal Ganpatram* v. *Keshavji Motichand.* (When a mortgage alleged is either admitted or proved, it may be presumed in a proper case having regard to the circumstances of the case, that it is a subsisting mortgage, if it is shown that the equity of redemption therein was not extinguished by operation of law.)

7a. 1950 F C 1 (A I R V 37 C 1 P 14) : 1949 F C R 484, *Chinna Subba Rao* v. *Mettavalli Raju.* (Mortgagor agreeing to convey mortgaged properties to mortgagee—Conveyance not executed — Right of redemption is not extinguished)

[*See also* 1952 Madh B 6 (A I R V 39 C 4 P 4), *Kukaji* v. *Misri Lal* ✠ 1951 Nag 171 (A I R V 38 C 34 P 22) : I L R (1950) Nag 618, *Balkrishna* v. *Rangnath.* (Simple mortgage — Subsequently mortgagee taking possession of mortgaged property under oral agreement in satisfaction of his debt — Subsequent vendee from mortgagor can bring suit for redemption.)]

15. 1955 N U C (Mad) 84 (A I R V 42), *Jadaya Goundan* v. *Makka Goundan.* (Where in a suit for redemption, by consent of parties the rights of the mortgagors to redeem the parties had been settled by allowing the mortgagors to redeem one of the properties and denying their rights to redeem other properties it was held that by reason of the agreement the right of redemption in respect of the other properties was extinguished.) ✠ 1953 Bom 421 (A I R V 40 C 132 P 12) : I L R (1953) Bom 1055 (DB), *Gangadhar Balkrishna* v. *Dattatraya Baliram.* (Execution of a mortgage decree against a minor judgment-debtor — His mother, acting as the guardian ad litem, entering into compromise with decree-holder without sanction of the Court—Mortgaged properties sold to the decree-holder in full satisfaction of the decree — Suit for possession by redemption of the mortgaged properties brought by minor after three years from the date of his attaining majority without setting aside the transfer — *Held*, that the transfer was binding on him and as a result of the transfer of the equity of redemption the right to redeem became extinguished by act of parties.)

Add after Pt. 1a :

[Pt. 1b] Or delay in enforcing right of redemption. *1952 Kutch 1 (A I R V 39 C 1 P 12), Bhailal Ganpatram* v. *Keshavji Motichand.*

Add after Pt. 5 :

[Pt. 5a] Further, when the extinguishment of the right to redeem is by act of parties the act must take the shape and observe the formalities which the law prescribes. Thus, if the agreement is to transfer immovable property exceeding Rs. 100 in value, then writing and registration are necessary because without that title cannot pass from one person to the other and mere delivery of possession under an oral agreement is not enough. *1951 Nag 171 (A I R V 38 C 34 P 11)* :

I L R (1950) Nag 618, Balkrishna v. *Rangnath.*

Add after Pt. 5a as a separate para :

[Pt. 5b] Where the mortgagee has agreed to accept in satisfaction of his mortgage debt the conveyance of certain lands to him by the mortgagor and not merely the promise to convey the lands the mortgage security or debt is not discharged till either payment in redemption is made or lands are transferred to the mortgagee. *1954 Nag 84 (A I R V 41 C 34 P 42) : I L R (1953) Nag 797 (DB), Dadoo Vithoba* v. *Venkatrao Tukaram.*

Note 23

Add in the Foot Notes indicated :

5. 1953 Trav-Co 375 (AIR V 40 C 145 P 4) : ILR (1953) Trav-Co 388, *Augustingu Xavier* v. *Pethru Antha.*

8. 1954 Mys 187 (Pr 3) (AIR V 41 C 81), *Paremajalu* v. *Pattangeri.* (Where a usufructuary mortgagee who is bound under the terms of the mortgage to pay the land revenue to the Government, fraudulently allows the property to be sold for arrears of Government revenue and purchases the property benami in the name of a third person, neither S. 106 (4) nor S. 145, Coorg Land Revenue Act, can operate as a bar to the mortgagors' suit for redemption and possession of the mortgaged property.) ✠ 1953 Pat 27 (AIR V 40 C 8 P 5) (DB), *Satdeo Singh* v. *Kamal Singh* ✠ 1952 Pat 476 (AIR V 39 P 8), *Bariar Singh* v. *Durga Gir* ✠ 1952 Trav Co 53 (AIR V 39 C 18 P 6, 11) (DB), *Krishna Pillai* v. *Cherian Abraham.* (Mortgagee bound to pay *michavaram* due committing default and purchasing mortgaged property *benami*) ✠ 1953 Nag 259 (AIR V 40 C 109 P 13) : ILR (1952) Nag 366 (372) (DB), *Munnabi* v. *Mohanlal.*

Add after Pt 2 :

[Pt 2a] An auction-purchaser in the sale held in pursuance of a mortgage decree for sale obtained in a suit upon a simple mortgage, in which the plaintiff in whom the equity of redemption was entirely vested was not a party, acquires no interest. His entry on the property becomes the entry of a trespasser. *1950 Pat 206 (AIR V 37 C 49 P 6) (DB), Batuk Prasad* v. *Rudra Das.* (For remedies open to the parties in such a case, see O. 34, R. 1, N. 19 in App. I.)

Add after Pt. 9 :

[Pt. 10] See also the undermentioned case. *1954 S C 336 (A I R V 41 C 80 P 8) (SC), Sidhakmal Nayan Ramanuj Das* v. *Bira Naik.* (Sale of mortgaged tenancy in execution of decree for rent — Purchase by mortgagee in possession — Right of tenant to redeem— Held not extinguished.)

Note 26

Add in the Foot Notes indicated :

1. 1954 Mad 650 (Pr 3) (A I R V 41 C 226) I L R (1954) Mad 664 (DB), *Karuppannan Servai* v. *Daivasigamania Pillai.* (The decree of Court contemplated in S. 60 is the final decree in a mortgage action foreclosing the mortgagor of his right to redeem.)

[*See also* 1955 N U C (Mad) 84 (AIR V 42), *Jadaya Goundan* v. *Makka Goundan.* (The earlier suit was a suit for redemption and redemption was asked for in respect of the several properties. By reason of the compromise between the vendors and the vendee, the relief for possession was agreed upon to be granted only in respect of one of the items of the properties covered by the said transactions.

Held that there was an order of court in an earlier suit for redemption, where relief was asked for in respect of several properties and relief was granted in respect of one of those properties, and the right of redemption in respect of the other properties must be deemed to have been extinguished by an order of court.)

1b. 1950 P C 88 (90) (AIR V 37 C 34 P 16): ILR (1951) 1 All 199 : 77 Ind App 53 (PC), *Autar Singh* v. *Sir Mohammad Ejaz.* (Anomalous mortgage—Final decree for foreclosure in accordance with agreement passed— Court has no jurisdiction to reopen the decree and to extend time for redemption on equitable grounds.)

2. 1953 Trav-Co 265 (AIR V 40 C 94 P 1), *Arathan Nadar* v. *Lakshmanan Nadar.* (First suit for redemption dismissed because of sanction of Government under S. 8, Travancore Civil P. C.—Travancore Civil P. C., superseded by Indian Civil P. C. — Fresh suit for redemption is maintainable,) ✠ 1953 All 503 (AIR V 40 C 243 P 4, 5), *Loknath Misir* v. *Smt. Daulata Kuer.* (A preliminary decree passed under O. 34, R. 7 (as it stood before its amendment in 1929) by itself does not put an end to a mortgagor's right to redeem even if it purports to say so.) ✠ 1950 All 88 (AIR V 37 C 29 P 4) : I L R (1951) 1 All 117. *Suraj Bali* v. *Rang Bahadur Singh.*

[*See also* 1954 Mad 650 (Pr 4) (AIR V 11 C 226): ILR (1954) Mad 664 (DB), *Karuppannan Servai* v. *Deivasigamania Pillai.* (If the decree passed is not one of foreclosure, proceedings taken in execution of that decree could not extinguish the right of redemption.)

3. 1955 Trav-Co 9 (Prs 1, 6) ((S)AIR V 42 C 5) : ILR (1954) Trav-Co 675 (FB), *Madhava Shenoi* v. *Yasodabai.*

4. 1953 Orissa 17 (AIR V 40 C 12 P 8) : ILR (1952) Cut 493 (DB), *Sheobalak Misra* v. *Suraj Prasad.*

17. 1952 Nag 202 (AIR V 39 C 57 P 17) : I L R (1949) Nag 526 (DB), *Gangaram Ramchandra* v *Baburao Kalusao.* (Mortgage by father on his own behalf and on behalf of his minor son —Suit on mortgage—Minor son's share excluded from suit—Decree against father—In execution property purchased by mortgagee himself — Minor son cannot redeem mortgage unless and until he sets aside sale.)

Add after Pt. 17b :

[Pt. 17c] This decision of the Full Bench of the Bombay High Court is approved by the Federal Court. While reversing the decision given by the Madras High Court, their Lordships of the Federal Court have held that provisions like O. 9, R. 9 or O. 23. R. 1 of Civil P. C., do not debar the mortgagor from filing a second suit for redemption, because, as in a partition suit, the cause of action in a redemption suit is a recurring one. The cause of action in each successive action, until the right of redemption is extinguished or a suit for redemption is time-barred, is a different one. *1950 F C 1 (A I R V 37 C 1 P 13) : 1949 F C R 484 (F C), Chinna Subba Rao* v. *Mattapalli Raju.* (Redemption suit—Date fixed for argument — Court on such date informed that plaintiff was not proceeding with case — *Held*, case was governed by O. 9, R. 8 and not by O. 9, R 9 or O. 23, R. 1, Civil P. C.—1945 Mad 225 (A I R V 32) : ILR (1945) Mad 803, Mattapalli Raju v. Venktan Raghavayya, Reversed.)

[Pt. 17d] *See also* the undermentioned decision to the same effect. *1955 N U C (Mad) 84 (AIR V 42), Jadaya Goundan* v. *Makka Goundan.* (If the right of redemption is not extinguished in the manner provided in section 60 the provisions of O. 23, R. 1, Civil P. C. is no bar to a second suit for redemption—1950 F C 1 (AIR V 37 C 1): 1949 F C R 484 (FC), T. C. Subba Rao v. Mattapalli Raju, Foll.)

Note 27

Add in the Foot Notes indicated :

2. 1954 Mys 187 (Pr 2) (A I R V 41 C 81), *Paremaialu* v. *Pattangeri.* (Where a usufructuary mortgagee who is bound under the terms of the mortgage to pay the land revenue to the Government, fraudulently allows the property to be sold for arrears of Government revenue and purchases the property benami in the name of a third person, neither S. 106 (4) nor S. 145, Coorg Land Revenue Act, can operate as a bar to the mortgagor's suit for redemption and possession of the mortgaged property)✠1951 Pat 566 (AIR V 38 C 160 P 9, 10) : 30 Pat 391 (DB), *Ram Rup Singh* v. *Jang Bahadur Singh.*

[*See also* 1953 Trave-Co 563 (A I R V 40 C 219 P 17) (D B), *Narayana Pillai* v. *Raghavan Pillai.* (Where the rights of a purchaser at a revenue sale become vested in another person whose default occasioned the sale, then the immunity from obligations that the property would have enjoyed had it remained with the stranger purchaser, would cease and the obligations would again attach to the property when it comes back to the defaulter. The principle is that a man 'cannot be allowed to take advantage of his own wrong.)]

3. 1951 Pat 566 (A I R V 38 C 160 P 13): 30 Pat 391 (DB), *Ram Rup Singh* v. *Jang Bahadur Singh.*

In Pt. 2, after the sentence "A revenue sale .... right of redemption," place figure 1a and add the following as Foot Note :'

1a. 1949 P C 330 (A I R V 36 C 83 P 10) (P C), *Ghulam Sarwar Khan* v. *Abdul Wahab Khan*✠ 1953 Nag 259 (A I R V 40 C 109 P 13) : I L R (1952) Nag 366 (373) (DB), *Munnabi* v. *Mohanlal.* (Purchaser at sale of property under S. 141 (c), Berar Land Revenue Code, obtains an absolute title free from all encumbrances, grants and contracts, unless made by him, but a purchaser under S. 141 (d) gets only the right, title and interest of the defaulter.)

[See however 1952 Nag 341 (A I R V 39 P 19, 22) : I L R (1952) Nag 211 (F B), *Maulabax* v. *Sardarmal.* (Purchase at revenue sale is free of encumbrances only when the property is sold for recovery of arrears of public revenue for the land is first security by statutory declaration and in all other cases the purchase is not free of encumbrances.)]

1946 52 I D 40024 (Nag), *Charoo* v. *Malkhan.* (Mortgagee of tenancy—Ejectment order against tenant — Mortgagee in possession paying rent arrears — Tenancy right of plaintiff not extinguished and he can redeem)

Add at the end of the Note :

[Pt. 5] Although the mortgagor's rights in the Zamindari property have vested free from all encumbrances by reason of the provisions of S. 3 (1), Madhya Bharat Zamindari Abolition Act, 1951, he may yet be entitled, on payment of mortgage money to the mortgagee, to the mortgage deed and all documents relating to the mortgaged property and he can still claim an acknowledgment in writing from the mortgagee that any right in derogation of his interest transferred to him had been extinguished. Moreover, under certain contingencies, a proprietor may be entitled to possession of a property even under that Act as his Khud Khasta. Hence, the mortgagor's right to continue the suit for redemption cannot be taken away unless the law specifically provides for the same. *1954 Madh B 193 (Pr. 33, 34) (A I R V 41 C 86) (FB), Sheodhari Rai* v. *Suraj Prasd Singh.*

[Pt. 6] See also the undermentioned case. *1955 N U C (Sau) 743 (AIR V 42), Soni Parshottam Nanu* v. *Dave Sada Shankar Sunderji.*

(Mortgaged property in possession of legal representative of mortgagor without obtaining probate according to law in force in the State (Jind State before formation of Saurashtra) — Property forfeited to

State—State recognizing right of legal representative to redeem — Property resold to legal representative — Forfeiture, held did not involve extinction of mortgage and the mortgage was kept alive — Reselling of property to the legal representative did not make any difference.

Note 28

Add in the Foot Notes indicated :

5. 1954 Trav-Co 165 (AIR V 41 C 62 P 4): I L R (1953) Trav-Co 871 (DB), *George Mathai* v. *Mathew Daniel*. (Any provision inserted in the deed of mortgage, which is repugnant to or inconsistent with the mortgagor's right of redeeming the security, will be deemed to be a clog or fetter on the equity of redemption and treated as void.) ✠ 1954 Trav-Co 1 2 (A I R V 41 C 51 P 4) : I L R (1953) Trav-Co 999 (F B). *Narayanan* v. *Kochupennu* (A stipulation in a mortgage, that in default of payment of the mortgage money on the date fixed, the mortgagor shall sell the property to the mortgagee at a fixed price or a price to be settled by an umpire is invalid as a clog.)

6. 1953 Bom 408 (A I R V 40 C 127 P 3) : I L R (1953) Bom 773, *Vadilal Chhaganlal* v. *Gokaldas*.

7. 1953 Bom 408 (A I R V 40 C 127 P 7) : I L R (1953) Bom 773, *Vadilal Chhaganlal* v. *Gokaldas Mansukh*. (The amount advanced under the mortgage, the nature of the security offered by the mortgagor, the circumstances in which the mortgagor was compelled to secure the amount, the terms and conditions on which the amount was in fact advanced and the other alternatives to which the mortgagor could have taken recourse for obtaining the sum advanced, would have to be considered before it is held that a particular term amounts to a clog because it is unreasonably long.)

8a. *See also* 1954 Ajmer 53 (1) (Pr 3) (A I R V 41 C 51) *Umrao Kunwar* v. *Misrilal*. (Any decision on the question whether the particular conditions of the mortgage-deed amount to a clog on the equity of redemption or not can only be a decision on the particular facts of the appeal in which it is given and cannot be a decision as to the law.)

12. 1954 Trav-Co 7 (A I R V 41 C 4 P 7): I L R (1952) Trav-Co. 438 (DB), *Raman Pillai* v. *Bhagavathi Pillai*. (Agreement that the mortgagee would acquire title to the property if there is default in payment of value of improvement held a clog.)

13. 1954 Trav-Co 165 (A I R V 41 C 62 P 4) : I L R (1953) Trav-Co. 871, *George Mathai* v. *Mathews Daniel*. ✠ 1952 Assam 19 (A I R V 39 C 10 P 15) : 1 L R (1950) 2 Assam 444 (DB), *Rupeswari Chutiani* v. *Giridhari Chutia*.

15. 19 3 Trav-Co 570 (A I R V 40 C 220 P 2) *Vaidyanath Chotdy* v. *Janaprakasam Yesuvaniyan*. (A provision in the mortgage deed that it would only be open to the mortgagee to ask for the return of the mortgage amount and that the mortgagor would not seek redemption is a clog on the equity of redemption — ('48) 1948 Trav, L R 556 (F B), *Padmanabha Pillai* v. *Umamaheswara Iyer* Foll.) ✠ 1951 Sau 52 (AIR V 38 C 26 P 4), *Jagjiwan Popat* v. *Jilubha Dhirubha*. (A condition that after redemption the mortgagee should continue in possession as a permanent tenant is invalid) ✠ ('50) 1950 Trav-Co. L R 496 (498) (DB), *Soosa Pillay* v. *Azhakianambia Pillay*. (Othi mortgage for specified period, providing that if redemption is not effected when period expires, mortgagee may treat transaction as sale, is clog on redemption —('48) 1948 Trav L R 556 (F B), *Padmanabha Pillai* v. *Umamaheswara Iyer*, Foll)

Add after Pt. 6 :

[Pt 6a] The contention that if the mortgagor permits the mortgagee to adopt a device which would impede or prevent his right of redemption, he is precluded from appealing to the doctrine of the clog on redemption in protection of his right to redeem cannot therefore be accepted. *1953 Bom 408 (A I R V 40 C 127 P 5): I L R (1953) Bom 773, Vadilal Chhaganlal* v. *Gokaldas Mansukh*. (Agreement that redemption should be after 99 years and mortgagee may build any structure on the mortgaged plot after spending any amount held clog on redemption.)

Note 29

Add in the Foot Note indicated :

2. 1955 Vind Pra 4 (Pr 3) (A I R V 42 C 3), *Nanhku Babulal* v. *Mitlal* (Where a document which is essentially a simple mortgage with an express personal covenant to pay contains a term under which the mortgaged property is to be deemed to have been sold out-right on failure of payment of the principal money with interest by a certain date, such a term in the mortgage amounts to a clog on the equity of redemption under S. 60 and is void: 1921 Mad 12 (A I R V 8 (FB), K. Venkiah v. Pillayi and 1922 P C 17 (A I R V 9) (PC) Mahomed Sherkhan v. Raja Seth Swami Dayal, Ref. to.) ✠ 1954 Trav-Co. 7 (A I R V 41 C 4 P 7) : I L R (1952) Trav-Co 438 (DB), *Raman Pillai* v. *Bhagawathi Pillai*. (The principle relating to clog on the equity of redemption embodied in S. 60 applies even to anomalous mortgages — 1922 P C 17 (A I R V 9), *Mohd. SherKhan* v. *Swami Dayal*, Rel. on.) ✠ ('50) 1950 Trav-Co L R 496 (498) (DB), *Soosa Pillay* v. *Azhakianambia Pillay*. (Othi mortgage — Clog on redemption — 1948 Trav-Co L R 556 (FB), *Padmanabha Pillai* v. *Umamaheswara Iyer*, Foll.)

Note 30

Add in the Foot Notes indicated :

1. 1951 Mad 524 (A I R V 38 C 152 P 2) (DB), *F. X. D. Pinto* v. *Sheenappa Malli* ✠ 1951 Pat 327 (A I R V 38 C 75 P 2, 3, 6) (DB), *Manik Chand Raut* v. *Baldeo*. (Stipulation in mortgage to sell property to mortgagee — Clause held invalid as clog on redemption.)

6. 1951 Mad 524 (A I R V 38 C 152 P 3) (DB), *F. X. D. Pinto* v. *Sheenappa Malli*.

Note 32

Add in the Foot Notes indicated :

6. 1953 Sau 193 (A I R V 40 C 92 P 4, 5), *Sidi Munja* v. *Giga Karna* (The original period of 61 years extended by the subsequent mortgagee for further period of 30 years held did not

amount to a clog on redemption.) ✠ 1946 52 I D 40066 (All), *Jawahir* v. *Nand Lal.* (Stipulation of long period for redemption — Absence of fraud or duress — Stipulation is not a clog.) ✠ 1950 Pat 173 (A I R V 37 C 35 P 2), *Hasar Aii* v. *Ajodhaya Sah.*

7. 1953 Sau 153 (A I R V 40 C 92 P 4, 5), *Sidi Munja* v. *Giga Karna.*

Add after Pt. 7 :

[Pt. 8] An agreement that a mortgagor will not redeem the mortgage until the happening at an uncertain period of a certain event was held a clog on the equity of redemption. *1949 Mad 768 (AIR V 36 C 343 P 4), Ponna Viyyanna Sarma* v. *Reddi Manikyam..* (Agreement to pay mortgage money after death of Hindu widow.)

Note 33

Add in the Foot Note indicated :

17. 1955 Pepsu 87 (Pr 4) (S) A I R V 42 C 20) (DB). *Charan Dass* v. *Shadiram.* (The stipulation that the mortgagor shall pay the cost of "shakasht" (breakage) and 'rekhat' (destruction) only means that the mortgagor takes upon himself to pay the cost of repairs or rebuilding in case of breakage or destruction, which are due to natural deterioration or by some other act of nature beyond the control of the mortgagee and not undertaken by him at his own initiative and out of his own sweet will. That would be authorising the mortgagee to improve out the mortgagor of his estate and thus clog the right of redemption.) ✠ ('49) 2 Sau L R 215 (217), *Bai Ranbhabai Thakershi* v *Prabhulal* (A condition or covenant in mortgage deed authorising mortgagee to build as he liked is not in the nature of a clog on equity of redemption.)

Note 34

Add in the Foot Note indicated :

2. 1953 All 339 (Pr 71) ((S) A I R V 42 C 97) (DB), *Ram Charan* v. *Bhagwan Dei.*

Note 37

Add in the Foot Note indicated :

6. 1954 Trav.Co 443 (Pr 5) (A I R V 41 C 154) (DB) *Godananda Brahamanda Boothi Swamiyar* v *Korah Thommi.* (Travancore Jenmi and Kudian Act (V of 1071 M. E.), S. 3 (1). The provisions for renewal will not by itself be sufficient to create an irredeemable tenure. That provision will be satisfied and exhausted with the grant of one renewal and thereafter the owner of the property will be entitled to enforce his right of redemption.) ✠ 1954 Trav-Co 7 (A I R V 41 C 4 P 10) : I L R (1952) Trav-Co 438 (DB), *Raman Pillai* v. *Bhagwath Pillai.* (The provision in a compromise decree relating to the forfeiture of the right of redemption does not cease to be a contract between the parties even though it is embodied in the decree and the decree is no bar to the parties to the contract contending that the agreement is illegal and unenforceable in law.)

Note 39

Add in the Foot Note indicated :

1. Also see 1951 Ajmer 28 (A I R V 38 C 19 P 15), *Shankarlal* v. *Gangadhar.*

Note 40

Add in the Foot Note indicated :

7. 1951 Punj 404 (A I R V 38 C 119 P 8): I L R (1950) Punj 271 (DB), *Som Nath* v. *Desai L. D.* (Notice addressed jointly to mortgagee and his tenant sent by post—Notice returned as refused by tenant — There is no service of notice on mortgagee.)

Add after Pt. 9 :

[Pt. 9a] Absence of notice of intention to redeem is not a bar to a suit for redemption. *1951 Punj 404 (A I R V 38 C 119 P 11) : I L R (1950) Punj 271 (DB). Som Nath* v. *Desai L. D.*

Note 41

Add in the Foot Notes indicated :

1. 1949 P C 330 (A I R V 36 C 83 P 11) (P C), *Ghulam Sarwar Khan* v. *Abdul Wahab Khan.*

2. 1955 N U C (Punj) 1355 (A I R V 42), *Gurcharan Singh* v *Subedar Sawan Singh.* (This provision of the Transfer of Property Act is not affected by the principles of customary law.) ✠ 1952 Pepsu 6 (A I R V 39 C 5 P 3, 4) : 3 Pepsu L R 484, *Bagga Singh* v. *Lal Chand.* (Mere fact that each branch of mortgagees' family is recorded as having definite share does not entitle mortgagors to get only part of mortgage redeemed.)

3. 1954 Trav Co 251 (A I R V 41 C 94 P 4) (DB), *Govinda Pillai Baswara Pillai* v. *Ahmed Moosa.* (Mortgagees can resist their claim for redemption of any item only if they have acquired the equity of redemption of that item.)

4 But see 1950 Kutch 36 (AIR V 37 C 28 P 6), *Agaria Nurmamad Alu* v. *Aher Marand Vira Sheja.* (Case from Kutch—Suit for redemption —Suit by some of co-owners of mortgaged property—They can redeem only their share.)

7. 1954 Mad 818 (Pr 5) (A I R V 41 C 273) : ILR (1955) Mad 274 (DB), *Parukutti Amma* v. *C. Balameenakshi Amma* (The only way by which the integrity would be broken is in the manner laid down in the last clause in S. 60. But that is only when there is no modification of the mortgage by consent of the parties.)

12. 1953 Kutch 8 (AIR V 40 C 5 P 8), *Jeevandas Ibji* v. *Jadeja Karubha Dujajee.* (When some of the co-mortgagors extend the period of a vatantar (usufructuary mortgage), other co-mortgagors are entitled to redeem to the extent of their share.) ✠ 1952 Nag 341 (A I R V 39 P 26, 48) : I L R (1952) Nag 211 (FB), *Maulabax* v. *Sardarmal* (It was held that the mortgage was deemed to have been split up.) ✠ 1956-52 I D 40082 (Trav-Co) (DB), *Gopala Pillai* v *Krishna Pillai.* (A suit for partial redemption is maintainable where the mortgagee recognizes a partition of the mortgaged property among the co-mortgagors.)

Add after Pt. 7 at the end of the paragraph :

[Pt. 7a] Where there are more than one mortgagors all of them must be parties to the agreement allowing piecemeal redemption. *1955 N U C (Andhra) 4462 (A I R V 42), Kavvi Kondayya* v. *Atchayamma.* (Where in a suit against one of the mortgagors and the lessee, the lessee

enters into a compromise with the mortgagee regarding one of the items of the property, the mortgage cannot be deemed to have been split up by reason of the compromise.)

Add after the sentence—"This agreement . . . by subsequent agreement (See S. 67 (d))."

[Pt. 7b] Where with the consent of all the parties interested in the mortgage including the mortgagee, the amount due under the mortgage liability in respect of it was apportioned between the two sets of properties, that is 2/5th share owned by the plaintiffs and the 3/5th share owned by the second defendant, thereby in effect and substance constituting what was one mortgage originally, into two distinct and separate mortgages, it was held that the principles laid down under S. 60, had no application to the case and the second defendant was no longer a co-mortgagor with the plaintiffs entitled to redeem the entire mortgage as contemplated by S. 9-A (8), Madras Agriculturists Relief Act (4 of 1938) and therefore the plaintiffs were entitled to have the mortgage amount scaled down. *1954 Mad 818 (Prs 5, 6) (A I R V 41 C 273) : I L R (1955) Mad 274 (DB), Parukutti Amma* v. *C. Balameenakshi Amma.*

Add after Pt. 12 :

[Pt. 13] Under the general law, a mortgage decree is one and indivisible subject to certain recognised exceptions. The Madras Agriculturists' Relief Act which is a special statute intended to give relief only to agriculturists trenches upon the general law in so far as it expressly provides that a debt owing to an agriculturist shall be scaled down under the Act. Thus, in case of a mortgage-debt when the loan has been advanced to more than one person, if one of the debtors happens to be an agriculturist while others are not, the agriculturist debtor is entitled to have his debts scaled down under the provisions of that Act in spite of the provision of the general law which prevents a mortgagor from denying the liability of the interest which he owns in the mortgaged property to satisfy the entire mortgage-debt. There is, therefore, nothing wrong in law in scaling down a mortgage decree in favour of one of the judgment-debtors, while as regards others the decree is kept intact. *1951 S C 189 (A I R V 38 C 30 P 10) : 1951 S C R 292 (S C), Ramaswami Aiyengar* v. *Kailasa Thevar.*

[Pt. 14] Where the melkanomdars had a valid title to thirteen out of the fourteen items of property granted to them in melkanom it was held that a partial redemption could not be granted; but they might be allowed to pay the whole mortgage amount including the cost of the improvements on the thirteen items and get redemption of only thirteen items, leaving the fourteenth item for appropriate future proceedings *1955 Mad 260 (Pr 4) ((S) A I R V 42 C 71) (DB), Kunhi Kalanthan* v. *P. Madhavi Amma.*

Note 42

Add in the Foot Note indicated :

2a. 1955 Punj 96 (Pr 4) ((S) A I R V 42 C 82), *Narain Singh* v. *Teja Singh.*

Note 43

Add in the Foot Note indicated :

1. *See* 1953 Trav-Co 283 (AIR V 40 C 104 P 5) : I L R (1953) Trav-Co 296 (DB), *Ahammathunni* v. *Subramonia Iyer.* (No release of portion of mortgage debt—No merger of interests of mortgagor and mortgagee in respect of portion—Owner of portion of mortgaged property cannot claim rateable abatement.)

8. 1955 Mad 439 (Pr 14) (AIR V 42 C 118) (DB), *Subbarama Reddiar* v. *Raghava Reddi.*

Note 44

Add in the Foot Notes indicated :

2. 1954 Madh B 67 (A I R V 41 C 41 P 78) : ILR (1953) Madh B 147, *Ghasiram* v. *Hiralal.*

3. 1954 Madh B 67 (A I R V 41 C 41 P 7, 8) : I L R (1953) Madh B 147, *Ghasiram* v. *Hiralal.*

4. *See* 1951 Trav-Co 103 (A I R V 38 C 37 P 4) : 1950 Trav Co L R 683 (DB), *Eapen Cherian* v. *Manacheekhan.*

5. 1953 Mad 720 (A I R V 40 C 277 P 2) : I L R (1953) Mad 1210, *Narayanaswami Goundar* v. *Perumal Chettiar.* (Acquisition of one-fourth share of mortgagor by mortgagee—Integrity of mortgage is broken by merger — Other mortgagors are entitled to sue for partition and for redemption of their own share.) ✠ 1954 Madh B 67 (A I R V 41 C 41 P 7, 8) : ILR (1953) Madh B 147, *Ghasiram* v. *Hiralal.* ✠ 1953 Kutch 8 (A I R V 40 C 5 P 8), *Jeevendas Ibji* v. *Jadeja Karubha* ✠ 1953 Nag 259 (A I R V 40 C 109 P 13) : I L R (1952) Nag 366 (373, 374) (DB), *Munnabi* v. *Mohanlal* (This principle does not apply to case of mortgagee who purchases part of mortgaged property at revenue sale free from any encumbrance.) ✠ 1952 Pat 101 (A I R V 39 C 43 P 14, 21) : 27 Pat 572 (DB), *Purna Chandra* v. *Govinda.* (Execution of mortgage decree -Mortgagee decree holder purchasing mortgaged property—Person interested in portion of mortgaged property not impleaded in suit—Suit for redemption by such person — *Held* that he was entitled only to partial redemption.) ✠ 1952 I D A 17169 (Nag), *Sundarbai* v. *Laxmichand.* (A mortgagee cannot deny the status of the mortgagor named in the document.) ✠ 1951 Trav-Co 212 (2) (A I R V 38 C 83 P 4) (DB), *Ouseph* v. *Parmeswaran.*

6 1954 Madh B 67 (AIR V 41 C 41 P 7, 8) : ILR (1953) Madh B 147, *Ghasiram* v. *Hiralal* ✠ 1952

Nag 341 (A I R V 39 P 28):ILR (1952) Nag 211 (FB), *Maulabux* v. *Sardaramal.*

8. 1954 Punj 81 (A I R V 41 C 36 P 14) : I L R (1953) Punj 271 (DB), *Pala Singh* v. *Attar Singh.*

Add after Pt. 23 :

[Pt. 24] *R* mortgaged fields Nos. 2 and 3 with *N* and subsequently fields Nos. 1, 2 and 3 with *V*. *V* assigned his mortgage to plaintiff on 12-3-35 and subsequently on 21-10-35 paid off the amount of *N's* decree and foreclosed fields Nos. 2 and 3. In the suit by plaintiff on the assigned mortgage the transferee of field No. 1 from *R* claimed that there was splitting up of the mortgage security and that he could therefore redeem piecemeal so far as his field was concerned. It was held that on the date of foreclosure by *V* he was no longer a mortgagee claiming under the mortgage in suit and that whatever he did could not affect the mortgage security which at that date was owned by plaintiff: *1946-52 I D 40080 (Nag), Mt. Mainabai* v. *Sk. Jalal.*

Note 46

Add in the Foot Note indicated :

1. 1953 Trav-Co 335 (AIR V 40 C 123 P 6), *Ayoon Sait* v. *Anantha Naiken* (Suit for redemption by two mortgagors A and B — B obtaining redemption of entire property—Second suit by A for redeeming his share and for partition by metes and bounds is not barred.) ✣ 1953 Mad 366 (AIR V 40 C 127 P 7), *Rahimansa Rowther* v. *Madras Islamia Educational Institution, Vellam.*

Note 48

Add in the Foot Notes indicated :

6. ('49) 1949 Bur L R (H C) 50 (54), *Maung Tha Yan* v. *U Myat Maung.*

10. 1955 Trav-Co 9 (Pr 1, 6) ((S) AIR V 42 C 5): I L R (1954) Trav-Co 675 (FB), *Madhava Shenai* v. *Yasodabai* ✣ 1950 F C 1 (A I R V 37 C 1 P 12) : 1949 F C R 484 (F C), *Chinna Subba Rao* v. *Mattappalli Raju.* (1945 Mad 225 (AIR V 32) : I L R (1945) Mad 803, Mattapalli Raju v. Venkata Raghavayya, Reversed.)

Add after Pt. 7 :

[Pt. 7a] The Calcutta view is followed by the Madhya Bharat High Court. *1955 N U C (Madh B) 203 (A I R V 42), Ghasilal* v. *Deebai.* (A suit for redemption is in substance a suit for possession of immovable property. The plaintiff is entitled to recover possession of the house on the basis of his title, even though a suit for redemption is not maintainable.)

Note 49

Add in the Foot Notes indicated :

1. 1953 Trav-Co 423 (A I R V 40 C 162 P 4) (DB), *Kaliya Pillai* v. *U. Kamalammal* ✣ 1952 Trav-Co 295 (A I R V 39 P 20) : I L R (1952) Trav-Co 152 (DB), *Pakarathi Neelakantan* v. *Ummini Pillai.* (Putting excessive value on improvements is not misconduct—Mortgagee however claiming more than what was bargained for in mortgage deed, and also putting plaintiff to prove his title to redeem, when there was no doubt about his title — Mortgagee allowed only one fourth of costs incurred by him.) ✣ 1946-52 I D 40102 (T-C) (DB), *Punnoose Chacko* v. *Punnuoose Kuriakose.*

9. 1954 Trav-Co 313 (AIR V 41 C 112 P 5) : ILR (1953) Trav-Co 823, *Narayanan Kaimal* v. *Sanku Kesavan.* (Where the Court finds that the mortgagee had put forward untenable contentions costs may be refused to him.) ✣ 1951 Trav-Co 17 (A I R V 38 C 7 P 9) (DB), *Azeekkal Sri Veerah Devaswom* v. *Ummar Sait Abdullah Sait.*

Note 50

Add in the Foot Notes indicated :

1. 1952 Kutch 1 (A I R V 39 C 1 P 6), *Bhailal Ganpatram* v. *Keshavji Motichand.* (Mortgage alleged is either admitted or proved—Presumption having regard to circumstances is that mortgage is subsisting) ✣ 1946-52 I D 49104 (Pepsu), *Rudra Nand* v. *Rali Ram.*

2. 1954 Ajmer 47 (47) (Prs 2, 3) (AIR V 41 C 45), *Mangi* v. *Ghisa.* (*Held*, that the plaintiff's allegation that the property in suit had been mortgaged with the defendant was not satisfactorily proved. As such the plaintiff was not entitled to succeed.) ✣ 1951 Ajmer 21 (A I R V 38 C 14 P 8), *Mangilal* v. *Ram Dayal.*

9. *See* 1950 Kutch 36 (A I R V 37 C 28 P 4, 5), *Agaria Nurmamad Alu* v. *Aher Marand Vira Sheja.*

15. *See also* 1955 N U C (Mad) 77 (A I R V 42), *Adam Kutty* v. *Puthia Veettil Paru Amma.* (It is open to a mortgagor in a suit for redemption of a usufructuary mortgage to rely upon his title and recover possession, if it is found that the mortgage relied upon is void.)

Add after Pt. 14 :

[Pt. 14a] The High Court of Rajasthan has also taken the same view. *1950 Raj 47 (A I R V 37 C 19 P 18) (DB), Kanhaiya Lal* v. *Jamna Lal.* (1938 Oudh 16 (A I R V 25), Gauri Shankar v. Lala, Relied on.)

[Pt. 14b] A similar view has been taken by the High Court of Travancore and Cochin. *1955 NUC (Trav.Co) 1906 (AIR V 42), Kurien Kurien* v. *Neelakantan Narayanan Chakkiar.* (Where the plaintiff brings a suit to redeem a specific mortgage (kanom) mentioned in the plaint he is bound to prove that mortgage and if he fails to do so he cannot succeed in the suit even if it is found that the defendant is in possession of the property as a mortgagee : 1943 All 393 (A I R V 30) (FB), Gur Saran v. Shib Singh, Foll.)

Note 53

Add after Pt. 2 as a separate para :

[Pt. 3] By his adverse possession and prescribing against a usufructuary mort-

gagee, the trespasser does not acquire any rights against the mortgagor. So far as the mortgagor is concerned, he cannot be subrogated to the position of his mortgagee and he cannot be compelled to claim redemption from the trespasser. As against the mortgagor he continues to be a mere trespasser and the mortgagor's right to sue him for possession starts only after the redemption. *1953 Pepsu 101 (A I R V 40 C 43 P 5), Ram Lal* v. *Chetu.* (Contractual relationship of mortgagor and mortgagee is not created between the trespasser and the mortgagor.)

SECTION 61

Note 2

Add in the Foot Notes indicated :

9. *See also* 1952 Trav-Co 363 (A I R V 39 P 4) (DB), *Girvadis Kunjuvariathu* v. *Chacku Vareethu.* (Usufructuary mortgage — Further advance—Provision making the advance charge on property—Mortgagee, held could consolidate the two documents and could claim the amount due thereunder.) ✠ 1952 Trav-Co 295 (A I R V 39 P 8) : I L R (1952) Trav-Co 152 (DB), *Pakavathi Neelakantan* v. *Ummini Pillai.* (Notwithstanding the fact that the Transfer of Property Act was not law in Travancore and Cochin before its introduction there, the principle which S. 61 (before its amendment in 1929) impliedly recognised was applicable to Travancore and Cochin; hence all the mortgages over the same property in favour of one and the same person must be simultaneously redeemed, and the mortgagor is not entitled to redeem one without redeeming the other or others.)

Note 5

Add in the Foot Notes indicated :

2. *See also* 1952 Trav-Co 552 (A I R V 39 P 7) (DB), *Kurien Chacko* v. *Ramakrishna Iyer.* (By agreement of parties, four documents were allowed to be consolidated. The mortgagee was allowed to treat all the four transactions as one and it was therefore competent for him to decline to be redeemed as to any unless he was redeemed as to all. He could thus treat all the four transactions as component parts of the same mortgage.)

In foot-note 3 take after A I R 1947 Lah 278 (FB)—

3. 1952 I D A 17172 (Punj), *Dhanpat Rai* v. *Tulsi Ram.* (Do.)

Note 6

Add in the Foot Notes indicated :

1. 1952 Trav-Co 150 (A I R V 39 P 2, 3, 4) (DB), *Narayana Menon* v. *Raman Namboodripad.*

2. 1952 Trav-Co 295 (A I R V 39 P 10) : I L R (1952) Trav-Co 152 (DB), *Pakavathi Neelahantan* v. *Ummini Pillai.* (The fact that an unsuccessful attempt was made to realise the puramkadam amount is no bar at all to permit the taking.)

SECTION 62

Note 2

Add in the Foot Note indicated :

2. 1953 All 33 (AIR V 40 C 9 P 3) (D B), *Parasram Shukul* v. *Bindeshari Pandey.*

Add after Pt. 8 as a separate para :

[Pt. 9] Though a mortgage may not be a self-liquidating mortgage in the first instance, it may become a self-liquidating mortgage at a later stage, e. g., by virtue of a statutory provision like that contained in the U. P. Debt Redemption Act, 1940, which by reducing the rate of interest and providing that the usufruct shall be calculated and its excess over the interest will be taken in satisfaction of the principal amount, has in a way, effected a revolutionary change in the terms of all subsisting usufructuary mortgages. In a sense they may be said to have become self-liquidating mortgages: *1953 All 620 (AIR V 40 C 310 P 5): ILR (1954) 1 All 691 (D B), Sita Ram Singh* v. *Gaya Prasad.* (Mortgages must be subsisting on the date on which the Debt Redemption Act came into force. If the right to redeem the mortgages had already expired before the Act came into force, there is nothing on which the Act will operate.)

Add as a separate para :

[Pt. 10] A suit under this section presupposes that the mortgagor's right to the property subsists. Where the mortgagor's title to the property is extinguished by any rule of law, he cannot maintain a suit under this section. *1955 NUC (All) 1763 (A I R V 42), Nabbu* v. *Shamshad Ali.* (There is nothing in the provisions of the Debt Redemption Act which has the effect of reviving an extinguished title.)

Note 3

Add at the end of the Note as a separate para:

[Pt. 4] It has been held in the undermentioned case that it is open to a mortgagor in a suit for redemption of a usufructuary mortgage to rely upon his title and recover possession, if it is found that the mortgage relied upon is void. *1955 N U C (Mad) 77 (A I R V 42), Adam Kutty* v. *Puthia Veettil Paru Amma.* (Notwithstanding the melkanom a Jenmi continues to be the owner of the property and his title is not transferred by virtue of a melcharth or a mel kanom. Where, therefore, a mel kanomdar brings a suit for redemption but the mel kanom is found to be void, he being in the position of a person entitled to only a limited right to

redeem the mortgage is not entitled to recover possession of the suit property.)

Note 5

Add in the Foot Note indicated :

13. *See also* 1950 All 466 (AIR V 37 C 182 P 2), (D B), *Babhan Singh* v. *Ram Subhag*. (Application for redemption on the ground that usufruct has satisfied whole mortgage debt — Burden lies on mortgagee to prove how much is due to him.)

Put Pt (9a) at the end of the sentence "Thus where the mortgagee. . . for the term fixed" and add the following case in the Foot Notes :

9a. 1954 Mys 187 (Pr 6) (A I R V 41 C 81), *Paremajalu* v *Pattangeri*. (Where a usufructuary mortgagee who is entitled to appropriate the usufruct of the property for a period of 50 years in discharge of the mortgage debt allows the mortgaged property to be sold for arrears of revenue which he was bound to pay under the terms of the mortgage and the mortgagor brings a suit for redemption and possession of the mortgaged property before the expiry of the period, the mortagee is not entitled to resist the suit on the ground that it is premature.)

SECTION 63

Note 1

Add in the Foot Note indicated :

5. ('49) 1 Pepsu L R 430 (432, 433) (DB), *Sardar Jai Singh* v. *Radha Kishan*. (The ejectment of the tenants by the mortgagee at the most can be considered to be an accession to the land which under S. 63 must go, in the absence of a contract to the contrary, along with the land on its redemption.)

Note 2

Add in the Foot Note indicated :

1. See however 1952 Trav-Co 552 (A I R V 39 P 5) (D B), *Kurien Chacko* v. *Ramkrishna Iyer*. (Mortgage of plaint item 1—Partition in mortgagor's tarwad — By partition mortgagee obtaining jenmom right over 3/8 of the whole property and plaintiff getting right over 5/8 share of the same—Plaint Item 2 which was Sirkar Puramboke land obtained on registry by mortgagee by virtue of his position as mortgagee of neighbouring land — Mortgagee held entitled to 3/8 share and mortgagor to 5/8 share of the accretion of item 2—Neither of them held could claim exclusive right)

Note 3

Add after Pt. 1 after the words "See illustration (b) to that section" :

[Pt. 1aa] But where a site only is mortgaged without the building thereon or where after the mortgage of the site a building is constructed thereon by the mortgagor and the mortgagee becomes the owner of the site in execution of the mortgage-decree, he is entitled to get possession of the site after removal of the building *1950 Trav.Co 78 (A I R V 37 C 35 P 2) (DB), Anthony Ouseph* v. *M. George.*

Note 7

Add in the Foot Note indicated :

2. 1951 Trav-Co 94 (AIR V 38 C 34 P 4, 5): 1950 Trav-Co L R 658 (D B), *Parvathi Amma* v. *Cheriyan Cheriyan*.(The fact that the mortgagor after ten years of persistent endeavour to get the registry in favour of his tarward, as against the mortgagee, withdrew from the contest evidently allowing the registry to be made in favour of the rival claimant cannot lead to the inference of any sharp practice by the mortgagee. At best it will only amount to a consent given by the mortgagor's tarwad to the claims of the mortgagee for the registry of the land in his favour in his own independent right.)

Note 9

Add in the Foot Note indicated :

1. ('49) 1 Pepsu L R 430 (432, 433), *Sardar Jai Singh* v. *Radha Kishan*. (Ejectment of occupancy tenants by mortgagee—Mortgagee not authorised to spend for ejectment—Accession not capable of separate possession or enjoyment without detriment to mortgaged property—Nor necessary to preserve the property from destruction, forfeiture or sale mortgagee held not entitled to the costs of acquisition)

SECTION 63A

Add in the synopsis after Item 8 :

9. Law prevalent in Malabar, Travancore and Cochin.

Note 1

Add in the Foot Note indicated :

2. 1952 Mdh B 6 (AIR V 39 C 4 P 5), *Kukaji* v. *Misrilal*. (The mortgagee held entitled to recover from his mortgagor the reasonable and proper costs incurred in making lasting improvements.)

Page 1163—Note 1, last para, lines 3 and 4: Place figure 8 after the words "to the costs of the improvements" and add the following as Foot Note :

8. 1949 All 681 (AIR V 36 C 255 P 4), *Ram Asray* v. *Hiralal*.

Note 1a

Add after Pt. 1 as a separate para :

[Pt 2] See also the undermentioned case from Jammu and Kashmir in which the compensation for improvement was allowed to the tenant of the mortgagee. *1953 J & K 14 (AIR V 40 C 7 P 2)*: *11 J & K L R 134, Mohd.* v. *Mukhti*.

Note 2

Page 1163—In Note 2, line 7 place figure 1a after the words "is however different" and add the following as Foot Note :

1a. ('50) 1950 Trav.Co L R 511 (517) (FB), *Mathai Koshi* v. *Geevarghese Kathanar*, (Prior mortgagee suing on his mortgage without impleading subsequent mortgagee and purchasing mortgaged property in execution—Subsequent sale of property — Transferee making improvements bona fide — As against subsequent mortgagee, transferee is entitled to costs of improvements—(Minority view in 1931 All 277 (AIR V 18) (FB), Nannumal v. Ramchander, Approved)

Note 3

Add in the Foot Note indicated :

1. 1955 Pepsu 87 (Pr 9) ((S)AIR V 42 C 20) (DB), *Charan Dass* v. *Shadiram* ✠ 1951 Ajmer 10 (AIR V 38 C 7 P 7), *Fayaz Hussain* v. *Shafi Hussain.* (Construction of a well may improve the value of the land but it does not follow that a well is always necessary to preserve agricultural land.)

Add after Pt. 2 as a separate para :

[Pt. 3] The costs of a suit instituted for recovery of possession of property do not come within any of the purposes mentioned in S. 63-A (2) and cannot be considered an improvement and hence the mortgagee would not be entitled to them before redemption. *1954 Mad 89 (AIR V 41 C 29 P 5), Palani Sri Dandayuthapani* v. *Mohammad Gani Rowther.*

Note 4

Add in the Foot Notes indicated :

1. 1955 Pepsu 87 (Pr 9) ((S)AIR V 42 C 20) (DB). *Charan Dass* v. *Shadiram.* (Section 63A applies where there is no condition between the parties with regard to improvements made by the mortgagee.) ✠ 1951 Ajmer 28 (AIR V 38 C 19 P 12), *Shankar Lal* v. *Gangadhar.* (Section 63A applies only if there is no contract between the parties. But where the mortgage-deed makes an express reference to improvements, in that the mortgagor will be liable to pay for the money spent by the mortgagee on improvement and there is no stipulation about payment of interest on this money then the interest on the money spent on improvements is not payable by the mortgagor) ✠ 1950 Kutch 74 (A I R V 37 C 59 P 1), *Velji Narshi* v. *Shah Ashpar Nenshi.* (Mortgage of house with possession—Mortgagee to get annual maintenance and repair costs—Suit for redemption after about 15 years — Mortgagee held entitled to special repair costs incurred in keeping house in sound condition.)

1a. ('49) 2 Sau L R 215 (217), *Bai Rambhabai Thakershi* v. *Prabhulal.* (Covenant that mortgagee has the authority to build as he liked.)

2. 1955 Pepsu 87 (Pr 9) ((S)AIR V 42 C 20), (DB), *Charan Dass* v. *Shadiram.* (Where there is a stipulation between the parties to mortgage that certain specific and no other improvements can be made and that they shall be subject to such terms as are agreed upon, the right of the mortgagor to improvements and the right of the mortgagee to cost thereof are subject to the contract into which the parties have entered in respect thereof.)

3. 1955 Pepsu 87 (Pr 4) ((S)AIR V 42 C 20) (DB), *Charan Dass* v. *Shadiram,*

Add after Pt. 3a :

[Pt. 3b] The stipulation that the mortgagor shall pay the cost of "shakasht" (breakage) and 'rekhat' (destruction) cannot be taken to mean that the mortgagor thereby binds himself to pay the expenses which the mortgagee may incur in breaking or demolishing the mortgaged property and then in rebuilding the same. Reasonably interpreted, the stipulation only means that the mortgagor takes upon himself to pay the costs of repairs or rebuilding in case of breakage or destruction, which are due to natural deterioration or by some other act of nature beyond the control of the mortgagee and not undertaken by him at his own initiative and out of his own sweet will. *1955 Pepsu 87 (Pr 4) ((S)AIR V 42 C 20) (DB), Charan Dass* v. *Shadiram.*

Note 5

Add after the first sentence in the Note :

[Pt. 1a] The mortgagor is liable to pay only those costs of improvements which have been properly and reasonably incurred. *1955 Pepsu 87 (Pr 9) ((S)AIR V 42 C 20) (DB), Charan Dass* v. *Shadiram.*

[*See also* 1955 N U C (Trav.Co) 544 (AIR V 42), *Narayanan Karunakara Kartha* v. *George Peter.* (No hard and fast rule can be laid down in the matter of deduction for droppings. The droppings would depend upon the nature of the soil and the fertility of the land. Thus where the property is situated close to a backwater and the land does not require special watering for the plantations allowing a deduction of only one-tenth of the cocoanuts for the droppings is not wrong.)

[Pt. 1b] Even in the case of natural decay or destruction of the mortgaged property by some unforeseen calamity, the expenditure on its repairs or rebuilding should be reasonable. What constitutes a proper and necessary expenditure is a question of fact depending upon the circumstances of each case. Among other things regard must be had to the nature situation and value of the property mortgaged, financial condition and position of the mortgagor, the amount that he could and would have himself spent under the circumstances and the *bona fide* intentions of the mortgagee. *1955 Pepsu 87 (Pr 6) ((S)AIR V 42 C 20)(DB), Charan Dass* v. *Shadiram.* (Where the entire structure of three shops mortgaged for Rs. 2,000/- was demolished from its very foundation and a new double storeyed building was raised in its place at an alleged expenditure of Rs. 13,000/- that is more than six times the mortgage-debt and with the addition of interest claimed thereon the liability of the mortgagor went to more than twenty times the debt.

Held, that the huge expenditure on the new construction could not be regarded reasonable.)

Add after Pt. 2 as a separate para :

[Pt. 3] It has been recently held by the Judicial Commissioner's Court at Kutch that a purchaser from the mortgagor must pay the mortgagee the costs of the improvements if he claims possession of the property as it stands. *1950 Kutch 14 (A I R V 37 C 12 P 6)*, *Visaria Harakha Devaraj* v. *Boricha Daya Naya.*

Add at the end of the Note :

[Pt. 3a] See also the undermentioned case. *1955 N U C (Trav-Co) 544 (AIR V 42)*, *Narayanan Karunakara Kartha* v. *George Peter.* (The usual practice in the Kottayam District, as in other parts of the State, is to allow the tenant or the mortgagee three-fourths of the value of improvements effected by him. Where extraordinary expenses had to be incurred in raising the level of the land in order to make it fit for plantation some separate allowance must be given for the levelling and as a rough rule one-third of the cost of levelling might be allowed in such cases.)

Add at the end of the Note :

[*See also* Note 1.]

Note 6

Add as a separate para :

[Pt. 2] The burden to show, what the expense of improvement was, is on the mortgagee. *1946-52 I D 40131 (Raj) (DB)*, *Motilal* v. *Bastimal.*

Add after Pt. 2 as a separate para :

[Pt. 3] There is no justification for restricting the value of improvements payable to the usufructuary mortgagee to the amount advanced under the mortgage. *1953 Trav.Co 441 (AIR V 40 C 175 P 3) (DB)*, *Francis* v. *Ouseph.*

Note 7

Add in the Foot Note indicated :

3. 1951 Ajmer 28 (AIR V 38 C 19 P 12), *Shanker Lal* v. *Gangadhar.* (No express reference to improvements in mortgage deed—No stipulation about payment of interest or money spent for improvements — Interest not payable by the mortgagor.)

Note 9

Add the following Note after Note 8 :

9. Law prevalent in Malabar, Travancore and Cochin :—

[Pt. 1] According to the custom prevalent in Malabar, Cochin and Travancore the right of possessory mortgagees to get value of improvements effected by them, independent of any agreement in that behalf but in the absence of an agreement to the contrary, has been recognised. *1951 Trav-Co 109 (A I R V 38 C 40 P 23)*: *ILR (1951) Trav-Co 209 (FB)*, *Chandi Avira* v. *Thomman Varkey.* (Improvements by sub-mortgagee holding under a usufructuary mortgagee) ✣ *1952 Trav-Co 507 (A I R V 39 P 3)*, *Narayan Pappu* v. *Easwaran Krishnan.* (Deduction towards dropping of cocoanuts.) ✣ *1952 Trav Co 295 (AIR V 39 P 14, 15)*: *ILR (1952) Trav. Co 152 (DB)*, *Pakavathi Neelakantan* v. *Ummini Pillai.* (Stipulation for improvements to be effected by mortgagee—Only some of improvements effected—Mortgagee not entitled to more than rateable proportion.) ✣ *1952 Trav Co 191 (A I R V 39 P 3) (DB)*, *Devassy* v. *Sankaranarayan.* (Redemption suit—Mortgagee claiming value of improvements —In previous suit by him against tenants for their eviction, mortgagee denying liability for improvements — Mortgagor pro forma party to it—Held there was neither estoppel nor res judicata barring his claim.) ✣ *('51) ILR (1951) Trav.Co 282 (285) (DB)*, *Matha Panickan* v. *Ouseph.* (Fruit bearing trees — Valuation.) ✣ *1946-52 I D 40135 (T.C) (DB)*, *Cheruchi* v. *Govinda Menon.* (Express stipulation prohibiting mortgagee from making improvements by plantation—Mortgagee held was not entitled to value of cocoanut trees—Held further that bunds and water channels were no improvements) ✣ *1946-52 I D 40136 (T.C) (DB)*, *Ouseph Kuriscko* v. *Nambiathen.* (According to mortgage-deed mortgagee entitled to one-half the value of improvements—Commissioner while assessing improvements deducting one-fourth on account of Jenmikoor — Assessment held not proper.) ✣ *1946-52 I D 40137 (Trav-Co.) (DB)*, *Augusfina Fran is* v. *V. Narayana Mench.* (Mortgagees claiming value of trees planted on reclaimed area—They cannot afterwards claim cost of reclamation.) ✣ *('49) 1949 Ker L Tim 92 (98) (DB)*, *Narayanai Chempakakuttu* v. *Chidambara Ramalekshmi Ammal.* (Specific sum provided for well and building—Entire value of well and building could not be claimed.)

SECTION 65

Note 3

Add after Pt. 1 :

[Pt. 1a.] A single Judge of the Calcutta

High Court has, in the undermentioned case, expressed a contrary view. He has held that covenants under this section are instances of covenants running with the land and are binding upon the transferee irrespective of any question of notice. *('48) I L R (1948) 1 Cal 492 (497), Bhupati Bhusan Tribedi* v. *Birendra Mohan Singha Chaudhuri.*

Note 4

Add in the Foot Note indicated :

2. 1949 Nag 81 (A I R V 36 C 27 P 4, 5) : I L R (1948) Nag 290 (DB), *Shanta Bai* v. *Narayanrao.*

Note 10

Add after Pt. 2a :

[Pt. 2b] The mortgagee when deprived of a part of the mortgaged property may if he chooses file a suit on the breach of contract for damages represented by the value of the property of which he has been dispossessed instead of suing for the entire mortgage money after repudiating the whole contract of mortgage and surrendering the remaining property. This right is not in any way taken away by S. 68. *1949 Pat 487 (AIR V 36 C 146 P 8) : 28 Pat 359 (DB), Mt. Parbati Kuer* v. *Durga Prasad Missir.* (Suit is not one under S. 68 but one under S. 73, Contract Act.)

Note 11

Add in the Foot Note indicated :

2. 1954 All 348 (A I R V 41 C 155 P 6), *Mt. Sundama Devi* v. *Ramkrishun Lal* (Transfer of equity of redemption—Money kept with vendee for payment of debt when sued—Mere retention of money does not create trust—Vendee held to be mere agent of vendor—No fresh suit lies against vendee for recovery of debt.)

SECTION 65A

Note 1

Add in the Foot Notes indicated :

6. 1952 S C 401 (AIR V 39 P 5, 6) : 1953 S C R 108 : 31 Pat 1020 (SC), *Kamakshaya Narayan Singh* v. *Chohan Ram.* (1917) Cal 222 (AIR V 4), *Madan Mohan Singh* v. *Raj Kishore.* Approved ; ('68) 10 Suth W R (Civ.) 325, *Banee Persad* v. *Reet Bhunjan Singh*, Explained;1916 Cal 870 (AIR V 3), *Balmukund* v. *Matilal*, Not approved.)

7a. 1951 Assam 101 (A I R V 38 C 52 P 16) : ILR (1949) 1 Assam 198 (DB), *Surjya Kumar Dhar* v. *Girish Chandra.* (Suit by mortgagee for mere declaration that the lease is not binding on him is not competent—His suit must be one for sale so as to afford an opportunity to lessee to redeem the property.)

8. 1950 Bom 71 (A I R V 37 C 20 P 4 & 10), *Mallappa Rachappa Shetgan* v. *Shicappa Tammanna Hadnur.*

Add after Pt 8 :

[Pt. 8a] The Supreme Court has however recently held, in *Kamakshaya Narayan Singh* v. *Chohan Ram*, that even in such cases the question has to be decided not on a distinction between an English mortgage and a simple mortgage or on considerations germane to S. 66 but on general principles with reference to the authority of the mortgagor as bailiff or agent of the mortgagee to deal with the property in the usual course of management. *1952 S C 401 (A I R V 39 P 12) : 1953 S C R 108 : 31 Pat 1020 (S C), Kamakshaya Narayan Singh* v. *Chohan Ram* (S. 66 has no applicability to leases of mortgaged property.)

Note 2

Add in the Foot Note indicated :

1. 1950 Bom 71 (AIR V 37, C 20, P 4), *Mallappa Rachappa Shetgan* v. *Shicappa Tammanna Hadnur.*

Note 4

Add after Pt. 5 :

[Pt. 5a] It is for the lessee, if he wants to resist the claim of the mortgagee, to establish that the lease in his favour was granted on the usual terms in the ordinary course of management. If he fails to raise that plea and establish it he can have no defence to an action by the mortgagee for a declaration that the lease is not binding on him. *1952 S C 401 (A I R V 39 P 13) : 1953 S C R 108 : 31 Pat 1020 (S C), Kamakshaya Narayan Singh* v. *Chohan Ram.* (Case of grant of permanent lease.)

Add after Pt 6 :

[Pt. 6a] The Supreme Court has, however, recently held that considerations germane to S. 66 have nothing to do with the question of the binding nature of a lease granted by the mortgagor and that the only consideration relevant in such cases would be whether, the mortgagor in possession having the authority to deal with the property in the usual course of management, the lease granted by him can rightly be deemed operative against the mortgagee. *1952 S C 401 (AIR V 39 P 10, 11) : 1953 S C R 108 : 31 Pat 1920 (S C), Kamakshaya Narayan Singh* v. *Chohan Ram.* (Permanent lease of land—Lessee not pleading that it was a dealing in the usual course of management by mortgagor—In absence of plea mortgagee held not bound.)

Add after Pt. 7 :

[Pt. 8] An executor's powers in the course of management of the estate of the deceased cannot be restricted by reference

to the meaning of the word "management" in this section or S. 76 (a). *('50) 1950 Bur L R (HC) (163) (177), Esoof Golam Mohamed Piperdi* v. *Ariff Mohamed Bham.* (He can sell testator's property in accordance with an agreement to sell entered into by the testator himself.)

Note 7

Add in the Foot Notes indicated :

1. *See also* 1955 N U C (All) 1691 (A I R V 42), *Devi Chand* v. *L. Har Kishan Das.* (By reason of having executed a simple mortgage a mortgagor's right to grant lease of his property does not come to an end.)

5. *See also* ('55) 1955-1 Mad L Jour 322 (334) (DB), *Abdul Rahim* v. *Swaminatha Odayar.* (Even if the lease for seven years offended the provisions of S. 65-A of the T. P. Act, the lessees would be tenants from year to year for they were inducted into possession by the then landholder, as his tenants and they continued to be in possession on the date when the Third Amendment Act (18 of 1936) came into force.)

Add at the end of the Note :

[Pt. 7] Though the lease may not be binding on the mortgagee, as between the lessor and the lessee, the lessee is not entitled to say that the lessor had no power to grant the lease on the ground that he had not obtained the consent of the mortgagee in granting the lease as provided in the mortgage. *1955 N U C (All) 1691 (A I R V 42), Devi Chand* v. *L. Har Kishan Das.*

SECTION 66

Note 1

Add before Pt. 1 :

[Pt. 1a] The section is a statutory enactment of the powers of the mortgagor in possession in regard to waste of mortgaged property. *1952 S C 401 (A I R V 39 P 10) : 1953 S C R 108 : 31 Pat 1020 (S C), Kamakshaya Narayan Singh* v. *Chohan Ram.*

Add after Pt. 4 :

[Pt. 5] Section 66 has nothing to do with the mortgagor's power to lease the mortgaged property. *1952 S C 401 (AIR V 39 P 10) ; 1953 S C R 108 : 31 Pat 1020 (S C), Kamakshaya Narayan Singh* v. *Chohan Ram.*

Note 3

Add after Pt. 1 :

[Pt. 1a] The mortgagor in possession is not liable for what in terms of the English Law of Real Property is known as permissive waste, that is for omission to repair or to prevent natural deterioration. He is, however, liable for destructive waste, that is, acts which are destructive or permanently injurious to the mortgaged property if the security was insufficient or would be rendered insufficient by such acts. *1952 S C 401 (A I R V 39 P 10) : 1953 S C R 108 : 31 Pat 1020 (S C), Kamakshaya Narayan Singh* v. *Chohan Ram.* (This section, therefore, has no application to the grant of a lease by the mortgagor in possession.)

SECTION 67

Note 3

Add in the Foot Note indicated :

1. 1953 Mad 32 (AIR V 40 C 14 P 22), *Ammenumma* v. *Chelampiriyarath.* (A mortagagee has a right under S. 67 of the T. P. Act to file a suit for sale subject only to the conditions prescribed therein and of course subject to the law of limitation and such a suit is not barred under S. 11, Civil P. C., by reason of a decree for sale passed on the same mortgage in a prior suit and under S. 100 of the T. P. Act the same principle applies to a second suit for sale to enforce a charge.)

Note 5

Add in the Foot Notes indicated :

3. 1955 Cal 194 (Pr 22) ((S) A I R V 42 C 51) (DB) *Durga Prosad* v. *Mario Galstaun,* (Where, therefore, the mortgagor can pay the money whenever it is convenient to him to do so, then he can pay even before a demand is made and hence it cannot be said that the mortgage money would become due only when a demand is made.)

4. ('51) 29 Mys L Jour 51 (53) (D B), *Kasi Radhakrishna* v. *Subbarama Sastry.*

5. 1955 Cal 194 (Pr 23) ((S) A I R V 42 C 51) (DB). *Durga Prasad* v. *Mario Galstaun.*

Note 10

Add in the Foot Note indicated :

1. 1951 Nag 171 (A I R V 38 C 34 P 21) : I L R (1950) Nag 618, *Balkrishna* v. *Rangnath.*

Note 13

Add after Pt. 2 :

[Pt. 2a] But where a simple mortgage without possession expressly stipulates that the mortgagee is entitled to foreclose the property on default in payment of the mortgage money a suit for foreclosure is maintainable. *1953 Hyd 137 (A I R V 40 C 59 P 2) : I L R (1951) Hyd 91 (93), Baji Rao* v. *Ganaji.*

Note 14

Add in the Foot Note indicated :

2. 1950 Nag 83 (A I R V 37 C 26 P 15) : I L R (1950 Nag 321 (DB), *Kuwarlal Amritlal* v. *Rekhlal Koduram.*

Note 15

Add in the Foot Notes indicated :

3. 1952 Mad 856 (A I R V 39 P 8), *Subbaraya Sarma* v. *Subramanyam.* (If under the mortgage deed the mortgagor expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee the trans-

action is a usufructuary mortgage notwithstanding that actual possession has not been delivered and the mortgagee cannot institute a suit for sale.)

6. 1954 Mys 177 (Pr 5) (A I R V 41 C 74) (DB). *Hutchappa* v. *Mallappa*, ✠ 1952 Mys 125 (AIR V 39 P 6) : I L R (1953) Mys 1, *Ramachandra Rao* v. *Sarvajana Vardhini Co. Ltd.*

Note 18

Add in the Foot Note indicated :

1. 1953 Mad 13 (A I R 40 C 5, P 7, 8) : I L R (1952) Mad 993 (DB), *Ramakkamal* v. *Subbarathnam Iyer.* (Mortgagee to enjoy property in lieu of interest — Personal covenant to pay —Possession not given to mortgagee – Mortgage held anomalous and hence mortgagee held entitled to decree for sale—Even otherwise the existence of personal covenant gave mortgagee right to sue for sale.) ✠ 1952 Mad 856 (A I R V 39, P 10, 11), *Subbaraya Sarma* v. *Subramanyam.* (Mortgage deed was held a combination of a simple mortgage and usufructuary mortgage because of the personal covenant contained therein and that because of that personal covenant a decree for sale could be made under S. 67.)

Note 19

Add in the Foot Notes indicated :

3. 1953 All 147 (A I R V 40 C 65 P 3) (DB), *Shamsher Bahadur* v. *Lal Batuk.*

5. 1955 N U C (Madh B) 1309 (A I R V 42). *Shri Govind* v. *Chiranjilal.* (The offer made by the puisne mortgagee to redeem the property or an agreement to purchase the decree of the prior mortgagee held did not extinguish his right to redeem the prior mortgage.)

Note 20

Add in the Foot Note indicated :

2. But see 1954 Mad 266 (A I R V 41 C 110 P 1), *Bogi Arijisah* v. *Kanniappa Mudaliar.* (In a contest between an auction purchaser in execution of decree on prior mortgage to which subsequent mortgagee was not a party and an auction purchaser in execution of decree on subsequent mortgage to which prior mortgagee is not made a party first purchaser is entitled to retain possession—1953 Mad 583 (A I R V 20) (FB), *Rel. on.*)

Note 21

Add in the Foot Note indicated :

4. 1953 All 295 (A I R V 40 C 130 P 13) : I L R (1951) 1 All 515 (D B), *Radha Krishna* v. *Parshottam Das.*

Add after Pt. 4 :

[Pt. 4a] So also it is open to a sub-mortgagee in an action to enforce his mortgage to obtain a decree foreclosing the right of not merely his mortgagor but also of the main mortgagor to redeem and a final decree passed in such an action would operate to extinguish the right of redemption. *1954 Mad 650 (Pr 3) (AIR V 41 C 226): ILR (1954) Mad 654 (DB), Karuppannan Servai* v. *Daivasigamania Pillai.* (Decree made it clear that original mortgagor was only a *pro forma* party to the action by the sub-mortgagee. Decree mentioned the amount due to the sub-mortgagee from his mortgagor and directed that in default of payment the "hypothecated property" should be sold and that any balance remaining after payment of the amount due to the plaintiff should be paid to the mortgagee. No adjudication of the rights of parties under the original mortgage. Amount due by the original mortgagor to the mortgagee not declared and no provision for any payment of surplus sale proceeds to him. Period fixed for redemption not expired. *Held* that decree could not be read as declaring the right of redemption in respect of original mortgage.)

Add after Pt. 5 :

[Pt. 5a] Where however the original mortgagor sells away the property and has no interest at all on the date of sub-mortgagee's suit for sale of property, he is not a necessary party to the suit, *1953 All 296 (A I R V 40 C 130 P 10): I L R (1951) 1 All 515 (D B), Radha Krishna* v. *Parshottam Das.* (Mortgagor selling property to prior mortgagee — Consideration consisting of amounts due on his mortgage and subsequent mortgage — Amount of subsequent mortgage kept with vendee-mortgagee for payment to subsequent mortgagee—Suit by sub-mortgagee of subsequent mortgagee for enforcement of his mortgage for sale of property—Original mortgagor owner is not necessary party.)

Note 27

Add in the Foot Notes indicated .

3. 1955 Trav-Co 17 (Prs 1, 2) (A I R V 42 C 9), *Mathew Alexander* v. *Chanda Pillai.*

4. 1951 Pepsu 18 (A I R V 38 C 4 P 5) 3 Pepsu L R 373 (DB), *Mt. Devki Devi* v. *Devi Dass.* ✠ 1950 All 598 (A I R V 37 C 234 P 25) (F B), *Rameshwar Bux Singh* v. *Ganga Bux Singh.*

6. 1950 All 598 (A I R V 37 C 234 P 25) : I L R (1951 2 All 475 (F B), *Rameshwar Bux Singh* v. *Ganga Bux Singh.*

Add after Pt. 29

[Pt. 30] But where the severance of interest between the mortgagees has been effected without the consent, expressed or implied, of the mortgagor and the severance is not binding on the mortgagor it has been held that the remedy of one of the mortagees is to sue for the whole of the mortgage amount with the consent of the co-mortgagee, and if such consent cannot be obtained, his remedy is to add in that suit the co-mortgagee as a defen-

dant and to seek for the proper mortgage decree which would provide for all the accounts and payments. *1955 Trav.Co 17 (Prs 1, 2) (A I R V 42 C 9), Mathew Alexander* v. *Chanda Pillai.*

Note 28

Add in the Foot Notes indicated :

2. 1954 Mad 540 (A I R V 41 C 202 P 2). *Daggireddi Venkataranga Reddi* v. *Nandiraju Velugotiah.*

3. 1951 Trav-Co 101 (A I R V 38 C 37 P 3, 4) : 1950 Trav-Co L R 683 (D B), *Eapen Cherian* v. *Manacheekhan.* (Purchase by hypothecatee of all items of property—Purchase in respect of some items if it proves infructuous breaks the integrity of mortgage — Charge over the items the purchase of which has become infructuous continues and can be enforced against them.)

SECTION 67-A

Note 1

Add in the Foot Note indicated :

10. 1953 Ajmer 51 (2) (A I R V 40 C 54 P 3), *Prabhulal Shri Ram* v. *Sm. Godawari.* (Suit on mortgage — Objection to suit on ground that it being on only one of two mortgages held by plaintiff was not maintainable — *Held*, that amendment of plaint was rightly allowed.)

Add after Pt. 12 :

[Pt. 13] The section does not contemplate the combination in the same suit of a claim relating to a prior charge which is not created by any mortgage and a claim on the basis of a mortgage *1952 I D A 17191 (All) (D B), Purshottam Das* v. *Batey Krishna.*

Add after Pt. 13 :

[Pt. 14] The bar of suit under the section must be pleaded. In the absence of such plea, the Court cannot go into the question. *1946 52 I D 40165 (Nag), Mt. Mainabai* v. *Skt. Jalal.* (Suit by assignee of mortgage — Defendent not raising plea that assignee was benamidar of assignor who had another mortgage in his favour but merely pleading that assignee had no right to see the assignment having been made, without consideration — *Held* that the Court could not go into the question of benami and hold that suit was barred by S. 67-A on the ground that the assignor had another mortgage in his favour the claim on which was not included in the suit.)

Note 6

Put Pt. (1a) at the end of the sentence: "All the mortgages . . . . to enforce all the mortgages " and add the following case in the foot note :

1a. 1954 Madh B 156 (Pr 5) (A I R V 41 C 78), *Laxmi Kumar* v. *Krishnaram Baldev Bank.* (The provisions of this section do not amend S. 16, C. P. Code.)

SECTION 68

Note 1

Add in the Foot Note indicated :

5. 1950 Madh B 72 (A I R V 37 C 33 P 37), *Gopiram Kashiram* v. *Shankar Rao.* (Mortgage with possession—Mortgagee leasing back property to mortgagor for an indefinite period—Sale of property by mortgagor to third person and delivery of property to such person — Mortgagee's suit for ejection of transferee as trespasser and mesne profits is not maintainable—Court dismissing the suit but entitling mortgagee to receive mortgage money — Decree held improper as no decree for mortgage money could be passed as he had not sued for it.)

Add after Pt. 4 :

[Pt. 4a] An executory contract can discharge validly a mortgage debt, and after such discharge of the debt it would not be open to the mortgagee to sue for the debt irrespective of whether the contract is subsequently carried out or not. *1946-52 I D 40164 (Nag) (DB), Hiralal* v. *Dattatraya.* (Agreement to sell part of property in consideration of mortgaged property being released.)

Add after Pt. 5 :

[Pt. 6] This section does not take away the right of the mortgagee to claim damages for the breach of an implied contract under S. 65, when he is deprived of a part of the mortgage security. *1949 Pat 487 (A I R V 36 C 146 P 8) : 28 Pat 359 (DB), Mt. Parbati Kuer* v. *Durga Prasad Missir.* (Such a suit is one under S. 73, Contract Act and not under this section.)

Add after Pt. 6 :

[Pt. 7] Mortgagee's right to recover the mortgage money by sale of the hypothecated property cannot in any way be affected by a mere decree obtained by a stranger against the hypothecator declaring that he is not the owner of the property. The stranger does not, by such a decree, acquire the rights of the hypothecator. *1953 Mys 111 (A I R V 40 C 53 P 6) : I L R (1953) Mys 98, Doddarangappa* v. *Kenchagowda.* (1935 All 351 (A I R V 22), Mt. Katori v. Om Prakash, Rel. on.)

Note 2

Add in the Foot Note indicated :

2. 1953 Cal 208 (A I R V 40 C 71 P 7), *Nityananda Ghose* v. *Rajpur Chaya Bani Cinema Ltd.* (In an equitable mortgage, the mortgagee has a right to sue for the mortgage-money within the meaning of S. 68 (1) (a) and further under such an equitable mortgage the mortgagor binds himself to repay the mortgage-money within the meaning of S. 68 (1) (a).)

Add after Pt. 14 :

[Pt. 14a] The mere fact that the mortgagee acquires the mortgaged property would not debar him from recovering his debt under the personal covenant in the mortgage deed unless the acquisition has the effect of extinguishing his debt. *1949 Nag 354 (A I R V 36 C 140 P 24, 25) : I L R (1949) Nag 284 (DB), Ramgopal Raghunathdas* v. *Ramchandra Krishnarao.* (Acquisition by simple mortgagee of mortgaged property by succession to auction-purchaser of property under maintenance decree against mortgagor—Mortgage debt is not extinguished—S. 60 has no bearing on question.)

Note 3

Add after Pt. 12 as a separate para :

[Pt. 12a] (5) Where one co-sharer mortgages the entire property and the other co-sharers obtain a decree declaring that the mortgage is not binding on their shares. *1954 All 314 (A I R V 41 C 148 P 4), Gulab Singh* v. *Hiralal.*

Note 4

Add after Pt. 18 :

[Pt. 18a] In the under-mentioned case it has been held that the mortgagee in such a case can repudiate the contract of mortgage and relinquish possession of the part still in his possession and sue for the entire mortgage money and obtain a simple money decree or hold to the contract and sue the mortgagor for the breach of contract measuring the damages suffered by him, having regard to the value of the property from which he has been dispossessed. *1949 Pat 487 (A I R V 36 C 146 P 8) : 28 Pat 359 (DB), Mt. Parbati Kuer* v. *Durga Prasad Missir.* (*Held* that the suit for damages is not one under this section but under S. 73, Contract Act.)

Note 5

Add in the Foot Notes indicated :

4. 1949 Pat 487 (A I R V 36 C 146 P 8) : 28 Pat 359 (DB), *Mt. Parbati Kuer* v. *Durga Prasad Missir.* (Mortgagee dispossessed of part of security can repudiate contract, relinquish possession of the other part, sue for whole mortgage-money and obtain money decree.)

7. 1953 Hyd 231 (A I R V 40 C 111 P 4) : I L R (1953) Hyd 331 (DB), *Ranba* v. *Bansilal.*

9. 1953 Hyd 231 (A I R V 40 C 111 P 4) : I L R (1953) Hyd 331 (DB), *Ranba* v. *Bansilal.* [*See also* 1954 Hyd 41 (A I R V 41 C 15 P 7) : I L R (1953) Eyd 642 (DB), *Venka Appa* v. *Jagannath.* (Anomalous mortgage providing for foreclosure on default of payment of mortgage-money—Foreclosure not possible — *Held* mortgagee could only claim mortgage money by way of compensation for breach of contract.)]

10. 1955 N U C (Pat) 231 (A I R V 42), *Anjani Kumar* v. *Mt. Sanjoga Kuer.* (In a suit brought before the expiry of the term of the mortgage the mortgagee is entitled to obtain a decree for possession and the decree cannot be refused on the ground that the mortgagor was not in possession on the date of the execution of the mortgage.) ✠ 1953 Hyd 231 (A I R V 40 C 111 P 4) : I L R (1953) Hyd 331 (DB), *Ranba* v. *Bansilal.* (Mortgagee granting lease to mortgagor—Possession not delivered back to mortgagee after expiry of lease—Mortgagee can sue for possession on basis of lease deed.)

25. 1950 Pat 34 (A I R V 37 C 13 P 2, 3) (DB), *Surju Mahton* v. *Parbhu Chand Sao.* (Subsequent simple mortgagee dispossessing prior usufructuary mortgagee in execution of his decree to which latter was not party—Latter can bring suit against former for possession and is not confined to suing for mortgage-money.)

Add after Pt. 3 :

[Pt. 3a] The right of mortgagee to possession besides being one to which he is entitled under the terms of the mortgage must also be one which is in accordance with law. *1952 Kutch 18 (A I R V 39 C 12 P 5), Kanaiyalal Pranjivan* v. *Dharji Gokalji.* (Mortgagee of undivided share of co-parcenary property is not entitled under Hindu law to joint possession and cannot recover mortgage money under S. 68 (1) (d).)

Delete the first case i. e. ('47) 34 A I R 1947 Bom 152 from Note 5 F. N. 7.

Add after Pt. 10 :

[Pt. 10a] It has been held in the under-mentioned case that where the mortgagor fails to deliver possession and the mortgage deed also specifically provides a personal covenant to pay, the mortgagee may either exercise his option under S. 68 (1) (d) or may act under the terms of the personal covenant itself. If the option is exercised by him under S. 68 (1) (d), the mortgage amount becomes due and the mortgagor will have to submit to a decree for the payment of the said amount. If the option under S. 68 (1) is not exercised by the mortgagee, the amount cannot be said to be due and the mortgagor will have to wait for the expiration of the stipulated period before he can redeem the property. *1954 Bom 407 (Pr 5) (A I R V 41 C 111) : I L R (1954) Bom 717 (DB), Sidramaya* v. *Danava.* (1947 Bom 152 (A I R V 34 C 47), Dnyanoba Gangaram v. Dattoba Balappa, Overruled.)

Add after Pt. 16 :

[Pt. 16a] Where *A*, *B* and *C* executed a zaripesgi mortgage in favour of *D* and

later on *D* granted a lease in favour of *A* and *B* only and *A* and *B* remained in possession after the expiry of the lease it was held that this section did not apply as there was no dispossession by *C* even though possession of *A* and *B* would amount to a dispossession of *D*. *1954 Pat 304 (Pr 5) (A I R V 41 C 106), Jainarain Choudhary* v. *Biseswar Prasad.*

Add after Pt. 25 :

[Pt. 26] He may also, where he has been deprived of a part of the mortgage security, sue for a part of the mortgage money, proportionate to the value of the property of which be has been deprived of, as damages for the breach of the implied contract under S. 65. *1949 Pat 487 (AIR V 36 C 146 P 8) : 28 Pat 359 (DB), Mt. Parbati Kuer* v. *Durga Prasad Missir.* (Such a suit is one under S. 73, Contract Act.)

Note 8

Add in the Foot Note indicated :

9. *See also* 1954 All 348 (A I R V 41 C 155 P 6), *Mst. Sudama Devi* v. *Ramkrishna Lal.* (Sale of equity of redemption — Money kept with vendee for payment to mortgagor — No obligation between mortgagee and purchaser is created—Purchaser is merely an agent — Fresh suit against purchaser by mortgagee for mortgage-money not maintainable.)

Note 12

Add in the Foot Note indicated :

3. *See also* 1952 Mys 125 (A I R V 39 P 4, 6) : ILR 19 3) Mys 1, *Ramachandra Rao* v *Sarvajana Vardhini Co. Ltd.* (Usufructuary mortgagee with personal covenant to pay after stipulated period — Transaction is composite mortgage styled as "simple mortgage usufructuary" — Money becomes payable under this section after expiry of stipulated period.)

Add after Pt. 2 :

[Pt. 2a] The Madras High Court in a recent case, however, has taken the former view and held that the section applied to the case of an anomalous mortgage. *1953 Mad 13 (A I R V 40 C 5 P 7) : I L R (1952) Mad 993 (DB), Ramakkamal* v. *Subbarathnam Iyer.*

Note 14

Add in the Foot Note indicated :

7. 1954 Sau 93 (Pr 3) (A I R V 41 C 41), *Mochi Mulji Valji* v. *Acharya Dolatram.* (Where a mortgage-deed contains two distinct agreements, one for the payment of the half yearly interest in advance to be recovered personally from the mortgagor and the other for the payment of the principal together with the unpaid interest and any other sum due under the mortgage, the cause of action for recovering the half yearly interest in advance is not the same as the one for recovering the principal. In such a case, therefore, O. 2, R. 2 does not apply.)

Add in Pt. (6) :

After the words 'barred by limitation' in Pt. (6) add the words "or under O. 2, R. 2, Civil P. C." and include the following case in Foot Note 6. *1954 Sau 93 (Pr 3) (AIR V 41 C 41), Mochi Mulji Valji* v. *Acharya Dolatram.*

Note 16

Add after Pt. 4 :

[Pt 5] In a recent decision, it has been held by the Full Bench of the Allahabad High Court that where under the mortgage deed the mortgagor has undertaken a personal responsibility to repay the loan only if the mortgaged property was found insufficient for the purpose and this provision has been interpreted by the decree in the mortgage suit to indicate that the property should be found *on a sale taking place* to be insufficient, the mortgagee is not entitled to a personal decree where no sale has taken place at all. Further, S. 68 (2) makes clear that the remedy granted by this section is by way of suit. *1951 All 195 (AIR V 38 C 21 P 29, 30) (FB), Sukra* v. *Ram Harakh.* (1928 All 71 (A I R V 15) (DB), Sahu Bisheshar Nath v. Chandu Lal, Overruled.)

Note 17

Add in the Foot Note indicated :

11. 1954 Mys 177 (Pr 5) (A I R V 41 C 74) (DB). *Hutchappa* v. *Mallappa.*

Note 18

Add after Pt. 2 :

[Pt. 2a] If the mortgagor chooses to create a personal liability by independent transaction like a promissory note, a cheque or other independent engagement completely dissociated from the mortgage, then he does not come within the scope of S 68 (1) (a) nor within the principle that security should be called up first before personal liability is enforced. In such a case the suit to enforce that personal liability is not one by the mortgagee for mortgage-money and such a suit cannot be stayed under S. 68 (2) *1953 Cal 208 (AIR V 40 C 71 P 8, 9, 11, 12), Nityananda Ghose* v. *Rajpur Chaya Bani Cinema Ltd.* (The right which belongs to the mortgagee is in his capacity as a mortgagee only and not in a totally different capacity)

Add after Pt 4 :

[Pt 5] A mortgagor who wishes to avail of the benefit of sub-s. (2) can only do so on the tacit assumption that there is a

valid mortgage. He cannot deny the mortgage and at the same time invoke to apply the discretionary relief under S. 68 (2). *1953 Cal 208 (A I R V 40 C 71 P 15), Nityananda Ghose* v. *Rajpur Chaya Bani Cinema Ltd.*

SECTION 69

In Section 69, in sub-s. (1), the words "notwithstanding anything contained in the Trustees' and Mortgagees' Powers Act, 1866," shall be omitted.

—*Omitted* by the Repealing and Amending Act, XLVIII of 1952 (S. 3 and Second Schedule.) [2-8-1952]

In the same sub-section,

in clauses (a) and (c) for the words 'Provincial' the word 'State' and in clause (b), for the word 'Crown' the word 'Government,' shall be substituted.

Substituted by A. L. O., 1950.

Note 3

Add after Pt. 7 :

[Pt. 8] There must be some substantive legislation which takes away the right of sale given to the mortgagee by the mortgage deed. Once a suit is filed by a mortgagor who is an agriculturist under S. 15D of the Dekkhan Agriculturists' Relief Act, the mortgagee cannot exercise his power of sale given under the mortgage deed so long as the suit remains pending. But once the decree is passed declaring an amount and the mortgagor has not exercised his option of redemption and the mortgagee has not exercised his option to ask for decree for sale, then the mortgagee cannot be prevented from exercising his right of sale under the mortgage deed. *1950 Bom 49 (AIR V 37 C 15 P 5) (DB), Govindram Bros. Ltd.* v. *Official Assignee Bombay.*

[Pt. 9] Under a mortgage deed it was provided that the mortgagees shall have the power to realise the amounts due under the mortgage by selling the property which was situated within the limits of the city of Madras in public auction or by private treaty under the provisions of S. 69 of the Transfer of Property Act. Default having occurred in the payment of the mortgage amount, the mortgagees sought to bring the property to sale in pursuance of the power granted as aforesaid. The mortgagor applied for the issue of a writ of mandamus to the mortgagees to stop the sale on the ground that while simple mortgagees of properties situated outside the City of Madras could enforce the mortgage only by instituting a suit thereon, the mortgagees of properties in the City of Madras were empowered by S. 69 of the Transfer of Property Act to realise the amounts due to them without the intervention of Court and that was a discrimination against mortgagors within the City of Madras and therefore repugnant to Art. 14 of the Constitution. It was held that the writ was not taken out against the State in which alone Art. 14 casts a duty and as what the mortgagees, who were citizens of the Union of India like the mortgagors, proposed to do was to enforce the contract entered into by them with the mortgagors, Art. 14 could obviously have no application. As the mortgagees were seeking merely to enforce private rights a writ of mandamus would not lie. *1955 N U C (Mad) 1828 (A I R V 42). T. S. Ramaswamy Iyer* v. *Gangadhar Bhatt.*

[Pt. 10] This section does not offend Art. 14 of the Constitution. *1955 Mad 135 (Pr 24) ((S) A I R V 42 C 33), Narasimhachariar* v. *Egmore Benefit Socity, 3rd Branch Ltd.*

[Pt. 11] The power of the mortgagee to sell under S. 69, does not in any way interfere with the freedom of the mortgagor to acquire property or dispose of property or hold property. On the other hand, this is a case of the mortgagor under the freedom guaranteed under Art. 14 of the Constitution holding property and subject to a freely negotiated contract by him, acquiring funds thereon providing for the disposal of the pr perty in the event of his not being able to discharge the mortgage in the manner agreed to by him Therefore, S. 69, does not offend Art. 19 (1) (f) of the Constitution. *1955 Mad 135 (Pr 25) ((S) AIR V 42 C 33). Narasimhachariar* v. *Egmore Benefit Society. 3rd Branch Ltd.*

Note 18

Add after the first sentence :

[Pt. 1a] Thus, it has been held that a mortgagee's sale in exercise of the power reserved in that behalf in the mortgage is not liable to be impeached on account of want of publicity or want of notice as required by law. *1955 Mad 331 (Pr 12) ((S) A I R V 42 C 90) (DB), Ranganathan* v. *Govt. of Madras.*

Add at the end as a separate para :

[Pt. 4] A sale by a mortgagee or receiver for debenture holders effected in pursuance of the power vested in him in that behalf by the mortgage deed or the debenture trust deed as the case may be without the sanction of the Court cannot be avoided as falling under either S. 171 or 232 of the Companies Act. A secured creditor realising his security without seeking the assistance of the Court is, thus, outside the winding up and no leave of Court is needed when a receiver appointed by a mortgagee exercises his power of sale under S. 69 (3), T. P. Act. If there is no allegation of want of '*bona fides*' or recklessness or fraud against the receiver in exercising such a power, the sale held by the receiver is valid and effectual to convey title to the purchaser and such a sale cannot be avoided on the ground either of want of due notice given by the receiver before effecting the sale or on the ground of undervalue. *1955 Mad 331 (Pr 17, 18) ((S) AIR V 42 C 90)(DB), Ranganathan* v. *Govt. of Madras.*

Note 23

Add in the Foot Note indicated :

5. 1955 Mad 331 (Pr 12) ((S) A I R V 42 C 90) (DB), *Ranganathan* v. *Govt. of Madras.* (A mortgagee's sale in exercise of the power reserved in that behalf in the mortgage is not liable to be impeached on account of want of publicity or want of notice as required either by the instrument of mortgage or by the law.)

SECTION 69-A

Note 5

Add at the end of third paragraph after the words "the removal of the receiver" :

[Pt. 2] The provisions of S. 69-A (2) would cover a case in which it is alleged by the mortgagor that there is no debt outstanding and therefore there should be no receiver. A mortgagor can make an application for the discharge of receiver on the ground that the debt due under the mortgage had been wiped out on an application of the provisions of S. 13-A of the Madras Agriculturists' Relief Act. *1954 Mad 896 (Pr. 6) (A I R V 41 C 308) : I L R (1954) Mad 1231 (DB), V. Venkatanarayana Rao* v. *Champalal Saransukha.*

SECTION 70

Note 2

Add in the Foot Note indicated :

4b. 1946-52 I D 40193 (Nag), *Visheshwar* v. *Anant.* (Mortgage of plot and structure — Subsequently pipe connection taken — Suit by mortgagee for possession of property — Pipe connection is accession to property and mortgagee entitled to it.)

SECTION 72

Note 2

Add after Pt. 7 as last but one para :

[Pt. 7a] The proviso to S. 72 which was introduced by the Amendment Act of 1929 is not retrospective in operation. A mortgagee who had paid prior to 1929 the municipal taxes on the property which the mortgagor was bound to pay under the contract, is entitled to add that amount to the principal under S. 72 even if he had given no notice to the mortgagor as required by the proviso. *1953 Mad 720 (A I R V 40 C 277 P 3) : I L R (1953) Mad 1200 (DB), Narayanaswami Goundar* v. *Perumal Chettiar.*

Note 3

Add in the Foot Notes indicated :

1. 1955 Pepsu 87 (Pr 10) ((S) A I R V 42 C 20) (DB), *Charan Dass* v *Shadiram* ✣ 1950 Mad 333 (A I R V 37 C 149 P 4, 9), *Vasudavayya* v. *Bhagirathi Bai.* (Mortgagee paying up charge decree to prevent sale. The words "add such money to the principal" in S. 72, T. P. Act, do not exclude the personal right of suit of the mortgagee under S. 69, Contract Act.)

6. 1955 Pepsu 87 (Pr 10) ((S) A I R V 42 C 20) (DB), *Charan Dass* v. *Shadiram.*

9. 1951 Mad 187 (A I R V 38 C 18 P 5) : I L R (1952) Mad 92 (FB), *Parvathi P.* v. *N. Makkam Amma.* (A kanomdar is entitled to be paid the value of improvements effected by him unfettered by the restrictions imposed by S. 72, T. P. Act, and has a right to remain in possession for the period of 12 years and even thereafter, until he is paid the kanom amount together with the value of improvements.)✣1949 P C 68 (A I R V 36 C 26 P 4) : 75 Ind App 160: ILR (1948) All 343 (P C), *Ratti Ram* v. *Motilal.* (Prior mortgage and lease of factory and premises by *A* to *B* — Subsequent decree for debt by *C* against *A* — *C* attaching factory and removing and selling part of roofing — *C* held, was liable in damages to *B* for his wrongful action — Damages to be measured by loss of value of mortgaged premises caused by *C's* wrongful action.)

10. *See also* 1953 Nag 259 (A I R V 40 C 109 P 4) : ILR (1952) Nag 366 (370) (DB), *Munnabi* v *Mohanlal.* (Right of mortgagee not in possession to pay land revenue cannot be converted to obligation.)

Add after Pt. 1 :

[Pt. 1a] The proviso, however, is not retrospective in operation. Hence a mortgagee who has paid prior to 1929 the municipal taxes on the property which the mortgagor was bound to pay under the contract, is entitled to add that amount to the principal under S. 72 even if he had not given notice to the mortgagor as required by the proviso. *1953 Mad 720*

(A I R V 40 C 277 P 3) : I L R (1953) Mad 1200 (DB), Narayanaswami Gounder v. *Perumal Chettiar.*

Add after Pt. 13 :

[Pt. 13a] After a mortgage is made the property is comprised of two parcels, the equity of redemption and the mortgagee rights. If a person puts to sale the equity of redemption in execution of a simple money decree, the rights of the mortgagee under the mortgage and the mortgage security remain unaffected. Section 72 would not cover the case of the mortgagee paying the money decree amount to save the property from sale in execution of the money-decree. *1954 All 420 (A I R V 41 C 173 P 5), Mohd. Suleman* v. *Maqsood Hussain.*

Note 4

Add after Pt. 5 :

[Pt. 6] Where the mortgagee obtains a decree for costs of the suit incurred in defending the title of the mortgaged property but makes no attempt, to recover the same from the other party he is not entitled to debit the mortgagor in his accounts with these costs. *1951 Bom 19 (A I R V 38 C 8 P 6) : I L R (1951) Bom 209 (DB), Nana Sakharam* v. *Dadaji Ramchandra.*

Note 5

Add in the Foot Note indicated :

4a. 1953 Mys 114 (A I R V 40 C 55 P 19) : I L R (1951) Mys 503, *Ramkrishnaiah* v. *Chandrasekhara Rao.* (Right of mortgagee to possession resisted and challenged — Mortgagee filing suit — Suit decreed and mesne profits and costs awarded — Mortgagee can only claim actual costs incurred by him in his suit — He is not entitled to add amount of mesne profits to mortgage debt.)

Add after Pt. 5a :

[Pt. 5aa] The mortgagee is not entitled to the expenses incurred by him in regard to certain criminal proceedings which had taken place between the parties in regard to the mortgaged land as it cannot be said in such a case that they were incurred by him for the purpose of making his own title good against the mortgagor. *1955 Mad 245 (Pr 2) ((S) A I R V 42 C 66) : I L R (1955) Mad 570, Benjamin* v. *Deva Doss.*

Note 11

Add in the Foot Note indicated :

5. 1950 Kutch 90 (A I R V 37 C 70 P 12, 13), *Bhabhanbai* v. *Kanji Raoji.* (Mortgagee in possession but mortgage not usufructuary — Interest on costs of improvement has to be calculated but interest on interest is not to be taken in any form — Cost of improvement first has to be deducted from gross produce and balance only applied to reduction of interest.)

SECTION 73

Note 1

Add in the Foot Note indicated :

6. 1953 All 147 (A I R V 40 C 65 P 4, 5) (DB), *Shamsher Bahadur* v *Lal Baluk.* (Usufructuary mortgage of zamindari rights and sir land — Loss of zamindari rights — Mortgage attaches to exproprietary tenancy — But when the exproprietary tenancy is not transferable under the appropriate Rent Act, no valid mortgage can be created by the application of the doctrine of substituted security and the mortgagor zamindar can claim back possession of the property from the mortgagee.)

Add after Pt. 3 :

[Pt. 3a] The doctrine, however, cannot be applied to cases where altogether different and distinct items are allotted. Thus where, notwithstanding the acquisition by the Municipality of a portion of the property and its substitution by a distinct plot as a compensation to the owner, a decree is passed purporting to create a charge over the entire property making no mention of the substituted property and the entire property is proclaimed for sale and purchased in execution by the decree-holder, the sale certificate making no reference to the substituted property, neither S. 73, in terms nor the principle of substituted security is applicable and the decree-holder auction-purchaser is not entitled to claim any title to the substituted property. *1952 Mad 263 (AIR V 39 C 105 (9) P 5), Nallamuthu Pillai* v. *Aravamudhu Iyengar.*

Note 2

Add in the Foot Note indicated :

3. 1951 All 654 (A I R V 38 C 178 P 1, 8, 9, 11), *Naubat Singh* v. *Hira.*

Note 10

Add after Pt. 9 :

[Pt. 9a] Thus if before the final decree is passed mortgaged property is substituted by another security in the form of compensation money it is a case of one mortgaged property being substituted by another security and a final decree directing payment out of this fund may be justified and on an application made on behalf of the plaintiff mortgagee the original Court can award final decree against the substituted security. But where final decree is already passed as against the original property it has been held that the directions pertaining to the mortgaged property can appropriately be read as those pertaining to the substituted security by reason of S. 73 (2), and the Court executing the decree can

secure realization and application of the fund standing as substituted security. The doctrine of substituted security can be applied in execution. *1954 Madh B 181 (Prs 19, 20) (A I R V 41 C 82) (FB). Nabbobai* v. *Hasan Gani.*

SECTION 76

Note 1

Add after Pt. 7 :

[Pt. 8] This section, which relates to the liabilities of a mortgagee in possession, has no application in determining the powers of an executor in the management of the estate of the deceased testator. *('50) 1950 Bur L R (H C) 163 (177) (DB), Esoof Golam Mohamad Piperdi* v. *Ariff Mohamed Bham.* (An executor can, in the course of the management of the estate of the deceased testator, sell any property in the said estate in accordance with an agreement for sale thereof which was entered into by the testator himself.)

Add after Pt. 8 as separate para :

[Pt. 9] Section 12 of U. P. Agriculturists' Relief Act (27 of 1934) has not changed the substantive law in S. 76. *1953 All 472 (AIR V 40 C 223 P 6, 9) : ILR (1954) 1 All 147 (DB), Ram Piari* v. *Ram Adhin.* (Civil Revn. No. 544 of 1945 D/- 1-10-1948 (All), Bhagwati Misir v. Ram Ugrah Misir, Overruled.)

Note 4

Add after Pt. 5 :

[Pt. 6] The section will not apply where the mortgage is deemed to be extinguished by operation of law. Once the Court is required to assume notionally that the mortgage is extinguished, possession after the date of such notional extinguishment of the mortgagee would not be possession during the continuance of the mortgage so as to attract the application of clauses (g) and (h) of S. 76. *1955 NUC (Orissa) 954 (A I R V 42), Banamali Mahapatra* v. *Chiricuri Venkayamma.*

Note 6

Add in the Foot Notes indicated :

1. 1952 S C 205 (AIR V 39 P 6) : 1952 S C R 775 (SC), *Mahabir Gope* v. *Harbans Narain Singh.*

6. 1954 All 16 (A I R V 41 C 13 P 6, 8) (DB), *Hardei* v. *Wahid Khan.* (A mortgagee in possession of shop has a right to let out shop and room appertaining thereto on a monthly tenancy and on redemption of mortgage the tenant continues to be a tenant and does not become trespasser)✣ 1953 All 472 (A I R V 40 C 223 P 6, 9) : I L R (1954) 1 All 147 (DB), *Ram Piari* v. *Ram Adhin* (Section 12, U. P. Agriculturists' Relief Act has not changed the substantive law—Mortgagee given full power to let out land—Mortgagee letting out land—In such a case handing over possession upon redemption to mortgagor means such possession as the property is capable of when redemption took place—Civil Revn. No. 544 of 1945, D/- 1-10-1948 (All), *Bhagwati Misir* v. *Ram Ugrah Misir*, Overruled.)

11. 1952 S C 205 (A I R V 39 P 6) : 1952 S C R 775 (SC), *Mahabir Gope* v. *Harbans Narain Singh* ✣ 1950 Pat 246 (AIR V 37 C 61 P 8, 9) : 29 Pat 180 (DB), *Jhalki Prasad Bhagat* v. *Bachulal.* (Mortgagee in possession of bhaoli holding—Commutation of bhaoli into nakdi rent — Amalgamation of the holdings with other lands during continuance of mortgage by him without consent of mortgagor will not be binding on mortgagor after redemption of the mortgage.)

13. 1952 S C 205 (A I R V 39 P 6) : 1952 S C R 775 (SC), *Mahabir Gope* v. *Harbans Narain Singh.*

14. 1952 S C 205 (A I R V 39 P 7) : 1952 S C R 775 (SC), *Mahabir Gope* v. *Harbans Narain Singh.* (But a tenant who has been settled by the mortgagee in possession under a *bona fide* and permissible settlement and in whose favour rights conferred or created by a statute, based on the nature of the land and possession for the requisite period, have sprung up, cannot be ejected by the mortgagor even after redemption. The exception however will not apply where terms of mortgage prohibit the mortgagee either expressly or impliedly from making any settlement of tenants on the land)✣ 1952 Trav Co 395 (A I R V 39 P 2, 4, 5) : I L R (1952) Trav-Co 61 (DB), *Varkey Chacko* v. *Thuppan Narayanan.* (Mortgagor landlord is not bound to recognise lease of the holding granted by his mortgagee beyond the limits of the obligation created by the mortgage transaction itself—His right to recover possession on redemption is not in any way affected by S. 4, Travancore-Cochin Holdings (Stay of Execution Proceedings) Act, 1950.)

Add after Pt. 13 :

[Pt. 13a] It was held in the undermentioned case that S. 111 (c) does not mean that, if in the exercise of due management as a person of ordinary prudence the mortgagee has entered into an agreement of tenancy, on the mere redemption of the mortgage without the mortgagor exercising his option of putting an end to the tenancy the tenancy automatically and *ipso facto* lapses on the date of redemption. *1954 All 16 (A I R V 41 C 13 P 6, 8) (DB); Hardei* v. *Wahidkhan.* (1952 S C 205 (AIR V 39) : 1952 S C R 775 (SC), Mahabir Gope v. Harbans Narain, Rel. on.)

Note 7

Add in the Foot Notes indicated :

5. 1950 Pat 379 (A I R V 37 C 104 P 19) : 29 Pat 545 (DB), *Gajadhar Marwari* v. *Baidyanath Mandal.* (Mortgagee with full right of realising profits should account for what has not been realised due to his wilful default.)

7. 1950 Kutch 77 (A I R V 37 C 61 P 4), *Damji Hemchand* v. *Devshi Anopchand.* (Usufructuary mortgage of property fetching rents —

Property lying vacant for some period — Mortgagee allowed interest during the period —Credit for fair rent should be given to the mortgagor for that period.)

10. *See also* 1952 I D A 17207 (All), *Abdul Sattar* v. *Briji Raj Singh.* (U. P. Agriculturists' Relief Act (27 of 1934) S. 12—Application under for redemption—Mortgagee in possession failing to produce accounts—Mortgagee allowing 25% of gross rental to become unrealisable — Inference of negligence—Court is entitled to take gross rental of mortgaged property into consideration for purpose of accounting.)

15. *See also* ('51) 1951 All L Jour 328 (330), *Ram Hazari* v. *Sheo Amber Singh.* (The words "the net profits with the exercise of ordinary diligence might have been realized" by a mortgagee occurring in S. 9 (1), U. P. Debt Redemption Act, 1940 are inapplicable to a case where non-realisation of the profits is occasioned by the act of the mortgagor himself.)

17. *See also* ('51) 1951 All L Jour 328 (331), *Ram Hazari* v. *Sheo Amber Singh.* (Case decided under S. 9, U. P. Debt Redemption Act. Mortgagor-lessee held could not take advantage of his own default in making payment of rent and say that if mortgagee had enforced his rights and had exercised diligence he might have realised the money, and therefore that he the mortgagor should get credit for it.)

18. 1951 Bom 19 (AIR V 38 C 8 P 6): ILR (1951) Bom 209 (DB). *Nana Sakharam* v. *Dadaji Ramchandra.* (Mortgagee however was held entitled to stipulated rate of interest.)

Note 8

Add in the Foot Notes indicated :

1. 1951 Nag 254 (A I R V 38 C 67 P 7) : I L R (1950) Nag 862, *Jhalliran* v. *Daulat Singh.*

5. *See also* ('51) ILR (1951) Trav-Co 282 (288) (DB), *Matha Panickan* v. *Ouseph.* (The normal rule is that the mortgagee should pay the tax.) ✠ 1953 Mys 114 (AIR V 40 C 55 P 18) : ILR (1951) Mys 503 (DB), *Ramakrishnaiah* v. *Chandrasekhar Rao.* (If the arrears of taxes due on the suit property related to the period prior to mortgagee coming into possession of the property and if he has paid the arrears due to save the property he may claim the re payment of that amount at the time of redemption.) ✠ 1949 All 681 (A I R V 36 C 255 P 7), *Ram Asray* v. *Hira Lal* (Mortgagee in possession — Rent to be set off against principal and interest — Mortgagee paying municipal taxes — Mortgagee is entitled to recover amount so paid from mortgagor.)

13. 1946-52 I D 40227 (Trav-Co) (DB), *Cheruchi* v. *Govinda Menon.* (Mortgage deed providing that out of pattom fixed mortgagee was to appropriate certain sum towards the interest and pay the balance to mortgagor for the payment of the tax due on the mortgage properties—The mortgagee is not liable to pay any enhanced tax.)

17. 1951 Nag 254 (A I R V 38 C 67 P 7) : I L R (1950) Nag 862, *Jhalliran* v. *Daulat Singh.*

18. 1952 Pat 286 (A I R V 39 P 5) : 31 Pat 365 (DB), *Deo Saran Singh* v. *Barhu Singh.* (Mortgage of holding with possession—Deed of mortgage silent as to liability to pay rent to landlord —Mcrtgagee is liable.)

21. 1934 Bom 134 (136) (A I R V 21) (FB). (('05) ILR 29 Bom 391 (DB) *Vithal* v *Shriram.* Overruled.)
And *delete* the following case which is given as [But see ('05) ILR 29 Bom 391 (399)(DB), *Vithal* v. *Shriram.*]

26. 1951 Orissa 300 (AIR V 38 C 74 P 3) : I L R (1949) 1 Cut 121 (DB), *Bira Naik* v. *Mahant Sidhakamal Nayan Ramanuj Das.* (A statutory mortgagee of property such as one under S. 225, Orissa Tenancy Act is under same obligation as a usufructuary mortgagee under S. 76(c) of this Act.)

30. 1954 Trav-Co 53 (AIR V 41 C 21 P 3) : I L R (1953) Trav-Co 825 (D B), *Kochukunju* v. *Sankara Pillai.* (Mortgagee to pay Sirkar tax and michavaram to jenmi—Jenmi's inaction to recover — Claim for michavaram barred — It enures for the benefit of mortgagee and not mortgagor.)

31. 1951 Nag 254 (A I R V 38 C 67 P 8) : I L R (1950) Nag 862, *Jhalliran* v. *Daulat Singh.*
[*See also* 1953 Mys 114 (A I R V 40 C 55 P 18) : I L R (1951) Mys 503 (DB), *Ramakrishnaiah* v. *Chandrasekhara Rao.* (Payment of taxes is duty of mortgagee. He cannot affect right of mortgagor by purchasing property at a sale for such taxes.)]

Add after Pt. 21 as separate para. under same sub-heading "rent" :

[Pt. 21a] Where the mortgage was executed pending the suit filed by the jenmi for enhancing the michavaram, the mortgagor and the mortgagees are both bound by the decree in that suit. If the mortgagees take the mortgage fully knowing that the jenmi's claim for enhancement of the michavaram was pending adjudication, on the principle recognised in S. 76 the mortgagees are bound to pay the enhanced michavaram and cannot claim any compensation from the mortgagor on account of the enhancement of the michavaram during the currency of the mortgage. *1954 Trav-Co 251 (AIR V 41 C 94 P 5) (DB), Govinda Pillai Baswara Pillai* v. *Ahmed Moosa.*

Add after Pt. 31 :

[Pt. 32] So also where the mortgagee allows the property to be sold at rent sale in default of payment of rent and himself purchases the property at the rent sale, the sale does not affect the equity of redemption of the mortgagor-tenant. *1951 Orissa 300 (AIR V 38 C 74 P 4, 11, 17): ILR (1949) 1 Cut 121 (DB), Bira Naik* v. *Mahant Sidhakamal Nayan Ramanuj Das.* (Statutory mortgagee under S. 225, Orissa Tenancy Act.) ✠ *1952 Pat 421 (AIR V 39 P 5) (DB), Deo Saran Singh* v. *Mahanth Mishra.* (Mortgagees, if they have defaulted in payment of rent, cannot take advantage of any such default to

purchase the property in the name of a person who has been established to be a benamidar of the mortgagees.)

Note 10

Add in the Foot Notes indicated :

1. 1952 S C 205 (A I R V 39 P 6) : 1952 S C R 775 (SC), *Mahabir Gope* v. *Harbans Narain Singh.* (Mortgagee cannot during the subsistence of mortgage act in detriment of mortgagor's interest and create leases which may enable the tenant to acquire permanent or occupancy rights in the land.)

7. See however 1951 Trav-Co 109 (A I R V 38 C 40 P 24) : I L R (1951) Trav Co 209 (FB), *Chandi Avira* v. *Thomman Varkey.* (Cutting timber and clearing the ground for purposes of improvement would not constitute waste.)

13. ('49) 1949 Ker L T 130 (134, 135) (DB), *John Francis Carlos* v. *Lekshmikutty Amma.* (Mortgagor is not entitled to ask for piecemeal accounting from mortgagee in possession—Usufructuary mortgagee obtaining decree for possession and arrears of rent against mortgagor to whom property was leased back — Execution of rent decree by sale of equity of redemption—Mortgagor cannot ask in that proceeding for assessment of compensation for waste for satisfaction of the decree would not result in the redemption of the mortgage and to grant him that relief would be to allow him to obtain piecemeal accounting.)

14. 1951 Trav-Co 109 (A I R V 38 C 40 P 24) : ILR (1951) Trav-Co 209 (FB), *Chandi Avira* v. *Thomman Varkey.*

Add after Pt. 9 :

[Pt. 9a] Grant of a lease which enables the tenant to acquire permanent or occupancy right in the land defeats the right of the mortgagor to khas possession and is therefore an act which comes within the prohibition of cl. (e). *1952 S C 205 (AIR V 39 P 6): 1952 S C R 775 (SC), Mahabir Gope* v. *Harbans Narain Singh.*

Add after Pt. 18 :

[Pt. 19] The burden of proving active waste by the mortgagee is on the mortgagor who claims compensation on that ground. *1946-52 I D 40220 (Tra.Co) (DB), E. Angustina Francis* v. *V. Narayanamench.*

Note 12

Add in the Foot Notes indicated :

1. 1953 Pat 27 (AIR V 40 C 8 P 6) (D B), *Satdeo Singh* v. *Kamal Singh.* (The provisions of S. 76 (g) of T. P. Act relating to the mortgages apply to statutory mortgage created by S. 171 (1) (c) of the Bihar Tenancy Act.) ✠ 1952 Pat 155 (AIR V 39 C 55 (6) P 5) (DB), *Ganshul Fatma* v. *Badri Singh.* (Same rule applies to statutory mortgages as for instance one under S. 171, Bihar Tenancy Act.) ✠ 1951 Orissa 300 (A I R V 38 C 74 P 10) : I L R (1949) 1 Cut 121, *Bira Naik* v. *Mahant Sidha Kamal Nayan Ramanuj Das.* (Statutory mortgagee under S. 225 Orissa Tenancy Act.)

3. *See also* 1950 Trav-Co 105 (A I R V 37 C 44 P 3) (DB), *Kerala Varman Thirumulpad* v. *Parmeswaran Othikhan.* (Mortgagee purchaser of property under his mortgage decree — Property under prior charge — Charge-holder in possession of property having purchased the same in execution of the decree upon a puisne mortgage — In suit for redemption of prior charge, charge-holder is bound to account from date of purchase of property by mortgagee under his decree.)

6. 1955 NUC (Raj) 296 (A I R V 42), *Basti Ram* v. *Sewaram.*

8. ('50) 1950 Ker L T 356 (361) (DB), *Kesava Pillai Madhava Pillai* v. *Narayanaru Sankararu.* (Possessory mortgage — Suit for redemption and arrears of michavaram payable to mortgagor under the mortgage — Decree for amount due from date of mortgage to date of suit was proper and michiavaram cannot be limited to period of six years prior to suit.)

Add after Pt. 14 :

[Pt. 14a] It is not necessary that a separate account should be maintained of the mortgage in question. The accounts relating to it contained in the general account books of the mortgagee can be relied upon. *1950 Kutch 90 (A I R V 37 C 70 P 5, 6, 7), Bhabhanbai* v. *Kanji Ravji.* (Observations relating to keeping of account books made.)

Add after Pt. 20 :

[Pt. 21] A person who has taken possession under a void mortgage is not under any liability to account. His duty under law is but to deliver up possession, to the person entitled to be in possession, with mesne profits. *1950 Trav-Co 33 (A I R V 37 C 17 P 7), (DB), Koyakutti* v. *Kunhipathu.*

[Pt. 22] Under S. 3 (b) of the Madras Estates Abolition and Conversion into Ryotwari Act XXVI of 1948, on and from the notified date, the entire estate stands transferred to the Government and vests in them free of all encumbrances. Consequently, where such estate is mortgaged with possession, on and from that date, the mortgagor ceases to be the owner of the property, and has no right whatever to claim the rents and profits from the property as and from the said notified date, though the relationship between the mortgagee and the mortgagor may continue in spite of the notification and the mortgagee in possession may continue to be liable to render an account in accordance with the terms of S. 76, Transfer of Property Act. *1955 Mad 266 (266) (Pr 2) (A I R V 42 C 75), Kalieti Munuswami Setti* v. *Muppirala Jagannadham.*

Note 13

Add in the Foot Note indicated :

1. ('49) 1949 Ker L T 130 (134, 135) (DB), *John Francis Carlos* v. *Lekshmikutty Amma*

Note 15

Add in the Foot Notes indicated :

1. 1951 Pepsu 18 (A I R V 38 C 4 P 6) : 3 Pepsu I L R 373 (DB), *Mt. Devki Devi* v. *L. Devi Dass* ✠ 1950 Pat 379 (A I R V 37 C 104 P 19) : 29 Pat 545 (DB), *Gajadhar Marwari* v. *Baidyanath Mandal.*

3. 1951 Pepsu 18 (A I R V 38 C 4 P 6) : 3 Pepsu I L R 373 (DB), *Mt. Devki Devi* v. *L. Devi Dass.*

7. *See also* 1955 N U C (Raj) 287 (A I R V 42) *Achal Chand* v. *Rekhraj.* ✠ (1951 Raj L W 9 *Premsukh* v *Prithviraj, Foll.*) ✠ ('51) 1951 Raj L W 9 (10) (D B). *Premsukh* v. *Prithvi Raj.* (If the mortgagor, who has taken the property mortgaged on lease from the mortgagee, is proved to have been in possession of the mortgaged property and paid no rent to the mortgagee or interest on principal amount, no presumption can be drawn against the mortgagee for his failure to keep accounts as required by S. 76. In such a case, the mortgagee is entitled to recover the interest as stipulated in the mortgage-deed for the extra period.)

Note 16

Add in the Foot Note indicated :

1a. 1950 Kutch 90 (A I R V 37 C 70 P 1, 11), *Bhabhanbai* v. *Kanji Raoji.* (Mortgagee cannot charge loss in his agricultural operation to debt account but must bear it himself—Costs of cultivation if allowed to carry interest from date of incurring them, monthly income of rent should also be allowed to bear interest from date of receipt.)

Add after Pt. 8 :

[Pt. 9] The statutory obligation of mortgagee under S. 76 (h) is not limited to any period of time. *('50) 1950 Ker L Tim 356 (361) (DB), Kesava Pillai Madhava Pillai* v. *Narayanaru Sankararu* ✠ *1952 Trav-Co. 552 (AIR V 39) (DB), Kurien Chacko* v. *Ramakrishna Iyer.*

Note 18

Add in the Foot Note indicated :

3. 1951 All 613 (A I R V 38 C 176 P 42, 72, 75) (F B), *Dara* v. *Mathura.* (Case decided under S. 9 (1), U. P. Debt Redemption Act in which it was held that 'net' profits in that section should be interpre ed in the same sense in which fair occupation rent is used in this section—Decisions 1944 All 283 (A I R V 31), *Sant Ram* v. *Ram Bilas* ; 1950 All 192 (A I R 37 C 71): I L R (1950) All 228. *Nand Kumar Lal* v. *Kuber Lal* ; Civ. Revn. No. 197 of 1945, D/- 5-1-1949 (All) and C. R. No. 100 of 1946, D- 10-2-1950 (All), *Overruled* and observations of Bind Basni Prasad J. in 1948 All 344 (A I R V 35 C 143) : I L R (1948) All 310, *Kashi Prasad* v. *Raghunandan, dissented from.*)

Add after Pt. 4 :

[Pt. 4a] What is the amount which the mortgagee would have realised if he had let out the land on the best terms available is in each case a question of fact. *1951 All 643 (A I R V 38 C 176 P 3, 60) (FB), Dara* v. *Mathura.* (Mortgage of proprietary or under-proprietary land—Calculation on the basis of sanctioned rent rates gives fair occupation rent, when there is no other evidence.)

Note 19

Add in the Foot Notes indicated :

5. 1950 All 105 (A I R V 37 C 42 P 4, 5), *Shri Thakurji Maharaj Thakur Dwara* v. *Jangoo Singh.* (But there must be proof that costs were actually incurred in making the collections. If the lower Court disallows the costs of collections for want of such proof revision is not maintainable.)

9. ('51) 1951 All L Jour 281 (282) (D B), *Fazulal Haq* v. *Pyare Lal.*

Note 20

Add in the Foot Note indicated :

1. *See also* 1955 N U C (Mys) 217 : (A I R V 42). *Sreenivasa Gowda* v. *Sidrame Gowda.*

Add after pt. 4 :

[Pt. 5] It has been held that the provisions of Ss. 11 (1) and 17 of the Orissa Money Lenders Act 3 of 1939 will override the provisions of this clause with respect to matters specifically dealt with therein but as respects matters which are not covered by these provisions the provisions of this clause would continue to regulate the right between the mortgagor and the mortgagee. *1955 N U C (Orissa) 954 (A I R V 42), Banamali Mahapatra* v. *Chirivuri Venkayamma.*

Note 22

Add in the Foot Note indicated :

5. 1954 Bom 417 (418) (Pr 12) (AIR V 41 C 113): I L R (1954) Bom 1131. *Genuji Ramji* v. *Murlidhar Laxman.* (A subsequent suit for compensation for the alleged demolition of the mortgaged property by the mortgagee while in possession will be barred under O. 2, R. 2, C. P. Code, if such a relief is not claimed in a prior suit for redemption brought by the mortgagor. 1922 Bom 156 (2) (A I R V 9). *Anandrao* v. *Bhikaji. Rel. on ;* (1910) I L R 33 Mad 71. *Sivachidambara Mudaliar* v. *Kamatchi Ammal,* Dissented from.)

Add after pt. 2 :

[Pt. 2a] As to the period of limitation for such a suit see the undermentioned case *1954 Bom 417 (419) (Pr 14) (AIR V 41 C 113) : I L R (1954) Bom 1131. Genuji Ramji* v. *Murlidhar Laxman* (A suit for compensation for the loss occasioned to the mortgagor by the wrongful act of the mortgagees in possession is a suit which would not be governed by Art. 36 but would be governed by Art. 120 of the Limitation Act. And the cause of action

will arise on the day the mortgagor demands redemption and is refused. (1910) I L R 33 Mad. 71, *Sivachidambara Mudaliar* v. *Kamatchi Ammal*, Dissented from.)

SECTION 77

Note 1

Add in the Foot Notes indicated :

2. 1955 N U C (Raj.) 296 (A I R V 42). *Basti Ram* v. *Sewaram.* (S. 77 is a proviso to S. 76.)

13. 1955 N U C (Raj) 296 (A I R V 42). *Basti Ram* v. *Sewaram.* (Where according to the terms of the contract between the parties, the possession of the property was delivered against the loan of certain amount and the profits were to be enjoyed in lieu of interest thereon, the mortgagees are not liable to account for any profits arising out of the property so long as they are entitled to remain in possession, i.e., till the full amount of the mortgage is repaid.)

SECTION 78

Note 11

Add in the Foot Note indicated:

1. 1953 Mad 1003 (A I R V 40 C 394 P 7), *Thanubuddi Venkatappa* v. *Gopavarapu Brahmayya.* (Existence of prior mortgage not disputed but genuineness attacked by subsequent mortgagee—Burden is on subsequent mortgagee to show that prior mortgage is a sham and bogus one created with intent to defraud him.)

SECTION 79

Note 2

Add after pt. 2 :

[Pt. 2a] The effect of Ss. 79 and 93 is that where a mortgage to secure future advances expresses the maximum to be secured, but after certain advances within the maximum have been made, a second mortgage is executed, the second mortgagee, if he had notice of the prior mortgage will have to yield to the prior mortgagee in respect of further advances made by the latter up to the maximum stated, although such advances may be made with knowledge of a subsequent mortgage : but if no maximum was expressed or if the subsequent mortgagee had no notice of the prior mortgage, the prior mortgagee making further advances after the second mortgage will have no priority in respect of such advances. Section 93 is thus complimentary to S. 79. *1955 Cal 194 (204) (Pr 39) ((S) AIR V 42 C 51) (DB). Durga Prosad* v. *Mario Galstaun.*

[Pt. 2b] These two sections deal with a case where there are two different mortgagees and determine their respective rights and priorities in the circumstances mentioned. They have no relevancy in a case where there is only one mortgagee and do not apply to the question relating to the character or constitution of the said mortgage. *1955 Cal 194 (199) (Pr 18) ((S) A I R V 42 C 51) (DB). Durga Prosad* v. *Mario Galstaun.*

SECTION 81

Note 6

Place the figure 1a after the end of the first sentence in para 2 viz. "Again the person claiming the right under this section must be a subsequent mortgagee" and add the following as foot note :

1a. 1955 Mad 208 (209) (Pr 4) ((S) A I R V 42 C 53), *Kuppuswami Goundar* v. *K. Muthuswami Goundan.* (Section does not apply to a subsequent purchaser of one of the items.)

Note 7

Add in the Foot Note indicated :

1. But see 1950 Dacca 9 (A I R V 37 C 3 P 3) (DB), *Sm. Jashoda Sundar Debi* v. *Sumanta Chandra Kangsha Banikya* (Properties *X* and *Y* were mortgaged to *A* and then property *Y* was mortgaged to *B*. *B* obtained a decree for sale on his mortgage and purchased property *Y* in execution. *A* then sued on his mortgage impleading *B* and obtained a decree for sale. In execution of that decree, *B* applied, ostensibly under S. 81, T. P. Act, that property *X* should be sold first : *Held* that, no question of marshalling arose as *A* was entitled to execute his decree against any of the properties *X* and *Y* and there was no other mortgage in existence.)

SECTION 82

Note 2

Add in the Foot Notes indicated :

1. 1955 N U C (Pat) 224 (A I R V 42) (D B), *Mt. Rajo Kuer* v. *Brij Behari Prasad.*

11. 1955 N U C (Pat) 224 (AIR V 42), *Mt. Rajo Kuer* v *Brij Behari Prasad.* (1930 P C 183 (A I R V 17) (P C), Ganeshilal v. Thakurcharan Singh, Foll.)

Note 6

Add in the Foot Notes indicated :

1. 1952 S C 47 (52) (A I R V 39 C 11 P 38, 48, 49) : 1952 S C R 179 (SC), *Kedarlal* v. *Harilal.*

6. 1952 Mys 99 (A I R V 39 P 12) : I L R (1952) Mys 259 (DB). *Kempe Gowda* v. *Lakkegowda.*

13. 1949 East Punj 254 (A I R V 36 C 56 P 6, 7, 8) (DB), *Ganesh Lal* v. *Joti Parshad.* (Redemption by one co-mortgagor — Amount paid for redemption far less than amount actually due —Other co-mortgagors can claim their share by paying proportionate shares of amount actually paid for redemption — Redeeming co-mortgagor is not entitled under subrogation to claim advantages and benefits which he may personally derive by act of redemption.)

Note 7

Add in the Foot Note indicated :

1. 1952 S C 47 (A I R V 39 C 11 P 38, 48, 49) : 1952 S C R 179 (S C), *Kedarlal* v. *Harilal.* (There being no contract to the contrary, only remedy was under S. 92 of the Transfer of Property Act read with S. 82.)

Note 12

Add in the Foot Notes indicated :

1. 1950 Dacca 9 (A I R V 37 C 3 P 4) (DB), *Sm. Jashoda Sundari Debi* v. *Sumanta Chandra Kangsha Banihya* (This right cannot be availed of against the mortgagee or the auction-purchaser.)

3. 1951 Hyd 167 (A I R V 38 C 60 P 3, 4) : ILR (1952) Hyd 23 (DB), *Mahammad Abdul Rehman* v. *Mohammad Shamsuddin*. (Second mortgage created on two properties by the mortgagor—One of the properties sold in execution of the decree on the first mortgage and was not available to the second mortgagee — Later on the mortgagor sold the other property to another person—*Held* second mortgagee was entitled to recover the whole of the debt from the property sold by the mortgagor.) ✠ 1949 Nag 346 (A I R V 36 C 137 P 4) : I L R (1949) Nag 376, *Delan Singh Ganpat Singh Lodhi* v. *Darbarilal*. (Mortgagor cannot claim contribution in the suit for foreclosure but must file a separate suit.)

Note 13

Add in the Foot Note indicated :

1. 1946-32 I D 40284 (All) (D B), *Nageshwar Sahai* v. *Shyam Bahadur*.

Note 14

Add in the Foot Notes indicated :

1a. 1950 Pat 174 (A I R V 37 C 36 R 14): 28 Pat 955 (D B), *Rameshwar Prasad Missir* v. *Ramnath Khemka* (The owner of the properties has an option either to pay his rateable share or to allow it to be realised out of the properties.)

2. 1949 Pat 522 (A I R V 36 C 160 P 10, 11): 28 Pat 325 (DB), *Gopinath* v. *Raghubansh Kumar Singh*.

5. 1949 Pat 522 (AIR V 36 C 160 P 10, 11): 28 Pat 325 (DB), *Gopinath* v. *Raghubansh Kumar Singh*.

Add after Pt. 7 :

[Pt. 8] In *Kedar Lal* v. *Hari Lal* it has now been held by their Lordships of the Supreme Court that when the right to contribution arises out of a mortgage, S. 82 will exclude the applicability of S. 43 of the Contract Act unless there is a contract to the contrary. The decisions above-mentioned holding that the mortgagor paying in excess of his share can claim personal relief against others, therefore require reconsideration. *1952 S C 47 (AIR V 39 C 11 Prs 31, 39); 1952 S C R 179 (S C).*

Note 15

Add in the Foot Note indicated :

3. *See also* 1946 52 I D 40267 (All) (D B), *Nageswar Sahai* v. *Shyam Bahadur*. (By operation of law joint mortgage coming to an end and one of the mortgagors and his property relieved of all liability — Proportional liability falls to be determined at the date when joint liability ceases—1947 Mad 86 (AIR V 34 C 37), Manjappa Goundan v. Pacha Goundan, Foll.)

Note 16

dd after Pt. 2.

[Pt. 3] Where in a proceeding started under the U. P. Encumbered Estates Act the entire mortgage amount is realised from one of the joint-debtors, he can maintain a suit for contribution from his co-debtors under this section even though he has failed to implead the co-debtors or to get the debt apportioned between himself and the co-debtors in the said proceeding. Such a suit is not barred by any provision in the U. P. Encumbered Estates Act. *1950 All 53 (A I R V 37 C 14 P 5, 6) : ILR (1950) All 1150 (DB), Sheodan Singh* v. *Ramesh Singh*.

Note 17

Add in the Foot Notes indicated :

11. 1949 Pat 522 (AIR V 36 C 160 P 2, 4, 5, 6) : 28 Pat 325 (DB), *Gopinath* v. *Raghubansh Kumar Singh*.

12. 1950 Pat 174 (A I R V 37 C 36 P 6, 13, 19) : 28 Pat 955 (DB), *Rameshwar Prasad Missir* v. *Ramnath Khemka*.

Add after Pt. 10 :

[Pt. 10a] *A* and *B* were co-owners of certain property. *B* sold his share to *C* leaving a portion of the consideration in the hands of *C* with direction to pay it to a mortgagee in possession. *C* converted the possessory mortgage into simple mortgage and entered into possession and thus redeemed it. It was held that the payment made by *C* to the mortgagee was merely as the agent of his vendor *B* and therefore he could not claim any contribution under S. 82 in his own right from *A*. *1951 All 596 (A I R V 38 C 152 P 10) (DB), Raj Bahadur Lal* v. *Sitla Prasad*.

Note 18

Add in the Foot Notes indicated :

1. 1953 Mad 873 (AIR V 40 C 342 P 3, 4), *Soorneedi Sathiraju* v. *Batchu Venkata Rao*.

2. *See also* 1952 Trav-Co 487 (A I R V 39 P 8, 9, 10) : ILR (1952) Trav-Co 115 (DB), *Mamman Mathai* v. *Geeverghese Zacheria*. (Subsequent mortgagee obtaining decree on his mortgage and purchasing in execution mortgaged property subject to prior mortgage — Prior mortgagee obtaining decree on his mortgage—Debt directed to be realised personally from mortgagor — Puisne mortgagee purchasing decree obtained by prior mortgagee and taking out execution — By purchase of equity of redemption decree held was extinguished pro tanto.)

6. *See also* 1952 Trav-Co 487 (A I R V 39 P 8, 9, 10) : I L R (1952) Trav-Co 115 (DB), *Mamman Mathai* v. *Geeverghese Zacheria*. (Vesting of part of equity of redemption in the mortgagee is tantamount to discharge of proportionate part of mortgage-debt—Execution Court can go into question of extent to which decree has been satisfied.)

Add after Pt. 2 as an independent para :

[Pt. 2a] Though such purchase would operate as a partial discharge of the mortgage debt, the discharge is not the result

of a payment made by the debtors. Moreover, after the purchase of the equity of redemption by the mortgagee, the debtor ceases to have any interest in it and any reduction of the liability of the mortgage by appropriation of the rateable value fixed under the section, does not enure to the benefit of the mortgagor. *1953 Mad 873 (AIR V 40 C 342 P 3, 4)*, *Soorneedi Sathiraju* v. *Batchu Venkata Rao.* (The amount appropriated towards the mortgage liability under S. 82 is, therefore, not a payment within the meaning of S. 8 (2) of the Madras Act, 4 of 1938.)

Note 19

Add in the Foot Notes indicated :

1. *See also* 1953 Trav-Co 283 (A I R V 40 C 104 P 5) : ILR (1953) Trav-Co 206 (DB), *Ahammathummi* v *Subramonia Iyer.* (No release of a portion of a mortgage debt and no merger of interests of mortgagor and mortgagee in respect of the portion—Owner of the portion of the mortgaged property cannot claim rateable abatement.)

2. 1953 Assam 82 (A I R V 40 C 34 P 5, 8) : I L R (1952) 4 Assam 118, *Nripendra Kumar Nedhi* v. *Maumoni Das.*

Note 26

Add after Pt. 2 :

[Pt. 3] Where by operation of law, the joint mortgage came to an end and one of the mortgagors as well as his property was relieved of all liability it was held that the proportionate liability fell to be determined at the date when the joint liability ceased because the property of one of the mortgagors was no longer liable for the interest that fell due subsequently and thus that interest was not a part of the mortgage money qua that property. *1946-52 I D 40267 (All) (DB)*, *Nageshwar Sahai* v. *Shyam Bahadur.*

SECTION 83

Note 2

Add in the Foot Note indicated :

4. 1955 Hyd 158 (159) (Pr 3) ((S) A I R V 42 C 40) : I L R (1955) Hyd 147 (DB), *Siddiqa Begum* v. *Mirza Hussaini Beg.*

Add after Pt. 8 :

[Pt. 9] Section 83 is wide enough to cover both the types of mortgages—simple and usufructuary. *1953 All 33 (A I R V 40 C 9 P 8) (DB)*, *Parasram Shukul* v. *Bindeshari Pandey.*

Add after Pt. 9 as separate para :

[Pt. 10] Section 12 of the U. P. Agriculturists' Relief Act (27 of 1934) has not changed the substantive law in S. 83. *1953 All 472 (AIR V 40 C 223 P 6, 9) : I L R (1954) 1 All 147 (DB)*, *Sm. Ram Piari* v. *Ram Adhin.* (Mortgagee letting out land within powers given by deed—In such a case handing over possession to mortgagor upon redemption means such possession as the property is capable of when redemption took place — 1949 All 589 (A I R V 36 C 214) : I L R (1949) All 803, Jagarnath Sahu v. Srikant Dube and Civil Revn. No. 544 of 1945, D/-1-10-1948 (All), Bhagwati Misir v. Ram Ugrah Misir, Overruled.)

Note 8

Add after Pt. 6 :

[Pt. 6a] Similarly where a mortgagor after making a deposit filed a suit for redemption insisting in the plaint that the payment should extinguish his liability under the mortgage as well as for the rent due to him as a lessee from the defendant mortgagee, it was held that the deposit could be taken only as one in terms of the plaint and that the tender could not be held to be a valid unconditional tender of the mortgage money. *1955 N U C (Trav-Co) 1671 (A I R V 42)*, *S. K. Mahadeva Iyer* v. *A. Narayanan Nair.*

After Pt. 9, in the last para of the Note, place figure 9a after the words "under the section actual deposit is necessary" and add the following as foot note :

9a. 1950 Madh B 72 (AIR V 37 C 33 P 34) (DB), *Gopiram Kashiram* v. *Shankar Rao.*

Note 10

Add after Pt. 1 as a separate para :

[Pt. 2] The rule that where the mortgagee is unwilling to accept the mortgage money from the mortgagor, the latter is under no obligation to deposit it during the pendency of the redemption suit, applies only when there has been a valid unconditional tender of the mortgage money and such a tender has been refused by the mortgagee. *1955 N U C (Trav-Co) 1671 (A I R V 42)*. *S. K. Mahadeva Iyer* v. *A. Narayanan Nair.*

Note 17

Add in the Foot Notes indicated :

1. 1955 N U C (Raj) 287 (A I R V 42), *Achal Chand* v. *Rekhraj* ✠ 1946-52 I D 40278 (Trav-Co) (DB), *Cheruchi* v. *Govinda Menon.* (Where there is a deficiency in the mortgage amount deposited by the mortgagor, there is no proper tender.)

2. 1955 N U C (Raj) 287 (A I R V 42), *Achal Chand* v. *Rekhraj* ✠ ('49) 1949 J L R 97 (DB), *Sagarmal* v. *Jwalasahai.*

3. 1955 N U C (Raj) 287 (A I R V 42), *Achal Chand* v. *Rekhraj.* (The mortgagee is at liberty to ignore an insufficient tender, and is entitled to recover interest at the contract rate up till the date of the redemption suit.) ✠ ('49) 1949 J L R 97 (DB), *Sagarmal* v. *Jwalasahai.*

19. 1955 Hyd 158 (159) (Pr 3) ((S) AIR V 42 C 40): I L R (1955) Hyd 147 (DB). *Siddiqa Begum* v. *Mirza Hussaini Beg* (Once a tender is made it is not for the Court to decide whether the amount deposited is actually due to the creditors.)

Add after Pt. 1 :

[Pt. 1a] The mere circumstance that the mortgagee had filed a suit in respect of a portion of the amount due at such date will not exonerate the mortgagor from his responsibility to deposit the full amount due. *1955 N U C (Raj) 287 (AIR V 42), Achal Chand* v. *Rekhraj.*

Add after Pt. 19 at the end of para :

[Pt. 20] Where a deposit is made under this section, all that the Court has to do is to pay the amount tendered to the mortgagee after completion of the prescribed formalities. It has no power to divert either the whole or part of the deposit to any other use. *1955 Hyd 158 (159) (Pr 3) ((S) A I R V 42 C 40)*: *I L R (1955) Hyd 147 (DB), Siddiqa Begum* v. *Mirza Hussaini Beg.*

Note 20

Add in the Foot Note indicated :

3. [*See also* ('49) 54 Mys HCR 136 (139), *Suryanarayana Rao* v. *Srinivasa Rao.* (It is not open to Court to decide or pass any order on any points of dispute in case the mortgagee files objections.)]

Add before Pt. 1 :

[Pt. 1a] Where an application under S. 83 is filed, it is only when a verified petition with documents contemplated in the latter part of the section is filed by the mortgagee that the Court can allow him to receive the money. *('49) 54 Mys HCR 136 (139), Suryanarayana Rao* v. *Srinivasa Rao.*

Note 21

Add in the Foot Note indicated :

1. ('49) 54 Mys H C R 136 (139), *Suryanarayana Rao* v. *Srinivasa Rao.*

Note 22

Add in the Foot Note indicated :

2. ('49) 54 Mys H C R 136 (139), *Suryanarayana Rao* v. *Srinivasa Rao.* (Even when a verified petition by mortgagee is filed the Court shall before paying him the amount deposited, direct him to deliver possession.)

SECTION 84

Note 3

Add after Pt. 3 :

[Pt. 3aa] When the purchaser of equity of redemption from the mortgagor tenders the mortgage amount in full to the mortgagee in possession, the mortgagee cannot refuse to accept the tender and claim his right to remain in possession, on the ground that the vendee had not paid the entire purchase money to the vendor-mortgagor. *1953 Mad 821 (A I R V 40 C 310 P 3) (DB), Venkataperumal Naidu* v. *Rathnasabhapathi.* (('04) I L R 27 Mad 28 (DB), Subrahmania Ayyar v. Poovan, Not followed.)

Note 5

Add in the Foot Notes indicated :

3. 1955 N U C (Trav-Co) 1671 (AIR V 42), *S. K. Mahadeva Iyer* v. *A. Narayanan Nair.* (Purchaser of property from mortgagor giving notice to assignee of mortgagee that he was prepared to tender amount on condition that assignee promised to indemnify him for any loss due to conduct of original mortgagor — Held conditional tender is not valid.) ✣ 1946-52 I D 40287 (Trav-Co) (DB), *Punnoose Chacko* v. *Punnoose Kuriakose.* (In order to stop interest there should be full and unconditional tender of mortgage-money.)

10. 1946-52 I D 40287 (Trav-Co) (DB), *Punnoose Chacko* v. *Punnoose Kuriakose.* (In order to stop interest there should be full and unconditional tender of mortgage money due.)

26. 1954 Nag 193 (205) (Pr 40) (AIR V 41 C 62) (DB), *Shrinarayan Rambilas* v. *Bhasker Waman.* (Mortgagor sending notice to mortgagee offering to redeem — Mortgagee declining offer and characterising notice as absurd—No actual tender or deposit made—Interest does not cease from date of notice.)

36. 1952 Raj 72 (AIR V 39 P 6), *Narain Dass* v. *Rikhabchand* ✣ ('49) 1949 Bur L R (H C) 58 (61), *Moung Zaw Nyun* v. *Ma Mai Kha.*

43. *See also* 1955 NUC (Trav-Co) 1671 (AIR V 42), *S. K. Mahadeva Iyer* v. *A Narayanan Nair.* (Assignment by mortgagee Bank in liquidation —Purchaser of mortgaged property who had undertaken to tender mortgage amount, filing application to liquidation court for permission to deposit mortgage amount—No notice to assignee from mortgagee—Held no valid tender.)

Add after Pt. 31 :

[Pt. 31a] Where the mortgagee Bank went into liquidation and a purchaser of the mortgaged property from the mortgagor asked the assignee of the mortgagee Bank to move the liquidation court for fixing the amount payable to him and offered to pay the same in cash or to execute a security bond charging the property it was held that this did not amount to a valid tender. *1955 N U C (Trav-Co) 1671 (AIR V 42), S. K. Mahadeva Iyer* v. *A. Narayanan Nair.*

Note 6

Add after Pt. 2 as a separate para :

[Pt. 3] A mortgagee in his suit on mortgage is justified in not accepting the deposit made by a purchaser of a portion of the hypotheca because the latter's title

was in dispute and also because of the condition attached to the deposit and, therefore, there would be no cessation of interest on the amount of deposit. *1954 Mad 830 (831) (Pr 2) (AIR V 41 C 279) (DB), Venku Reddi, In re.* (1931 Nag 91 (AIR V 18), Sitaram v. Ramrao, Rel. on.)

Note 8

Add in the Foot Note indicated :

6. 1946-52 ID 40287 (Trav-Co) (DB), *Punnoose Chacko* v. *Punnoose Kuriakose* (Tender should, in order to be effective, be followed by a full deposit in Court along with the suit.)

Add after Pt 11 as a separate para :

[Pt. 12] In the undermentioned case the mortgagor sent a notice to the mortgagee offering to redeem the mortgaged properties but the mortgagee declined the offer characterising the notice as absurd. The mortgagor did not actually tender or deposit the amount. It was held that interest did not cease to run from the date of giving the notice. *1954 Nag 193 (200) (Pr 40) (AIR V 41 C 62) (DB), Shrinarayan Rambilas* v. *Bhasker Waman.*

Note 11

Place figure 3a at the end of first para and add the following as foot note :

3a. *See* 1952 Trav Co 236 (AIR V 39 P 2, 3) (DB), *Janaki Amma* v. *Mathiri.* (Under S. 83 deposit of mortgage amount in Court by the mortgagor will operate as a valid tender of mortgage-money only when notice of deposit is given to the mortgagee.)

Note 16

Add in the Foot Note indicated :

3. 1952 Trav.Co 92 (AIR V 39 C 39 P 9 10) : 1950 Trav.Co L R 393 (DB), *Beevathuma* v. *Lakshmi Amma.*

Note 19

Add in the Foot Notes indicated :

1. 1946-52 I D 40279 (Trav-Co) (DB), *Kunju Krishna* v. *Varghese.* (In the case of a usufructuary mortgage, mesne profits prior to the date on which the mortgagee had notice of the deposit cannot be claimed — So also, the mortgagee's liability to account for the profits does not arise before he is in a position to draw the money from Court) ✠ 1952 Trav-Co 236 (AIR V 39 P 2, 3) (DB), *Janaki Amma* v. *Mathiri.* (Mortgagor who has obtained a decree for redemption can claim mesne profits only from the date of service of the notice of deposit on the mortgagee, till the date of actual delivery of possess on to the mortgagor.) ✠ 1953 Mad 821 (AIR V 40 C 310 P 3) (DB), *Venkataperumal Naidu* v. *Rathnasabhapathi.* (('04) ILR 27 Mad 28 (DB), Subrahmania Ayyar v. Poovan, Not followed.)

SECTION 91

Note 3

Add in the Foot Notes indicated :

1. *See also* 1955 N U C (Mad) 3203 (A I R V 42), *Krishnan Nair* v. *Dakshayani Amma.* (Under S. 91 it is open to any co-sharer to redeem a mortgage executed by himself and other co-sharers.)
3. 1951 Cal 203 (A I R V 38 C 35 P 13) : I L R (1951) 2 Cal 309 (DB), *Raj Kumar Rai Mahapatra* v. *Mritunjoy Das.*
4. 1951 Cal 202 (A I R V 38 C 35 P 13) : I L R (1951) 2 Cal 309 (DB), *Raj Kamar Rai Mahapatra* v. *Mritunjoy Das.* (But the mortgagor cannot actively enforce his right to redeem when sued upon the personal covenant.)

Add after Pt. 5 :

[Pt. 6] The prior mortgagee brought a suit on his mortgage without impleading the puisne mortgagee. A decree was passed and the property was sold in execution. the auction purchaser sued the puisne mortgagee in possession for the sale amount. It was held that by merely instituting such suit the auction purchaser did not lose his right as auction purchaser, and he could not be deemed to have abandoned his right under the Court purchase. There was no revival of the equity of the redemption in the original owner so as to entitle him to sue for redemption. *1954 Trav-Co 384 (Pr 10, 11) (AIR V 41 C 134) (D B), Giriyamman Narasimhan* v. *Ramchandran Venkitarayan.*

Note 4

Add in the Foot Note indicated :

1. 1952 I D A 17215 (Nag), *Kanchhedilal* v. *Laxmibai.* (Suit on mortgage dismissed as barred by time against purchaser of part of property—Purchaser cannot redeem other mortgaged property.)

Add after Pt. 2a as a separate para :

[Pt. 2b] It has been held that a co debtor who is not a mortgagor but who is personally liable for the mortgage debt under the terms of the mortgage is a person entitled to redeem the mortgage within the meaning of this section. *1955 N U C (All) 1695 (A I R V 42), Gopi Nath* v. *Bhanu Shanker Yasjnik.*

Note 5

Add in the Foot Notes indicated :

3. 1955 NUC (Mad) 3203 (AIR V 42), *Krishnan Nair* v. *Dakshayani Amma.* (Mortgage by separated member of tarward—Mortgagee has a right to redeem a previous mortgage binding on tarwad)✠1953 Bom 405 (A I R V 40 C 126 P 6, 9) : I L R (1954) Bom 10 (DB), *Nagu Tukaram Ghalulo* v. *Gopal Ganesh Gadgil.* (Prior mortgagee obtaining decree without making puisne mortgagee party—Execution—Mortgage property put to sale — Rights of puisne mortgagee are not affected so long as they are not barred—His right to redeem prior mortgagee subsists—His claim cannot be resisted on the ground that the claim of redemption will lead to consequential relief of possession in his favour) ✠1950 Assam 53 (AIR V 37 C 21 P 25) : I L R (1949) 1 Assam 59 (D B), *Gopi Kanta*

Bhuiya v. *Kali Kanta Bhattacharjya.* (Suit for sale by prior mortgagee—Puisne mortgagee not impleaded — Prior mortgagee purchasing property in execution—Puisne mortgagee has right to redeem mortgage — On redemption equity reverts to mortgagor—(Obiter.))

4. 1951 Assam 68 (A I R V 38 C 35 P 10) : ILR (1950) 2 Assam 275 (D B), *Pitram* v. *Lalit.* (Obiter — Per Ram Labhaya J., Thadani J., dissenting.)

[*See* 1953 Bom 405 (AIR V 40 C 126 P 6): ILR (1954) Bom 10 (D B), *Nagu Tukaram Ghatulo* v. *Gopal Ganesh Gadgil.* (If the puisne mortgagee's right to enforce his rights is barred the position may be different)]

Note 7

Add in the Foot Note indicated :

5. 1952 Pat 321 (A I R V 39 C 56 P 5) 27 Pat 526 (DB), *Abdul Gafoor* v. *Sagun Choudhary.*

Note 8

Add in the Foot Notes indicated :

1. 1952 Mys 12 (AIR V 39 C 8 P 9) : ILR (1951) Mys 389 (D B), *Chaluvegowda* v. *Chennegowda.* (Mortgagee allowing mortgage to be redeemed by a person not entitled to redeem—Purchaser of equity of redemption can obtain a decree for redemption against mortgagee and such person.)

[*See* 1950 Trav-Co 16 (A I R V 37 C 10 P 1) (D B), *Karthiani Amma* v. *Parvathi Amma.* (Suit for redemption by purchaser of equity of redemption in tarwad property—Person who is stranger to tarwad and who is in the position of a sub-mortgagee cannot question validity of purchase)]

3. 1954 Trav-Co 251 (A I R V 41 C 94 P 4) (DB), *Govinda Pillai Baswara Pillai* v. *Ahmed Moosa.* (Mortgagee can resist the claim for redemption of any item only if he, the mortgagee, has acquired the equity of redemption of that item.)✣('50) 1950 Trav-Co L R 150 (152, 153) (DB), *K. Ouseph* v. *Anothony.* (He is entitled to bring a suit for redemption of the mortgage even without obtaining formal delivery of possession under his sale certificate through the execution Court. When the property is outstanding in the possession of a mortgagee an auction-purchaser who takes no symbolical delivery would not after the lapse of 12 years automatically lose his right to redeem.)

Add after Pt. 3 :

[Pt. 3a] But a purchaser of equity of redemption in part of the mortgaged property and against whom a suit on the mortgage is dismissed as time barred is not entitled to redeem the other portion of the mortgaged property. *1952 I D A 17215 (Nag)*, *Kanchhedi Lal* v. *Laxmibai.*

Note 10

Add in the Foot Note indicated :

5. *See also* 1951 Pat 254 (AIR V 38 C 52 P 10) : 30 Pat 613 (D B), *Madanlal* v. *Ghasiram.* (Attaching creditor purchasing mortgaged property in execution of his decree during pendency of mortgage suit — Sale in execution of mortgage decree—His right to redeem is extinguished.)

Note 12

Add in the Foot Note indicated :

1a. 1951 Assam 101 (AIR V 38 C 52 P 16) : ILR (1949) 1 Assam 198 (DB), *Surjya Kumar Dhar* v. *Girish Chandra.* (Lessee not impleaded as party in suit for sale on mortgage—His right to redeem remains unaffected.)

Add after Pt. 9 :

[Pt. 9a] In the following case a distinction was made between the permanent tenants on land before the mortgage and those after the mortgage. It was held that in the former case what is mortgaged by the landlord is reversionary right vesting in him and the permanent tenant has no interest in it as would entitle him to redeem. His interest is paramount in the sense that it is not affected by redemption or foreclosure or sale and he is not a necessary party to a suit under O. 34, R. 1, Civil P. C. But in the case of a permanent tenant after the mortgage, it was held that since his rights came into existence during the subsistence of the mortgage, he is entitled to redeem. *1953 Bom 315 (A I R V 40 C 99 P 2, 8) : I L R (1953) Bom 727*, *Sakharam* v. *Pandurang Raghunath.* (('96) I L R 19 Mad 151, Paya Matalhir Appu v. Kovamel Amina; ('07) I L R 29 All 679, Raghunandan Prasad v. Ambika Singh and 1933 Bom 97 (A I R V 20), Venkatesh v. Bhujaballi, Distinguished.)

Note 13

Add in the Foot Note indicated :

3. 1951 All 655 (A I R V 38 C 179 P 17, 18), *Ramkali* v. *Murlidhar.* (Bhej Barari tenure.)

Note 16

Add in the Foot Notes indicated :

2. 1952 Pepsu 74 (A I R V 39 P 2) : I L R (1952) Patiala 101, *Bhag Singh* v. *Mt. Santi.*

3. 1950 Orissa 150 (A I R V 39 C 25 P 18) (DB), *Mitru Thapa* v. *Mt. Gurubari Goudani.* ((Obiter)—Per Ray C. J.—It is always desirable that when a reversioner wants to make out a case of an interest in the equity of redemption so as to be entitled to redeem, he must plead and prove that it was necessary for the preservation and protection of the property.)

4. 1950 Orissa 150 (A I R V 37 C 25 P 10, 16) (DB), *Mitru Thapa* v. *Mt. Gurubari Goudani.* ((Obiter.) — Per Ray C. J. — The words "any interest in the property mortgaged" or "the right to redeem the same" would convey the widest possible connotation so as to include the particular kind of "interest" that a reversioner under Hindu law has in the last male owner's property during the subsistence of limited owner's tenure.)

Note 24

Add in the Foot Note indicated :

1. 1954 Madh B 67 (A I R V 41 C 41 P 7, 8) : ILR (1953) Madh B 147, *Gasiram* v. *Hiralal.* (Mortgaged property held by *A* and *B* as tenants

in common — Sale of *A's* share of equity of redemption to mortgagee—*B* cannot redeem *A's* share — Mortgagee by purchase becomes full owner of the share.)

Note 25

Add after Pt. 5 as a separate para :

[Pt. 6] It has been held that when an attaching creditor in execution of his decree, purchases the property which is subject to a mortgage, his right to redeem the mortgage under the old S. 91 (f) is extinguished. After the purchase, he can only seek to redeem the mortgage as being the owner of the equity of redemption. But, if his purchase is during the pendency of the mortgage suit, his interest is extinguished by the sale in execution of the mortgage decree. *1951 Pat 254 (AIR V 38 C 52 P 10) : 30 Pat 613 (DB), Madan Lal* v. *Ghashiram.*

Note 32

Add in the Foot Note indicated :

1. 1955 NUC (Trav-Co) 1075 (AIR V 42), *Rudra Warrier* v. *Neelacanta Kurup.* (A wayfarer cannot offer the mortgage money and seek redemption from a mortgagee; ('53) 1953 Ker L T (SN) 18 (3), *Thoma* v. *Prabakaran Nair*, Rel. on.) ✠ 1953 Nag 4 (A I R V 39 C 2 P 10) : I L R (1952) Nag 238, *Kisan Janu* v. *Mt. Prayagbai* ✠ 1952 Trav-Co 105 (A I R V 39 C 47 P 21, 22) (DB), *Anantha Raman* v. *Arunachalam Panniker.* (Person claiming title through trespasser redeeming mortgage — Mortgage is not extinguished — Real owner can sue him for possession or for redemption.)

SECTION 92

Note 1

Add in the Foot Notes indicated :

5. 1950 Mad 186 (A I R V 37 C 79 P 7) (DB), *Appala Naidu* v. *Bhimalingam.*

[*See also* 1955 N U C (Trav-Co) 542 (AIR V 42), *Kunji Kutty Pillai* v. *Neelakanta Warrier.* (For the application of the equitable principle of subrogation it is necessary not merely to prove that the money advanced by the person who claimed the right of subrogation was in fact utilised for the discharge of the encumbrance, but also that there was an intention to keep the charge alive for the benefit of the person : ('39) 29 Trav L J 317, Pichandia Pillai Kuttalam Pillai v. Moideen Pillai Nagoor Meeran Pillai and ('39) 29 Trav L J 1267, Harihara Iyer v. Thanu, Foll.)]

9. 1950 Mad 186 (A I R V 37 C 79 P 5) (DB), *Appala Naidu* v. *Bhimalingam* ✠ 1950 Pat 13 (A I R V 37 C 4 P 6) : 28 Pat 531 (DB), *Jagdeo Singh* v. *Rambilash Singh.*

Note 2

Add in the Foot Note indicated :

1. 1955 N U C (Pat) 243 (A I R V 42), *Mt. Sundarbati Kuer* v. *Muhammad Alam.* (1940 Pat 385 (A I R V 27) (FB), Tikasao v. Harilal Foll.)

Note 5

Add in the Foot Note indicated :

1. 1953 All 296 (A I R V 40 C 130 P 17) : I L R (1951) 1 All 515 (DB), *Radhakrishna* v. *Parshottam Das.*

Add after Pt. 6 :

[Pt. 6a] And the Saurashtra High Court. *1953 Sau 43 (AIR V 40 C 20 P 11, 12), Harbham Malde* v. *Parbat Veja.*

Note 7

Add in the Foot Note indicated :

1. 1950 Mad 186 (A I R V 37 C 79 P 7) (DB), *Appala Naidu* v. *Bhimalingam.* (The right to subrogation will arise only on discharge of prior mortgage and not earlier.)

Note 8

Add in the Foot Note indicated :

1. 1953 All 296 (A I R V 40 C 130 P 19) : I L R (1951) 1 All 515 (DB), *Radhakrishna* v. *Parshottam Das.* (Prior mortgagee purchasing mortgaged property — Sale consideration consisting of amount of his own mortgage and also that of subsequent mortgage — Amount of subsequent mortgage kept with vendee — Vendee mortgagee not subrogated to right of subsequent mortgagee.)

Note 11

Add in the Foot Note indicated :

1. 1955 NUC (Mad) 3203 (AIR V 42), *Krishnan Nair* v. *Dakshayani Amma.* (Mortgagee from separated member of tarwad redeeming previous mortgage binding on tarwad is subrogated to the rights of the previous mortgage.) ✠ 1953 Trav-Co 536 (A I R V 40 C 203 P 2) (DB), *Kochu Cherukkan Madhavan* v. *Kochupannu Chakki.* (If there is nothing to show that the second mortgagee either expressly or impliedly indicated any intention to extinguish the prior charge he should be deemed to have adopted the course which is to his interest, namely, to keep the prior charge alive. He is thus subrogated to the position of the first mortgagee : 10 Cal 1035 (PC), Rel. on.)

[*See also* 1950 Pat 13 (A I R V 37 C 4 C 8) : 28 Pat 531 (DB), *Jagdeo Singh* v. *Rambilash Singh.* (Anomalous mortgagee paying mortgage decree in favour of prior mortgagee — Payment made in order to preserve mortgaged property from sale—Payment made is not one by volunteer — Such mortgagee is entitled to subrogation under S. 92.)]

Note 13

Add in the Foot Note indicated :

1. 1954 Mad 604 (A I R V 41 C 220 P 49) : I L R (1954) Mad 80 (D B), *Subbiah Goundan* v. *Ramaswami Goundan* ✠ 1956.52 I D 40316 (Nag), *Lalji* v. *Vallaahdas.*

Note 15

Add in the Foot Notes indicated :

3. 1955 N U C (Punj) 1355 (A I R V 42), *Gurcharan Singh* v. *Subedar Sawan Singh.* (A co-mortgagor can redeem the whole of the mortgage by paying the whole of the mortgage amount and be subrogated in place of the mortgagee and he cannot under S. 60 of the Act redeem his own share) ✠ 1955 N U C (Trav-Co) 537 (A I R V 42) (DB), *Mathevan Nadar* v. *Kochan Nadar* ✠ 1952 S C 47 (A I R V 39 C 11 P 38,

48, 49) : 1952 S C R 179 (SC), *Kedarlal* v. *Harilal.* (Where the right to contribution arises out of a mortgage, S. 82 excludes S. 43 of the Contract Act — There being no contract to the contrary remedy of party is under S. 92 read with S. 82.)

5. 1950 Pat 174 (A I R V 37 C 36 P 6, 13, 19) : 28 Pat 955 (DB), *Rameshwar Pd. Missir* v. *Ramnath Khemka.* ✣ 1949 Pat 522 (A I R V 36 C 160 P 2, 4, 5, 6) : 28 Pat 325 (DB), *Gopinath* v. *Raghubansh Kumar Singh.*

Note 16

Add in the Foot Note indicated :

1. 1952 Pepsu 74 (A I R V 39 P 2):I L R (1952) Patiala 101, *Bhag Singh* v. *Mt. Santi.* (Even if the reversioners redeem the mortgage during lifetime of widow they would be in the position of volunteers.) ✣ 1952 Trav-Co 105 (A I R V 39 C 47 P 19, 21, 22) (DB). *Anantha Raman* v. *Arunachalam Panniker.* (Where a person who has absolutely no title to the property mortgaged sells it, the purchaser's position is no more than that of an intruder between the mortgagee and the true owner of the equity of redemption) ✣ 1950 Orissa 150 (AIR V 37 C 25 P 8, 20, 22, 27) (DB), *Mitru Thapa* v. *Mt. Gurubari Goudani.*

Note 17

Add in the Foot Note indicated :

1. 1952 Trav.Co 105 (A I R V 39 C 47 P 19, 21, 22) (DB), *Anantha Raman* v. *Arunachalam Panniker.* (Where a person who has no title to the property mortgaged sells it, the purchaser's position is no more than that of an intruder between the mortgagee and the true owner of the equity of redemption.)

Note 19

Add in the Foot Notes indicated :

2. 1955 N U C (Orissa) 1859 (A I R V 42), *Krishnachandra* v. *Rabindra Narayan Das.*

8. 1955 N U C (Pat) 242 (A I R V 42), *Mt. Sundarbati Kuer* v. *Muhammad Alam.* (S. 92 has merely crystallised the law on the subject with this difference only that now subrogation will not be granted unless the mortgagor has by registered instrument agreed that the person who has advanced money to him with which the mortgage has been redeemed shall be subordinated to the rights of the mortgagee whose mortgage has been redeemed: 1940 Pat 385 (AIR V 27) (FB), Tikasao v. Harilal.)

Note 20

Add at the end of the Note :

[Pt. 9] The expression will include persons deriving title from the original mortgagor. *1951 Mad 917 (AIR V 38 C 327 P 11) (DB), Shambhatta* v. *Narayana Bhatta.*

Add after Pt. 9 :

[Pt. 10] It has been held that mortgagor in Para. 3 does not necessarily mean all the mortgagors where there are more than one and that one of them can by a covenant, give the right of subrogation. *1951 Mad 917 (AIR V 38 C 327 P 17) (DB), Shambhatta* v. *Narayana Bhatta.*

Note 22

Add in the Foot Note indicated :

4. 1953 All 296 (A I R V 40 C 130 P 19) : I L R (1951) 1 All 515 (DB), *Radha Krishna* v. *Purshottam Das* ✣ 1951 All 596 (AIR V 38 C 152 P 8) (DB), *Raj Bahadur Lal* v. *Sitla Prasad* ✣ 1950 All 682 (A I R V 37 C 267 P 41, 43) : ILR (1951) 2 All 384 (FB), *Sita Ram* v. *Sharada Narain Singh* ✣ 1950 Mad 186 (AIR V 37 C 79 P 7) (DB), *Appala Naidu* v. *Bhimalingam.* (Where a puisne mortgagee purchases the mortgaged property and the consideration for such sale is the amount due on his own mortgage and also the amount due on a prior mortgage which he undertakes to discharge, the case falls within the third para. of S. 92.)

Note 23

Add in the Foot Note indicated :

1. 1955 N U C (Andhra) 4462 (AIR V 42), *Kavvi Kondayya* v. *Atchayamma.*

10. 1953 Trav-Co 69 (AIR V 40 C 24 P 2, 3) : I L R (1952) Trav-Co 911, *Neelakanta Pillai* v. *Sankara Pillai.* (Plaintiff is entitled to the benefit of S. 92 in respect of the amount paid by him in partial discharge of the prior mortgage provided the whole mortgage has been extinguished.)

Note 24

Add in the Foot Note indicated :

3a. 1953 S C 1 (AIR V 40 C 1 P 9, 11, 17):1953 S C R 243:I L R (1952) Punj 495 (SC), *Ganeshi Lal* v. *Joti Pershad.* (1949 East Punjab 254 (AIR V 36 C 56), Ganeshi Lal v. Joti Pershad, Affirmed.)

Note 31

Add after Pt. 1 as a separate para :

[Pt. 2] A plea of subrogation depending upon investigation of facts cannot be raised for the first time in second appeal. *1954 Andhra 15 (16, 17) (Pr 6) (A I R V 41 C 10), Rathiah* v. *Santhamma.*

SECTION 93

Note 3

Add at the end of second para but before Pt. 1:

[Pt. 1a] The effect of Ss. 79 and 93 is that where a mortgage to secure future advances expresses the maximum to be secured, but after certain advances with in maximum have been made, a second mortgage is executed, the second mortgagee, if he had notice of the prior mortgage will have to yield to the prior mortgagee in respect of further advances made by the latter up to the maximum stated, although such advances may be made with knowledge of a subsequent mortgage; but if no maximum was expressed or if the subsequent mortgagee had no notice of the prior mortgage, the prior mortgagee making further advances after the second mortgage will have no priority in respect of such advances. Sec-

tion 93 is thus complimentary to S. 79. *1955 Cal 194 (204) (Pr 39) ((S) A I R V 42 C 51) (DB), Durga Prasad* v. *Mario Galstaun.*

[Pt. 1b] These sections deal with a case where there are two different mortgagees and have no relevancy in a case where there is only one mortgagee and do not apply to the question relating to the character or constitution of the said mortgage. *1955 Cal 194 (Pr 18) ((S) A I R V 42 C 51) (DB), Durga Prasad* v. *Mario Galstaun.*

SECTION 95

Note 1

Add in the Foot Note indicated :

12. 1955 N U C (Trav-Co) 537 (AIR V 42) (DB), *Mathevan Nadar* v. *Kochan Nadar.*

SECTION 96

Note 2

Page 1530—Place figure 1 after the words "by deposit of title deeds" with which the first sentence in Note 2 ends and add the following as Foot Note :

1. 1953 Cal 208 (A I R V 40 C 71 P 7), *Nityananda Ghose* v. *Rajpur Chaya Bani Cinema Ltd.* (By the combined operation of S. 96 and S. 58 (b) an equitable mortgage is a mortgage where the mortgagor binds himself personally to pay the mortgage-money.)

SECTION 98

Note 3

Page 1533—Place figure 1a after the words "should not be applied" in the seventh line of Note 3 and add the following as Foot Note :

1a. 1950 Pat 13 (A I R V 37 C 4 P 6, 7) : 28 Pat 531 (DB), *Jagdeo Singh* v. *Rambilash Singh.* (Where a mortgagee is compelled to pay a previous mortgage-debt in order to obtain possession of the mortgaged property, he is entitled to the right of legal subrogation under S. 92 (1) where such a right is not curtailed by the terms of the contract.)

[*See also* 1953 Madh B 9 (AIR V 40 C 6 P 15) : ILR (1953) Madh B 104, *Amarji Nagaji* v. *Joravarsingh.* (Deed transferring possession of land to creditor for a certain period towards discharge of debt—Debtor also contracting for personal liability—Deed held anomalous mortgage—Mortgagor's right to redeem held was implied in condition that mortgagee's right to land was to cease after the expiry of stipulated period.)]

Note 5

Add in the Foot Note indicated :

8. 1953 Mad 13 (AIR V 40 C 5 P 7) : ILR (1952) Mad 993 (DB), *Ramakkammal* v. *C. G. Subbarathnam Iyer.*

Note 7

Add in the Foot Notes indicated :

1. 1955 N U C (Mad) 695 (AIR V 42), *Katavath Mammu Kutti* v. *Pathinharayil.*

1a. 1955 N U C (Mad) 695 (AIR V 42), *Katavath Mammu Kutti* v. *Pathinharayil.* ✠ (1954) 1 Mad L J 439 (442), *Katavath Mammu Kutti* v. *Pathinharayil Cheria Chathu Kump.*

2. 1955 N U C (Mad) 695 (AIR V 42), *Katavath Mammu Kutti* v. *Pathinharayil.* (A transaction which otherwise fulfils the requirements of a kanom as defined in S. 3 (1) of the Malabar Tenancy Act does not cease to be a kanom simply because the renewal fee calculated according to the provisions of the Act comes to nothing.) ✠ 1951 Mad 187 (AIR V 38 C 18 P 9) : I L R (1952) Mad 92 (FB), *Parvathi P.* v. *N. Makkam Amma.* (Though a *jenmi* could have instituted a suit for recovery of the rent from the *kanomdar* as and when it fell due during the subsistence of the *kanom*, still the rent in arrear becomes a matter of account to be taken between the *jenmi* and the kanomdar in a suit for redemption of the *kanom.* The fact that the *kanomdar* had *porappad* or *michawaram* every year does not exempt him from liability to pay it at the time of redemption if he failed to pay it at the stipulated time.) ✠ (1954) 1 Mad L J 439 (411, 442), *Katavath Mammu Kutti* v. *Pathinharayil Cheria Chathu Kump.* (Nature of *kanom* transaction, rights and liabilities of parties, indicated.)

Note 8

Add in the Foot Note indicated :

1. 1955 N U C (Trav-Co) 543 (A I R V 42) *Sivagurupandran Nadar* v. *Chudalayandi Nadar.* (The deliberate avoidance of the term 'kanom' in the document and the conscious use of the expression 'Oora Otti' denoting a particular type of mortgage, would go to show that at least the executant of the document wanted to reserve with him the right of redemption.)

SECTION 100

Note 1

Add in the Foot Note indicated :

1. 1951 Cal 308 (A I R V 38 C 102 P 11) (DB), *Chanduram* v. *The Municipal Commissioners of Kurseony.*

Page 1533—Place the figure 2a after the words 'or by operation of law' in the sentence immediately following the quotation marked as Pt. 2 and add the following foot note as :

2a. 1946 52 I D 40342 (Nag), *Rikhiram* v. *Ramprasad.*

Note 4

Add in the Foot Note indicated :

1. 1953 Bom 101 (AIR V 40 C 33 P 7), *Fatechand Tarachand* v. *Parashram Maghammal.* (The rule of English Law as stated in Holroyd v. Marshall, (1861-62) 10 H L C 191 : 11 E R 999 and Collyer v. Isaacs. (1881) 19 Ch D 342 : 51 L J Ch 14 applies to India. Hence a charge on future property operates upon such property as soon as it comes into existence.) ✠ 1951 Assam 56 (A I R V 38 C 29 P 6) : I L R 1951 3 Assam 1 (DB), *Alkashali Khalifa* v. *Nath Bank Ltd.*

Note 5

Add in the Foot Notes indicated :

1. 1951 Pat 254 (A I R V 38 C 52 P 5) : 30 Pat 613 (DB), *Madan Lal* v. *Ghasiram.* (Compromise in terms of which decree is passed embodying agreement that certain property shall

remain under attachment till satisfaction of decree and be liable to be sold—*Held* no charge was created as it did not show intention to make the property security.) ✠ 1950 Cal 323 (AIR V 37 C 112 P 6) : I L R (1951) 1 Cal 507 (DB), *Naresh Chandra Ray* v. *Dhirendra Nath Dey*. (Recitals in jaminnama making it clear that defendant's vatni interest was made security for payment of money due to plaintiff in respect of darpatni rent—Document creates a charge within S. 100.) ✠ 1950 Pat 478 (A I R V 37 C 120 P 7) (DB), *Gangamoni Devi* v. *Kumud Chandra*. (Even if document fails as a lease it could be treated as creating a charge on lease-hold property where in clear terms it creates a charge.)

4. 1949 All 539 (A I R V 36 C 196 P 3) : I L R (1949) All 790 (DB), *H. C. Mukerji* v. *Radha Mohan*.

23. 1954 Aimer 77 (77, 78) (Pr 2, 3) (A I R V 41 C 75). *Mukan Kanwar* v. *Umrao Mal*. (Where Cl. (5) of the agreement arrived at between the parties provided ". . . the properties movable or immovable, partitioned or unpartitioned, self-acquired or joint, left by the late Rai Bahadur which shall be the absolute property of party No. 2 to be utilized by him in the manner he may think fit, subject to his discharging the obligations mentioned above . . ." and Cl. (3) contained the obligation to pay a certain maintenance allowance :

Held that all the properties allotted to party No. 2 under the agreement became subject to the charge for payment of the maintenance.) ✠ 1952 Trav-Co 62 (A I R V 39 C 23 P 4, 5) (DB), *Velayudha Kurup Narayana Kurup* v. *Govinda Pillai*. (Partition deed—Direction to sell part of property and utilize cash towards payment of debts—Charge on items of property directed to be sold was not intended to be created.) ✠ 1949 All 539 (AIR V 36 C 196 P 3, 4, 5) : I L R (1949) All 790 *H. C. Mukerji* v. *Radha Mohan*. (Suit for arrears of rent compromised—Arrears made payable in instalments—Defendant agreeing not to remove or dispose of stock-in trade remaining in the premises before entire decretal amount was paid—Any attempt on part of defendant only entitling plaintiff to take out execution for entire decretal amount—Compromise also providing that defendant was not to quit premises before payment of decretal amount and that if he did so without providing adequate security, execution for entire amount could be taken—Absence of clear expression of intention to create charge on stock-in-trade—*Held* that no charge was created.)

Note 9

Add in the Foot Notes indicated :

1. 1953 Tra Co. 344 (A I R V 40 C 128 P 5, 7) : I L R (1953) Tra-Co 293 (DB), *Richard Facey Hunter Crowther* v. *Pakkianathan Jnanabharanom*. (('11) 11 Ind Cas 629 (Mad), Balasubramania Nadar v. Sivaguru Asari; 1918 Mad 674 (A I R V 5) Imbichi v. Achampat Avukoya Haji and 23 Trav. L J 466 (FB), Krishna Vadhyar v. Karthiyayani, Foll.; ('87) ILR 14 Cal 687, Madho Misser v. Sidh Binaik Upadhya and 1932 Cal 451 (AIR V 19), Mohini Debi v. Purna Sashi, Not foll.) ✠ 1952 Madh B 16 (A 1 R V 39 C 10 P 3) (DB), *Shriniwas Das Bawari* v. *Jamanadas*.

2. 1952 Madh B 16 (A I R V 39 C 10 P 3) (DB), *Shriniwas Das Bawari* v. *Jamanadas*.

4. 1953 Trav-Co 344 (A I R V 40 C 128 P 7) : I L R (1953) Tra-Co 298 (DB), *Richard Facey Hunter Crowther* v. *Pakkianatham Jnanabharanom*. (('11) 11 Ind Cas 629 (Mad), Balasubramania Nadar v. Shivaguru Asari; 1918 Mad 674 (A I R V 5), Imbichi v. Achampat Avukoya Haji and 23 Trav L J 463 (FB), Krishna Vadhayar v. Karthiyayani, Foll.; ('87) I L R 14 Cal 687, Madho Misser v. Sidh Binaik Upadhya and 1932 Cal 451 (A I R V 19), Mohini Debi v. Purna Sashi, Not. foll.) ✠ 1952 Madh B 16 (AIR V 39 C 10 P 3) (DB), *Shriniwas Das Bawari* v. *Jamanadas*. (Direction in decree that amount shall be realisable from a certain property if mortgaged property was found insufficient creates a valid contingent charge.)

Note 10

Add in the Foot Note indicated :

19. 1955 Mad 331 (339) (Pr 19) ((S) A I R V 42 C 90) (DB), *Ranganathan* v. *Govt. of Madras*. (Where the debenture holders appoint a receiver and such receiver takes possession of the assets of the mortgagor company comprised in the floating charge, it becomes crystallised and fixed on those assets and there is no question of any floating charge to which the provisions of S. 230 (2) can apply after that date. (1941) 1941 Ch 129: 110 L J Ch 51, *Tetley & Son Ltd.* v. *Griffin Hotel Co. Ltd.*, Rel. on.)

Note 12

Add after Pt. 2 :

[Pt. 2a] So also a charge under S. 74, Orissa Tenancy Act, is not a charge within the meaning of this section. *1951 Orissa 41 (A I R V 38 C 16 P 9): I L R (1950) Cut 195 (DB), Girdhari* v. *Abdul Khan*.

Note 13

Add in the Foot Notes indicated :

5. 1950 Nag 117 (A I R V 37 C 41 P 29) : I L R (1949) Nag 802, *Bapurao* v. *Narayan* ✠ ('48) I L R (1948) 1 Cal 492 (498). *Bhupati Bhusan* v. *Birendra Mohan*. (Charge only gives a right to payment out of a particular fund or property without transferring that fund or property.)

[*See also* 1950 Lah 54 (A I R V 37 C 15 P 12) : Pak L R (1949) Lah 595, *Allah Ditta* v. *Jhanda*. (The creation of mere charge in the legal sense being not a transaction which involves the transfer of an interest in land is not avoided by S. 19, Punjab Colonisation of Government Lands Act, 1912.)]

8. 1950 Nag 117 (A I R V 37 C 41 P 29) : I L R (1949) Nag 802, *Bapurao* v. *Narayan* ✠ ('48) I L R (1948) 1 Cal 492 (498), *Bhupati Bhusan* v. *Birendra Mohan*. (A mortgage creates a right in rem and is good against a subsequent transferee. In a charge no right in rem is created but the right is something more than a personal obligation, and is a jus ad rem which is good only against a subsequent transferee with notice or a volunteer with or without notice.)

9. ('48) I L R (1948) 1 Cal 492 (498), *Bhupati Bhusan* v. *Birendra Mohan*. (An agreement to pay annuity to a person and to continue to pay to his descendants from generation to generation making it a charge over property creates a charge and not a mortgage, as the intention of

the parties is to create a liability in perpetuity not capable of being redeemed absolutely at any time.)

Note 14

Add in the Foot Note indicated :

2. 1946-52 I D 40365 (Kutch), *Thacher Hirji Dharamshi* v. *Hubal Dosal Habhani*. (Transaction intended to be mortgage of movable—Contention that it did not amount to mortgage on the ground that there was no delivery—*Held* even so, there was a charge and transferee with notice was bound.)

Note 16

Add in the Foot Note indicated :

5. 1952 Pat 73 (A I R V 39 C 30 P 14, 15) : 30 Pat 1161 (DB), *Sheobachan Pandey* v. *Madhosaran*. (Ekrarnama creating further charge on mortgaged property requires registration — If unregistered, neither the document nor oral evidence of its contents is admissible in evidence.)

[But see 1950 Nag 117 (AIR V 37 C 41 P 32, 38, 39) : I L R (1949) Nag 802, *Bapurao* v. *Narayan*.]

Add after Pt. 6 :

[Pt. 6a] It has also been held that in such cases the fact that the compromise creating the charge had not been attested would not render the charge or the decree invalid. *1952 Mad 163 (A I R V 39 C 73 P 2)*, *Batcha Sahib* v. *Periyanayagammal*.

Note 17

Add in the Foot Notes indicated :

2. 1952 All 315 (A I R V 39 C 90 (30) P 16), *Har Charan Lal* v. *Agra Municipal Baard, Agra*. (Charge under S. 177, U. P. Municipalities Act — Charge is indivisible and cannot be split up by apportioning the liability for taxes among various persons.)

10. 1952 Trav-Co 539 (A I R V 39 P 4) (DB), *Avera Kurian* v. *Vengu Ammal*.

Add after Pt 11 :

[Pt. 12] The charge already created in favour of the creditor would continue to subsist so long as the same has not been extinguished or abandoned by express words to that effect. *1951 Tra-Co 17 (A I R V 38 C 7 P 4) (DB)*, *Azheekhal Shree Varaha Devaswami* v. *Ummer Sait Abdulla Sait*. (Lease back in favour of mortgagor – Pattom charged on property —Surrender of lease by release deed undertaking to pay arrears of pattom — No express words showing intention to extinguish earlier charge — Charge is not extinguished)

Note 22

Add in the Foot Notes indicated :

3. 1951 Cal 398 (A I R V 38 C 102 P 11) (DB), *Chanduram* v. *Municipal Commrs. of Kurseong Municipality*

4. 1950 Nag 117 (A I R V 37 C 41 P 9): I L R (1949) Nag 802, *Bapurao* v. *Narayana*.

Note 24

Add in the Foot Notes indicated :

1. 1953 Pat 58 (AIR V 40 C 18 P 5) : 31 Pat 722 (DB), *Rajkishore Lal* v. *Sultan Jehan*.

3. 1953 Pat 58 (AIR V 40 C 18 P 5) : 31 Pat 722 (DB), *Rajkishore Lal* v. *Sultan Jehan*.

Note 25

Add in the Foot Notes indicated:

1. 1946-52 I D 40369 (Nag), *Rikhi Ram* v. *Ram Prasad*. (Passing of preliminary decree and then final decree is not usual — Decree passed is tantamount to decree under O. 34, R. 5 (3).)

3. 1953 Mad 32 (A I R V 40 C 14 P 22), *Ammenumma* v. *Chelampiriyarath*. (Decree for sale to enforce charge passed in prior suit — Second suit to enforce charge by sale is not barred.)

Note 28

Add in the Foot Notes indicated :

1. 1950 Nag 117 (A I R V 37 C 41 P 51) : I L R (1949) Nag 802, *Bapurao* v. *Narayan*.

2. 1950 Nag 117 (A I R V 37 C 41 P 51) : I L R (1949) Nag 802, *Bapurao* v. *Narayan*.

10 1950 Nag 117 (A I R V 37 C 41 P 51) : I L R (1949) Nag 802, *Bapurao* v. *Narayar*. (Adjustment of decree by making decretal amount charge on immovable property — Adjustment certified by Court — Charge held one under S. 100 and did not bind purchaser without notice of it—Even if charge be regarded not one created by decree, same results would follow — Agreement made charge as one by act of parties and subsequent incorporation in order of Court made no difference.)

11. 1951 All 141 (A I R V 38 C 16 P 17, 18, 39, 40 43, 49) : ILR (1953) 1 All 284 (FB), *Mahesh Prasad* v. *Mundar Mt*. (Word 'charge' used in second para must have reference to the charge mentioned in first para, namely, charge created by act of parties or by operation of law.)

12. ('49) I L R (1949) 1 Cal 392 (397) (DB), *Chandra Nath Dawn* v. *Sm. Him Nalini Dassi*.

14. 1951 All 141 (A I R V 38 C 16 P 50) : I L R (1953) 1 All 284 (FB), *Mahesh Prasad* v. *Mt. Mundar*.

[*See also* ('49) I L R (1949) 1 Cal 392 (397) (DB), *Chandra Nath Dawn* v. *Sm. Him Nalini Dassi*. (Decree creating charge satisfied — Charge sought to be enforced not by way of execution of decree but by way of operation of law of subrogation — Law of estoppel cannot operate and transferee without notice is protected.)]

15. 1953 Mad 71 (A I R V 40 C 23 P 8) (DB), *Arunachalam Iyer* v. *Lingiah, K N*.

16a. ('50) 1951 Nag L Jour (Notes) 166, *S. P. Tiwari* v. *Jamunabai*. (Purchaser at auction sale is affected by lis pendens — Charge created by maintenance decree binds the purchaser during pendency of the suit for maintenance in which a charge on the property was claimed.)

Place figure 1a after the words "decree of Court" in line 3 and add the following as foot note :

1a. *See* 1953 Trav.Co 193 (AIR V 40 C 64 Pr 7) : I L R (1952) Trav-Co. 241 (DB), *Sankararu Bhattathiri* v. *Dakshayani Amma*. (Where it is expressly stated in the judgment that the amount decreed would not be a charge on the plaint properties, the direction that the decree

amount could be realised from the properties of the defendants' family cannot amount to creating a charge on those properties.)

Add after Pt. 6a :

[Pt. 6b] The question whether a charge is created by the decree itself or by the compromise stated by the Counsel before the Court, is naturally a question of fact which has to be decided on the interpretation of the statement which is made by the Counsel. *1953 All 588 (A I R V 40 C 290 P 5) (DB), Kaushlendra Pratap Sahi* v. *Messrs. Sen and Sanyal.*

Place figure 18a after the words "when it is executable" in line 2, in last but one para and add the following as foot note :

18a. 1953 Cal 676 (AIR V 40 C 257 P 16, 21) (DB), *Manindra Nath Biswas* v. *Radhasyam Biswas.* (When a charge is created by the decree and is enforceable in execution under the terms thereof, the statutory impediment, contained in O. 34, Rr. 14 and 15 of the Civil Procedure Code, does not apply and no suit is necessary or imperative in that behalf under the law.)

Note 29

Add in the Foot Note indicated :

1. 1952 Pat 81 (A I R V 39 C 33 P 6) : 27 Pat 421 (DB), *Hridaynarain* v. *Haricharan.* (Principle does not apply to a case where the person who claims salvage lien had no interest in the properties before he made the payment.) ✠ 1953 Orissa 103 (Pr. 6) (A I R V 40 C 47), *Atabhdhi* v. *Bhagabhat Naik.*

Add after Pt. 12b :

[Pt. 12b-1] In a recent case, a single Judge of the Madras High Court, however, expressed the view that where a person in whose name the patta stood paid the Government revenue for an item of property which in fact belonged to another and claimed a charge on the property such a claim could not be allowed. *1950 Mad 39 (A I R V 37 C 23 P 2), Saraswati Madthi* v. *Rama Shetty.*

Note 30

Add after Pt. 7 :

[Pt. 8] So also where in a suit for maintenance filed in forma pauperis, a decree creating a charge on property for arrears of maintenance was passed, the charge so created was held to take precedence over the rights of the purchaser at the sale held in enforcement of the statutory charge under O. 33, R. 10, for arrears of court-fee in that suit. *1949 Pat 466 (A I R V 36 C 137 P 8, 11, 12) : 28 Pat 336 (DB), Mt. Bhagerna Kuer* v. *Ramdevi Rai.*

SECTION 101

Note 4

Add in the Foot Note indicated :

5. *See also* 1952 Cal 749 (A I R V 39 P 5) *Saila Bala Devi* v. *Gauri Bala Devi.* (Where the mortgagee purchased the entire mortgaged property and subsequently it transpired that the vendor was entitled to only 8 anna share in the property the only remedy of the mortgagee is to sue the vendor for damages. He has no right to bring a suit for enforcing the 8 anna share of the mortgage.)

Note 9.

Place figure 1a at the end of the 1st para and add the following as Foot Note :

1a. 1953 Mys 122 (AIR V 40 C 57 P 26) : I L R (1952) Mys 227 (DB), *Nanjundasetty, S.* v. *S. Venkatachar.* (The mortgagee cannot be considered to be trustee in any sense by becoming the purchaser of the property.) ✠ 1951 Nag 164 (A I R 38 C 33 P 44) : I L R (1950) Nag 698 (DB), *Bhagirthi Bai* v. *Manohar.* (Section does not confer rights against owners of the property.)

Note 10

Add in the Foot Note indicated :

2. 1953 Nag 200 (A I R V 40 C 75 P 35, 46): I L R (1952) Nag 684 (697) (DB). *Balwant Rao Laxmanrao* v. *Dhondba.* (Decree by prior mortgagee — Puisne mortgagee not made party — Suit by latter — Prior mortgage can be used as shield even though a fresh suit to enforce it would be barred by time.)

Volume III

SECTION 105

Synopsis

Add in the synopsis—

6A. Lease or mortgage — Distinction — See S. 58, N. 4.

Note 1

Add after Pt. 3 :

[Pt. 3a] In *Namdeo Lokman Ladhi* v. *Narmadabai*, their Lordships of the Supreme Court held that the statement in *Brahmayya* v. *Sundaramania, 1948 Mad 275 (A I R V 35 C 140) : I L R (1948) Mad 757 (FB)* that Ss. 105 to 116 are founded upon principles of reason and equity cannot be accepted either as correct or precise. It was, however, held that to the extent that these sections give statutory recognition to the principles of justice, equity and good conscience, they are applicable to cases not governed by the Act. *1953 S C 228 (A I R V 40 C 55 P 23) : 1953 S C R 1009 (S C).*

Add after Pt. 7 :

[Pt. 7a] See *Namdeo Lokman Ladhi* v. *Narmadabai, 1953 S C 228 (AIR V 40*

C 55 P 20) : 1953 S C R 1009 (SC), referred to above.

Add after Pt. 7a, as independent para :

[Pt. 7b] Section 2 (d) clearly excludes the application of the provisions of S. 105 to the relationship which has been created by a decree. The provisions of the section would, however, be invoked as matters of justice, equity and good conscience. *1954 Bom 370 (Pr 16) (A I R V 41 C 107) : ILR (1954) Bom 615 (DB), Ramjithai Virpal* v. *Gordhandas Maganlal.*

Note 2

Add in the Foot Notes indicated :

1. 1952 I D A 17256A (Nag), *Khubbi Dulare* v. *Lachoo.* (Right to enjoy must be exclusive.)

2. *See also* 1951 Bom 127 (AIR V 38 C 25 P 6, 10) : I L R (1951) Bom 692 (DB), *Ramchandra Annappa Hedge* v. *Subraya Timmaya.* (Lease is a transfer of immovable property within meaning of S. 53A).

Note 3

Add in the Foot Notes indicated :

1. 1951 Bom 127 (AIR V 38 C 25 P 6, 10) : ILR (1951) Bom 692 (DB), *Ramchandra Annappa Hedge* v. *Subraya Timmaya Hedge.* (Merely because the section defines a lease as a transfer of a right to enjoy immovable property it does not follow that a transfer of the benefit to arise out of land, viz., the right to enjoy immovable property is not a transfer of interest in immovable property.)

2. 1954 Pat 249 (A I R 41 C 90 P 11) : 32 Pat 887 : 1954 Cri L Jour 664 (DB), *State of Bihar* v. *Ishri Bhagat.* (Right to construct platform on drain granted by Municipality on payment of annual rental—It is merely right to do something on drain—It does not create any interest in the drain itself — Grantee is not a lessee) ✠ 1953 Sau 73 (A I R V 40 C 31 P 4) (DB), *Samsudin Jhaver* v. *Assistant Custodian* ✠ 1952 Nag 325 (AIR V 39 P 16) : I L R (1952) Nag 464 (DB), *Samrathmal Dhanraj* v. *Sunderbai* ✠ 1951 Pat 190 (A I R V 38 C 33 P 9) (DB), *Jai Narain* v. *Syed Ali Murtaza* ✠ 1952 I D A 17256 A (Nag), *Khubbi Dulare* v. *Lachoo.*

Page 1605 : In Note 3 line 4, after the words "It will only be a licence" and before "(See Note 13)" add figure 2a and add the following as foot note—

2a. ('52) 1952-1 All E R 1199 (1201) : (1952) 1 T L R 1037, *Cobb* v. *Lane* ✠ 1951 Pat 190 (AIR V 38 C 33 P 9) (DB), *Jai Narain* v. *Syed Ali Murtaza.*

Note 4

Add in the Foot Note indicated :

2. 1955 Nag 170 (173) (Pr 13) (AIR V 42 C 39) : ILR (1955) Nag 151 (DB). *Trivenibai Mangilal* v. *Leelabai Vrijpalji.* (The relevant portions of a document were in these terms: "I have, this day given to you that land described below which is owned by me. Now you have become occupancy tenant of the same. You may enjoy the same in any way you like from generation to generation. My estate and heirs or myself shall have absolutely no right thereto. You shall become the owner of the said land from 1-6-1944. I will have absolutely no right thereto after the said date. The estate has been given to you in lieu of your Rs. 8,700 due to you, subject to the condition that in case your amount has not been paid to you on 1-6-1944, you may fully enjoy the estate described above in any way you like from generation to generation." The document was not signed by both the parties nor was it witnessed by any other persons. Possession was neither intended to be, nor was as a matter of fact, given on the date the document was executed or on any subsequent date:

Held, that the transaction amounted not to an agreement to lease within the meaning of S. 2 (7), Registration Act but simply to an agreement for a future lease on the non-happening of a certain event, *viz*, the non-payment of the amount advanced. The parties never intended that this document created *in praesenti* an interest in the fields mentioned therein, though the enjoyment of the property may be deferred to a future date.)

Add after Pt. 3 :

[Pt. 3a] A document purporting to be a lease but signed by the lessee alone cannot create a lease. Such a document must be considered as an agreement to lease. *('50) 1950 Bur L R (H C) 71 (73) (DB) Maung Maw* v. *U Ba Thwe.*

[Pt. 3b] An instrument is usually construed as a lease if it contains words of present demise. It is construed as an executory agreement, notwithstanding that it contains words of present demise, where certain things have to be done by the lessor before the lease is granted, such as the completion or repair or improvement of the premises, or by the lessee, such as the obtaining of sureties. *1954 S C 496 (498) (Pr 6) (AIR V 41 C 115) : 1955 S C R 158 : 1954 Cri L Jour 1333 (SC), Tolaram Relumal* v. *State of Bombay.*

Note 5

Add in the Foot Note indicated :

5. 1952 I D A 17256A (Nag), *Khubbi Dulare* v. *Lachhoo* ✠ 1952 I D A 17242 (Cal), *Bharat Sabai Grass Ltd.* v. *State of M. P.* ✠ 1951 Trav-Co 180 (AIR V 38 C 75 P 4) (DB), *Paranchu Ouseph* v. *Pakku Kaujathu* ✠ 1950 Nag 107 (AIR V 37 C 37 P 7) : ILR (1950) Nag 218, *Baldeo Prasad* v. *Rewaram* ✠ ('50) 1950 Bur L R (SC) 64 (65), *Indian Starch Products Ltd.* v. *The Controller of Rents, Rangoon.*

Page 1609 — In line 1 from top, add 1a after the word 'enjoyment' and add the following as foot-note—

1a. 1950 East Punj 296 (AIR V 37 C 67 P 26) (DB), *Governor-General in Council* v. *Shrimati Indar Mani.*

Add after Pt. 2a :

[Pt. 2b] But he can lease out the reversion. *('51) 55 Cal W N 86 (87) (DB), Sreenarayan Mansingka* v. *Durga Dutt.*

Add after sentence after Pt. 7 as a separate para :

[Pt. 7a] It is not necessary that actual possession of the property should be given to the lessee by the lessor himself. For transfer of possession of immovable property, the transferee need not be put in physical possession of the property by the person who executes the deed of transfer. Transfer of the right to be in possession amounts to transfer of possession. *1952 Trav.Co 333 (AIR V 39 P 5, 6) (FB), Sanku Krishnan* v. *Hari Prabhu.*

Place after the words "also transferred" at the end of last para figure 8a and add the following as foot-note :

8a. 1950 East Punj 296 (AIR V 37 C 67 P 26) (DB), *Governor-General in Council* v. *Shrimati Indar Mani Jatia.*

Note 6

Page 1611—In first line, after the words "in such a case" place figure 2a and add the following as foot-note :

2a. 1951 All 655 (AIR V 38 C 179 P 17, 18), *Ramkali* v. *Murlidhar.*

Add after Pt. 5 :

[Pt. 5a] In construing a transaction one has to look beneath the verbiage and ascertain what are the real rights which are being transferred. *1949 Nag 389 (AIR V 36 C 158 P 6, 7, 9, 11) : I L R (1949) Nag 849 (DB), Balram Nasare* v. *Mahadeo Panduji.*

Add after Pt. 6 :

[Pt. 6a] But the encumbrances created by the tenants also pass to the landlord and the landlord is entitled upon reversion to redeem the mortgage. *1951 All 655 (AIR V 38 C 179 P 17, 18), Ramkali* v. *Murlidhar.*

Add the following words after Pt. 8 in the same para :

"(See also Note 67 and S. 58, Note 4.)"

Add after Pt. 8 as a separate para :

[Pt. 8a] Where a proprietor holding *sir* rights parts with only occupancy rights in a field and not ownership outright and the parties agree that a specified rent shall be paid in respect of those fields, then whatever the parties may choose to call the transaction in law the transfer amounts to a lease. *1949 Nag 389 (AIR V 36 C 158 P 6, 7, 9, 11): I L R (1949) Nag 849 (DB), Balram Nasare* v. *Mahadeo Panduji.*

Note 6A

Add after Note 6 :

6A. Lease or mortgage — Distinction—See S. 58, Note 4.

Note 6B

Add after Note 6a :

6B. Lease and sub-lease—Distinction.

[Pt. 1] There is no difference in legal character between a lease and sub-lease. It is true that in the case of a lease, the proprietor is the transferor, and in the case of a sub-lease the lessee is the transferor. But this does not affect the legal character of the transaction. A lease is the transfer of a right to enjoy immovable property made for a certain time and where the agreement (whether it is called a lease or a sub-lease) vests in the grantee a right of possession for a certain time, it operates as a conveyance and is a lease in the eye of law. *1954 Pat 340 (342) (Pr 5) (AIR V 41 C 119) : ILR 33 Pat 198 (DB), Mineral Development, Ltd.* v. *Union of India.*

Note 7

Add in the Foot Notes indicated :

1. 1953 Sau 73 (AIR V 40 C 31 P 4) (DB), *Samsuddin Jhaver* v. *Assistant Custodian.*

8. 195 All 661 (A I R V 37 C 259 P 3), *Chotelal* v. *Mt. Durga Bai.*

Add after Pt 1 :

[Pt. 1a] The law requires that a deed of lease should be executed by the lessor and the lessee both. *1950 All 661 (AIR V 37 C 259 P 3), Chotelal* v. *Mt. Durga Bai* ✠ *('50) 1950 Bur L R (H C) 71 73 (DB), Maung Maw* v. *U Ba Thwe.* (Instrument of lease contains covenants by both the lessor and the lessee.)

[Pt. 1b] The contract may be express or may be implied from the acts and conduct of the parties which indicate that the landlord intended to divest himself of the possession of the premises and that the tenant intended to assume possession thereof. One of the most important circumstances from which this inference may be drawn is the payment of rent, for although rent is not an essential, it is a normal incident of tenancy, and the fact that a person in possession of the premises paid rent to the owner thereof indicates to an extent at least that the relationship of landlord and tenant exists between the parties. On the other hand the fact that no rent was paid would lead one to a contrary conclusion and negative the existence of such relationship. *1955 Punj 37 (39) (A I R V 42 C 13 P 10) (DB), Ammar Ahmad Khan* v. *Union of India* *1955 Punj 34 (36) ((S) A I R V 42*

C 12 P 12) (DB), Gurcharan Singh v. *Chairman, Delhi I. Trust.* (Rent is a usual, though not an essential, incident of the relationship of landlord and tenant and payment of rent by the occupier to the owner of premises raises a presumption that the relationship of landlord and tenant has come into existence. The presumption however is a rebuttable one and may be rebutted by showing that the acts and conduct of the parties are inconsistent with its existence.)

Add after Pt. 4 :

[Pt. 4a] So also a unilateral unregistered agreement by a person to occupy a house and pay a certain monthly rent, is nothing more than a karar or agreement undertaking to pay rent for use and occupation and not a lease. Such a document is admissible in evidence and the executant is bound by its terms. *1951 Mys 24 (AIR V 38 C 12 P 2, 4), Hassan Sait* v. *Mirchandani.*

Add after Pt. 7 :

[Pt. 7a] The revenue Courts have no power to change the terms of the contract between the parties and to lay down a different date for the commencement of the tenancy. *1953 Nag 219 (A I R V 40 C 84 P 10) : I L R (1954) Nag 147, Ilahibux* v. *Munir Khan.*

[Pt. 7b] A Court cannot reconstitute a contract of tenancy between the lessor and the lessee. Thus where the demised premises, specified portions of which are in possession of different tenants, are destroyed by fire and after the reconstruction of the premises the whole of it is given to one of the tenants on a fresh lease, the Court has not got – much less the rent control authorities —jurisdiction to direct a sub-division of the fresh tenancy and to compel him to confine his lease to the area originally occupied by him. *1955 NUC (Nag) 1236 (A I R V 42), Rambai Hari Kisan* v. *Champalal.*

Note 8

Add in the Foot Notes indicated :

2. 1953 Sau 73 (A I R V 40 C 31 P 4) (DB), *Samsuddin Jhaver* v. *Assistant Custodian* (Payment received from person under misrepresentation that such person was tenant—No tenancy is created.)

3. 1955 Punj 34 (36) (Pr 12) ((S) A I R V 42 C 12) (DB), *Gurcharan Singh* v. *Chairman, Delhi I. Trust.* (Payment of rent by occupier to owner of premises raises a rebuttable presumption as to relationship of landlord and tenant.) ✠ 1955 Punj 37 (39) (Pr 10) (A I R V 42 C 13) (DB), *Ammar Ahmad Khan* v. *Union of India.*

4. 1950 All 661 (A I R V 37 C 259 P 3), *Chotelal* v. *Mt. Durga Bai.*

6. 1950 Assam 17 (A I R V 37 C 6 P 12) (DB), *Hanuman Bux Agarwalla* v. *Bibhuti Prosad Singh.* (Where pending the completion of sale of a house by the appellant's agent to the respondent on the former's obtaining the required authority from the appellant, the respondent agreed to pay rent to the appellant, *held* that there was a contract of tenancy between the appellant and the respondent and the latter was liable for rent.)

Add after Pt. 1 :

[Pt. 1a] Such payment may only prove permissive occupation not amounting to any right or title to possession. *1954 S C 758 (Pr 5) (A I R V 41 C 175) (S C), Sheodhari Rai* v. *Suraj Prasad Singh.*

Page 1613—In line 10 from the top, after the words "of possession" place the figure 4a and add the following as foot note :

4a. 1953 Cal 349 (AIR V 40 C 130 P 11, 12, 14), *Murlidhar Kuthia* v. *Tara Dye.* (Lease of premises invalid for want of registration — Lessee in possession paying rent and lessor accepting same—There is tenancy from month to month.)

Note 9

Add in the Foot Notes indicated :

1. 1953 All 499 (A I R V 40 C 240 P 14), *Shiv Dutt* v. *Ghasita* ✠ (1950) All 661 (A I R V 37 C 259 P 3), *Chotelal* v. *Mt. Durga Bai.*

2. 1955 N U C (Cal) 844 (A I R V 42), *Bhabatarini Dassi* v. *Manmohan Palsai.* (Where tenant alone executed and registered a unilateral document of lease of thika tenancy for a term, the lease would not operate as valid lease or contract.) ✠ 1955 N U C (Madh B) 1553 (AIR V 42), *Balbimrao Balasahib* v. *Har Prasad* ✠ 1952 All 544 (A I R V 39 C 90 (42) P 7) (DB), *Dau Dayal* v. *Brij Mohan* ✠ 1953 All 499 (AIR V 40 C 240 P 14), *Shiv Dutt* v. *Ghasita* ✠ 1951 Mys 24 (A I R V 38 C 12 P 2, 4), *Hassan Sait* v. *Mirchandani.* (Unilateral agreement to occupy house and pay rent.) ✠ 1951 Mys 13 (AIR V 38 C 7 P 3, 4), *Ramanna* v. *H. S. Rangaswamy.* (Rent chit by tenant.) ✠ 1950 All 661 (A I R V 37 C 259 P 3) *Chotelal* v. *Mt. Durga Bai* ✠ ('50) 1950 Bur L R (HC) 71 (73) (DB), *Moung Maw* v. *U Ba Thwe.*

3. 1951 Mys 13 (AIR V 38 C 7 P 3, 4), *Ramanna* v. *H. S. Rangaswamy.* (Rent chit would be admissible in proof of admission of lease and suit for rent by landlord on the basis of the rent chit will be maintainable.)

4a 1951 Mys 21 (AIR V 38 C 12 P 2, 4), *Harsan Sait* v. *Mirchandani* ✠ ('50) 1950 Bur L R (HC) 71 (73) (DB), *Maung Maw* v. *U Ba Thwe.* (Document signed by lessee alone must be considered as agreement to lease.)

5. 1955 N U C (Madh B) 1553 (AIR V 42), *Balbimrao Balasahib* v. *Har Prasad.* (Rent note for one year does not require registration under S. 17 (1) (d) Registration Act.)

Add after Pt. 3 :

[Pt. 3a] The kabuliat is nevertheless admissible in evidence for the purpose of determining the nature of possession. *1950*

All 611 (AIR V 37 C 259 P 3), Chotelal v. *Mt. Durgabai.*

Note 11

Add in the Foot Note indicated :

1- *See also* (1954) 1954-2 All E R 601 (604), *Montague* v. *Browning.* (A landlord had let his dwelling house to a tenant at 10s. a week as rent, the arrangement being that the tenant was to perform the duties of a caretaker of the landlord's premises. The rental of 10s. to be paid per week was arrived at by deducting the tenant's wages of £40 a year from the agreed rental value of the house, *i.e.*, £66 a year. Subsequently, the landlord decided to increase his wages to £66 and informed the tenant that he would not have to pay the rent of 10s. a week any more. The tenancy was subject to the Rent Restriction Act.

Held (i) that in the circumstances it could not be held that a new tenancy came into force when the landlord decided to increase the wages by 10s. a week, so as to take the tenancy out of the operation of the Rent Restriction Act. (1925) 1 K B 514 : 94 L J K B 280, *Hornsby* v. *Maynard*, dist.)

Note 13

Add in the Foot Notes indicated :

3. ('52) 1952-1 All E R 1199 (1201) : (1952) 1 T L R 1037, *Cobb* v. *Lane.*

12. 1954 Mys 89 (91) (Pr 6) (A I R V 41 C 41) : I L R (1953) Mys 578, *Thimmarayappa* v. *Narayanappa* ✣ 1951 Pat 190 (A I R V 38 C 33 P 9) (DB), *Jai Narain* v. *Syed Ali Murtaza.*

14. 1953 Mad 456 (A I R V 40 C 173 P 3, 4), *Punnamana R.* v. *Lakkaraji Venkata.*

In line 6 of the Note place figure '1a' after the word 'lease' and add the following as foot note :

1a. 1954 Bom 370 (Pr 9) (A I R V 41 C 107) : I L R (1954) Bom 615 (DB), *Ramjibhai Virpal* v. *Gordhandas Magan Lal.* (Besides right to exclusive possession and enjoyment there must be other equally important ingredients mentioned in S. 105) ✣ 1954 Pat 249 (A I R V 41 C 90 P 11) : 32 Pat 887 : 1954 Cri L Jour 664 (DB), *State of Bihar* v. *Ishri Bhagat.* (Right to construct platform over drain by Municipality on condition of payment of annual rent — It is merely a right to do something on drain — It does not create any interest in drain itself—Grantee is not lessee.)

In line 10 of the Note place figure 1b after the words "in property" and add the following as Foot Note :

1b. 1952 I D A 17255 A (Nag), *Khubbi Dulare* v. *Lachhoo.*

In line 14 of the Note place figure '1c' after the words "the right is a lease" and add the following as Foot Note :

1c. 1953 Sau 137 (A I R V 40 C 68 P 2, 3) (DB), *Faramroz M. Marolia* v. *Dave Ravishanker.* (Case of sub-lease.)

In line 20 of the Note, place the figure 1d after the words "but a licence" and add the following as Foot Note :

1d. 1954 Bom 370 (Pr 9) (A I R V 41 C 107) : I L R (1954) Bom 615 (DB), *Ramjibhai Virpal* v. *Gordhandas Magan Lal.* (Exclusive possession is compatible with licence — English law indicated.)

Add after Pt. 14 :

[Pt. 14a] The reason for this distinction between a lease and a licence is apparent. In the case of a licence except in the two cases mentioned in S. 60 (a) and (b) of the Easements Act it is revokable at the will of the owner. For that reason, unlike in the case of lease, the Legislature did not provide for forfeiture in the case of a licence. *1953 Mad 456 (A I R V 40 C 173 P 4), Punnamma R.* v. *Lakkaraju Venkata.*

Note 14

Add in the Foot Notes indicated :

1. 1952 I D A 17242 (Cal), *Bharat Sabai Grass Ltd.* v. *State of M. P.* ✣ 1950 East Punj 296 (A I R V 37 C 67 P 28) (DB), *Governor-General in Council* v. *Shrimati Indar Mani* ✣ 1950 Nag 107 (A I R V 37 C 37 P 7, 8) : I L R (1950) Nag 218. *Baldeo Prasad* v. *Rewaram.* (Regard must be had to the substance of the agreement.) ✣ ('50) 1950 Bur L R (S C) 64 (65), *Indian Starch Product Ltd.* v. *The Controller of Rents, Rangoon.*

2. 1955 N U C (Punj) 1357 (A I R V 42), *Shrimati Devi* v. *Ram Kishen* ✣ 1952 I D A 17256A (Nag), *Khubbi Dulare* v. *Lachhoo* ✣ 1952 I D A 17242 (Cal), *Bharat Sabai Grass Ltd.* v. *State of M. P.* ✣ 1951 Trav-Co. 189 (A I R V 38 C 75 P 4) (DB), *Paranchu Ouseph* v. *Pakku Kanjathu* ✣ 1950 Cal 23 (A I R V 37 C 6 P 26) : I L R (1950) 2 Cal 443 (DB), *Rampratap Kayan* v. *The National Petroleum Co. Ltd.* ✣ 1950 East Punj 296 (A I R V 37 C 67 P 28) (DB), *Governor-General in Council* v. *Shrimati Indarmani* ✣ 1950 Nag 107 (A I R V 37 C 37 P 7) : I L R (1950) Nag 218, *Baldeo Prasad* v. *Rewaram.* (If according to the contract, the land is to be used in a certain way and on certain terms while its possession and control remains with the owner himself the right conferred would be merely a licence and nothing more.) ✣ ('50) 1950 Bur L R (S C) 64 (65), *Indian Starch Products Ltd.* v. *The Controller of Rents, Rangoon.* (Right of way as a mere personal licence.)

3. 1955 N U C (Punj) 1357 (A I R V 42), *Shrimati Devi* v. *Ram Kishen* ✣ 1953 Cal 149 (AIR V 40 C 48 P 2) (DB), *Kali Prosad* v. *Jagadish Pada.* (Agreement conferring exclusive right to enjoyment of furnished premises in consideration of a lump sum per month.) ✣ 1950 Cal 23 (A I R V 37 C 6 P 26) : I L R (1950) 2 Cal 443 (DB), *Ram Pratap Kayan* v. *National Petroleum Co. Ltd.* ✣ 1950 East Punj 296 (A I R V 37 C 67 P 28) (DB), *Governor General in Council* v. *Shrimati Indar Mani Jatia.* (On construction, held that the agreement did not amount to a lease.)

4. 1952 I D A 17256A (Nag), *Khubbi Dulare* v. *Lachhoo.* (A grant of a mere right to cultivate *singada* in a tank of which the grantee has not been given exclusive possession is not a lease but a licence.)

5. 1954 Mys 89 (91) (Pr 5) (A I R V 41 C 41) : I L R (1953) Mys 578, *Thimmarayappa* v. *Narayanappa.* (Right to vend fruits in certain municipal area.) ✣ ('52) 1952-1 All E R 1199 (1201) : (1952) 1 T L R 1037, *Cobb* v. *Lane.*

6. 1951 Trav.Co 189 (A I R V 38 C 75 P 4) (DB), *Paranchu Ouseph* v. *Pakku Kanjathu.* (Right to cultivate "vacant space" given — Location or area not mentioned — Grantor exercising right of possession by planting trees — Transaction held not lease, though styled as Pattamcheettu and though rent paid was Pattam — A I R Commentary on T. P. Act, approved.) ✠ ('50) 1950 Bur L R (H C) 1 (13) (DB), *Gurbachan Singh* v. *Jos. E. Fernando.* (A document contained the terms that *F* would allot *G* shares in his business premises for carrying on radio business, that for allotting those shares *G* would pay *F* a sum of Rs. 100, as "guaranteed commission" on *G's* business and that both of them were to observe strictly the same business hours. *Held* that the document was one evidencing the licensing of a portion of *F's* premises for a specific purpose.)

7. 1955 Bom 175 (176) (Pr 8) (A I R V 42 C 46) : I L R (1954) Bom 1256, *Narayan Ramchandra* v. *Gangadhar Keshav.* (Compromise decree in suit for possession providing that the possession of the property might be retained with the defendant for a specified period on a condition to pay a rent of Re. 1 a year and if the defendant failed to give possession after that period the plaintiff should take possession by executing the decree and that on this condition the defendant had left his contentions in the suit. *Held* that the parties intended to create a lease and not a license.) ✠ 1953 Cal 149 (A I R V 40 C 46 P 2) (DB), *Kali Prosad* v. *Jagadish Pada* (*A* agreeing to give *B* use of furnished cinema house — *B* allowed the use of furniture, machines, house, etc. — *B* to pay lump sum monthly and all taxes and rates — *B* entitled to spend money for improvement, the sum to be advanced being treated as loan to be set off against premium—*B* held given exclusive right to enjoyment — Agreement held amounted to letting of premises.) ✠ 1951 Pat 190 (A I R V 38 C 33 P 6) (DB), *Jai Narayan* v. *Syed Ali Murtaza.* (A obtaining lease of land from Municipality for fixing petrol pump — A transferring to *B* exclusive right of management of pump for premium of Rs. 20 P. M. — *A* undertaking to get lease of pump from oil company in *B's* name — *A* removing his materials from shop and *B* constructing new shop — *B* to bear all taxes, charges and expenses of management — No interest left for *A* except receiving monthly premium — Document held created a sub-lease and not a licence in favour of *B.*) ✠ 1950 Cal 23 (A I R V 37 C 6 P 26) : I L R (1950) 2 Cal 443 (DB), *Ram Pratap Kayan* v. *National Petroleum Co. Ltd.* (Grant for manufacturing process involving installation of costly machines by grantee — Premises to be returned on expiry of term in same condition in which it was handed over — Alteration with permission of grantor permissible — Grant held lease and not licence. *(obiter.)*) ✠ 1950 Nag 107 (AIR V 37 C 37 P 7, 8): I L R (1950) Nag 218, *Baldeo Prasad* v. *Rewaram* (Document styled as lease in perpetuity for "nistar" of *chotta* grass land in occupancy right — Yearly rent liable to revision at next settlement—Lessor still to have right of taking away wood for fuel and doing every other kind of nistar — Transaction held lease and not licence, nature of the act required to be done by the grantee being such as to require exclusive possession.)

Add after Pt. 1 :

[Pt. 1b] Further the document must be read as a whole and it would not be right to lay emphasis on a part of the document and to ignore the other part. *1955 Bom 175 (176) (Pr 6) (A I R V 42 C 46)* : *I L R (1954) Bom 1256 Narayan Ramchandra* v. *Gangadhar Keshav.*

[Pt. 1b.] There is no inference of law which compels one to say that a man must be regarded as a tenant at will because one finds him, living in a house as if it was his home. It depends upon the intention of the parties whether relationship of landlord and tenant is created between them. In ascertaining the intention, the Court will look into the circumstances in which the person claiming to be tenant went into occupation to find whether the conduct of parties shows that the occupant was intended to have an interest in land or merely a personal privilege without any such interest. *('52) 1952-1 All E R 1199 (1201)* : *(1952) 1 T L R 1037 Cobb* v. *Lane.*

In line 10 place figure '2a' after the words "only a licence" and add the following as Foot Note :

2a. ('50) 1950 Bur L R (S C) 64 (65, 66), *Indian Starch Products Limited* v. *The Controller of Rents, Rangoon.* ✠ 1952 I D A 172-42 (Cal.), *Bharat Sabai Grass Ltd.* v. *State of M. P.* (Exclusive possession should be intended to be vested in the transferee.) ✠ 1951 Trav Co. 189 (A I R V 38 C 75 P 4) (DB), *Paramchu Ouseph* v. *Pakku Kanjathu.* ✠ ('50) 1950 Bur L R (HC) 1 (DB), *Gurbachan Singh* v. *Jos. E. Fernando.*

In line 14 of the Note place figure 2b after the words "in the lessor" and add the following as Foot Note :

2b. 1953 Sau 137 (A I R V 40 C 68 P 2) (DB), *Faramroz M. Marolia* v. *Dave Ravishanker,*

Add after Pt. 3 :

[Pt. 3a] The exclusive possession would be taken to have been given if the nature of the acts to be done by the grantee was such as required a right of exclusive occupation. *1950 Cal 23 (A I R V 37 C 6 P 26) : I L R (1950) 2 Cal 443 (DB), Ram Pratap Kayan* v. *The National Petroleum Co. Ltd.* (Grant of shed for purposes of erecting costly machinery.) ✠ *1950 Nag 107 (A I R V 37 C 37 P 7) : I L R (1950) Nag 218, Baldeo Prasad* v. *Rewaram.* (If the nature of the acts to be done by the grantee requires that he should be in exclusive possession the pro-

per inference to be drawn would be that it is a lease.)

Page 1620—At the end of Item 4, after the words "licence" place figure 3b and add the following as foot note :

3b. 1952 Nag 325 (AIR V 39 P 16) : I L R (1952) Nag 464 (DB), *Samrathmal Dhanraj* v. *Sunderbai.*

Page 1621—In line 4 from the top after the word "granted" place figure 9a and add the following as foot note :

9a. *See* ('52) 1952-1 All E R 1199 (1201): (1952) 1T L R 1037, *Cobb* v. *Lane.*

Add after Pt. 10 :

[Pt. 10a] Where a *qabuliat* exhibits a contract between the parties to pay a certain amount every month in lieu of the occupation and is executed by one of the parties only it is not a lease but is a licence. *1952 All 344 (A I R V 39 C 90 (42) P 7) (DB), Dau Dayal* v. *Brij Mohan* ✠ *('52) 1952 R D (HC) 14 (16), Shiv Dutt* v. *Ghasita.* (Where possession was allowed for unspecified period and there was no valid lease deed, the position of the occupier was that of a licensee.)

Add after Pt. 10a :

[Pt. 10b] A theka of lakh parsadi for extracting lac, with a delivery of possession to the grantee does not create an interest in the land and does not amount to a lease. *1952 Nag 325 (A I R V 39 P 16, 17) : I L R (1952) Nag 464 (DB). Samrathmal Dhanraj* v. *Sunderbai.* (Grantees are not "thekadars of proprietary rights' within meaning of S. 2 (11) (b), C. P. Ten. Act, 1920.)

Add after Pt. 13 :

[Pt. 13a] For distinction between a tenant and an occupier, see the undermentioned decision. *1952 Cal 915 (A I R V 39 P 20) (DB), Dinendro Mullick* v. *Union of India.* (There must be contract of tenancy before a person can be a tenant. But if there is no contract, and the possession of person is permissive, then it is a case of an occupier. Rent is realisable from the tenant. Profit, on the other hand, is payable by a person for the use of another's property with his consent, when the rent or the period is not fixed. Occupier is not a tenant. When the rent has been agreed, the tenant pays the agreed rent. Where the rent has not been fixed, the occupier must pay such sum as the occupation is worth.)

Add after Pt. 13a :

[Pt. 13b] Where a person is in possession for a long time and there is no proof of tenancy, no inference that he is in possession as a licensee can be made. *('49) 1949 Nag L Jour (Notes) 262, Govinda* v. *Syed Raza.*

Note 15

Add in the Foot Note indicated :

4. 1950 Raj 56 (A I R V 37 C 22 P 6), *Bal Chandra* v. *Banshi Dhar.* (In this case, it was held on the construction of the deed that a relationship of landlord and tenant was created between the parties.)

Add after Pt. 2 :

[Pt. 2a.] In the undermentioned case, it was, however, held that exclusive possession for indefinite period is not the test of the occupier being a tenant-at-will and that such a possession is not inconsistent with the fact of the occupier being a licensee. *('52) 1952-1 All E R 1199 (1201) : (1952) 1 T L R 1037, Cobb.* v. *Lane.* (Intention of parties is real test.)

Note 17

Add in the Foot Note indicated :

2. 1954 Mys 89 (91) (Pr 5) (A I R V 41 C 41) : I L R (1953) Mys 578. *Thimmarayappa* v. *Narayanappa.* (Plaintiff applying to Municipality for grant of a lease-right for vending fruits on monthly rental—Deed reciting that by resolution Municipality had agreed to lease the land to plaintiff—Recital in deed held was incorrect—Resolution held permitting applicant to vend fruits on the specified land and not granting land on lease—Deed held was merely a licence and not a lease.)

Note 19

Add in Foot Note indicated :

8. 1954 Pat 304 (306) (Pr 4) (A I R V 41 C 106) *Jainarain Choudhary* v. *Biseswar Prasad.* (Registered kabuliyat and patta executed but valid lease not created due to non-compliance with S. 107—Decree for compensation for use and occupation can be passed against person in possession under that lease.)

Note 24

Add after Pt. 1a :

[Pt. 1b] Where there is no evidence as to the date when a person was actually admitted to tenancy the date of the occupation cannot be taken as the date of the commencement of the tenancy. *1955 NUC (Ajmer) 321 (AIR V 42), Panchulal* v. *Atumal.*

Add after Pt. 2 :

[Pt. 2a] The Revenue Courts have no power to change the terms of the contract between the parties and to lay down a different date for the commencement of the tenancy. *1953 Nag 219 (A I R V 40 C 84 P 10) : I L R (1954) Nag 147, Ilahibux* v. *Muniz Khan.*

Note 25

In line 10 of the note place figure 2b after the words 'the lease' and add the following as Foot Note :

2b. 1954 Assam 58 (A I R V 40 C 15 P 10) : ILR (1953) 5 Assam 207, *Hamida Khatoon* v. *Shibananda Bhandari.*

Note 26

Add in the Foot Note indicated :

1. 1950 Bom 161 (A I R V 37 C 42 P 3) (DB), *R. S. Rammohanrai Jaswantrai Dessai* v. *Somabhai.* (Unles there are words indicating grant of perpetual lease.)

In line 4 of the note place figure 1a after the sentence, "It may be implied" and add the following as Foot Note :

1a. 1954 Assam 58 (AIR V 40 C 15 P 10) : I L R (1953) 5 Assam 207, *Hamida Khatoon* v. *Shivananda Bhandari* ✠ 1954 Bom 257 (A I R V 41 C 75 P 3, 5, 6, 13, 14): I L R (1954) Bom 448 (DB), *Bavasaheb Walad Mansursaheb* v. *West Patent Press Co. Ltd.* (Tenancy for building purposes—Tenancy is not intended to be one at will but either permanent lease or one for life time of lessee) ✠ 1953 Trav Co 353 (A I R V 40 C 132 P 9), *Easwara Pillai* v. *Krishna Prabhu* (Custom relating to cultivation of Punja lands—Transaction of lease comes to an end as soon as harvest is over and pattam is paid to the lessor. No particular formality of surrender is required—Fresh arrangement has to be entered to do agricultural operation for next crop.)

In line 5 of the note place figure 1b after the words "by law or usage" and add the following as Foot Note :

1b. 1954 Assam 58 (AIR V 40 C 15 P 10) : I L R (1953) 5 Assam 207, *Hamida Khatoon* v. *Shibananda Bhandari.*

In line 7 of the note place the figure 1c after the words "purpose of the lease" and add the following as Foot Note :

1c. 1954 Assam 58 (AIR V 40 C 15 P 10) : I L R (1953) 5 Assam 207, *Hamida Khattoon* v. *Shibananda Bhandari.*

In line 15 of the note place figure 1d after the words "is to continue" and add the following as Foot Note :

1d. 1954 Assam 58 (AIR V 40 C 15 P 10) : I L R (1953) 5 Assam 207, *Hamida Khatoon* v. *Shibananda Bhandari.*

Note 27

Add in the Foot Notes indicated :

2. 1954 Bom 257 (AIR V 41 C 75 P 3, 5, 6, 13, 14) : I L R (1954) Bom 448 (DB), *Bavasaheb Walad Mansursahib* v. *West Patent Press Co. Ltd.* (1926) Bom 374 (AIR V 13) (DB), Bai Sona v. Bai Hirgavri, Dissented from.)

6. See however 1954 Bom 257 (AIR V 41 C 75 P 3, 5, 6, 13, 14) : I L R (1954) Bom 448 (DB), *Bavasaheb Walad Mansursaheb* v. *West Patent Press Co. Ltd.* (Such a lease is not a tenancy-at-will. It is not also a permanent lease—This is a tenancy for life-time of lessee : 1926 Bom 374 (AIR V 13) (DB), Bai Sona v. Bai Hirgavri, Dissented from.)

In Foot Note 1, after the words 'disapproved in A I R 1943 Bom 148' add "and 1954 Bom 257 (AIR V 41 C 75) : ILR (1954) Bom 448 (DB)."

Add after Pt. 9 at the end of the para :

[Pt. 9a] On this view of the matter, such a lease creates a hereditary interest. See the undermentioned case. *1950 Bom 161 (AIR V 37 C 42 P 6) (DB), R. S. Rammohanrai* v. *Somabhai.* (A compromise decree containing the terms of a lease provided that the defendant was to continue as a tenant so long as he abided by the conditions about the payment of rent and rendering certain service to the plaintiff. The rent was to be revised after every twelve years and the right of cultivation was not to be assigned. In case of assignment, the landlord was entitled to take possession. It was held that though the lease was for an indefinite period, taking into consideration the terms of lease, the surrounding circumstances and the subsequent conduct of the parties, a hereditary interest was created by the lease.)

Note 29

Add after Pt. 5 :

[Pt. 6] In the undermentioned case, it was held that where the lessee continues in possession after expiry of the lease and pays rent which the lessor accepts, the tenancy becomes a tenancy-at-will and the death of the lessee determines it. *1950 All 583 (AIR V 37 C 228 P 12) : I L R (1952) 1 All 85 (DB), Ramlal* v. *Bhagwan Das.*

Note 30

Add after 2nd para. as a separate para :

[Pt. 3] A lease from month to month or monthly tenancy terminable by a notice to quit by either party, is not a lease for a term. To such a case S. 110 has no application. *1950 Orissa 1 (AIR V 37 C 1 P 9) : I L R (1949) 1 Cut 231 (DB), Banchhanidhi Samantrai* v. *Lachminarain Agarwala.*

Note 31

Add in the Foot Notes indicated :

3. ('52) 1952-2 All E R 492 (495, 496) : (1952) 2 Q B 788, *Leek and Moorlands Building Society* v. *Clark.* (A periodic tenancy renews itself unless either side brings it to an end.)

9. 1952 Kutch 13 (AIR V 39 C 6 P 2), *Vallabhaji Bhanji* v. *Jivandas Murarji.* (Even if tenant continues after expiry of 12 months, tenancy remains one at will.)

10. 1952 Kutch 13 (A I R V 39 C 6, P 2), *Vallabhaji Bhanji* v. *Jivandas Murarji.*

14. 1955 NUC (Cal) 756 (AIR V 42), *Lachmi Narain* v. *Amulyadhan Auddy.* (A monthly tenancy does not come to an end on the termination of every month. A characteristic of a periodical tenancy is that as each period commences, it is not a new tenancy; it is really an

accretion to the old tenancy. A monthly tenancy, that is a tenancy subject to a month's notice (in India to fifteen days notice), creates in the first instance a tenancy for two months certain. But as soon as the third month commences, that is not a new tenancy; it turns the original tenancy into a three months' tenancy and when the fourth month begins, the tenancy becomes a four months' tenancy, and so on.)

Add after Pt. 17 :

[Pt. 17a] The rent payable at the end of each month or year does not constitute a debt which arises by reason of an obligation which is incurred at the beginning of each month or year. The true position is that the rent is payable by reason of an obligation which arose on the date on which the monthly or yearly tenancy was created. *1955 NUC (Cal) 756 (A I R V 42), Lachmi Narayan* v. *Amulyadhan Auddy.*

Place figure 18 after the words "month to month" in the last line of the Note and add the following as Foot Note :

18. 1954 Assam 58 (AIR V 40 C 15 P 10) : I L R (1953) 5 Assam 207, *Hamida Khatoon* v. *Shibananda Bhandari.*

Note 32

Add in the Foot Notes indicated :

2. 1952 Kutch 13 (AIR V 39 C 6 P 2), *Vallabhaji Bhanji* v. *Jivandas Murarji.* (Although an annual rent may be reserved in the lease.) ✠ 1952 IDA 17254 (Punj), *Baldev Inder Singh* v. *Bachan Singh.* (Lease for 11 months—Provision that landlord would get possession and tenant could give up possession by giving 15 days' notice before expiry of the period — This is not tenancy-at-will.)

7. 1955 NUC (Trav-Co) 765 (AIR V 42), *Narayanan Thayyan* v *Govinda Menon.*

15. 1950 All 583 (AIR V 37 C 228 P 12) : ILR (1952) 1 All 85 (DB), *Ramlal* v. *Bhagwan Das.* (Death of tenant-at-will—Tenancy is determined—Possession of heirs is adverse—Notice to quit is not necessary.)

Add after Pt. 2 and at the end of para. 1 :

[Pt. 2a] But exclusive possession for indefinite period is not the test of the occupier being a tenant-at-will, such possession being not inconsistent with his being a licensee. *('52) 1952-1 All E R 1199 (1201) : (1952) 1 T L R 1037, Cobb* v. *Lane,*

Add after the end of first para after Pt. 2a as a fresh para :

[Pt. 2b] A tenancy at will arises by implication of law in cases of permissive occupation when a person is in possession of premises with the consent of the owner. It may also arise when the tenant expressly agrees to vacate whenever possession is demanded by the landlord. *1955 NUC (Sau) 983 (AIR V 42), Jivandas Dharshi* v. *Andarji Manekchand.*

Add after Pt. 5 :

[Pt. 5a] Where in the case of a lease for a term certain with a provision for continuation thereafter, the lessee continues in possession after the expiry of the term and pays rent which the lessor accepts, the tenancy becomes a tenancy-at-will and the death of the lessee determines it. *1950 All 583 (AIR V 37 C 228 P 12) : I L R (1952) 1 All 85 (DB), Ramlal* v. *Bhagwan Das.*

Add after Pt. 5a as a separate para :

[Pt. 5b] Where the lease merely states that there was no 'Bandhani,' the expression 'Bandhani' obviously means that the lease was not for a fixed term of years and not that it was without any terms or conditions. Unless the contract of the lease itself contains a condition to put an end to the lease at the will of the landlord or the tenant, the tenancy cannot be a tenancy at will. *1955 NUC (Orissa) 985 (AIR V 42), Bahan Rana* v. *Narshing Swar.*

Add after Pt. 8 :

[Pt. 8a] Death of the lessee also determines the lease. *1950 All 583 (AIR V 37 C 228 P 12) : I L R (1952) 1 All 85 (DB), Ramlal* v. *Bhagwan Das.*

Note 34

Page 1646—In line 4 of the note, after the words "under this section" and before "see Note 25)" place figure 1a and add the following as Foot Note :

1a. 1946-52 ID 40120 (All), *Ibne Hasan* v. *Masih Ullah.* (Where a lease provided that the lessee will cultivate and pay the agreed rent year after year to the lessor, held that the lease could be operative during the lifetime of the lessor.)

Note 35

Add in the Foot Note indicated :

6. ('48) I L R (1948) 2 Cal 107 (168), *Ambika Charan Chakrabarti* v. *Rai Rajan Ray.* (A provision in the lease to the effect that, in case the landlords wish to let out the lands after the expiry of the terms of the lease, the tenants would have the right of taking the renewal lease, cannot be construed as conferring on the lessees a right of renewal of the lease.)

Page 1648—In Foot Notes Col. 2 after the words also see S 111 Note 3, place figure 6, before 1947 Cal 378 (382) (AIR V 34).

Add after Pt. 5 :

[Pt. 5a] See also the undermentioned case. *('50) 1950 1 All E R 436 (440), Re Greenwoods Agreement.* (A covenant in a lease of premises for three years providing for renewal on the terms and conditions "as are herein contained including the covenant for renewal," is one for perpetual renewal.)

Add after Pt. 7 :

[Pt. 7a] In the undermentioned case, it was held on the construction of the renewal clause that this clause gave an option of refusal to the lessee. *1949 Assam 78 (AIR V 36 C 37 P 6, 8 11) (DB), Girindra Chandra Das* v. *Kamini Nath Roy.* (A lease for a period of 5 years at an annual rent contained a renewal clause as follows :

"After expiry of the first lease, I shall take second lease of these lands by paying proper rent. I shall not be entitled to claim possession of the lands without taking settlement. After expiry of the due date, I shall give up possession of the lands without notice"—*Held* that the provision was intended to give an option of refusal to the lessee, and the suit for ejectment upon expiry of the term of the lease without giving the lessee the option of refusal of a fresh settlement was not maintainable.)

Note 36

Add in the Foot Notes indicated :

1. 1954 Orissa 110 (AIR V 40 C 33 P 5, 7) : ILR (1954) Cut 1 (DB), *Radhakamal* v. *Puri Municipality.*

4. 1954 Orissa 110 (AIR V 40 C 33 P 5, 7) : ILR (1954) Cut 1 (DB), *Radhakamal* v. *Puri Municipality.*

Note 38

Add after Pt. 5 :

[Pt. 6] In case of a Kanom tenancy under which the tenant is entitled not only to hold it for the period of twelve years generally but also to hold it so long as the Kanom amount remains unpaid it is not true to say that his title becomes extinguished by the expiry of the term. Nor can it be said that he is a person who holds over without the consent of the landlord for he is there by reason of the charge without payment of which he is not liable to be turned out. He is entitled to hold it whether or not it pleases the landlord. Such tenant cannot therefore be treated on the same footing as a tenant at sufferance. *('49) 1949 Trav-Co L R 50 (54) (DB), Parameswaran Namboodripad* v. *Variathu.*

Note 39

Add after the words "acceptance of rent" and before "(see Note 38)" in the last line of the first para :

[Pt. 1a] Where in case of a lease for fixed term containing a renewal clause, the lessee holds over after the expiry of the lease without asking for resettlement and the lessor does not accept rent, merely asking for renewal of the lease should not be deemed to have the effect of renewal of the lease, when there is nothing to show that the landlord assented to it. *1954 Pat 41 (AIR V 41 C 16 P 6), Tarak Chandra Dutta* v. *Jagdish Chandra Deo.*

Note 40

Add in the Foot Notes indicated :

1. 1953 Ajmer 24(2) (A I R V 40 C 26 P 7), *Gopi Kishan* v. *Murlidhar.* (He is not liable to pay the rent but to compensate the landlord for the damages suffered by him.) ✠ 1953 Trav-Co 369 (A I R V 40 C 142 P 3) (DB), *Nagamony Kumaraswamy* v. *S. Thiruchittambalam.*

2. *See* 1953 Ajmer 24 (2) (AIR V 40 C 26 P 7), *Gopi Kishan* v. *Murlidhar.* (Tenant holding over without landlord's consent is not liable to pay rent but to compensate the landlord for damages suffered by him — The Court will in such cases have to determine the amount of damages.)

[*See also* 1955 N U C (Madh B) 62 (A I R V 42), *Santsaran* v. *Bankelal Ramlal.* (It is a matter of discretion resting with the trial Court to decide whether the former tenant who contumaciously held over should be penalised or not to the extent of making him pay double the rent as compensation for use and occupation.)]

[But see 1949 Nag 336 (AIR V 36 C 129 P 10) : I L R (1949 Nag 432, *Baban Purnaji Kale* v. *Champabai.* (Sub lessee remaining in possession after expiry of lease—Lessor not assenting —Sub-lessee is liable for damages, for use and occupation.)]

In line 6 of the Note place figure 1a after the words "between the parties", and add the following as Foot Note :

1a. 1953 Ajmer 24(2) (AIR V 40 C 26 P 7), *Gopi Kisan* v. *Murlidhar.*

Note 41

Add after the words 'not a permanent lease" in the last sentence, and before words "see Note 28" in para 1 :

[Pt. 3a] Lease for building purposes may prima facie be a permanent lease. *1954 Bom 257 (A I R V 41 C 75 P 3, 5 6, 13, 14) : ILR (1954) Bom 448 (DB), Bavasaheb Walad Mansursaheb* v. *West Patent Press Co. Ltd.*

Note 42

Add in the Foot Notes indicated :

5. 1954 Mad 161 (A I R V 41 C 62 P 1, 2, 5), *Govinda Reddi* v. *Pattabi Rama Reddi.* (Inam means in its ordinary and accepted sense a grant of a freehold interest. Where the deed does not divest the transferor of his ownership, there can be no inam, however extensive the interest which might be conveyed to the transferee.)

8. 1954 Mad 161 (A I R V 41 C 62 P 1, 2, 5), *Govinda Reddi* v. *Pattabhai Rama Reddi.* (Deed not divesting ownership — Provision for payment of rent and for cancellation of lease upon breach of any condition—Transaction held lease and not "inam" within meaning of S. 3(2) (d) of Madras Estates Land Act, 1908.)

Add after Pt. 7 :

[Pt. 7a] See also the undermentioned case—*1952 Orissa 99 (AIR V 39 C 24 P 24) : I L R (1949) 1 Cut 139 (DB), Tirtha Naik* v. *Lal Sadananda Singh.* (Where the contractual relation created is in the nature of perpetual tenure rather than the creation a relationship of 'landlord' and 'tenant' and the position is really that of a 'grantor' and 'grantee' the law of forfeiture on non-payment of rent is not applicable in the absence of proof of a definite contract to that effect.)

Add after Pt. 12 :

[Pt. 13] In the undermentioned case, holders of *Bhej Barari* tenure of Tindwari village paid an amount which actually amounted to land revenue together with cess, in proportion to the land in their possession. The settlement of proportionate land revenue was directly made with them at the time of the settlement and their names were entered in the appendix to the khewat of the village. They possessed right to mortgage their holdings without the consent of the zamindar but they had no right to sell the land in their possession. It was held distinguishing Sonet Kooer's case" that *Bhej Barars* of village Tindwari were a kind of sub-proprietors and not tenants of the lands held by them but that the *Bhej Barars* were to be assimilated to the position of a permanent lessee with a limited right of disposal of their holding and that, therefore, the holding reverted to the zamindar on the death of the *Bhej Barar* tenant without leaving any heirs. *1951 All 655 (A I R V 38 C 179 P17, 18), Ram Kali* v. *Murlidhar.* (('75-76) I L R 1 Cal 391 (PC), Sonet Kocer v. Mirzah Himmut Bahadoor, Dist; ('97) I L R 24 Cal 440, Kally Dass v. Monmohini Dassee; ('09) ILR 36 Cal 1003 (PC). Abhiram v. Shyam Charan, Rel. on.)

Note 43

Add in the Foot Notes indicated :

1. 1952 Orissa 165 (A I R V 39 P 3, 4) : I L R (1951) Cut 134 (DB), *Sudarsan Das* v. *Bhaju Sahu.* (Sub-tenant of raiyati land claiming permanent tenancy.) ✠ 1952 Pat 43 (A I R V 39 C 15 P 5), *Sahabu Mahton* v. *Hari Ram Mahto.*

4. 1952 Orissa 165 (A I R V 39 P 3, 4) : I L R (1951) Cut 134 (BB), *Sudarsan Das* v *Bhaju Sahu.* (1920 PC 67 (AIR V 7) (PC), Sethuratnam Iyer v. Venkatachalam, followed.) ✠ 1952 Pat 43 (A I R V 39 C 15 P 5), *Sahabu Mahton* v. *Hari Ram Mahto.*

Note 44

Add in the Foot Notes indicated :

3. 1952 Orissa 165 (A I R V 39 P 3, 4) : I L R (1951) Cut 134 (DB), *Sudarsan Das* v. *Bhaju Sahu.* (No inference of permanency is permissible either from long possession or payment of a uniform rent. On the other hand the fact that in two successive settlements the defendants have been recorded as sikimi tenants or sub-tenants alone would militate against any presumption of permanence of tenancy) ✠ 1952 Orissa 99 (AIR V 39 C 24 P 22) : I L R (1949) 1 Cut 139 (DB), *Thirtha Naik* v. *Lal Sadanand Singh.*

5. 1952 Orissa 99 (AIR V 39 C 24 P 22) : I L R (1949) 1 Cut 139 (DB), *Thirtha Naik* v. *Lal Sadanand Singh* ✠ 1946-52 I D 40427 (Orissa) (DB), *Jagannath Mahaprabhu* v. *Birmal Chandra Adhya.*

Place figure 4a after the words "justifies such a presumption" in line 11 para 3 and add the following as foot-note :

4a. 1953 S C 195 (A I R V 40 C 47 P 3) : 1953 S C R 1001 (SC), *Satyanarayana* v. *Venkatapayya.* (A presumption of an origin in some lawful title may in certain circumstances be made to support possessory rights, long and quietly enjoyed, where no actual proof of title is forthcoming but that presumption cannot be made where there is sufficient evidence and convincing proof of the nature of the grant and the persons to whom it was made.)

Add after Pt. 5 :

[Pt. 5a] Moreover in order to raise this presumption the title in dispute must have identically descended from one to another upto the date of the suit. *1946-52 I D 40427 (Orissa) (DB), Jagannath Mahaprabhu* v. *Birmal Chandra Adhya.*

[Pt. 5b] See also the undermentioned case. *1952 Orissa 99 (A I R V 39 C 24 P 23) : I L R (1949) 1 Cut 139 (DB), Thirtha Naik* v. *Lal Sadanand Singh.* (Where the origin of the tenancy is unknown and its inception is lost in antiquity, the principle of lost grant can be invoked by the tenant and from the conduct of the parties and the surrounding circumstances the Court can presume that the tenancy was permanent one.)

Add after Pt. 6 :

[Pt. 6a] In the undermentioned case, where neither the origin of the tenancy nor its nature or terms were known, and it was in evidence that uniform rent payable annually was recovered from the tenants for the last thirty years, it was held that the facts gave rise to a presumption of permanent tenancy under S. 79, Mysore Land Revenue Code. *('49) 27 Mys L Jour 85 (87, 88) (DB) Singamma* v. *Srikantiah.*

Add after Pt. 12 at the end of the para :

[Pt. 12a] It was held in the undermentioned case that a presumption of lost grant can reasonably be made where there has been non-realisation of rent for several years and where the origin of the tenancy is unknown. But where the Inam register shows clearly the origin of the tenancy and also shows that some Jodi was actually payable to the zamindar, there can be no question of presuming a lost grant from the mere fact of non-payment in spite of demand. *1953 Orissa 92 (A I R V 40 C 42 P 5), Padmanabha Singh* v. *Arjuna Panigrahi.*

Add after Pt. 13 :

[Pt. 13a] Where a person was in long possession under a definite claim that he was a rent-free tenant under the Mohunt of Asthal, and had also been recorded as such in the record of rights, it was held by the Calcutta High Court that a legal necessity authorising the Mohunt to make the rent-free grant would be presumed and the presumption of lost grant would arise. *1951 Cal 385 (A I R V 38 C 92 P 6) (DB),, Manohar Das* v. *Charu Chandra. (1927 Cal 210 (AIR V 14), Kiran Chandra* v. *Srinath Rel. on)*

Add after Pt. 15 as a separate para :

[Pt. 16] The doctrine of lost grant has no application to the case of inhabitants of particular localities seeking to establish rights of user to some piece of land or water. No lost grant can be presumed in favour of a fluctuating and unascertained body of persons who constituted the inhabitants of a village. *1951 S C 247 (A I R V 38 C 43 P 11, 12): 1951 S C R 431 : 30 Pat 871 (SC), Braja Sunder Deb* v. *Moni Behara. (1950 P C 56 (A I R V 37 C 23)=76Ind App 271=29 Pat 1 (PC), Lakshmidhar Misra* v. *Rangalal Rel. on: 1937 Cal 245 (A I R V 24), Asrabulla* v. *Kiamatulla, Approved.)*

Note 45

Add after Pt. 2 :

[Pt. 2a] In the undermentioned case, where a person was in long possession under a definite claim that he was a rent-free tenant under the Mohunt of Asthal, and had also been recorded as such in the record of rights, it was held by the Calcutta High Court that a legal necessity authorizing the Mohunt to make the rent-free grant would be presumed and the presumption of lost grant would arise. *1951 Cal 385 (A I R V 38 C 92 P 6) (DB), Manohar Das* v. *Charu Chandra.*

Add after Pt. 3 :

[Pt. 3a] By this rule of presumption, competence to alienate will not be attributed to one who is proved to be incompetent. Such a case is, however, different from a case in which one has ordinarily a limited power of disposition but in special circumstances has an extended power. *1946-52 I D 40427 (Orissa) (D B), Jagannath Mohaprabhu* v. *Birmal Chandra Adhya.*

Note 47

Add in the Foot Notes indicated :

1. 1953 Mys 29 (A I R V 40 C 13 P 6) : I L R (1953) Mys 92, *Muthegowda* v. *Shanbhogue Naranappa* (In the absence of any words of inheritance a grant cannot *prima facie* be construed to create a hereditary interest, though the want of appropriate words conveying such an interest may be supplied by the purpose of the grant, custom or usage, appropriate to such locality, evidence of long uninterrupted enjoyment at a fixed unvarying rent or by subsequent recognition and conduct of parties. These surrounding circumstances must however be unequivocal.)

6. 1950 Bom 161 (A I R V 37 C 42 P 5) (DB), *R. S. Rammohanrai Jaswantrai Dessai* v *Somobhai.* (Omission of words of inheritance does not show conclusively that the lease is not hereditary.)

8. 1954 Bom 257 (A I R V 41 C 75 P 3, 5, 6, 13, 14) : I L R (1954) Bom 448 (DB), *Bavasaheb Walad Mansursaheb* v. *West Patent Press Co. Ltd.*

10. 1950 Bom 161 (A I R V 37 C 42 P 3) (DB), *R. S. Rammohanrai Jaswantrai Dessai* v. *Somobhai.*

11. 1950 Bom 161 (AIR V 37 C 42 P 5, 6) (DB), *R. S. Rammohanrai Jaswantrai Dessai* v. *Somabhai.*

Add after Pt. 6 :

[Pt. 6a.] The words "Khayam Guttige Kagada" which may be translated as "fixed or confirmed lease deed" do not 'per se' imply that the lease is perpetual and inheritable. *1953 Mys 29 (AIR V 40 C 13 P 8) : ILR (1953) Mys 92, Muthegowda* v. *Shanbhogue Naranappa.*

Note 48

Add in the Foot Notes indicated :

2. 1952 Orissa 165 (A I R V 39 P 3, 4) : I L R (1951) Cut 131 (DB), *Sudarsan Das* v. *Bhaju Sahu.*

4. 1953 S C 153 (A I R V 40 C 40 P 4) : 1953 S C R 930 (SC), *Bejoy Gopal Mukherji* v. *Protual Chandra Ghose*

In line 18 of the Note place the figure 3a after the words "by themselves conclusive" and add the following as foot note :

3a. 1953 S C 153 (A I R V 40 C 40 P 3) : 1953 SCR 930 (SC) *Bejoy Gopal* v. *Protul Chandra.* (Permanent tenancy does not imply fixity of rent or occupation.)

Note 49

Add in the Foot Notes indicated :

1. 1953 S C 153 (A I R V 40 C 40 P 4) : 1953 SCR 930 (SC), *Bejoy Gopal* v. *Protul Chandra.* (Neither possession for generations at uniform rent, nor construction of permanent structure by itself is conclusive proof of permanent tenancy—It is the cumulative effect of these, coupled with several other facts that may lead to inference of permanent tenancy.) ✠ 1954 Mad 412 (A I R V 41 C 166 P 9), *In re Lakhminarayan.*

2. 1954 Mad 412 (A I R V 41 C 166 P 9), *In re Lakshminarayan.* (It is for the tenant to show that his holding leads to inference of permanent tenure.) ✠ 1952 Orissa 165 (A I R V 39 P 3, 4) : ILR (1951) Cut 134 (DB), *Sudarsan Das* v. *Bhaju Sahu.* (On the other hand, the fact that in two successive settlements the defendants have been recorded as sikimi tenants or sub-tenants alone would militate against any presumption of permanence of tenancy.)

5. 1953 SC 153 (AIR V 40 C 40 P 4) : 1953 SCR 930 (SC), *Bejoy Gopal* v. *Protual Chandra.*

Add after Pt. 6 in the beginning of the last para of the note :

[Pt. 6a] Permanent tenancy does not imply fixity of rent or occupation. *1953 S C 153 (A I R V 40 C 40 P 3)=1953 S C R 930 (SC), Bejoy Gopal* v. *Protual Chandra*

Note 50

Add in the Foot Notes indicated :

1. 1955 Orissa 64 (64) (Pr 4) (A I R V 42 C 18) (DB), *Jagatguru Sankaracharya Bharati Tirtha Krishna Swamy* v. *Bhagabat Disoi.* (The kabuliyat executed by the defendant recited that on the date of the grant the land was lying fallow and that the defendant took it on lease for the express purpose of putting up a house with a stipulation that he would deliver a certain number of Handis and kudias annually to the plaintiff. The document contained a further recital that the defendant was not liable to eviction though the plaintiff was given the liberty, in case of default in payment, to realise any arrears of rent through a suit. *Held* that the document purported to confer a permanent right of occupancy upon the defendant.) ✠ 1954 Bom 257 (A R V 41 C 75 P 3, 5) : I L R (1954) Bom 448 (DB), *Bavasaheb Walad Monsursaheb* v. *West Patent Press Co Ltd.* ✠ 1954 Mad 412 (AIR V 41 C 166 P 9), *In re Lakshminarayan.*

4. *See* 1954 Mad 412 (A I R V 41 C 166 P 9), *In re Lakshminarayn.* (Permanent tenancy may be inferred when the tenancy is made for building purposes; but the mere fact that a lease of land is made for dwelling purposes does not make it permanent, unless there is something to show that the building was intended to be or was in fact a masonry building.)

In line 8 of the note place figure 2a after the words "the inference" and add the following as foot note :

2a. 1954 Mad 412 (A I R V 41 C 166 P 9), *In re Lakshminarayan.*

Note 51

In line 4 of the note place figure 1a after the words "a strong indication" and add the following as foot note :

1a. 1953 S C 153 (A I R V 40 C 40 P 4) : 1953 S C R 930 (SC), *Bejoy Gopol* v. *Protul Chandra.* (Neither possession for generations at uniform rent nor construction of permanent structure by itself is conclusive proof of permanent tenancy — It is the cumulative effect of these, coupled with several other facts, that may lead to inference of permanent tenancy.)

Note 58

Add after Pt. 3 before : '(See Note 57)' :

[Pt. 3a] Where the lessee of salt pans undertakes to spend money for constructing railway siding, but no obligation is cast on him to effect that improvement, the effect of failure to effect the improvement being only to cut down the term of the lease, the expenditure incurred for the purpose is neither premium nor rent. Similarly, the money expended for building new pans for getting more income is not rent. *1953 Mad 632 (AIR V 40 C 248 P 6) (DB), Subbiah Nadar* v. *Commr. of I. T. & Excess Profits Tax, Madras.*

Note 59

Add in the Foot Note indicated :

5. 1950 Pat 284 (AIR V 37 C 70 P 6, 7, 8) (DB), *Raja Ram Stngh* v. *Kanhaya Rai.* (*A* planting trees on land of *B*, as trespasser — Agreement between *A* and *B* to share fruit of trees, half and half — *B* settling land on *C* recognizing *C* as tenant — *C* transferring his interest to *D* — Suit by *D* against *A* for half share in fruit — *Held* suit was not suit for rent within meaning of Art. 8, Provincial Small Cause Courts Act, 1887.)

Page 1687 — In item 3 in Para 1, after the word "occasions" place figure 1a and add the following as foot-note :

1a. 1952 Cal 391 (A I R V 39 C 111 P 10, 12), *Har Mohan Dutt* v. *C. K. Sen & Co. Ltd.* (Advance payment is not rent — Case under West Bengal Premises Rent Control (Temporary Provisions) Act 1948, S. 11 (1).)

Add after Pt. 12 :

[Pt. 12a] See also the undermentioned case. *1952 Madh B 56 (AIR V 39 C 24 P 6), Ramjilal* v. *Ahmad Ali.* (Unless there is an express agreement to pay enhanced rent, or circumstances or conduct from which one could be inferred, a claim for enhanced rent cannot stand.)

Note 60

Add after Pt. 5 as separate para :

[Pt. 5a] Where the lessee of salt pans undertakes to spend money for constructing railway siding, but no obligation is cast on him to effect that improvement, the effect of failure to effect that improvement being only to cut down the term of the lease,

the expenditure incurred for the purpose is neither premium nor rent. Similarly, the money expended for building new pans for getting more income is not rent. *1953 Mad 632 (A I R V 40 C 248 P 6) (DB), Subbiah Nadar* v. *Commissioner of I. T. & Excess Profits Tax, Madras.*

Add after Pt. 16 as a fresh para :

[Pt. 17] It has been held in the undermentioned case that rent does not include charges for electricity or water supply payable by the tenant to the landlord. *1955 Mad 93 (95) (Pr 10) ((S) A I R V 42 C 26), Abdul Ghafoor Sahib* v. *A. M. Abdul Salam Sahib.* (Case under Madras Buildings (Lease and Rent Control) Act (25 of 1949)—These charges must be excluded in fixing standard rent.)

Note 62

Add in the Foot Notes indicated :

1. *See also* (1954) 1954-2 All E R 601 (604), *Montague* v. *Browning.* (Rent payable in kind —Parties by agreement quantifying money value —Sum so quantified is rent.)

2. 1949 Mad 618 (AIR V 36 C 271 P 6), *Krishna Bhatta* v. *Narayana Achary* (A clause in a mulgeni chit ran as follows : "Thereafter the *geni* per annum is Rs. 44 in cash—Two kalasiges of cashewnuts of the value of five annas:" *Held* that the lessor was entitled to the value of two kalasiges of cashewnuts in accordance with the prevailing market rate.)

Note 63

Add in the Foot Note indicated :

1. 1951 Assam 86 (A I R V 38 C 42 P 5, 8, 9) : I L R (1951) 3 Assam 171, *Rudra Narayana* v. *Chintaram Hazarika.* (Such a tenancy can be created on general principles even apart from the provisions of the T. P. Act and Assam (Temporarily Settled Districts) Tenancy Act.)

Note 64

Add in the Foot Note indicated :

1. 1952 Madh-B 56 (AIR V 39 C 24 P 6), *Ramjilal* v. *Ahmad Ali.* (There must be express agreement to pay enhanced rent or circumstances or conduct from which such agreement can be inferred.)

Add after Pt 1 :

[Pt. 1a.] Or unless the tenant has by any supervening cause incurred further liability. *('51) 1951 Ker L Tim 179 (184) (D B), Lakshmi* v. *Subramania Iyer.*

Page 1694 — In line 5 of the Note, before the words "(See 59)" add :

[Pt. 1b] Subsequent events including rise in prices are no consideration to effect an alteration in his liability *('51) 1951 Ker L Tim 179 (184) (D B), Lakshmi* v. *Subramania Iyer Narayana Iyer.*

Add after first para. as a separate point :

[Pt. 1c] A rent control law which provides for the variation of rent agreed to between the parties and empowers the Court to fix standard rent cannot be impugned as invalid as being repugnant to the provisions of this section. *1954 Raj 252 (256) (Prs 11, 12, 13) (A I R V 41 C 79) (DB), Milapchand* v. *Dwarka Das.* (Sections 6 and 8 of the Rajasthan Premises (Control of Rent and Eviction) Act (XVII of 1950) are merely supplementary to the Transfer of Property Act, and are not repugnant to Ss. 105 and 108 (1) of that Act in view of the provisions of S. 37, Contract Act, which clearly envisages interference with agreement by validly made law.)

Note 65

Add in the Foot Note indicated :

2. *See also* 1953 Orissa 92 (A I R V 40 C 42 P 5). *Padmanabha Singh* v. *Arjuna Panigrahi.* (Distinction between acquisition of rent-free title by adverse possession on the one hand and presumption of lost grant in favour of the rent-free title on the other, pointed out—Inam Register showing origin of tenancy and also that some jodi was actually payable to zamindar — There is no question of presuming lost grant from mere fact of non-payment in spite of demand.)

Page 1695—In line 2 of the Note place figure 1a after the words "prescription," and add the following as foot note :

1a. 1951 Cal 385 (A I R V 38 C 92 P 6) (DB), *Manohar Das* v. *Charu Chandra* (Presumption of lost grant.)

Add after Pt. 1 :

[Pt. 1aa] For the burden of proof, in cases where the defendant claims rent-free tenure, and for the evidentiary value of record of rights see the undermentioned case. *('51) 55 Cal W N 21 (25, 26), Moslema Khatum* v. *Fanindra Lal Sen.* (Case law referred.)

Note 67

Add in the Foot Notes indicated :

4. 1955 N U C (Andhra) 1767 (A I R V 42), *Palinedi Hanumayya* v. *Addanki Shrinivasa Rao.* ((1897) ILR 24 Cal 272 (279) (PC), Bengal Indigo Company v. Roghabur Das; (1903) I L R 25 All 115 (119) (P C), Nidha Sah v. Murlidar ; (1884) I L R 7 Mad 203 (206) (F B), Reference under Indian Stamp Act ; (1898) I L R 21 Mad 358 (F B), Reference under Stamp Act, Section 46 and (1902) I L R 26 Bom 252 (FB), Tukaram v. Ramchand, Rel. on.)

8. 1955 N U C (Andhra) 1767 (A I R V 42), *Palinedi Hanumayya* v. *Addanki Srinivasa Rao.*

9 1955 N U C (Andhra) 1767 (A I R V 42), *Palinedi Hanumayya* v. *Addanki Srinivasa Rao.*

10. 1952 Trav-Co 104 (A I R V 39 C 46 P 2) (DB), *Snaku Vava* v. *Kakutty Nambishtathiri.*

Add after Pt. 18 :

[Pt. 19] See also the undermentioned case. *1955 N U C (Mad) 1826 (A I R V 42), Thiyyath Chakki* v. *Ravunni Nayar.* (A mortgage with possession is normally treated by two documents, one the panaya deed executed by the mortgagor to the mortgagee and the panaya Kychit which evidences the possession taken by the mortgagee under the terms of the mortgage. Both constitute the mortgage and it is not open to a party to these transactions to contend relying only on the panaya kychit that it is a lease and not a mortgage.)

Note 69

Add in the Foot Note indicated :

3. 1954 Nag 20 (A I R V 41 C 5 P 25, 26, 31, 34, 39, 40, 41) : I L R (1953) Nag 383 (DB), *Vishwasrao Amritrao* v. *Bhagwant Shivaji.* (Case under Berar Patel and Patwaris Law (1900) — Grant was not personal or subsistence grant — Land forming appendage to office — It is inalienable — It can be resumed upon alienation — Onus is on grantee to establish that such grants for remuneration are not resumable.)

Add after Pt. 7 as a separate para :

[Pt. 8] Resumption consists in putting an end to the grant under which lands are held remitting the services. On the exercise of the right of resumption, the zamindar may recover possession of the land, if the land itself had been the subject-matter of the grant or if the grant was only of the melwaram in whole or in part and the grantee had been in possession before such a grant, he may put an end to the beneficial tenure and impose full assessment, but before he can exercise his right to resume or take possession of the land, he must establish his right to resume and evict the person in possession of the land. That depends upon the nature, extent and terms of the grant. *1952 Mad 166 (A I R V 39 C 76 P 8), Sooramma* v. *Venkataratnam.*

Note 70

Add in the Foot Notes indicated :

7. 1954 Pat 304 (306) (Pr 4) (A I R V 41 C 103), *Jainarain Choudhary* v. *Biseswar Prasad.* (Registered kabuliyat and patta executed but valid lease not created due to non-compliance with S. 107 — Decree for compensation for use and occupation can be passed against person in possession under that lease.)

10. 1955 N U C (Punj) 1886 (AIR V 42), *L. Ram Narain Dass* v. *L. Ram Pershad.* (A suit for recovery of rent may be allowed to be amended into one for recovery of damages on account of the use and occupation of the premises. 1951 Nag 123 (A I R V 38 C 25A) : I L R (1951) Nag 279, Chintaman v. Shanker — 1951 Cal 448, (A I R V 38 C 122), Bimala Bala Debi v. Khoka Parui — (1909) 3 Ind Cas 345 (Cal), Gobinda Sundar Sinha v. Sri Krishna Chakravarti — (1913) 7 Sind L R 23, Khiaram v. Chhatomal, Relied on.) ✠ 1954 Ajmer 65 (66) (Pr 6) (A I R V 41 C 66), *Baluram* v. *Bhagchand.* (A suit for rent on the basis of a subsisting tenancy is different from a suit for mesne profits or damages for use and occupation against a trespasser. The landlord who has not come to Court claiming damages for use and occupation or mesne profits but has sued on the basis of a subsisting tenancy is not entitled to a decree for mesne profits.)

Page 1704, Para 3, line 3 — After the word 'landlord' place the figure 5a and add the following as Foot Note :

5a But see 1949 Nag 336 (A I R V 36 C 129 P 10) : I L R (1949) Nag 432, *Baban Purnaji Kale* v. *Champabai.* (Sub-lessee remaining in possession after expiry of lease — Lessor not assenting to his continuing in possession — Sub-lessee is liable for damages for use and occupation.)

Page 1704, Para 5, line 3 — After the words "mesne profits" place the figure 7a and add the following as Foot Note :

7a. 1953 Trav-Co 369 (A I R V 40 C 142 P 3) (DB), *Nagamony Kumaraswamy* v. *S. Thiruchittambalam.* (Possession of tenant after notice to quit is wrongful — He is liable for mesne profits — Liability is not affected by the fact that tenant had effected improvement against express stipulation in the lease.)

Note 71

Add in the Foot Notes indicated :

3. 1953 Trav-Co 353 (A I R V 40 C 132 P 9), *Easwara Pillai* v. *Krishna Prabhu.* (According to the custom relating to the cultivation of Punja lands no special formality is required for the surrender of the property after the harvest is taken. Although the transaction may not be of the nature of a mere licence it comes to an end as soon as the harvest is taken and pattom is paid to the lessor.)

4. 1953 Trav-Co 353 (A I R V 40 C 132 P 9), *Easwara Pillai* v *Krishna Prabhu.* (Lease of Punja lands for cultivation is for period of harvest only — No particular formality for surrendering is required.)

Add after P. 4 :

[Pt. 5] Where the lessee has agreed to vacate the premises, whenever the landlord sells the premises, it means that in the contingency the tenant would not insist upon other formalities essential for terminating a tenancy. The agreement does not exclude the landlord's right to terminate the tenancy after due notice. The agreement merely provides an additional mode of termination of the tenancy. *1951 Kutch 72 (A I R V 38 C 46 P 2), Vishanji Kunwarji* v. *Panchibai.*

Note 72

Add in the Foot Notes indicated :

2. 1952 I D A 17237 (Punj) *Baldev Inder Singh* v. *Bachan Singh.* (Legal representative of deceased lesse would have same protection as lessee has under East Punjab Rent Restriction Act) ✠ 19 0 Bom 16 (A I R V 37 C 42 P 3) (DB), *R. S. Rammohanrai Jaswantrai Desai* v. *Somabhai.* (In the absence of provision that tenancy is not to continue after grantees' life time.)

3. 1954 Bom 257 (A I R V 41 C 75 P 3, 5, 6, 13, 14) : I L R (1954) Bom 448 (DB), *Bavasaheb Walad Mansursaheb* v. *West Patent Press Co. Ltd.*

4. 1952 I D A 17237 (Punj). *Baldev Inder Singh* v. *Bachan Singh.* (Legal representatives of the deceased lessee would also have the same protection as the lessee has under the provisions of the East Punjab Urban Rent Restriction Act.)

6. 1954 Bom 257 (A I R V 41 C 75 P 3, 5, 6, 13, 14) : I L R (1954) Bom 448 (DB), *Bavasaheb Walad Mansursaheb* v. *West Patent Press Co. Ltd.* (Such a lease is *prima facie* not intended to be tenancy-at-will — It may be for life time of lessee or a permanent lease.) ✠ 1950 All 583 (A I R V 37 C 228 P 12) : I L R (1952) 1 All 85 (DB) *Ramlal* v. *Bhagwan Das.*

7. 1950 Bom 161 (A I R V 37 C 42 P 3) (DB), *R. S. Rammohanrai Jaswantrai Desai* v. *Somabhai.*

12. 1946-52 I D 40420 (All), *Ibne Hasan* v. *Masih Ullah* ✠ 1950 Bom 161 (A I R V 37 C 42 P 3) (DB), *R. S Rammohanrai Jaswantrai Dessai* v. *Somabhai.*

Add after Pt. 4 as a separate para :

[Pt. 4a] In the undermentioned case, it was held that an annual patta is a lease for one year which confers no right of transfer or inheritance. *1951 Assam 140 (A I R V 38 C 64 P 3) : I L R (1951) 3 Assam 35, Mafizuddin* v. *Manidra Kumar Lahira.* (Case under Assam Land and Revenue Regulation, I of 1886. The lessees alone are entitled to have their names entered in the mutation register. Any person claiming a beneficial interest in the lease is not entitled to have his name mutated in the mutation register.)

Add after Pt. 5 as para 3 in Note 72 :

[Pt. 6a] The tenancy rights which are transferable under S. 108 (j) are not necessarily heritable. *1954 Bom 257 (A I R V 41 C 75 P 9) : I L R (1954) Bom 448 (DB), Bavasaheb Walad Mansursaheb* v. *West Patent Press Co. Ltd.*

Note 79

Add in the Foot Notes indicated :

1. ('50) 8 J & K L R 204 (210) (DB), *Ramloo Malik* v. *Abdullah.*

3. ('50) 8 & J K L R 204 (210) (DB), *Ramloo Malik* v. *Abdullah.* (Denial of landlord's title.)

4. ('49) 8 J & K L R 157 (159), *Satar* v. *Razak.*

Add after Pt. 6 as a separate para :

[Pt. 6a] It is not open to a tenant by any unilateral act to alter his character of a tenant. Thus, a sub-tenant cannot by getting his name mutated as a tenant without the knowledge or consent of the tenant, claim to be a tenant. *1951 Him. Pra. 65 (A I R V 38 C 20 P 10), Kamla* v. *Mt. Nathin.*

Note 80a

Page 1712/4 — In line 6 of the Note, after the words "to quit" place figure 1a and add the following as foot-note :

1a. 1950 All 583 (A I R V 37 C 228 P 12): I L R (1952) 1 All 85 (DB), *Ramanlal* v. *Bhagwan Das.* (Tenancy-at-will — Death of lessee determines lease—Suit against lessee's heirs continuing in possession as trespassers will lie.)

Note 82

Add after the second para, as a separate para :

[Pt. 1a] If there is possession under a void or invalid lease, (as where it is not registered). there is a tenancy-at-will. This situation generally arose in England when the lease was oral and offended against the Statute of Frauds. The law implied that, in the first instance, there was a tenancy-at-will and that it was converted by payment of rent into a tenancy from year to year or from month to month as the case might be. (See Note 8) The law is the same in India. *1953 Cal 349 (A I R V 40 C 130 P 11, 12, 13), Muraidhar Kulthia* v. *Tara Dye.* (Lease of premises invalid for want of registration Lessee in possession paying rent from month to month — Lessor accepting—There is tenancy from month to month.)

Add at the end of Note 82 :

[Pt. 4] In the undermentioned case, it was held that a person in possession under an invalid lease is a mere trespasser and that therefore he cannot invoke the aid of the principle of constructive possession, viz., the possession of a part is the possession of the whole. The doctrine is available to a person who has the legal title vested in him in the leasehold. The possession of a trespasser is limited to the lands which are actually in his physical possession. *1951 Pat 160 (A I R V 38 C 24 P 9) (DB), Hari Prosad Agarwalla* v. *Abdul Haq.*

Note 84

Add after Pt. 2 :

[Pt. 3] But in the undermentioned case it was held that the right as a tenant can be obtained by permanently occupying

land only by a custom or by grant from the owner if the latter has power to grant such a right, or under an Act of the Legislature. When, therefore, no custom is pleaded and there is no Act of the Legislature conferring permanent rights on the persons occupying the land and the lease settlement on which they rely is prohibited by the statute, it is not open to the Court to hold that they had acquired right of tenancy by prescription. *1952 Pat 43 (A I R V 39 C 15 P 5), Sahabu Mahton* v. *Hari Ram Mohto.* (('8) I L R 9 Bom 198, *Radhabai* v. *Anantrav Bhagvant*, Doubted.)

SECTION 106
State Amendment

U. P.

In 106,

(1) The words "expiring with the end of a year of the tenancy" and "expiring with the end of a month of the tenancy" shall be *omitted*; and

(2) For the words "fifteen days' notice," the words "thiry days' notice", shall be *substituted.*

—U. P. Civil Laws (Reforms and Amendment) Act, 1954, Sch.

Note 2

Add in the Foot Notes indicated :

5. 1952 Cal 221 (A I R V 39 C 75 (14) P 6), *Nagendranath Karmakar* v. *Jotish Chandra Mukherjee.* (Lease for manufacture — Lease deed stating that lease would be determined by one month's notice—Six months' notice not necessary.)

7. 955 Raj 1 (3) (Pr 18) ((S) A I R V 42 C 1) (DB), *Suraj Mal* v *Sita Ram.* (Tenant agreeing to vacate on receiving information one month previous to the time when it was intended to be vacated.) ✠ 1951 Mad 408 (AIR V 38 C 121 P 5) (DB). *Arunachala Naicker* v. *Mahmood Saheb.* (Lease for a period of two years on monthly rent—Contract providing that lessee is to vacate if one month's notice is given after the expiry of lease—Held notice of one month could be given at any time after expiry of lease.) ✠ 1951 Raj 88 (A I R V 38 C 37 P 4), *Ghulam Mohammad* v. *Lakshmibux.*

[But see 1953 J & K 15 (A I R V 40 C 8 P 3) 12 J & K L R 1, *Vishwa Nath* v. *Bishen Dass.* (Where "the local law to the contrary" provides six months' notice in place of 15 days' notice to be given by a landlord to a tenant, it does not relieve the landlord from that condition which is provided by S 106 of the Transfer of Property Act and which is that the notice must expire with the end of the month of tenancy. 1923 Lah 659 (A I R V 10), *Chuni Lal* v. *Chuni Lal*; 1938 Cal 656 (A I R V 25), *Baidyanath Basak* v. *Onkar Mul*; 1943 Bom 306 (AIR V 30), *Utility Articles Manufacturing Co.* v. *Motilal Bombay Mills Ltd.*, Rel. on.) ✠ 1951 Sau 64 (A I R V 38 C 32 P 3), *Sunderji* v. *Gangubai.* (If the contract contains a stipulation only as to the period of the notice it modifies the provisions of S 106 to that extent but does affect the other requirement of the section, viz., that the notice is to expire with the end of a month of the tenancy, and this latter requirement has to be complied with in order that the lease can be validly terminated.) ✠ 1950 Ajmer 79 (AIR V 37 C 87 P 6), *Mukandnand* v. *Gulabchand.* (Though the special contract as to notice of one month abrogates the first rule in S. 106, regarding 15 days' notice still the notice had to comply with the second rule in that section and was invalid as it did not expire on the last date of a month of the tenancy.)]

8. 1949 All 703 (A I R V 36 C 261 P 90) : I L R (1949) All 840 (DB), *Suiti Devi* v. *Banarasidas.* (Original lease providing for 3 months' notice—Lease held over on same terms — Provision of 6 months' notice not applicable.)

[But see 1952 Cal 455 (A I R V 39 P 11), *Sailabala Dassee* v. *Trippassier H. A.* (Lessee holding over — No agreement as to terms of holding over—Lease deemed to be from month to month under S. 106—15 days' notice as required by S. 106 is sufficient even if original lease provides for one month's notice : 1934 Cal 135 (AIR V 21), Das Rathi Kumar v. Sarat Chandra and ('05) ILR 32 Cal 123, Trailokya Nath v. Sarat Chandra, Rel. on.) ✠ 1953 Mad 884 (AIR V 40 C 347 P 15) : I L R (1953) ad 31 (DB). *Bapayya* v. *Venkataraman.* (Terms of the expired lease cannot be imported under S. 116 when the tenant holds over.)]

9. 1953 Sau 119 (A I R V 40 C 60 P 6) (DB), *Kesharlal Virchand* v. *Bal Ajawali Vachhary.* (Condition in the rent note to the effect that tenant should deliver possession to landlord at whatever time he makes the demand—Condition merely means that tenancy is not for fixed term and does not amount to contract to the contrary.)

Add after Pt. 6 as a separate para :

[Pt 6a] When there is a contract governing the question of notice, the Court must read that contract in a reasonable way to ascertain what the parties intended by way of notice and not try to read into the contract some term that would have to be implied only if there were no contract. *1951 Mad 408 (A I R V 38 C 121 P 3) (DB), Arunachala Naicker* v. *Mahmood Saheb.*

Add after Pt. 7 :

[Pt 7a] Where a lease for manufacturing purpose specifically provides that the tenancy is to be treated as a monthly tenancy, it would be a valid contract to the contrary and on the terms of this section itself the tenancy would be terminable by fifteen days' notice to quit expiring with the end of the tenancy *1955 Assam 102 (104) (Pr 5) (AIR V 42 C 21) (DB), Jewan Singh* v. *Mandalal Agarwalla.*

Add after Pt. 8 at the end of the paragraph :
See also S. 116 Notes 11 and 12.

Add after Pt. 9 :

[Pt. 9a] The contract to the contrary, as contemplated by the section, need not be an express contract : it may be implied, but it certainly should be a valid contract. If it is no contract in law, the section will be operative and regulate the duration of the lease. *1952 S C 23 AIR V 39 C 6 P 13) : 1952 S C R 269 : 31 Pat 21 (SC). Ram Kumar* v. *Jagdish Chandra.*

Add at the end after Pt 10 :

[Pt. 11] Where the kind of agreement which a tenant sets up cannot be proved except by a registered instrument and there is no registered agreement, the requirement of the law that he must prove an agreement to the contrary, even if such a contract is pleaded cannot be fulfilled. *1955 Nag 27 (29) (Pr 8) ((S) A I R V 42 C 6) : I L R (1954) Nag 957 (DB), Baldeoprasad* v. *Dashrathlal.*

Note 3

Add in the Foot Note indicated :

2 1955 N U C (adh B) 52 (A I R V 42), *Santsaran* v. *Bankelal Ramlal* ✠ 1955 N U C (adh B) 1197 (A I R V 42), *Wazir Pahlwan* v. *Harnarayan Gangaram* ✠ 1953 Tra..Co 577 (A I R V 40 C 227 P 5) : 1 L R (1953) Trav-Co 706 (DB), *Bharat Insurance Co. Ltd.* v. *Bivathu.* (Tenancy originally a monthly one — Valid notice of termination served and accepted — Tenant claiming extension of time by six months as per Rule 9 of Cochin Non-Residential Rent Control Order of 1118—Extension allowed by Rent Controller — Tenancy becomes one for definite term only and expires by efflux of time —Such tenancy is not governed by s. 106—No notice terminating tenancy is necessary)

3 1955 N U C (Tripura) 19:5 (A R V 42), *Aswini Kumar De* v *Asutosh Bhowmik.* (Lease for a fixed term of years No provision in lease deed for any notice to quit in case of breach of contract—Lessee continuing in possession after expiry of term of his lease without payment of any rent, though he was bound to deliver possession to lessor under S 108 (q), T. P. Act —Notice to quit is not necessary — Any notice to quit served by the lessor on the lessee cannot be held to be defective merely because it is not a six months' notice.)

Add as a separate para at the end of the Note:

[Pt. 6] A unilateral document of lease for a term providing for ejectment without notice after expiry of term executed and registered by the tenant alone would not operate as a valid lease or contract dispensing with requirement of notice under this section, so as to enable the landlord to maintain a suit for ejectment without such notice on ground of expiry of the term of the lease. *1955 N U C (Cal) 844 (A I R V 42), Bhabatarini Dassi* v. *Monomohan Palsai.*

Note 6

Add in the Foot Notes indicated :

1a. *See also* 1952 All 141 (AIR V 39 C 51 P 9), *Amer Singh* v. *Hoshiar Singh.* (Where the rent note provides that "in case of the lessee's failure to pay the rent agreed, the lessor would be entitled to eject the defendant," no question of notice can arise at all as, when such a contingency arises, the lessor can sue to eject the lessee straightway as a mer trespasser)

3 1953 Cal 549 (A I R V 40 C 130 P 1), *Muridhar Kulthia* v. *Mt. Tara Dye.* (Such a tenancy is converted by payment and acceptance of rent into one from year to year or month to month as the case may be.)

5. 1955 N U C (Trav Co) 765 (A R V 42), *Narayanan Thayyan* v. *Govinda Menon.* ✠ 1952 Kutch 3 (A I R V 39 C 6 P 2), *Vellabhaji Bhanji* v. *Jivandas Murarji.* (According to rent note, rent settled for one year — Rent to be paid from month to month as it fell due— Tenant to vacate, at any time when called upon to do so—Tenancy-at-will is created—No notice to quit is required—Even after expiry of 12 months if tenant continues, tenancy still remains tenancy-at-will and does not become tenancy from month to month)

[See however 1951 Orissa 262 (A I R V 38 C 63 P 1), *Banamali Behera* v. *Padmalabha.* (Where the tenants have put up a dwelling house and have been proved to have remained in occupation of the land for as long as 70 years, paying a uniform annual rent, the tenancy cannot be terminated without a reasonable notice being served on them whether the tenancy is agricultural or not.)]

6. 1955 N U C (Trav-Co) 765 (A I R V 42), *Narayanan Thayyan* v. *Govinda Menon.* ✠ 1951 Orissa 262 (A I R V 38 C 63 P 10), *Banamali Behera* v. *Padmalabha.*

7. 1950 All 583 (A I R V 37 C 228 P 12) : I L R (1952) 1 All 85 (DB), *Raman Lal* v. *Bhagwan Das.*

Add after Pt. 7 :

[Pt 7a] But a notice not signed by the lessor or his agent is of no value. *1951 Orissa 262 (A I R V 38 C 63 P 10), Banamali Behera* v. *Padmalabha.*

Note 9

Add after Pt. 1 as a separate para :

[Pt. 2] The Bombay Tenancy and Agricultural Land Act, 1948, makes it impossible for the landlord to terminate the tenancy either of a protected or non-protected tenant by giving a six months' notice expiring at the end of the year. The Act is therefore a local law to the contrary within the meaning of this section and the tenancy of a protected tenant cannot be regarded as one from year to year. *1953 Bom 332 (A I R V 40 C 104 P 2) (DB), Jagannath Narayan* v. *Vasant Ramkrishna.*

Add after Pt. 2 as a separate para :

[Pt 3] There is nothing in the Administration of Evacuee Property Act, 1950, which deprives the landlord of his right to give a notice to his tenant and terminate his tenancy under S. 106, T. P. Act. *1954 Bom 56 (A I R V 41 C 10 P 2, 3) (DB), Bapasola* v. *Mirchandani, B. D.*

Add after Pt. 3 as separate paras :

[Pt. 4] Though S. 106 required that before a monthly tenancy could be determined a notice under that section had to be given, when an order has been made under S. 6, sub-s. (2) or (3) of the Bengal Suppression of Immoral Traffic Act, 1933, the landlord becomes entitled to determine the tenancy immediately and this notwithstanding S. 106, T. P. Act, as such power is given to the landlord under sub-s. (8) which operates 'notwithstanding anything contained in any other law for the time being in force. *1955 N U C (Cal) 1100 (A I R V 42), Nemai Chand Sen* v. *Kumud Behari Basu.*

[Pt. 5] The statutory tenancy under S. 12 (1), West Bengal Premises Rent Control (Temporary Provisions) Act (XVII of 1950), would come to an end only under one of the different clauses in the proviso to sub s. (1) and no notice under S. 106, T. P Act is necessary *1955 Cal 226 (229) (Pr 9) ((S) A I R V 42 C 57) (DB), Haratal Das* v. *Pasupati Charan Biswas.*

Note 12

Add in the Foot Notes indicated :

2. 1955 N U C (Orissa) 935 (A I R V 42), *Bahan Rana* v. *Narshing Swar.* Lease for build ng purpose is to be presumed to be monthly tenancy.) ✠ 1953 Orissa 245 (A I R V 40 C 69 P 5), *Chhoti Bai* v. *Gangadhar Misra.* ✠ 1952 I D A 17282 (Nag) (DB), *Vijaysesha* v. *A. D. C., Akola.* ✠ 1952 I D A 17283 (Nag), *Shamrao* v. *Ambadas.* (Where the rent note says that on the date of executio Rs. 6 were paid as rent for the year, that does not show that it is a yearly tenancy. Rents are paid sometimes in a lump sum at the end of a year even though the tenancy may be a monthly one.)

5. 1952 S C 23 (A I R V 39 C 6 P 13) : 1952 S C R 269 : 31 Pat 21 (S C), *Ram Kumar* v. *Jagdish Chandra.*

Add after Pt. 3 as a separate para :

[Pt 3a] The rule of construction embodied in this section applies not only to leases of uncertain duration but also to leases implied by law which may be inferred from possession and acceptance of rent (See also Note 18.) *1952 S C 23 (A I R V 39 C 6 P 13) : 1952 S C R 269 : 31 Pat 21 (S C), Ram Kumar* v. *Jagdish Chandra.*

Add after Pt 5 as a separate para :

[Pt. 6] This section cannot be read subject to S. 107, which deals with the creation of tenancy from year to year by act of parties only by a registered instrument. A lease which is to be deemed to be a lease from year to year by operation of law is a very different thing from a lease from year to year by act of parties. Hence, it is incorrect to say that unless a lease is created by a registered document no presumption as to year to year tenancy can be drawn under S. 106. The two sections deal with entirely different matters and there is no conflict or contradiction between the two. *1950 Cal 23 (A I R V 37 C 6 P 23) : I L R (1950) 2 Cal 443 (D B), Ram Protap Kayan* v. *National Petroleum Co. Ltd.* (Obiter:—Per P. N. Mitra J.)

Note 13

Add in the Foot Note indicated :

2. 1952 Assam 100 (A I R V 39 P 29, 34) : I L R (1952) 4 Assam 401 (F B). *Himatsingka Timber Ltd.* v. *Kumudini Dutta.* (Tenancy for residential purposes and for stacking timber which is commercial purpose—Tenancy is not for agricultural purposes — Tenancy is governed by Transfer of Property Act and not Goalpara Tenancy Act—Notice to quit should be under T. P. Act and not Goalpara Tenancy Act.) ✠ 1950 Cal 20 (A I R V 37 C 5 P 7, 8) : I L R (1950) 2 Cal 268 (DB), *Abdul Samad* v. *Jitoo Chowdhury.* (Plaintiff taking some non-agricultural land on lease from uncles and sub-leasing some to defendant for residential purposes — Upon death of uncles, plaintiff inheriting their interest and amalgamating them with some agr cultural holding inherited by him from father — Defendant held did not become under raiyat, within the meaning of S. 4 (3), Bengal Tenancy Act, sub-lease being non ag icultural at inception and having retained that character throughout — Notice under S. 106 held valid.)

In foot-note 1a for "A I R 1949 Mad 275" substitute "AIR 1948 Mad 275" and add the following as foot-note remark :

"[Note : Commented upon in 1953 S C 228 A I R V 40 C 55 P 23) 1953 S C R 1009 (SC), *Namdeo* v. *Narmadabai.*]"

Add after Pt. 3 :

[Pt. 3a] The Court must look to the original intention of the parties which can be gathered from the deed itself and not to the subsequent conduct of the lessee. *1951 All 396 (A I R V 38 C 70 P 6) (D B), Manzoor Ali Usmani* v. *Mt Lal Devi.* (If after taking a lease for a showroom the lessee, (a manufacturing concern) began to carry on any manufacturing operation upon the premises the lease is

not converted into one for manufacturing purposes. The very fact that the lease was only for a period of one year indicates that the original intention was not to let out the premises for manufacturing purposes.)

[Pt. 3b] A lease for manufacturing purpose must be a lease which at its inception is for that purpose by agreement of the parties and both parties must know that the lease is for manufacturing purpose at the time of the grant. If that is not so the nature of the subsequent user by the tenant without agreement of the landlord will not convert it nto one for manufacturing purpose. *1952 Cal 320 (A I R V 39 C 83 P 16), Sati Prasanna* v. *Md. Fazal.*

[Pt. 3c] The word 'manufacturing' in this section should be given its commonly understood meaning which is neither the etymological meaning nor the technical meaning as applied to mechanical industry or commerce. The popular concept is that there must be production of a new or a different article or the process must be such as converts one kind of article into another. In this sense printing simpliciter is not necessarily a manufacture. *1952 Cal 320 (A I R V 39 C 83 P 13), Sati Paasanna Mukherjee* v. *Md. Fazal.*

[Pt 3d] A lease for mixed or multiple purpose like dwelling purpose, for setting up a printing press and for ordinary business purposes is not a lease for 'manufacturing purpose' within the meaning of this section but is within the meaning of the words 'any other purpose' in the section. *1952 Cal 320 (A I R V 39 C 83 P 10), Sati Prasanna Mukherjee* v *Md Fazal.* ✱ *1955 Cal 169 (172) (Pr 19) (A I R V 42 C 43), L. A. Saunders* v. *Land Corporation of Bengal.* (Where the tenancy is for 'residential and manufacturing purposes' as distinguished from 'manufacturing purposes these 'mixed and multiple purposes' would take it outside the earlier clause and bring it within the later residuary clause for any other purpose'. 1952 Cal 320 (A I R V 39 C 83), Sati Prasanna v. Md. Fazel; A F. O. D. No 52 of 1950, D/- 23.11-1950 (Cal.) Mohd. Fazal v. Sati Prasanna. Foll.)

[Pt. 3e] The use of the word "manufacture" to describe the process of preparation of sweets though not unknown is, generally speaking, not very appropriate and as a general rule it cannot be held that preparation of sweetmeats would answer the test of "manufacture' for purposes of the section. *1954 Cal 224 (A I R V 40 C 84 P 6) Brohmananda Das* v. *Nagendra Chandra Sarkar.* (*Held* on facts that lease in question was at least as much for sale of sweets as for preparing the same in the disputed premises That being so, it was not solely for manufacturing purposes but was as much for other purposes as well. It was therefore, a lease for "any other purpose.)"

Add at the end of the Note as a separate para:

[Pt. 5] Where the plaint in an ejectment suit very distinctly averred that the tenancy was a monthly one according to the contract between the parties and the assertion in the plaint was not specifically denied in the written statement; and the only plea which the defendants set up was that the lease granted to the defendant being a manufacturing lease, the fifteen days' notice was invalid, it was held that in the absence of any specific denial, it must be assumed, that there was a contract according to which, in spite of the nature of the tenancy, the parties agreed that the tenancy should be a monthly tenancy for which a monthly rent was payable, and therefore on the terms of S. 106 itself the tenancy was terminable by fifteen days' notice to quit expiring with the end of a month of the tenancy. *1955 Assam 102 (104) (Pr 5) (A I R V 42 C 21) (D B), Jewan Singh* v. *Mandalal Agarwalla.*

Note 15

Add in the Foot Notes indicated :

1. 1952 S C 23 (A I R V 39 C 6 P 13): 1952 SCR 269 : 31 Pat 21 (S C), *Ram Kumar* v. *Jagdish Chandra*+1951 Orissa 262 (AIR V 38 C 63 P 9), *Banamali Behera* v. *Padmalabha.* (Annual rent fixed - Tenancy is not from month to month merely because a house stands upon the holding.)

[*See also* 1955 Assam 102 (105) (Pr 6) (A I R V 42 C 21) (D B) *Jewan Singh* v. *Mandalal Agarwalla.* (The mode in which rent is expressly payable affords a presumption that the tenancy is of a character corresponding to the the nature of the monthly or the annual payment.)

2. 1954 Assam 53 (A I R V 41 C 15 P 6) : I L R (1953) 5 Assam 207, *Hamida Khatoon* v. *Shibananda Bhandari*+1952 S C 23 (AIR V 39 C 6 P 13) : 1952 S C R 269: 31 Pat 21 (S C), *Ram Kumar* v. *Jagdish Chandra.* (Lease of land for building purposes for ten years fixing yearly rent -Lease inoperative under law —Acceptance of yearly rent—Tenancy from month to month arises by implication of law.)

3. 1955 N U C (Sau) 933 (A I R V 42), *Jivandas Dharshi* v. *Andarji Manekchand*. (A lease of shops in which no term is fixed will be deemed to be a lease from month to month and not from year to year notwithstanding the fact that rent was to be paid at the end of the year and was fixed at an annual rate.) ✠ 1952 IDA 17283 (Nag), *Shamrao* v. *Ambadas*. (Rent note in respect of a house stating at a certain amount was paid as rent for the year — *Held* it was a monthly and not yearly tenancy.)

[*See also* 1955 N U C (Assam) 1294 (AIR V 42), *Akara Sheikh* v *Safaruddin Ahmad* (A mere reservation of an annual rent does not make the tenancy an annual tenancy It is the purpose of the tenancy which determines whether six months' notice to quit is essential or a notice to quit terminating within a fortnight of the expiry of the tenancy would be quite enough: 1952 S C 23 (AIR V 39 C 6): 1952 S CR 269 : 31 Pat 21 (S C). Ram Kumar Das v. Jagdish Chandra Deo. Foll.)

Add after the end of Pt. 2a:

[Pt. 2b] It is submitted with respect that the decision in so far as it holds the lease to be valid for the first year is not correct. In *Ram Kumar* v *Jagdish Chandra*, the Supreme Court had an occasion to deal with this very question. In that case the defendant had executed a registered kabuliat in favour of the plaintiff by which he took a settlement of land for building purposes at an annual rent for a period of ten years. The defendant paid the annual rent for the first two years only. The kabuliat not being an operative document under S. 107, the question was whether the tenancy created by implication of law was a month to month tenancy. It was held that the tenancy created by implication of law must be presumed to be a monthly tenancy under this section. In repelling the contention that a lease for one year certain might fairly be presumed from the payment of annual rent, Justice B. K. Mukherjea who delivered the judgment of the Court observed as follows.—

"But one serious objection to this view seems to be that this would amount to making a new contract for the parties. The parties here certainly did not intend to create a lease for one year. The lease was intended to be for a period exceeding one year, but as the intention was not expressed in the proper legal form it could not be given effect to. It is one thing to say that in the absence of a valid agreement, the rights of the parties would be regulated by law in the same manner as if no agreement existed at all; it is quite another thing to substitute a new agreemen for the parties which is palpably contradicted by the admitted facts of the case."

—1952 S C 23 (A I R V 39 C 6 P 15) : 1952 S C R 269 : 31 Pat 21 (S C).

Note 17

Add in the Foot Note indicated :

1a. 1955 N U C (Cal) 756 (A I R V 42), *Lachmi Narayan* v. *Amulyadhan Auddy*. (A monthly tenancy does not come to an end on the termination of every month. A characteristic of a periodical tenancy is that as each period commences it is not a new tenancy it is really an accretion to the old tenancy.)

Note 18

Add in the Foot Notes indicated :

1 1955 N U C (Orissa) 95 (A I R V 42), *Bahan Rana* v *Narshing Swar*. (Unregistered lease for a number of year for building purpose—Tenancy created by acceptance of rent may be presumed under S. 106 to be monthly tenancy.) ✠ 1952 S C 23 (A I R V 39 C 6 P 13) : 1952 S C R 269: 31 Pat 21 (S C), *Ram Kumar* v *Jagdish Chandra* ✠ 1953 Cal 349 (AIR V 40 C 130 P 1, 1), *Murlidhar Kulthia* v. *Tara Dye*. (Lease invalid for want of registration.)

2. 1955 N U C (Cal) 844 (A I R V 42), *Bhabatarini Dassi* v. *Monomohan Palsai* (Unilateral lease by tenant for a term providing for eviction without notice is invalid — Landlord cannot eject lessee without notice on efflux of time on ground that it operates as a contract to the contrary which dispenses with notice to quit under S. 106.) ✠ 1952 S 23 (A I R V 39 C 6 P 13) : 1952 S C R 269: 31 Pat 21 (S C), *Ram Kumar* v. *Jagdish Chandra*.

Note 19

Add in the Foot Notes indicated :

2. *See also* 1954 Nag 292 (293) (Pr 5) (A I R V 41 C 105) : I L R (1954) Nag 644 (DB), *Rochaldas Tikamchand* v. *Ratanchand Baghmal* Notice need not mention exact date of termination of tenancy—It is enough if landlord says that the tenant should vacate at the end of the month of the tenancy.)

3. *See* ('50) 86 Cal L Jour 198 (218, 219), *Sm. Durgarani Devi* v. *Mohiuddin*, (A notice to quit and deliver possession "on the expiry of a month of your tenancy which will expire next after the end of one month from the service of this notice," held not vague and uncertain.)

4. 1954 Nag 101 (A I R V 39 C 45 (3) P 7). *Gayaprasad* v. *S. S. Munnilal* ✠ ('50) 86 Cal L Jour 19 (218), *Sm. Durgarani Devi* v *Mohiuddin* ✠ 1953 Cal 352 (A I R V 40 C 131 P 13, 15), *Jatindra Nath* v. *Malai Ram*.

5. 1954 Ajmer 62 (63) (Pr 6) (A I R V 41 C 62) *Hukamchand Kishanlal* v. *Nathmal*. (Notice to quit must not be interpreted too technically or in a spirit of hair splitting.) ✠ 1952 Punj 422 (A I R V 39 P 4) : I L R (1953) Punj 100 (DB), *Bawa Singh* v *Kundanlal*.

6. *See also* 1952 Nag 101 (A I R V 39 C 45 (3) P 7), *Gayaprasad* v. *S S Munnilal* ✠ 1952 I D A 17285 (Nag) *Abdul Azim* v *Yakubekhan* ✠ ('50) 86 Cal L Jour 198 (218), *Sm Durgarani Devi* v *Mohiuddin* ✠ 1953 Cal 352 (A I R V 40 C 31 P 13, 15), *Jitendra Nath* v. *Malai Ram*.

7 1955 N U C (Sau) 1488 (A I R V 42). *Ibrahim Noorbhai* v, *Vallabhdas Manji*. (Notice dated 9.11-1951 asking to vacate on expiry of one month from receipt of notice or on expiry of the month according to defendant's own belief is valid.) ✠ 1955 N U C (Sau) 1492 (A I R

V 42), *Trikamdas Nichaldas* v. *Abdul Kadar.* (A lease f r ne year commenced n Kartak Sud St. 2005 corresponding with 2 11 48, and accoiding to the English calendar the month of the tenancy expired o the 1st of the month. The notice to quit expired on 30-4-50, strictly speaking, the notice should have expired on the 1st of May. Held that a clerical error as regards the date, which did not mislead, would not vitiate the n tice. 1938 All 649 (A I R V 25) Badal v. Ram Bharosa; 1952 All 141, (A I R V 39 C 51) *Amar Singh* v. *Hoshiar Singh Rel. on.)* ✠ (1954) 1954 3 All E R 214, (21F): (1954) 1 W L R 1 0. *Eastaugh* v. *Macpherson.* (Where the landlord let to a tenant a office on a yearly tena cy commenci g o 1st April, 1953, liable to be determined by three months' notice expiring at the end of any year and on 23rd December, 1953 the la dlord by notice wrote to the tenant 'to accept three months' notice to vacate the office b the date (*i. e*, 31st March, 1954)".

Held that the notice was valid a d unambiguous; that the words "by the date" meant "on or before the date". and not "before the date")✠ 1953 al 5-5 (A I R V 40 C 220 P 1) (DB). *Mrs. A. Cacacie* v. *S Safdar Ali.* (Tenant occupying flat Nos. 3 and 3A—Notice mentioning flat No. 3 only—Receipts and correspondence showing that both partie understood that tenant was vacating entire premises—*Held* that in spite of the light misdescript on, the notice was sufficient and legal.) ✠ 1953 Cal 160 (A I R V 40 C 53 P 27, 28 & 29), *Tulsiram Shaw* v. *R. C. Pal Ltd.* (Where i stead of addressing the quit notice to a limited company which was the tena t it was addressed to a person who was the managi g director himself and the ame of the company was written after the name of the ma aging director with a 'Limited" appended after the n me, and the notice was treated by the addressee and the company as a notice to the company itself: *Held* that the notice was valid.) ✠ 1952 I D A 17285 (Nag). *Abdul Azim* v. *Ya ubekhan.* (Where tne relevant p rtion of the notice was "this notice is hereby give to you that you vacate the lands of my client by the last day of your monthly te ancy which last day comes after 15 days of receip of thi otice" *Held* that the notice was valid.) ✠ 1953 Cal 352 (A I R V 40 C 131 P 13), *Jatindra Nath* v. *Malai Ram.* (A notice given on 19th July 1945 to quit and deliver up possessi n "w th the end of 31 t July 1945 or at the end of a month of your tenancy which would expire next after 15 days from the receipt of this notice" is neither vague nor insufficient and not bad in law.)

9. ('50) 86 Cal L Jour 193 (211) *Sm Durgarani Devi* v *Mohiuddin.* (The lessor has no ri ht to terminate the tenan y by giving notice to quit a part of the demised premises and the assignee of the reversion of part does not acquire a right to terminate the tenancy by giving notice to quit as to such part, unless the tenancy has been broken up.)

12. *See* 1952 Cal 221 (A I R V 39 C 75 (14) P 8), *Najendranath Karmakar* v *Jotish Chandra Mukherjee* (Notice t quit recitin that defendant No. 1 was the tenant, that defen lant No. 2 had merely paid portions of the rent by cheques and that as a matter of abundant caution, the notice to quit was also served on him: *Held*, that the reason in the notice to quit was not material for determining validity of notice. Unquestionably defendant No. 2 was required by the notice to quit to determine the tenancy of the defendant No. 2 if ultimately such a tenancy was found to be true.)

Add after Pt. 4:

[Pt. 4a] Courts should give such construction as would not work hardship on the tenant and would not strain the language too much against the landlord. *1954 Nag 292 (293) (Pr 5, 6) (A I R V 41 C 105) : I L R (1954) Nag 624. (DB) Rochaldas Tikamchand* v. *Ratanchand Baghmal.*

Add after Pt. 5:

[Pt. 5a] When the language used in a notice is open to doubt it is necessary to look at the intention of the landlord and the rule of construction is to make it sensible and not insensible. *1953 Cal 160 (A I R V 40 C 53 P 21, 23), Tulsiram Shaw* v. *R. C Pal Ltd.*

Add after Pt. 5a as a separate para:

[Pt. 5b] The principle underlying the rule embodied in the section is that the tenant must have clear 15 days' or 6 months' time prior to the end of the month or year of his tenancy so that he may in the meanwhile remove his effects after arranging for another accommodation. If in addition to this period he is allowed a few hours more so that he leaves the premises by the first day of the ensuing month or year he cannot be said to be prejudiced and the notice cannot be held to be invalid on that account. *1953 All 218 (A I R V 40 C 100 P 13), Ghasi Ram* v. *Chaubey Mitra Sen.*

Note 21

Add in the Foot Note indicated:

2. 1946-52 ID 40461 (Nag), *Sk Karim* v. *Jagannath.* (Five years' lease — Forfeiture at end of one year as per terms — S. 111 and not S. 106 applies.)

[*See also* 1946 52 I D 40529 (Nag), *Mst. Indibai* v. *Shyamasunder* (Notice requiring tenant to vacate by the 31st March 1948 given on 1-3-48, is sufficient notice under S. 111 (g).)]

Note 23

Add in the Foot Note indicated:

1 1953 Punj 243 (A I R V 40 C 101 P 7): I L R (1954) Punj 149, *Basheshar Nath Sarin* v. *Delhi Improvement Trust* (Where a notice to quit has been given, a subsequent notice to quit is of no effect unless it can be inferred from other circumstances that a new tenancy has been created after the expiry of the first notice; nor does it amount to a waiver of the first notice in the absence of any proof thereof.)

Note 24

Add in the Foot Notes indicated :

4. 1954 Tripura 21 (22) (Pr 5) (A I R V 41 C 12), *Gopal Krishna* v. *Jagadindra Kishore.* (Suit for declaration of Takshichi taluki interest and for possession after ejectment — Neither party setting up tenancy — Notice not necessary.) ✠ 1952 J & K 35 (A I R V 39 P 2) : 11 J & K L R 59, *Ramzan Khan* v. *Ghani Sufi.* (Tenant holding over without consent of lessor — Dispossession by landlord — Subsequent obtaining of possession — Original lease is not renewed and he can be ejected without any notice.) ✠ 1953 Mys 62 (A I R V 40 C 32 P 7): ILR (1952) Mys 368 (DB), *Gurumurthappa, M.* v. *Chicknunisamappa.* ✠ 1950 All 583 (A I R 37 C 228 P 12) : I L R (1952) 1 All 85 (D B), *Ramanlal* v. *Bhagwan Das.* (Tenancy-at-will — Death of lessee—Possession of lessee's heir is adverse and suit against him as trespasser would lie—Notice to quit is not necessary.)

7. 1950 Mys 83 (A I R V 37 C 20 P 2) (D B) *Siddarama Setty* v. *Kalappa.*

Add after Pt. 10 as separate paras :

[Pt. 11] *Rent control legislation and notice to quit.* — Where under the rent control legislation a landlord obtains previous permission of the Rent Controller for issuing a notice to quit under this section to his tenant, the order granting permission is final till it is set aside in appeal. Even if an appeal is pending against the grant of sanction, the landlord can issue a notice to quit under this section and file an ejectment suit. The mere pendency of such an appeal will not invalidate the notice. *1951 Nag 203 (A I R V 38 C 49 P 9)* : *I L R (1951) Nag 401, Phanibhushan Deb* v. *Gulabchand.* (1948 Bom. 347 (A I R V 35 C 83) : I L R (1948) Bom. 346, Indra Singh v. Shiavax Cawasji, Dissent. from.)

[Pt. 12] A permission granted to give quit notice remains valid and subsisting until the lease is terminated and tenant evicted. If, therefore, a notice given after permission is held to be invalid, fresh permission for second notice is not necessary. *('51) 1951 Nag L Jour (Notes) 122, V. P. Thatte* v. *Vithaldas.*

[Pt. 13] Where a special law, such as the U. P. (Temporary) Control of Rent and Eviction Act, 1947, has imposed certain condition upon the exercise of the landlord's right to eject his tenant, one amongst them being that the tenant should make a wilful default in the payment of rent within one month of the service of notice of demand, and the tenant makes such default the parties would be relegated to the general law and according to the general law the landlord would be entitled to evict the tenant after giving the requisite notice. Landlord's suit after giving such notice under the general law is competent even though the tenant tenders thereafter the whole rent due. *1952 All 579 (A I R V 39 C 96 P 3), Khumani* v *Saktey Lal.*

[Pt. 13a] A notice under S. 106, T. P. Act and a notice under S 3 of the U. P. (Temporary Control of Rent and Eviction Act can be given simultaneously. If the tenant makes the payment, the landlord would have no right to file a suit by reason of S. 3 of the latter Act. *1955 N U C (All) 866 (A I R V 42) (DB). Sm. Baddey* v. *Sm. Mahadevi.*

[Pt. 14] Where a landlord seeks eviction of his tenant he must not only prove one of the grounds mentioned in S. 4 of the Madhya Bharat Sthan Niyantran Vidhan but also that the tenancy was determined by a valid notice to quit or by any other mode recognised by law The provisions of this Act are not in any way abrogated or repealed by the Sthan Niyantran Vidhan. *1952 Madh B 121 (AIR V 39 P 5, 11): I L R (1952) Madh B 126 (DB), Chhote Lal* v. *Abdullabhai.*

[Pt. 15] See also the undermentioned case. *1953 All 218 (A I R V 40 C 100 P 10, 11), Ghasi Ram* v. *Chhubey Mitra Sen.* (Plaintiff obtaining permission from District Magistrate under S. 3, U. P. (Temporary) Control of Rent and Eviction Act—Even then notice under S. 106, T. P. Act is necessary: 1952 All 863 (A I R V 39), *Ram Sarup.* v. *Gayatri Devi,* Foll.)

Note 25

Add in the Foot Note indicated :

4. 1951 Assam 70 (A I R V 38 C 36 P 15) : I L R (1950) 2 Assam 166 (D B), *Ratneswar Goswami* v. *Mongoli Chutiani,* (Suit for ejectment of monthly tenant—Defendant denying landlord's title in written statement—Defendant held not entitled to notice to quit.)

Note 29

Add in the Foot Note indicated :

1. 1955 N U C (Punj) 121 (A I R V 42), *Dr. Prem Nath* v. *Pt. Manmohan Nath Dar* (Law presumes that a notice to quit has been impliedly served on sub-tenant.)

Note 32

Add in the Foot Note indicated :

5. 1951 All 853 (A I R V 38 C 214 P 10, 11, 13) (DB), *Sahir Husain Khan* v. *Sirajul Haq.* (Tenant holding over after notice to quit—Notice providing that tenant shall be liable to pay damages for use and occupation at an enhanced rate of rent after the date fixed in the

notice—If tenant neither replies nor vacates the house, there can be no tenancy by implication to pay the enhanced rent — Tenant would be liable to pay damages for use and occupation at a reasonable rate not exceeding the enhanced rate stated in the notice for the period of his holding over: 1934 All 115 (A I R V 21), Madan Mohan Garg v. Bohra Ram Lal, *Dissent. from.*)

Add after Pt. 2 as a separate para :

[Pt. 2a] When the lessee has remained in possession after the termination of the lease and the lessor has continued to accept rent from the lessee, the lease must be deemed by virtue of S. 116 to be renewed from month to month or from year to year according to the purpose of which the property is leased. (See Notes under S. 116.) *(49) 1949 J L R 257 (258, 259) (DB), Sri Narain* v. *Gangar Singh.*

Add after the word Patna in Pt. 8 the word "Rajasthan" and add the following in Foot Note 8 :

1946-2 I D 40501 (Raj), *Purshottam* v. *Radha Vallabh.* (Where the notice to quit by landlord requiring the tenant to pay enhanced rent on failure to quit is invalid, the landlord cannot claim enhanced rent.)

Add after Pt 8 :

[Pt. 8a] The Judicial Commissioner's Court of Ajmer has held that a tenant holding over after the expiry of the lease must be deemed to be holding over on the same terms as in the original lease, if the notice served on him after the expiry of the original lease is invalid, notwithstanding the fact that the notice contains a warning for payment of enhanced rent in case the premises are not vacated. *1950 Ajmer 79 (A I R V 37 C 87 P 7), Mukanchand* v. *Gulabchand.*

Note 33

Add in the Foot Not indicated :

1. 1953 Nag 251 (A I R V 40 C 102 P 5) : I L R (1953) Nag 837 (DB), *Mohammad Nurul Huda* v *Kikabhai* (The fact that a person looks after certain house and collects its rent does not make him a landlord entitled to terminate lease.)

Note 34

Add in the Foot Notes indicated :

2. 1953 Orissa 245 (AIR V 40 C 69 P 6), *Chhoti Bai* v *Gangadhar Misra.* (Notice given by brothers without joining their mother who has interest in the property at the time of the notice is invalid.)

4. 1953 Nag 18 (A I R V 40 C 10 P 3) : I L R (1953) Nag 672, *Abdul Hamid* v. *Bhuwaneshwar Prasad* & ('50) 86 Cal L Jour 193 (213), *Sm. Durgarani Devi* v *Mohiuddin.*

5. ('50) 86 Cal L Jour 198 (213), *Sm Durgarani Devi* v. *Mohiuddin.*

6. ('50) 86 Cal L Jour 198 (213), *Sm. Durgarani Devi* v. *Mohiuddin.*

7. ('49) 1949 J L R 49 (DB), *Bhagirath* v. *Lachhmi Narain.* (Where the other co-lessor had also become a plaintiff, the notice which was on behalf of both the lessors would not be invalid although signed by one of them only.)

Add as a new sub-heading in the Note after Pt. 19 :

Firm as landlord.

[Pt. 20] The partners collectively, that is, as a firm are not debarred from entering into a contract of lease and when they do so, they are the landlords and the firm is the lessor. Each partner acts as the agent of the other in law and it is not necessary that the identity of the partners should be disclosed either in the notice under S. 106 or in the suit, unless the lessor or the lessee makes a demand in accordance with the provisions of O. 30, Civil P. C. *1953 Assam 206 (A I R V 40 C 87 P 6) : I L R (1952) 4 Assam 357, Saligram Rai Chunilal Bahadur and Co.* v. *Abdul Gani.*

[Pt. 21] Where therefore, the tenants do not deny that the plaintiff firm was the lessor and where they do not call upon the plaintiff firm to disclose the names of its partners, the suit cannot be held to be incompetent on the ground that the partners of the firm were not joined as parties or that the notice was not served upon the defendants tenants on behalf of the partners individually. *1953 Assam 206 (A I R V 40 C 87 P 6) : I L R (1952) 4 Assam 357, Saligram Rai Chunilal Bahadur and Co* v *Abdul Gani.*

[Pt. 23] Once a relationship of landlord and tenant is established between a plaintiff firm and the defendants, then whatever may have been the changes in the composition of the plaintiff firm, the defendants continue to be the tenants of the firm and in a suit for ejectment brought by the firm, the Court is not concerned with the identity of the partners in the firm. *1953 Assam 206 (A I R V 40 C 87 P 6 : I L R (1952) 4 Assam 357, Saligram Rai Chunnilal Bahadur and Co.* v. *Abdul Gani.*

Note 35

Add in the Foot Note indicated :

4 1953 My-62 (AIR V 40 C 32 P 7): ILR (1953) Mys 368 (DB), *Gurumurthappa, M.* v. *Chikmunisamappa.*

Add after Pt. 6 as a separate para :

(Pt. 7) An assignee of a part of the reversion has no right to determine the tenancy as to such part unless there is a severance of the reversion and the tenant

recognises or acknowledges the title of the owner of a severed part of the reversion in which case the notice to quit with regard to such severed part would be legal and binding on the tenant. *('50) 86 Cal L Jour 198 (213, 214, 215 & 216), Sm. Durgarani Devi* v. *Mohiudain.*

Note 36

Add after Pt 3 at the end of the Note as a separate para :

[Pt 4] Clause 23 of the C. P. & Berar Letting of Houses and Rent Control Order does not create any tenancy but only empowers the Deputy Commissioner to order the landlord to let the vacant house to a Government servant or to a displaced person under certain circumstances. The tenancy is, therefore between the Government servant or the displaced person and the landlord, and will be governed by T.P. Act in all matters except those in respect of which provisions have been made in the Order. Hence, where a Government servant to whom a house had been allotted under Cl. 23 of the Order subsequently retires from Government service, there is no automatic termination of the tenancy by reason of such retirement under the Order and the Rent Controller has no power to issue notice calling upon such retired servant to vacate the house. *1953 Nag 31 (AIR V 40 C 17 P 2, 5, 6) : ILR 1952) Nag 767 (DB), Sarvate, R. R.* v. *Deputy Commissioner, Jabalpur.*

Note 37

Add in the Foot Notes indicated :

3. 1954 Ajmer 65 (66) (Pr. 3) (A I R V 41 C 66), *Baluram* v. *Bhagchand,* (In the absence of service of notice on both the joint tenants service must be deemed to be insufficient. When one of the joint tenants was not served it must be held that the tenancy was not validly terminated.)

4. 1951 Raj 88 (A I R V 38 C 37 P 7), *Ghulam Mohammad* v. *Lakshmibux.* (Where a notice to quit sent by post is addressed to both the joint tenants who are brothers but the notice is tendered to and refused by one of them, it would be a sufficient service on both.)

11. 1955 NUC (Punj) 21 (AIR V 42), *Dr. Prem Nath* v. *Pt Manmohan Nath Dar,* (Notices to quit is not necessary to terminate a tenancy at sufferance or a sub-tenancy created by a tenant. When a notice to quit is served on a tenant the law presumes that a notice to quit has been impliedly serve on all members of his family, on all his servants and employees and on all his sub-tenants.)

Note 38

Add in the Foot Note indicated :

1a. 953 Cal 160 (A I R V 40 C 53 P 28. 29), *Tulsiram Shaw* v. *R. C. Pal Ltd.* (Tenant, a limited company—Notice addressed to Managing director of limited company—Notice treated by addressee and company as notice to company itself—Notice is valid.)

Note 39

Add in the Foot Notes indicated :

1. 1946 52 I D 40517 (Kutch), *Devachand Ramji* v. *Rajyogar Harisaw* Lease for indefinite period Notice to quit within 15 days is bad.)

2. 953 Cal 949 (AIR V 40 C 130 P 14) *Muralidhar Kulthia* v *Mt Tara Dey* (Notice to quit by the end of October served on 4 10 1944 is valid.) ✠ ('50) 8 J & K L R 191 (197 (DB), *Vasdev* v. *Karam Chand*

3. 1946-52 I D 40461 (Raj), *Purshottam* v. *Radha Vallabh* (When a lease for an indefinite period is to be determined by 3 months' notice to quit, the notice to vacate in 4 days is invalid and the tenancy is not terminated on the mere expir of period of three months after that date.)

6. 1951 Ajmer 52(1) (AIR V 38 C 4 P 3) *Motilal* v. *Thandiram* (A notice calling upon a tenant to vacate by a specified date includes that day as well—1949 Ajmer 38 (A I R V 36 C 15), *Sunder Singh* v. *Arjun Singh,* followed.)

Add after the first sentence :

[Pt. 1a] The section makes mention of two kinds of leases in which the notice has to be of six months, and in all other cases the notice is of 15 days ending with the month of tenancy *1955 Nag 27 28) (Pr 7) ((S) A I R V 42 C 6) : I L R (1954) Nag 957 (DB), Baldeo Prasad* v. *Dashrathlal.*

Add after Pt. 8 :

[Pt. 9] See also the undermentioned case. *('49) 1949 J L R 49 (DB). Bhagirath* v. *Lachhmi Narain.* (A notice to quit "within one month' would only mean at the latest by the end of one month. It may also mean that the landlord will be estopped from claiming the rent for the remaining period of the month, if the tenant vacated at any time within the month, but the longest period allowed to the tenant would not be less than a month.)

Note 40

Add in the Foot Notes indicated :

1. 1953 Nag 219 (A I R V 40 C 84 P 10) : ILR (1954) Nag 147, *Illahibux* v *Munir Khan.* (Tenancy commencing on 13th—Notice to vacate on 12th is not good—It should call upon tenant to vacate at the end of that day. 951 All 396 (A I R V 38 C 70 P 5) (DB), *Mansoor Ali Usmani* v. *Mt Lal Devi* ✠ 1952 All 32 A I R V 39 C 7 P 3), *Pahlad Das* v *Ganga Saran.* (A notice requiring the tenant to vacate the house on the 26th of the month or on any date on which the tenant considers that his tenancy expires is a valid notice as it permits the tenant to vacate the premises immediately after the expiry of the month of his tenancy 1949 All 173 (A I R V 36 C 63) : I L R (1949) All 414, *Ganga Prasad* v. *Prem Kumar Kohli.* Foll.) ✠

1950 Mys 69 (AIR V 37 C 20 P 2) (DB), *Siddaram Setty* v *Kalappa*.+1950 Orissa 1 (AIR V 37 C 1 P 3 : ILR (1949) 1 Cut 231 (DB) *Benchhanidhi Samntrai* v *Lachminarain Agarwala*. 2 1954 Trav Co. 467 (4 7) (Firs 3, 4) (AIR V 41 C 164), *Chottalal Othamchand* v. *A. Padmanabha*. (Where a notice terminati g a tenancy from month to month commencing on the first of each month reckoned according to the English calendar was given in the following terms, namely. I terminate your tenancy with effect from the last day of August 1945. I hereby demand of you the surrender .... on the said date for which purpose I shall be present at the premises between 4 and 5 p.m. on 31st August, 1945.'

Held, that the concluding sentence made it quite clear that the termination intended was not at midnight on 31st August 1945, but at the latest by 5 p m. on the said date and therefore did not amount to fifteen days' notice 'expiring with the end of a month of the tenancy' which for August, 1945, would be at midnight on 31st August 1945.)

6 1954 Ajmer 62 (62, 63) (Pr 6) (AIR V 41 C 62) *Hukamchand Kishanlal* v. *Nathmal* (A notice requiring the tenant to vacate the premises not on the last day of the month but on the first day of the succeeding month is not invalid merely because it allows one extra day.) + 1953 All 218 (A I R V 40 C 100 P 13), *Ghasi Ram* v *Chaubey Mitra Sen* (A notice asking the tenant to vacate the house "by the 1st May 1947" and not on or by the 30th April 1947 is not an invalid notice)+195 All 579 (A I R V 39 C 96 P 3), *Khumani* v. *Saktey Lal*. (Tenancy beginn g from 6th of every month—Notice on 20th of previous month—Recital that 15 days' notice was given and tenant should vacate on 6th of following month—Notice held not invalid in having asked tenant to vacate on 6th instead of 5th having regard to its entire contents.)+1952 Nag 101 (A I R V 9 C 45 (3) P 7 9), *Gayaprasad Ganapatilal* v. *Munnilal Narayan*+ 952 Punj 422 (AI V 39 P 4) : ILR (1953) Punj 100 (DB), *Beva Singh* v. *Kundanlal*. (Notice to vacate premises on or before 1.10 1950 given on 12-9- 950 is valid)+ 1952 Pat 69 (AIR V 39 C 27 P 1) : 30 Pat 1155 (DB) *Ram Palak* v. *Bilas Mahton* (A notice expiring on the anniversary of the commencement of the tenancy is not a bad notice.)+1946-52 I D 40516 (Nag), *Sk Chand* v *Sk. Sukabi*. (Where the notice stated "I call upon you by this notice to vacate the house on 3-11-47 on the expiry of this notice on 2-11-47 for terminating the lease" and the monthly tenancy had commenced from the 3rd of a month: *Held*, that the notice was valid) +1 53 All 598 (AIR V 40 C 297 P 10, 12), *Mohan Lal* v. *Kumar Sen* (Monthl tenancy ommencing on first day of each Hindi month—Notice asking tenant to vacate on first of month following month of notice or on such date which tenant believed to be date on which tenancy expired is valid)+('51) 1951 All L Jour 285 (288) (DB), *Durga Prasad* v. *Ramakant*.
8. 1952 Assam 132 (AIR V 9 P 4) : ILR (1951) 3 Assam 240, *Ananta Ojah* v. *Hari Osimuddin* (The legal connotation of the expression 'to quit on a particular day' is that the person required to quit can remain in occupation till the midnight of that day if he so desires).

Page 1744—In foot-note 6 of Note 40 add the word 'But see' before 1949 Ajmer 38 (40) (AIR V 36 C 15) and after that case, add the following also as a 'But see' case :

[But see 1951 Ajmer 52 (1) (A I R V 38 C 41 P 3), *Motilal* v. *Thandiram* (1949 Ajmer 38 (A I R V 36 C 1), *Sunder Singh* v. *Arjun Singh*, followed.)]

Add after Pt. 2 as a separate para :

[Pt. 2a] The section does not require that the exact date of the termination of the tenancy should be specified in the notice. Hence, if the tenancy is to expire at the end of a month according to the English calendar it is enough if the landlord says in the notice that the tenant should vacate at the end of the month, without mentioning any particular date. *1954 Nag 292 293) (Pr 5) (AIR V 41 C 105) : I L R (1954) Nag 624 (DB), Rochaldas Tikamchand* v. *Ratanchand Baghmal*.

Add after Pt. 6 :

[Pt. 6a] A notice to quit written in Bengali was given on 20-12-1948 calling upon the tenant to vacate 15 days after the notice within the month of Poush, that is to say, by the first of Magh and the month of the tenancy was the Bengali month. It was held that the notice to quit was not defective. *1952 Cal 19 (A I R V 39 C 7 P 7), Ahumad Ali* v. *Jyotsna Kumar*.

[Pt. 6b] In a lease commencing on 8-10-34 the notice given to the tenant mentioned that he was to vacate the house by 7th July 1949 or other date when the month ends. It was held that though the tenancy was to expire on the midnight of 8th July and not 7th as mentioned in the notice, it was regularised and validated by insertion of the subsequent clause. *1953 Orissa 58 (A I R V 40 C 25 P 3), Arja Venkataratnam* v. *Atmakuru Suryanarayana*.

[Pt. 6c] Notice to vacate and deliver possession on the expiry of one month from the receipt of the notice, or on the expiry of the month according to the defendant's own belief does not conform to the requirements of S 106 because it does not expire with the end of the month of the tenancy. However the second part gives a clear notice to vacate on the expiry of the month as the defendant understood the month to be and the notice containing such a provision is valid. *1955 N U C (Nau) 1488 (AIR V 42), Ibrahim Noorbhai* v. *Vallabhdas Manji*.

Note 41

Add in the Foot Notes indicated :

1. 1953 Assam 202 (A I R V 40 C 83 P 4) : ILR (1952) 4 Assam 441, *Haridas Tapadar* v. *Sailendra Chandra De.* ✣ 1946 52 I D 40487 (Nag), *Mst Indibai* v. *Shayamsunder* ✣ 1950 Orissa 1 (A I R V 37 C 1 P 3) : I L R (1949) 1 Cut 231, *Benchhanidhi Samantrai* v. *Lachminarayan Agarwala* (Monthly tenancy commencing on 11th — Notice to quit by 18th of succeeding month is valid.)

2. 1950 Nag 233 (A I R V 37 C 71 P 4, 5) : ILR (1950) Nag 437, (DB , *Chand Mohd.* v. *Murtazakhan* (1943 Bom 306 (AIR V 30), *Utility Articles Manufacturing Co.* : *Motilal Bombay Mills Ltd.*, *Rel. on* ; 1937 Nag 139 (AIR V 24), *Sheikh Nuroo* v. *Meghraj*, Overruled) ✣ 1950 Orissa 1 (A I R V 37 C 1 P 3) : I L R (1949) 1 Cut 231, *Benchhanidhi Samantrai* v. *Lachminarayan Agarwala.*

3. 1952 Mys 139 (A I R V 39 P 7) : I L R (1953) Mys 7, *Krishnaiah Setty* v. *Lakshman Rao.*

[*See also* 1954 Cal 243 (A I R V 41 C 89 P -) *Trilochan Nath* v *Kalipada Malik.* (Absence of lease on record to show from which particular date of the month tenancy commenced— No dispute raised by defendant as to what was the month of tenancy or on which particular day of the month tenancy had commenced —Also defendant not traversing in written statement right of plaintiff to determine tenancy with effect from last day of Bengali month —Presumption that tenancy ran from first day to the last day of a Bengali month, held could be drawn.)]

6. *See also* 1955 N U C (Sau) 1492 (A I R V 42), *Trikamdas Nichaldas* v *Abdul Kadar.* (A lease for one year commenced on Kartak Sud St. 2005 corresponding with 2-11-48, and according to the English calendar the month of the tenancy expired on the 1st of the month., The notice to quit expired on 30-4-50 strictly speaking the notice should have expired on the 1st of May. Held that a clerical error as regards the date, which did not mislead, would not vitiate the notice. 1938 All 649 (AIR V 25), Badal v. Ram Bharosa; 1952 All 141 (AIR V 39 C 51), Amar Singh v. Hoshiar Singh, Rel on.)

Add after Pt. 3, as a separate para :

[Pt. 3a] In the case of a monthly tenancy created by an oral lease accompanied by delivery of possession the month of the tenancy commences on the date the lessee enters into possession and there is no presumption that it commences from the 1st of a calendar month. *1946-52 I D 40487 (Nag). Mst Indibai* v. *Shyamsunder.*

Add after Pt. 7 as a separate para :

[Pt. 8] Where a lease for a period of 11 months is executed on 1st January 1946 but the day of its commencement is not named, the lease must be deemed under S. 110 to have commenced on the 1st of January 1946 when it was made. In such a case, the tenancy from month to month created by holding over would in the absence of any fresh agreement also commence from the first day of the month next after the expiry of original term of the lease and would expire at the end of the calendar month. Hence, a notice demanding possession on the morning of the first day of the next calendar month would be perfectly valid under this section. *1952 Mys 139 (AIR V 39 P 7) : I L R (1953) Mys 7 Krishnaiah Setty* v. *Lakshmana Rao (1932 P C 279 (A I R V 19) (PC), Benoy Krishan Das* v. *Salscicioni*, Distinguished.)

Add after Pt. 8 as a separate para :

As to the effect of a contract or local law or usage to the contrary altering the period of notice on the requirement of this section that the notice must expire with the end of the year of the month of the tenancy, see Note 2.

Note 42

Add in the Foot Note indicated :

2 1955 NUC (Madh-B) 69 (A I R V 42), *Ganga Prasad Chhoteram* v. *Birijibai.* (Rent note mentioning both Hindi Miti and English date for commencement of tenancy — Tenancy held was governed by English calendar in the absence of anything specific in the rent note to show that it was to be governed by Hindi calendar.) ✣ 1953 Assam 202 (A I R V 40 C 83 P 5) : I L R (1952) 4 Assam 441, *Haridas Tapadar* v. *Sailendra Chandra De*

[But see 1952 Cal 19 (A I R V 39 C 7 P 6), *Ahumad Ali* v. *Jyotsna Kumar.* (Section 106 clearly contemplates any kind of "monthly tenancy" which may be according to an English calendar, Bengali calendar, Sambat calendar and so forth, and may commence on any day of the particular month, say from the 5th of a month to the 4th of the next and soon—Hence it is incorrect to say that all tenancies from month to month under S 106 must be according to the English calendar. View of Rau J. in 1944 Cal 84 (A I R V 31), Calcutta Lending and Shipping Co. Ltd. v. Victor Oil Co., Diss. from.)]

Note 43

Add after Pt. 2 :

[Pt. 2a] But an unsigned notice merely bearing the typed name of the landlord at the end is invalid. *1951 All 483 (A I R V 38 C 106 P 7), Hiralal* v. *Diputy Commr , Rai Bareli*

[Pt. 2b] There is, however, nothing in the section to show that there must be authority in any particular form to the person who signs the notice on behalf of the persons giving notice. Thus, where the landlords are two brothers A and B, a notice of ejectment signed by B's son C on their behalf is a valid notice. *1952 Raj L W 400 (401), Hotilal* v. *Chhogalal.*

Add after Pt. 4 :

[Pt. 5] Where the notice did not disclose the name of the landlord but the tenant had given to the landlord a reply of the notice, it was held that the notice was not rendered invalid. *1952 I D A 17284 (Nag), Abdul Azim* v *Yakubkhan.*

[Pt. 6] A notice to quit under this section need not specify the grounds on which the landlord wants to determine the lease Hence, even if the landlord specifies the grounds in the notice, it does not necessarily follow that a subsequent suit for eviction of the tenant filed by the landlord is a suit on the grounds stated in the notice. The contents of a notice to quit and its service are governed by the provisions of this section and not of the Rent Control legislation which merely allows the landlord to evict his tenant only on certain specified grounds. *1952 Cal 773 (A I R V 39 P 31), Amarendra Nath* v. *Bibhuti Bhusan* ✠ *1950 Cal 225 (A I R V 37 C 78 P 22) : I L R 1950) 1 Cal 396, Sm. Gangamoyee Dey* v. *Manindra Chandra.* (A notice to quit need not state any ground at all. Section 11 of the West Bengal Premises Rent Control (Temporary Provisions) Act has nothing to do with notice to quit and it is not necessary that it should be in any particular form except that as required by the T. P. Act.)

Note 45

Add in the Foot Notes indicated :

2. 1955 N U C (Orissa) 1115 (AIR V 42), *Hyder Ali* v. *Rajakishore Sahu.* (Notice by registered post correctly addressed—It is sufficient service by post.) ✠ 1953 Assam 206 (A I R V 40 C 87 P 6) : I L R (1952) 4 Assam 357, *Saligram Rai Chunnilal Bahadur & Co.* v. *Abdul Gani* (Notice sent by registered post properly addressed — Proof of service by calling postal peon not necessary.)

6. 1954 Ajmer 65 (66) (Pr 2) (A I R V 41 C 66), *Baluram* v. *Bhagchand.*

7. 1953 Mad 884 (A I R V 40 C 347 P 13) : ILR (1953) Mad 31 (DB), *Bapayya* v. *Venkataratnam.* (Postal endorsement is admissible in evidence ev n though the postman is not examined and unless rebutted it is sufficient notice under S. 106: 1935 Bom 247 (A I R V 22) (DB), Vaman v. Khanderao, Dissented from.)

8. 1954 Ajmer 45 (47) (Pr 10) (A I R V 41 C 44), *Sheo Ram* v. *Rameshwarlal.* (There must be evidence indicating the actual tender of the letter to the lessee and its refusal by him.)

12. ('49) 1949 J L R 184 (188) (DB), *Ladhulal* v. *Hiralal.* (Notice by registered post sen to shop of tenant and received by his son—Notice is not effective — Case under Jaipur Transfer of Property Act.)

Add after Pt 8 :

[Pt. 8a] Where there was an endorsement on the envelope indicating that the tenant had disappeared in order to avoid taking the registered letter it was held that no presumption of service can be raised as the letter is received back undelivered. In such case, it must be held that the notice was not sent by post. *1954 Ajmer 65 (66) (Pr 2) (A I R V 41 C 66), Baluram* v. *Bhagchand.* (1954 Ajmer 45 (A I R V 41 C 44), Sheo Ram v. Rameshwarlal, Foll.)

Add after Pt. 9 :

[Pt. 9a] Where the registered cover was addressed to the premises in which the tenant was living and where it was taken for service by the postal peon the endorsement of the postal peon 'left' does not conclude the matter if the notice is proved to have been served on the tenant. *1952 Cal 221 (A I R V 39 C 75 (14) P 7), Nagendranath Karmakar* v. *Jotish Chandra Mukherjee.* ('47) 51 Cal W N 650, Sita Nath v. Soleman Molla, Rel. on.)

Page 1751 — In Note 45 in the last sentence after the words "sent by post" place the figure 14 and add the following as foot note:

14. 1951 All 396 (A I R V 38 C 70 P 7) (DB), *Monzoor Ali Usmani* v. *Mt. Lal Devi.* (Service by registered post at addressee's residence — Servant signing acknowledment on behalf of his master—Service is valid.)

Note 48

Add in the Foot Note indicated :

1. *See also* 1954 Mys 89 (91) (Pr 6) (A I R V 41 C 1) : I L R (1953) Mys 578. *Thimmarayappa* v *Narayanappa.* (A Municipality is not outside the provisions of the Transfer of Property Act and that if it has granted a lease, notice, must be given before the same can be terminated.)

Note 49

Add in the Foot Notes indicated :

2a 1955 N U C (Sau) 967 (A I R V 42), *Lalji Madhavji* v. *Anantrai Durlabhji* (Tenancy entered into prior to coming into force of T. P. Act in former Nawanagar State — Notice given by landlord need not conform to requi ements of S. 106.) ✠ 1955 NUC (Sau) 971 (A I R V 42), *Vanand Valji Nathu* v. *Vora Bhaijibhai Mulla Mamuji.* (A lease executed before the Transfer of Property Act will be governed not by the provisions of that Act but by the local law and, therefore, the technical requirements of notic under s. 106 of the Act are not applicable to the notice to quit given in such a case. 1953 Sau 113 (A I R V 40 C 59) (DB), Karsandas Ramji v. Kassanji Kalyanji, Rel. on.) ✠ 1955 N U C (Sau) 983 (A I R V 42), *Jivandas Dharshi* v. *Andarji Manekchand.* (A lease executed in the former Junagarh State before the T. P. Act was made applicable to it in 1949 will not be governed by the provisions of the T. P. Act. Even if the notice to quit served by the

landlord is not in accordance with the strict requirements of S 106, the tenant is liable to be evicted. 1953 Sau 1:3 (AIR V 40 C 59) (DB), Karsandas Ramji v. Karsanji Kalyanji, Rel. on.) ✠1955 N U C (Sau) 1138 (A I R V 42), *Shantagauri Maganlal* v. *Utlamchand Meghraj*. (To a lease created in 1948 i e., before the application of the T. P Act to Saurashtra the technical provisions of S. 106 would not apply and the landlord could have determined the tenanc by a reasonable notice under the law then in force.) ✠ ('52) 54 Pun L R 425 (425) *Sundara Bai* v. *Mumtaz Jan*. (Act does not apply to Delhi and Ajmer-Merwara — Notice to quit served on tenant Technical defects in notice cannot make it invalid when there is substantial compliance with S. 106 — Notice on day following date of expiration of monthly tenanc served in manner provided by section — Tenant cannot contend that notice is of no effect on that ground.) ✠ 1953 Mad 884 (Pr 18) (A I R V 40 C 347) : I L R (1953) Mad 31 (DB), *Bapayya* v. *Venkataratnam* (Provisions as to notice contained in S. 1 6 are not proprio vigore applicable to agricultural leases. It is enough if the notice is in fact reasonable — (Notice held reasonable))

3. 1953 Mad 884 (A I R V 40 C 347 P 17, 18) : ILR (1953) Mad 31 (DB), *Bapayya* v. *Venkataratnam*. (Notice calling upon tenant to surrender by 31st March though fasli year would end on 30th June—Notice held reasonable a there would be no standing crops on land and land would lie fallow till 30th June)

4. 1951 Cal 269 (A I R V 38 C 56 P 11) : I L R (1951) 2 Cal 76, *Faguniswari Dasi* v *Dhum Lal Pal*. (Notice given at a time when there were no standing crops and before any steps could be taken for next cultivation— held reasonable)

15 1955 N U C (Sau) 1488 (AIR V 42), *Ibrahim Noorbhai* v. *Vailabhdas Manji*. (With respect to the tenancy that has commenced long before the Transfer of Property Act came to be applied to the area comprising the former Nawanagar State, it is not necessary for the landlord to do any overt act showing an intention to determine the lease nor is any notice to determine the lease necessary. The mere institution of a suit for ejectment is a sufficient indication of the landlord's intention to determine the lease and no separate notice is necessary to determine it.)

Add after Pt. 13 as a separat para :

(Pt 13a) A notice to quit does not become invalid merely because the particulars as regards the tenancy are not accurately set out in the notice. *1955 Mad 206 (207) (Pr 2) ((S) A I R V 42 C 52)*, *Alphonso Pinto* v. *Thukru Hengsu*.

SECTION 107

In section 107, for the word 'Provincial' the word 'State' shall be substituted —Substituted by A. L. O. 1950.

In remark [g] under S. 107, insert after the notification relating to "Bombay" :

HIMACHAL PRADESH

The Central Government has exempted from the operation of Section 107 all territories in the State of Himachal Pradesh except :

(i) an area within the limits of a municipality, and

(ii) a notified area as declared and notified under section 241 of the Punjab Municipal Act 1911 as applied to Himachal Pradesh.

—Gaz. Ind , 1-12-1951, Part II-Sec 3, page 2040 (S. R. O. 1873).

Add in the synopsis after Items 1 and 2 respectively :

1a. This section and S. 106.

2a. Immovable property — See S. 3, Note 2.

Note 1

Add in the Foot Note indicated :

5. 1955 NUC (Madh B) 69 (A I R V 42) *Ganga Prasad Chhoteram* v. *Birijibai*. (Lease for one year only—Registration is not necessary.)

In note 1, after the first sentence ending with the words "lease under this Act" add the following Pt. 1a :

[Pt. 1a] It applies both to written instrument embodying terms of lease and an oral lease. *1949 Nag 389 (A I R V 36 C 158 P 17)*: *I L R (1949) Nag 849 (DB)*, *Balram Nasare* v *Mahadeo Panduji*.

Add after Pt. 7 as a separate para :

Section 107 has no application to leases for agricultural purposes : See S. 117, N. 4.

Note 1a

Add after Note 1 :

1a. This section and S. 106—

[Pt. 1] Section 107 deals with the creation of a tenancy from year to year by act of parties Section 106 provides for the lease where the contract between the parties is silent as to its duration and enacts that the lease shall be deemed to be a lease from year to year, though not registered The lease by operation of law is a very different thing from the creation of a lease from year to year by act of parties. The two sections deal with entirely different matters and there is no conflict or contradiction between the two. *1950 Cal 23 (A I R V 37 C 6 P 23)* : *I L R (1950) 2 Cal 443 Ram Pratap* v. *National Petroleum Co Ltd*.

Note 2a

Add after Note 2 :

2a Immovable property — See Section 3 Note 2.

Note 3

Add in the Foot Notes indicated :

2. 1953 All 499 (AIR V 40 C 240 P 11, 12), *Shiv Dutt* v. *Ghasita*. (Having regard to the terms of the Kabuliat it was difficult to hold that any permanent rights in the land wer granted to the defendant. e was only allowed to hold it for an unspecified period.)

3. But see 1954 Bom 257 (AIR V 41 C 75 Pr 13, 14) : I L R (1954) Bom 448 (DB), *Bavasaheb Walid Mansursaheb* v *West Patent Press Co. Ltd.* (1926 Bom 374 (A I R V 13), Dissented from.)

Note 4

Add in the Foot Note indicated :

1. 1954 Assam 102 (Pr 8) (A I R V 41 C 37) : I L R (1954) 6 Assam 5 (D B), *Sajid Mia Majumdar* v. *Abdul Sattar Gani.* (Where the period of the tenancy is specified and under the agreement between the parties, the tenant has to vacate without notice after the expiry of a specified period it cannot be regarded as a lease from year to year.)

Add after Pt. 2 :

[Pt. 2a] A lease which under the law is "deemed" to be a lease from year to year is nonetheless 'a lease from year to year' and must satisfy the statutory requirement of registration subject of course to the provision of S. 53A *1952 Cal 320 (A I R V 39 C 83 P 15), Sati Prasanna Mukherjee* v. *Md. Fazal.*

Add after Pt. 3 :

[Pt. 4] In the undermentioned case, it was held that when a person held over, after an unregistered lease of a shop for manufacturing purpose for one year, which fixed only monthly rent the holding over could not be from year to year as that would amount to negativing the provisions of S. 107 and that the tenancy must be held to be from month to month, so far as the period of holding over was concerned. *1952 All 634 (A I R V 39 C 123 P 4, 5), Kishan Lal* v *Lal Ram Chander.*

It is, however, submitted that the lease by holding over under S 116, though it may be from year to year does not require any registration. There seems no question of negativing the provisions of S 107 as the section does not apply to cases by holding over But the actual decision may perhaps be justified on the ground that the provision for monthly rent is an "agreement to contrary" within the meaning of S. 116.

Note 6

Add in the Foot Note indicated :

1. 1954 Assam 102 (Pr 8) (A I R V 41 C 37) : I L R (1954) 6 Assam 95 (D B), *Sajid Mia Majumdar* v *Abdul Sattar Gani* (Where the lease is not for an indefinite period, even though the rent for the year or even a yearly rent is mentioned, the lease cannot be said to be reserving a yearly rent.)

Note 7

Add in the Foot Notes indicated :

1. 1954 Cal 207 (A I R V 41 C 75 P 4) (DB), *Ram Abatar Mahato* v. *Sm. Shanta Bala Dasi.*

4. 1955 NUC (Orissa) 985 (A I R V 42), *Bahan Rana* v. *Narshing Swar.* (Where there is no registered document the case of the plaintiff that the tenancy is for a fixed period of a number of years or the case of the defendant that it is a permanent tenancy has got to be ignored — in view of the fact that defendant paid rent and plaintiff accepted it, tenancy was held to be a monthly tenancy under S. 106, T. P. Act.)

5. 1955 S C 325 Pr 11) ((S) A I R V 42 C 59) (SC), *Sri Sita Maharani* v. *Chhedi Mahto.* (Unregistered *patta kunda* described as *hukum nama* purporting to create permanent settlement — Not admissible in evidence.) ✠ 1954 Cal 207 (A I R V 41 C 75 P 4) (DB), *Ram Abatar Mahato* v *Sm Shanta Bala Dasi.*

1954 I D A 1729. (Nag), *Shamrao* v. *Ambadas.* (To show nature of possession and also to prove admission made by him.) ✠ 1950 All 681 (A I R V 37 C 253 P 5), *Chotelal* v. *Mt. Durga Bai.* (Qabuliat deed executed by lessee alone not registered Possession on basis of deed — Deed could not be treated as lease — Deed however held admissible for purpose of determining the nature of possession.)

Add after Pt. 3 :

[Pt. 3a] Where in a suit for ejectment the plea of the tenant attracts the first paragraph of S. 107, T. P Act, the tenant cannot prove the fact either of a lease from year to year or a lease of immovable property reserving yearly rent without a registered instrument in his favour. All other evidence is shut out under S. 49, Registration Act, and this includes even the admission of the landlord to that effect. *1955 Nag 27 (Pr 6) ((S) A I R V 42 C 6) : I L R (1954) Nag 957 (DB), Baldeoprasad* v. *Dashrathlal.*

Note 9

Add in the Foot Note indicated :

6. 195 Punj 403 (A I R V 39 P 7), *Nandu Mal* v. *Ramji Lal* (Document not registered Delivery of possession was essential.) ✠ 1946-52 I D 40487 (Nag), *Mst Indibai* v. *Shyamsunder.* (The month of the tenancy commences on the date the lessee enters into possession and there is no presumption that it commences from the 1st of a calendar month.)

Add at the end of the 3rd paragraph of the Note ending with the words 'and delivery of possession' :

[Pt. 8b] Similarly where the lessor did not execute any document and it was the lessee alone who executed a *kabuliyat* and the lessee was in possession of the property after the execution of the *kabuliyat* it was held that it may be presumed under S. 114 of the Evidence Act that there must have been an oral agreement between the lessor and lessee agreeing to the terms on which the lessee was being put in possession of the property and there was, therefore, an oral agreement accompanied by delivery of

possession which satisfied the requirements of S. 107 *1954 All 475 (Pr 24) (A I R V 41 C 197) (DB), Sheo Dulare* v. *Anant Ram.*

Note 10

Add in the Foot Notes indicated :

2. 1951 Cal 361 A I R V 38 C 86 P 47) : I L R (1951) 2 Cal 444 (DB), *Manindranath* v. *Amiya Pal.* (The facts that the lease is stated to be an indenture and contains mutual covenants by the lessor and the lessee are not conclusive to shew that the document, to be valid, must be executed by the lessor and the lessee.)

3. 1955 N U C (Madh B) 1553 (A I R V 42), *Balbimrao Balasahib* v. *Har Prasad.* (Rent Note is not a lease under T P. Act and when it is for one year does not require registration even under Regn Act.) ✠ 1953 All 499 (A I R V 40 C 240), *Shiv Dutt* v. *Ghasita* ✠ 1951 Pat 160 (A I R V 38 C 24 P 8) (DB) *Hari Prasad Agarwala* v. *Abdul Haq.* (Registered instrument of lease falling under Para. 1 of S. 107 not executed in manner specified under Para. 3 of that section — Lease cannot be construed as one by oral agreement for one year—Subsequent possession is not holding over.)

5. 1952 Cal 352 A I R V 39 C 95 P 6), *Birendra Nath Roy* v. *Mst. Sukumari Bakshi.* (Bharapatra by executant stating that he is a tenant under a certain person at a particular rent for a period of three years—Unilateral document—Deed not a lease covered by Para. 3—Document held binding on the executant.) ✠ 1950 All 661 (A I R V 37 C 259 P 3), *Chotelal* v. *Mt. Durga Bai* (Qabuliat deed executed by lessee alone held admissible in evidence for purpose of determining nature of possession)

Add after Pt. 6 as separate para :

[Pt. 6a] The requirement of S. 107 of joint execution by the lessor and the lessee applies only to a case where a lease of immovable property is made by a registered instrument. Hence, a kabuliat executed by a lessee, if unregistered, does not come within the mischief of S. 107. *1954 Cal 207 (A I R V 41 C 75 P 4) (DB), Ram Abatar Mahato* v. *Sri Shanta Bala Dasi.*

Note 11

Add after Pt. 1 :

[Pt. 1a] Prima facie an agreement, which affords protection under the proviso, must be a valid agreement. An oral contract of tenancy for five years is invalid under S. 107. It was, therefore, held in the undermentioned case that the term could not be taken advantage of by a tenant in an application for eviction under S. 7 of the Madras Buildings (Lease and Rent Control) Act in which there is no provision validating the leases which are invalid under the Transfer of Property Act. *1952 Mad 863 (A I R V 39 P 3, 4), Sengayyan Chettiar* v. *Rasu Chettiar.*

Note 12

In Pt. 4 of this Note, after the words "According to" add the words "the High Court of Calcutta and" and add the following case in foot-note :

4. 1951 Cal 361 (A I R V 38 C 86 P 129) : I L R (1951) 2 Cal 444 (DB), *Manindranath* v. *Amiya Lal.*

Note 15

Add in the Foot Notes indicated :

2. 1955 Nag 170 (A I R V 42 C 39 P 15) : I L R (1955) Nag 151 (DB), *Trivenibai Mangilal* v. *Leelabai Vrijpalji* ✠ 951 Nag 235 (A I R V 38 C 81 P 9 11) : I L R (1953) Nag 799 (DB), *Mt. Radhabai* v. *N. J. Nayadu.* (Section 107 does not require written agreement to lease to be signed both by lessor and lessee.)

2a. 1955 Nag 170 (Pr 15) (A I R V 42 C 39) : I L R (1955) Nag 151 (DB), *Trivenibai Mangilal* v. *Leelabai Vrijpalji.*

[See also 1952 Pat 409 (A I R V 39 P 14) (DB), *Jagdish Chandra* v. *Muhammad Bukhtiyar.* (Agreement resolving dispute as to interpretation of lease—Registration not required.)*]*

4. 1953 All 499 (A I R V 40 C 240 P 14), *Shiv Dutt* v. *Ghasita.*

5. 1955 Nag 170 (A I R V 42 C 39 P 15) : I L R (1955) Nag 151 (DB), *Trivenibai Mangilal* v. *Leelabai Vrijpalji.*

SECTION 108 (GENERAL)

Note 1

At the end of Para 1, after the words "usage to the contrary" place figure 1a and add the following as Foot Note :

1a. For example see: 1953 S C 16 (AIR V 40 C 5 P 12) : 1953 SCR 185 (SC), *Bhatia Co-operative Housing Society, Ltd.* v. *Patel D. C.*

Add at the end Para 1 :

[Pt 1b] Breach of any of the obligations does not entitle the lessor to determine the lease and re-enter but gives only the right to recover damages or to obtain an injunction. *1951 Nag 207 (AIR V 38 C 51 P 9) : ILR (1950) Nag 870, K. G. Pandit* v. *Narasinghdas Sitaram.*

SECTION 108, CLAUSE (a)

Note 2

Add after Pt. 6 :

[Pt. 7] See also the undermentioned case. *('50) 1950-1 All E R 894 (897) : 94 Sol Jo 304 J. W. Cates Ltd.* v. *Brawnlow Trust Ltd* (In an action for damages for breach of contract to grant lease through defect of title, when there is no question of any deceit or lack of good faith the plaintiff is entitled to the return of the deposit, to interest on the deposit and to the expenses incurred in investigating the title.)

SECTION 108, CLAUSE (c)

Note 1

Add in the Foot Notes indicated :

3. *See* ('48) ILR (1948) 1 Cal 492 (497), *Bhupati Bhusan Tribedi* v. *Birendra Mohan Singha Chaudhuri*. (Covenants running with land are binding on property in hands of transferees irrespective of any question of notice.)

7. But see 1951 Assam 62 (AIR V 38 C 33 P 8): ILR (1950) 2 Assam 297 (DB), *Abdul Sahid* v. *China Les Hing*. (Per *Thadani C. J.* — The right of the lessee to quiet enjoyment is dependent upon his paying the rent reserved by the lease.)

Note 3

Add after Pt. 4 :

[Pt. 5] If the lessee subsequently attorns to such an owner by payment of rent, the title of the lessor becomes extinguished and there is a surrender of lease by operation of law. Hence the lessor is not entitled to claim rent from the lessee subsequent to the period of eviction. *1950 Mys 9 (AIR V 37 C 4 P 4, 15) : 55 Mys H C R 299 (DB), Hanumanthaiya* v. *Thavakal San.*

Note 6

Add after Pt. 1 :

[Pt. 1a] If there is a severance of the land or of the reversion the benefit of the covenants running with the land and the reversion are also severed and run with the severed parts of the land and the reversion when the conditions laid down in S. 37 are fulfilled. The assignee of the reversion of the whole or part is entitled to enforce conditions. The burden of the condition runs with the land and conditions may be enforced against the assignee of land. *('50) 86 Cal L Jour 198 (207, 208), Sm. Durgarani Devi* v. *Mohiuddin.*

Note 8

Add in the Foot Note indicated :

1. 1951 Nag 379 (AIR V 38 C 117 P 12, 16): ILR (1951) Nag 516. *Kanchanlal* v. *Hariprasad.*

Add after Pt. 4 as a separate para :

[Pt. 5] In the case of a lease by a mortgagor, the lessor's title suffers from the defect that in case the mortgagee files a suit on the mortgage and obtains a decree for sale and sells up the property the auction purchaser would be entitled to dispossess the lessee and hence the lessee can claim, in a suit brought against him for damages for breach of contract in terminating the lease before the period, that he had avoided the lease on the ground of a breach of covenant for quiet enjoyment, provided he has taken that plea in the written statement. *1955 NUC (All) 1691 (AIR V 42), Devichand* v. *L. Har Kishan Das.*

SECTION 108, CLAUSE (e)

In the Synopsis, after item 6 add :

6a. Doctrine of frustration—Its applicability to lease.

Note 4

Add after Pt. 1 :

[Pt. 1a] This clause makes no reference to the rights of the lessor if the lessee, in spite of the destruction of the premises elects to pay the rent. *1950 Cal 441 (AIR V 37 C 170 P 9) : I L R (1951) 2 Cal 37, Kshitish Chandra Mondal* v. *Shiba Rani Debi.* (This clause does not in terms apply where lessee neither elects to walk out even after total destruction nor is willing to suspend payment of rent and to give up possession.)

Note 6a

Add after Note 6 :

6a. Doctrine of frustration — Its applicability to lease.— The doctrine of frustration may be applied to leases.[1] If a specific subject-matter, assumed by the parties to exist or to continue in existence, is accidentally destroyed the promise made in the contract of lease is discharged. This rule, however, is not attracted where the parties have already contemplated and provided for the particular contingency.[2]

1. ('81) ILR 7 Cal 474 (478, 479) (DB), *Inder Pershad* v. *Campbell.*
2. 1950 Cal 441 (AIR V 37 C 170 P 11, 12) : ILR (1951) 2 C 37, *Kshitish Chandra Mondal* v. *Shiba Rani Debi.*

SECTION 108, CLAUSE (f)

Note 1

Add in the Foot Notes indicated :

1. 1955 NUC (Madh B) 198 (AIR V 42), *Gopaljee Dhannusa* v. *Vallabhadas Sundarlal.* (A lessee cannot claim the costs of repairs from lessor under S. 108 (f) unless the lessor is under either a contractual or statutory obligation to make repairs).

4. 1955 NUC (Madh B) 198 (AIR V 42), *Gopaljee Dhannusa* v *Vallabhadas Sundarlal.* (('98) 2 Cal W N 31, Charles Stuart v. Patrick Playfair; 1923 Cal 524 (AIR V 10), Bijoi Chandra Singh v. Howrah Amta Light Railway Co., Ltd.; 1927 Bom 115 (AIR V 14), Lakhmichand v. Ratanbai, Rel. on. Chitale's T. P. Act, cited with approval.)

Add after Pt. 6 :

[Pt. 7] The act of the lessee in carrying out necessary repairs will not entail the determination of the lease, because of the provision in the lease deed prohibiting the lessee to make alteration in the structure

without the landlord's consent. *1953 Trav Co 462 (AIR V 40 C 182 P 4, 5), Augustine* v. *Chandy.*

Note 2

Add in the Foot Note indicated :

4. 1951 Pat 508 (AIR V 38 C 140 P 5) (DB), *Bansi Sah* v. *Krishna Chandra.*

Add after Pt. 4 :

[Pt. 4a] Nor can the lessee claim abatement of rent in the absence of any evidence that he has been deprived of the use of a portion of the premises or has suffered loss, pecuniary or otherwise by reason of the failure of the landlord to effect such repairs as he was under the terms of the lease bound to do. *1951 Pat 508 (AIR V 38 C 140 P 7) (DB), Bansi Sah* v. *Krishna Chandra.*

Note 3

Add after Pt. 4 :

[Pt. 5] Provision in the lease deed that the lessee should not make any alteration in the structure with the landlord's consent, does not prevent the lessee from carrying on necessary repair work if the lessor wilfully neglects to do it. In such a case the act of the lessee does not entail the determination of the lease. *1953 Trav.Co 462 (AIR V 40 C 182 P 4, 5), Augustine* v. *Chandy.*

SECTION 108, CLAUSE (g)

Note 4

Add as a separate para after Pt. 2 :

[Pt 3a] Where a lease of premises granted for the purpose of cinema shows contained a covenant for free admission to the effect that the lessee "shall at all times during the period of the lease keep one box containing not less than four seats at the disposal of the lessor for use of herself or other person or persons authorized by her and under the Bengal Amusement Tax Act, 1922, all free or complimentary passes and tickets were also liable to pay the entertainment tax, it was held that the proper meaning of such a contract was the lessee had undertaken no more than to forgo all payments in respect of the box chargeable by himself and had only agreed that as between the lessor and the lessee, the box shall be free and that there was no further undertaking, implied in the covenant, that the lessee would also pay on the lessor's behalf a tax imposed on her by the State for witnessing the performances. *1955 NUC (Cal) 2865 (AIR V 42) (DB), Madan Theatres Ltd.* v. *Sm. Charushila Dassi.*

SECTION 108, CLAUSE(h)

Note 2

Add in the Foot Notes indicated :

1. 1955 Andhra 62 (Pr 12, 13) ((S) AIR V 42 C 24), *Kakarlapudi Rangaraju* v. *Happavaluri Sitarammayya.*

6. 1954 Trav-Co 239 (AIR V 41 C 89 P 5) : ILR (1953) Trav-Co 595, *Gnanamoni* v. *Ibrahim.* ((1901) ILR 24 Mad 47 (FB), V. Nambudripad v. Valiachathu Achan, Rel. on.)
[*See also* 1955 NUC (Trav-Co) 1040 (AIR V 42), *Michel Michel* v. *Narayanan Potti.*]

7. 1955 Andhra 62 (P 12, 13) ((S) A I R V 42 C 24), *Kakarlapudi Rangaraju* v. *Happavaluri Sitaramayya.* (Unless there is an established practice or statutory rule, trees of spontaneous growth belong to the owner of the land.)

8. 1950 Madh B 39 (AIR V 37 C 20 P 2) : 1 Madh B L R 497, *Jugrajsa Chunilalsa* v. *Umrao Singh.* (Trees planted by tenant, on Sardeshmukhi land—Property in trees passes to landlord on the expiry of his lease.)

9. 1952 Bom 100 (AIR V 39 C 18 P 4, 5, 6, 9) (DB), *Ganesh Subraya* v. *Hanamant Vithoba.* (Mulgeni tenancy—Extent of right to remove timber and non-timber trees.)

Page 1814—in line 20 from the top place figure 5a after the words 'as stated above' and add the following as Foot Note :

5a. 1955 Andhra 62 (Pr 12) ((S)AIR V 42 C 24), *Kakarlapudi Rangaraju* v. *Happavaluri Sitaramayya.*

Add after Pt. 6a :

[Pt. 6b] The effect of the provision in clause (h) is that the lessee is the owner of the building put up by him, although it is put up on the land belonging to the lessor. *1951 Bom 205 (AIR V 38 C 41 P 3), Laxmipat Singhania* v. *Larsen and Toubro Ltd.*

[Pt. 6c] However, the provision contained in this clause is subject to a contract to the contrary between the lessor and the lessee. Thus, where by an agreement between the parties thereto a building constructed on the land leased becomes part of the land and the property of the lessor, and the lessee takes a lease on that footing, the lessee or any person claiming title through him cannot later on be heard to say that the building does not belong to the lessor *1953 S C 16 (AIR V 40 C 5 P 12) : 1953 S C R 185 (SC), Bhatia Co operative Housing Society Ltd.* v. *Patel, D. C.*

Add as a separate para after Pt. 9 :

[Pt. 10] Where some co-sharers plant trees on the common holding the trees do not belong only to the persons planting them but to all the co-sharers in the land. *1955 Punj 63 (Pr 11) ((S)AIR V 42 C 23) (DB). Hari Ram* v. *Santa Ram.*

Note 3

Add in the Foot Notes indicated :

1. 1953 Trav-Co 584 (AIR V 40 C 231 P 5) : ILR (1953) Trav-Co 568, *Velu* v. *Lekshmi*. (As regards unexhausted improvements existing at time of eviction, the tenant was entitled to compensation.)

3. 1954 Mad 985 (Pr 4) (AIR V 41 C 341) : ILR (1955) Mad 774, *Arumugham Naicker* v. *Tiruvalluva Nainar Temple* ✣ ('51) 88 Cal L Jour 27 (32), *Pyari Churn* v. *Monmothanath Banerjee*. (Order 21, R. 95 or O. 21, R. 35, Civil P. C., does not contain any provision for demolition of structures by the Court.)

4. 1954 Mad 985 (Pr 4, 6) (AIR V 41 C 341) : ILR (1955) Mad 774, *Arumugham Naicker* v. *Tiruvalluva Nainar Temple*. (Tenant ordered under S. 41, Presidency Small Cause Court Act to vacate— His right to remove fixtures put up by him on the land is lost when he leaves the property — Order directing giving of vacant possession implies power to the belief to remove the superstructure.)

Note 4

Add in the Foot Note indicated :

5. 1952 I D A 17302 (Assam), *Rashendra Chandra* v. *Mahendra Kumar*. (Terms of Kabuliyat not making any provision for payment of compensation to lessee for improvements made by him upon termination of lease — No compensation can be awarded.)

[*See also* 1955 NUC (Trav-Co) 1040 (AIR V 42), *Michel Michel* v. *Narayanan Potti*.]

[See however 1955 NUC (Orissa) 979 (AIR V 42), *Killamsetti Suryanarayan* v. *Maharaja Sri Vikrama Deo Verma*. (Relief on equitable grounds. 1944 Pat 30 (AIR V 31), Darbarilal v. Ranceganj Coal Association Ltd., Applied; (1899) ILR 21 All 496 (PC), Lala Beni Ram v. Kundan Lal, Referred to.)

Add after Pt. 5 as separate para :

[Pt. 6] Under the clause as it stood before the amendment of 1929, it was only as regards the unexhausted improvements existing at the time of eviction that the tenant was entitled to claim compensation. *1953 Trav-Co 584 (AIR V 40 C 231 P 5): ILR (1953) Trav-Co 568, Velu* v. *Lekshmi*. (Held, that if the improvements consisted of trees, the landlord was entitled to a share of the total value assessed on them. The landlord's share was according to custom $\frac{1}{4}$th and that of tenant $\frac{3}{4}$th. To speak of the landlord's share of the improvements effected by the tenant, eviction must be contemplated.)

Add after Pt. 6 :

[Pt. 7] There may be cases where under a contract between the lessor and the lessee the latter is under an obligation to improve the property and if the contract provides that on the affecting of those improvements they would belong to the landlord and become part and parcel of his property subject to his liability to pay an agreed or ascertainable sum to the lessee, then though the improvements may belong to the landlord the tenant would still be entitled to retain possession until compensation is paid to him. *1955 NUC (Trav-Co.) 1040 (AIR V 42), Michel Michel* v. *Narayanan Potti*.

Note 5

Add after Pt. 1 :

[Pt. 2] A 'kutcha' hut is a "thing attached to the earth" as a pucca structure and the lessee may remove it before giving up possession. *('51) 88 Cal L Jour 27 (32), Pyari Churn* v. *Monmothanath Banerjee*.

Note 7

Add as a separate para after Pt. 1 :

[Pt. 2] A covenant in the lease deed directing the lessee not to claim any portion of the compensation which may be awarded it the property leased out be compulsorily acquired is valid in law and enforceable and if, at the same time, the lessee has with eyes open agreed to undertake the repairs to the structures to the extent of certain amount and within a limited period, the Court has no option in the matter and the entire compensation money must go to the lessor. *1955 NUC (Cal) 1541 (Pr 8, 9) (AIR V 42) (DB), Purna Chandra* v. *Fakir Mohammad*. (1936 Cal 249 (AIR V 23), Radha Nath Maity v. Krishna Chandra, Disting and Expl. Case law referred.)

SECTION 108, CLAUSE (j)

Note 1

Add in the Foot Notes indicated :

2. But see 1954 Cal 541 (Prs 12, 13) (AIR V 41 C 182) (DB), *Bishnupuriya* v. *Panchkari Das*. (Tenancy of land created before the Transfer of Property Act with the express purpose of construction of pucca building for the purpose of residence was ordinarily transferable and the condition against alienation provided as one of the terms of the kabuliyat would be void, as infringing the rule against perpetuities. (1871) 7 Beng. L. R. 152, Bance Madhub Banerjee v. Joy Kissen Mookerjee, Foll.; 1921 Cal 582 (A I R V 8). Sulin Mohan Banerjee v. Raj Krishna Ghose, Expl. Page, J. in 1927 Cal 39 (A I R V 14) Sarada Kanta v. Nabin Chandra, Dissent. from.)

4. 1954 Orissa 132 (A I R V 41 C 132 P 16) : ILR (1954) Cut 33 (DB), *Batakrushna* v. *Kunja Behari*. (Where it is clearly established that pucca houses originally stood on the holding and the tenancy is found to be a permanent tenancy, transferability may be assumed.)

5. 1952 Cal 141 (A I R V 39 C 56 P 6), *Haripada Singh* v. *Sailesh Chandra Mitra*. (Where a

tenant is forbidden from subletting the premises under the terms of the lease, a sub-tenant in possession cannot contend that the premises are lawfully sub-let to him.) ✠ 1950 Madh B 72 (A I R V 37 C 33 P 18) (DB), *Gopiram Kashiram* v. *Shankar Rao.* (Sale of property leased.)

6. *See* 1951 S C 1 (A I R V 38 C 1 P 1) 1950 S C R 840 : I L R (1952) 1 Cal 111 (SC), *Kamala Ranjan* v. *Baijnath.* (Covenant not to assign except on lessor's written consent—Lessor not to withhold consent unreasonably in case of respectable person — Agreement to assign to respectable person—Assignment whether breach of covenant — Specific performance of agreement.)

9. 1951 S C 1 (A I R V 38 C 1 P 9) : 1950 S C R 840 : I L R (1952) 1 Cal 111 (SC), *Kamala Ranjan* v. *Baijnath.* (Covenant allowing assignment with lessor's consent—Consent not to be unreasonably withheld— Effect of the clause.)

Add after Pt. 5 as separate para :

[Pt. 5aa] The fact that the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947, makes sub-letting without landlord's consent unlawful and gives the landlord a ground for eviction, does not mean that S. 108 (j) is impliedly repealed. *1953 Sau 113 (A I R V 40 C 59 P 15) (DB), Karasandas* v. *Karsanji* (Section 111, T. P. Act also is not repealed by implication.) ✠ *1953 Sau 119 (A I R V 40 C 60 P 7) (DB), Keshavlal* v. *Bai Ajawali.* 1953 Sau 113 (A I R V 40). *Karasandas* v. *Karasanji, Rel. on.)*

In line 2 of the last para of the note place figure 11a after the words 'is also heritable' and add the following as foot note :

11a. 1954 Bom 257 (A I R V 41 C 75 P 9) : ILR (1954) Bom 448 (DB), *Bavasahib Mansur Sahib* v. *West Patent Press Co. Ltd.*

Add after Pt. 12 as separate para :

[Pt. 13] Where it is established that one of the conditions of his tenancy was that the tenant must carry on business on the premises let, then the application of S. 108 (j) is excluded. *1953 Cal 729 (AIR V 40 C 277 P 6), Mohammad Safi* v. *Union of India.*

Note 2

Add in the Foot Notes indicated :

2. 1954 Madh B 72 (A I R V 37 C 33 P 20) (DB), *Gopiram* v. *Shankar Rao.*

3. 1950 Orissa 110 (AIR V 41 C 33 P 5, 7) : ILR (1954) Cut 1 (DB), *Radhakamal* v. *Puri Municipality.* (Covenants running with land — Assignee is bound by them — If covenants are for benefit of lessee, and directly touch the land the lessor is also bound by them—Option to renew lease runs with land and both lessor (or his successors) and lessee or his successors and assigns are bound by it—This is the result whether the assignment is of reversion or of the terms.)

Note 3

In line 5 of the note place figure 1a after the words "lessees' interest" and add the following as foot note :

[Pt. 1a] Covenant requiring lessee to put up building on leased premises and covenant relating to renewal of lease are covenants running with land. Assignees of lease incur the liability and acquire the right. *1954 Orissa 110 (A I R V 41 C 33 P 5, 7) : ILR (1954) Cut 1 (DB), Radhakamal* v. *Puri Municipality.*

Note 4

Add in the Foot Notes indicated :

1. ('50) 86 Cal L Jour 198 (207), *Sm. Durgarani Devi* v. *Mohiuddin.* (In a case of an assignment by a lessee of his whole interest in part of the demised premises, where the share of the demised premises is not held by the assignee in severalty, privity of estate exists between him and the lessor and he is liable to pay full rent and to perform the covenant to repair in its entirety. On the other hand, if the demised premises are held by the assignee in severalty, he is liable to pay only an apportioned part of the rent in respect of the land actually vested in him.)

2. 1952 S C 156 (AIR V 39 P 9) : 1952 SCR 418: 1952 Cr L Jour 836 (SC), *King, W. H.* v. *Republic of India.* (Distinction between assignment and relinquishment pointed out) ✠ ('49) 1949 Trav C L R 50 (53) (DB), *Parameswaram Namboothiripad* v. *Variathu.* (Whether he enters into possession or not.)

4. 1951 Cal 251 (A I R V 38 C 51 P 12) : I L R (1950) 2 Cal 352 (DB), *Dwijendra Nath Mukherjee* v. *Promode Kishore Mondal.*

Add after Pt. 4 :

[Pt. 4a] Similarly, covenant to put up building on leased premises runs with the land and the assignee from the lessee is bound by it. *1954 Orissa 110 (AIR V 41 C 33 P 5, 7) : I L R (1954) Cut 1 (DB), Radhakamal* v. *Puri Municipality.*

Note 5

Add in the Foot Note indicated :

1. 1955 N U C (Punj) 121 (A I R V 42), *Dr. Prem Nath* v *Pt Manmohan Nath Dar* ✠ 1952 Pat 409 (A I R V 39 P 16) (DB), *Jagdish Chandra* v. *Muhammad Bukhtiyar.* (Lessor and sub-lessee—Privity of contract—Covenants in principal lease—Sub lessee is not bound)

Add after Pt. 1 :

[Pt. 1a] Even where the landlord gives his consent to the creation of a sub-tenancy the landlord does not enter into any contractual relationship with the sub-tenant. His action in giving his consent amounted merely to a declaration that he would not eject his tenant on the ground that he has sublet the premises. *1955 N U C (Punj) 121 (A I R V 42), Dr. Prem Nath* v *Pt. Manmohan Nath Dar.* (In other

words, he merely waived his right to eject the tenant for subletting the premises, a right which he could, in the absence of this waiver, have exercised under clause (c) of Section 9 (1) of the Delhi and Ajmer-Merwara Rent Control Act.)

Note 6

Add in the Foot Note indicated :

5. 1949 Mad 618 (AIR V 36 C 271 P 3), *Krishna Bhatia* v. *Narayana Achary*.

Note 8

Add in the Foot Note indicated :

1. 1951 Assam 140 (A I R V 38 C 64 P 3) : ILR (1951) 3 Assam 35, *Mafizuddin* v. *Manindra Kr Lahiri*. (Assam Land and Revenue Regulation—Lease for one year—No right of transfer or inheritance.) ✠ 1950 Ajmer 59 (AIR V 37 C 73 P 2), *Chouth Mal* v. *Hiralal*. (Agricultural lease—Lease by Government - Lessee has no right to mortgage land to third party.)

SECTION 108, CLAUSE (1)

Note 1

Add in the Foot Notes indicated :

1. *See also* 1955 NUC (Cal) 879 (A I R V 42), *Hiranmoyee Debi* v. *Jahangir Meerza*. (There is no privity of contract between the landlord and the heir of an occupancy raiyat and the heir can be made liable for the rent of the holding only when such privity is established by the raiyat accepting the inheritance.)

2. 1946-52 I D 40591 (Trav-Co) (DB), *Ayyappan Pillai* v. *Velamma Azhakamma*. (Lease deed by *A* in favour of *B*—*A* and his brother *C* living in property leased—Suit by *B* against *A* and *C* for rent—C is not liable for rent.)

Add after Pt. 3 :

[Pt. 3a] A tenant is not, under this Act, entitled to claim any assessment of fair and equitable rent. *1951 Pat 508 (AIR V 38 C 140 P 7) (DB), Bansi Sah* v. *Krishna Chandra*.

Add as a separate para after Pt. 8 :

[Pt. 9] S. 108(1) lays down the liability of the lessee to pay at the proper time and place the rent to the lessor or his agent. The emphasis in cl. (1) is on payment or tender at the proper time or place. The clause has nothing to do with the fixation of rent, and therefore the provisions of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950, which give power to the Courts to scale down the agreed rent, cannot be said to be repugnant to cl. (1), but they are only supplementary to it. It provides that the agreement between the parties may be varied on certain grounds, and the procedure for this variation is provided in the Act. It cannot be said that Ss. 6 and 8 of the Act create a repugnancy with S. 105 or 108 (1), Transfer of Property Act, in view of the provisions of S. 37, Contract Act, which clearly envisages interference with agreement by validly made law. *1954 Raj 252 (Pr 12) (AIR V 41 C 79) (DB), Milapchand* v. *Dwarkadas*.

Note 5

Add in the Foot Note indicated :

2. 1953 Bom 280 (A I R V 40 C 86 P 3, 4, 7, 8): ILR (1953) Bom 633 (DB), *Satibai* v. *Vishnibai Kimatrai*. (Property in Karachi — Express covenant by tenant with landlord to pay rent—Covenant not providing for place where rent is to be paid — Tenant has to find landlord—Both parties migrating to Bombay—Arrears of rent are payable in Bombay and not to Custodian of Evacuee Property in Pakistan: (1852) 8 Ex 689 : 22 L J Ex 264, Haldane v. Johnsan, Rel. on; (1920) 2 K B 287:89 L J K B 999, Ralli Brothers v. Compania Naviera Sotay Azner, Disting.)

Add after Pt. 5 :

[Pt. 5a] Thus the tenant on a monthly basis must pay rent to the landlord every month — it may be on a stated date as agreed between the parties—unless it is proved to the satisfaction of the court that there was a contract to the contrary. *1955 NUC (Nag) 1185 (AIR V 42), Muthura Prasad Manaklal* v. *S. S. Sharma*

Add after Pt. (7) as a separate para :

[Pt. 8] Where the order of the Rent Controller directs the tenant to pay to the landlord all the arrears of rent due on or before a certain date and allows the landlord to evict the tenant if he defaults to pay the arrears within the specified time, the mere remittance of the amount by money order within the time limit does not constitute a lawful tender. Until and unless the tenant proves that the amount was actually taken to the landlord and offered to him for payment, there cannot be said to have been any lawful tender. *1955 NUC (Trav-Co) 1669 (A I R V 42), Ittyoommen* v. *Mathews C. Jacob*. (1952 Trav-Co 181 (AIR V 39) (DB), Krishnan Neelakandhan v. Kerala Gilt Edged Security life Assurance Co. Ltd., Distinguished.)

Note 6

Add after Pt. 4 :

[Pt. 5] Where the property is situate at Karachi and there is an express contract by the tenant with the landlord to pay rent but no place of payment is provided for, it is the tenant's duty to find the landlord. If both the parties have migrated to Bombay the arrears of rent are payable in Bombay and not to the Custodian of Evacuee Property in Pakistan. *1953 Bom 280 (AIR V 40 C 86 P 3, 4, 7, 8) :*

I L R (1953) Bom 633 (DB), Satibai v. *Vishnibai.* ((1853) 8 Ex 689 : 22 L J Ex 264, Haldane v. Johnson, Rel. on.)

Note 7

Add in the Foot Note indicated :

4. 1949 Mad 618 (AIR V 36 C 271 P 4), *Krishna Bhatta* v. *Narayana Achary.* (When there is a lease in favour of a single person as tenant and when that tenant dies the liability of the heirs would be a joint liability.)

Add after Pt. 4 :

[Pt. 4a] An *inter se* partition of the interest among the tenants does not affect their liability to the lessor for the payment of the whole rent, as several tenants of a tenancy in law constitute but a single tenant. *1951 S C 186 (A I R V 38 C 29 P 10) : 1951 S C R 153 : I L R 30 Pat 664 (S C), Badri Narain Jha* v. *Rameshwar Dayal Singh.* (Partition of mokarrari interest among mokarraridars.)

Note 8

Add in the Foot Note indicated.

1. ('51) 1951 Ker L Tim 179 (184) (DB), *Lakshmi* v. *Subramania Iyer Narayana Iyer.* (Subsequent events including rise in prices are no consideration to effect an alteration in tenants' liability.)

Add after Pt. 1 :

[Pt. 1a] The lessor is entitled during the subsistence of the lease to enhance the rent only on an agreement. *1953 Trav-Co 584 (A I R V 40 C 231 P 6) : I L R (1953) Trax-Co 568, Velu* v. *Lekshmi.*

Note 10

Add in the Foot Note indicated :

1. 1951 Mad 718 (A I R V 38 C 232 P 8), *Periaswami Kaliyarayar* v *Periaswami Padayachi.* (Where lessor grants usufructuary mortgage of properties when both leases had sometime to run, the right of mortgagee to recover rent would be only to proceed against concurrent lessee and not against original lessee)

In Note 10, line 5, after the words "of such previous lease" place figure a1 and add the following as Foot Note :

a1. ('51) 55 Cal W N 86 (87) (DB), *Sreenarayan Mansingka* v. *Durga Dutta Misra.* (There is nothing in the terms of S. 105 which prohibits or prevents the leasing out of a reversion.)

Note 13

Add after Pt. 1 :

[Pt. 1a] There is no forfeiture of lease, on account of non-payment of rent unless there is a clause in the lease deed to this effect. *1953 Sau 94 (AIR V 40 C 45 P 5), Harsur Samat* v. *Samat Rama.*

Note 14

Add in the Foot Notes indicated :

11. 1952 All 125 (AIR V 39 C 47 P 13), *Gopalji Maharaj* v. *Shiamlal.* (Lessee evicted by lessor from portion of leased premises.)

13. But see ('48) I L R (1948) 2 Cal 284 (292) (DB), *Raj Narayan Kundu* v. *Sita Chandra Koley.* (Rent sale — Holding found lesser in extent than its description in sale proclamation —Auction-purchaser is entitled to proportionate abatement of rent from landlord decree-holder —('01) I L R 29 Cal 370, Doyal Krishna Naskar v. Amrit Lall Das, Foll.)

Add as a separate para after Pt. 48 :

[Pt. 49] In a suit for rent of a house the Court cannot reduce any amount on the ground of the house being out of repair, where the house was already in that condition at the time of the executions of the rent note. *1955 N U C (Ajmer) 1414 (Pr 3) (AIR V 42), Manaklal Rampertapji* v. *Sheoraj Narain.*

SECTION 108, CLAUSE (m)

Note 1

Add in the Foot Note indicated :

4. 1953 Trav-Co 462 (A I R V 40 C 182 P 4, 5), *Augustine* v. *Chandy.* (Prohibition in lease deed against lessee's making alteration in structure without landlord's consent — Necessary repairs can be made by tenant upon landlord's wilful neglect — This does not give right to landlord to determine lease.)

Add after Pt. 2 :

[Pt. 2a] In the undermentioned case "waste" in law was defined as "any authorised act of a tenant in possession which tends to the destruction of the tenement or otherwise to the injury of the inheritance." *1954 Trav-Co 239 (AIR V 41 C 89 P 5): I L R (1953) Trav-Co 595, Gnanamoni* v. *Abraham.*

Note 2

Add in the Foot Note indicated :

1. 1951 Raj 120 (AIR V 38 C 50 P 10), *Pakar* v. *Lakshman* (Omission on the part of a tenant of land to put manure can be no detriment to the land.)

Add after Pt. 3, in the end of para 1 :

[Pt. 3a] Thus in the case of a thatched old shed made of very flimsy materials like bamboo and arecanut stem repairs would imply renewal and replacement of parts that have decayed. *1953 Trav-Co 462 (AIR V 40 C 182 P 4, 5), Augustine* v. *Chandy.* ("Repair includes replacement of parts . . . . Many, and in fact most, repairs imply that some portion of the total fabric is renewed, that new is put in place of old," per Fletcher-Moulton L. J. in *Lurcott* v. *Wakelly,* (1911) 1 K B 905 (918) : 80 L J K B 713)

Add after Pt. 5 :

[Pt. 6] When once the tenancy has been properly terminated the landlord's right is to claim damages for any loss caused to

him by reason of any wilful negligence or default on the part of the tenant. *1953 Mad 996 (AIR V 40 C 391 P 5), Raman, A. C.* v. *Muthavally.*

Add after Pt. 6 :

[Pt. 7] The measure of damages is taken to be the amount by which the value of the reversion is diminished. *1946-52 I D 40602 (Nag), R. B. G. P. Choudhury* v. *M. R. Malhotra.* (The difficulty in calculations has led to the adoption of practical measure in such cases of the reasonable cost of putting the premises into the state of repairs in which they ought to have been left.)

Note 7

Add after Pt. 1 :

[Pt. 2] But a provision in the lease deed that the lessee should not make any alteration in the structure without the consent of the lessor, does not prevent the lessee altogether from doing the necessary repair work if the lessor wilfully neglects to do it. In such a case the act of the lessee does not entail the determination of the lease. *1953 Trav-Co 462 (A I R V 40 C 182 P 4, 5), Augustine* v. *Chandy.*

SECTION 108, CLAUSE (o)

Note 4

Add in the Foot Notes indicated :

1a. *See* 1952 Bom 100 (A I R V 39 C 18 P 4, 5, 6, 9) (D B), *Ganesh Subraya* v. *Hanamant Vithoba.* (Mulgeni tenancy—Extent of right to cut and remove trees.)

3. 1954 Trav-Co 239 (AIR V 41 C 89 P 5) : I L R (1953) Trav-Co 595, *Gnanamoni* v. *Abraham.*

5. 1955 Andhra 62 (Prs 12, 13) ((S) A I R V 42 C 24), *Kakarlapudi Rangaraju* v. *Happavaluri Sitaramayya.*

SECTION 108, CLAUSE (p)

Note 1

Add in the Foot Notes indicated :

1a. 1954 Cal 224 (A I R V 41 C 84 P 9), *Brohmananda Das* v. *Nagendra Chandra Sarkar.* (Tenant of sweetmeat shop constructing surface drain upon floor of verandah and erecting water-fittings by making holes in walls — 20 Gallon water reservoir fixed on angle iron — Further pucca masonry wall — Construction held permanent structure—Tenant held not entitled to protection of West Bengal Premises Rent Control (Temporary Provisions) Act, 1948.)‡1951 Pat 600 (AIR V 38 C 168 P 6) (DB), *Chhedi Manjhi* v. *Mahipal Bahadur Singh.*

8. 1951 Pat 600 (A I R V 38 C 168 P 7) (DB), *Chhedi Manjhi* v. *Mahipal Bahadur Singh.*

9. 1951 Pat 600 (A I R V 38 C 168 P 6) (DB), *Chhedi Manjhi* v. *Mahipal Bahadur Singh.*

SECTION 108, CLAUSE (q)

Note 1

Add in the Foot Notes indicated :

1. *See* 1953 Bom 76 (A I R V 40 C 23 P 5) (DB), *Raghubir Narayan* v. *Fernandes G. A.* (It is only on the determination of the lease or the tenancy that the landlord becomes entitled to the possession of the property)

9. 1955 N U C (Tripura) 1915 (A I R V 42), *Aswini Kumar De* v. *Asutosh Bhowmik.* (A sub-tenant of a jotedar, who continues in possession of the land after the expiry of the term of his lease without paying any rent to the jotedar, must be deemed to have committed a breach of the conditions of his contract and is therefore liable to be ejected by the Jotedar under S 108 (q), T. P. Act read with S. 79, Tripura Tenancy Act.)

[*See also* 1955 N U C (Punj) 1603 (A I R V 42), *Mela Singh* v. *Punjab State.* (A landlord, who has given a lease to a third person, is entitled, for the purposes of putting his lessee in possession, to maintain a suit to eject the previous lessee whose term of lease has expired and who cannot, therefore, be called a tenant.)]

14. 1953 Mad 996 (AIR V 40 C 391 P 5), *Raman A. C.* v. *Muthavally.*

Add after Pt. 1 :

[Pt. 1a] The right of the landlord to get and the liability of the tenant to surrender possession of the properties leased, on the determination of the tenancy, is inherent in the very relationship of landlord and tenant and will be implied by the law. *1952 Trav Co 359 (A I R V 39 P 7): I L R (1951) Trav-Co 522 (DB), Abraham* v. *Boothalingam Pillai.*

Add after Pt. 7 :

[Pt. 7a] It was held in the undermentioned case that where after the lessor has leased certain premises to the lessee, the Government requisitioned a portion of it from the lessee, the lessor's suit for possession, on the expiry of the lease, against the lessee for the portion which was in occupation of the lessee was maintainable. *1951 Bom 385 (A I R V 38 C 81 P 5) : I L R (1951) Bom 670 (DB), Shankarlal* v. *Pandharinath.*

Add after Pt. 12 as a separate para :

[Pt. 12a] If a tenant leaves the premises without placing the landlord in possession thereof, that may entitle the landlord to claim rents are profits from him if he proposes to exercise his rights under the lease, but in a case where he acquiesces in the act of the tenant even though he has not been placed in physical possession of the tenement, it cannot be said that the tenancy is still subsisting. *1954 Nag 305 (Pr 6) (AIR V 41 C 110): I L R (1954) Nag 414 (DB), Mehromal* v. *T. N. Behel.*

(A letting premises to *B*—*B* sub-letting to *C* without *A's* premission contrary to contract and leaving premises — Premises allotted to *D* while in possession of *C* — *Held C's* possession being unlawful, premises can be considered as vacant.)

Note 2

Add after Pt. 1 :

[Pt. 2] It was held in the undermentioned case that by virtue of S. 11 of the West Bengal Premises Rent Control (Temporary Provisions) Act (38 of 1948) only such provisions of the Rent Act which were in conflict with the Transfer of Property Act prevailed against the T. P. Act. The other provisions of the T. P. Act not so inconsistent remained in force and were of full effect. *('50) 85 Cal L Jour 81 (87), Manoranjan Bhattacharjee* v. *Satya Charan Law* ✣ Also see the following cases: *1951 Assam 62 (A I R V 38 C 33 P 8)* : *I L R (1950) 2 Assam 297, Abdul Sahid* v. *China Lee Hing.* (Sections 7 and 8 of the Assam Urban Area Rent Control Act (3 of 1946) silent on question of failure by tenant to pay rent regularly — These sections should be read with S. 108 (c), T. P. Act) ✣ *1951 Cal 560 (A I R V 38 C 163 Prs 14 15, 16, 22, 24) (DB), Satish Chandra Basu* v. *Sisir Kumar Roy.* (To the extent the right conferred by S. 108 (f), T. P. Act is inconsistent with the right as defined in S. 18 (1) (2) of the Calcutta Rent Ordinance (5 of 1946), the Ordinance intercepts, in the cases specified in S. 18, the operation of S. 108 (f) T. P. Act.)

SECTION 109

Note 2

Add in the Foot Note indicated ;

1. ('51) 55 Cal W N 656 (660) (DB), *Jamini Bala* v. *Administrator General of West Bengal.* (Covenant involving a claim affecting the reversion of leased lands — Covenant runs with land and is not a personal one—Transferee of reversion is entitled to benefits as well as subject to liabilities of the covenant.)

Note 4

In Note 4 line 4 after the words "in such property" place figure 1a and add the following as Foot Note :

1a. 1954 Mad 514 (A I R 41 C 190 P 7), *Bhogilal M. Davay* v. *S. R. Subramania Iyer.* (Transferee is, therefore, a landlord and he is entitled to apply under S. 7 (3) of the Madras Buildings Lease and Rent Control Act.)✣('51) 55 Cal W N 656 (660) (DB). *Jamini Bala* v. *Administrator General of West Bengal.* (Assignee of part of reversion has the benefit of lessee's covenants and bears the burden of lessor's covenants.)

Note 5

Add in the Foot Note indicated :

1. *See also* 1955 N U C (Sau) 1138 (A I R V 42), *Shantagauri Maganlal* v. *Uttamchand Meghraj.* (Lease created in 1948 i. e., before the application of the T. P. Act to Saurashtra — Transfer of leased premises — The purchaser possesses under S. 109 all the rights of the landlord — A reasonable notice to the lessee is by the transferee — Tenancy properly determined.)

Note 9

In Note 9 line 2 after the words "before the date of the transfer" place figure 1a and add the following as Foot Note :

1a. 1946-52 I D 40562 (Nag), *Pandurang* v. *Chintaman* ✣ 1946-52 I D 40609 (Nag) *Shrikisandas Seth* v. *Mst. Gangabai.* (Exproprietor of village is entitled to sue for the arrears of rent which fell due during the period of his proprietorship — Right to the arrears does not pass to the new proprietor.)

SECTION 110

In the first marginal note, after the words "on which" insert the word "term"

Note 1

Add in the Foot Notes indicated :

5a 1952 All 141 (A I R V 39 C 51 P 7), *Amar Singh* v. *Hoshiar Singh.* (This legal position will not be affected even if the lessee holds over after expiry of the lease and the lessor accepts rent for the period) ✣ 1953 Mys 139 (AIR V 39 P 7) : I L R (1953) Mys 7, *Krishnaiah Setty* v. *Lakshmana Rao.*

9. 1950 Nag 233 (A I R V 37 C 71 P 4, 5): I L R (1950) Nag 437 (DB), *Chand Mohd.* v. *Murtaza Khan* ✣ 1950 Orissa 1 (A I R V 37 C 1 P 9) : I L R (1949) 1 Cut 231 (DB), *Banchhanidhi Samantrai* v. *Lachminarain Agarwala.*

Add after Pt. 6 :

[Pt. 6a] In the absence of an express statement that the lease commenced from a particular date the principle of exclusion of the particular day, in the computation of the period of lease, does not apply. *1952 Mys 139 (AIR V 39 P 7) : I L R (1953) Mys 7, Krishniah Setty* v. *Lakshmana Rao.*

Note 3

Add in the Foot Note indicated :

1. 1955 Cal 226 (Pr 3) ((S) AIR V 42 C 57) (DB), *Haralal Das* v. *Pasupati Charan Biswas.* (Dates of commencement and expiry specified in the lease—Second paragraph does not apply.)

SECTION 111

Note 1

Add in the Foot Notes indicated :

2. [See however 1951 Bom 283 (A I R V 38 C 57 P 7) : I L R (1951) Bom 293 (DB), *Tatya* v. *Yeshwant.* (Section 111 (g) — Requirements of notice of forfeiture, embody principles of justice, equity and good conscience and apply to agricultural leases.)]

3. 1953 Sau 113 (A I R V 40 C 59 P 16) (DB), *Karsandas Rawji* v. *Karsanji Kalyani.* (Lease executed in former Nawanagar State before T. P. Act was made applicable there.) ✠ 1950 Bom 123 (A I R V 37 C 33 P 5, 6) : I L R (1949) Bom 883 (DB), *Namdeo Lokman* v. *Keshoodeo* (Section 111 (g) — Requirement of notice of forfeiture does not contain principles of justice, equity and good conscience and cannot be extended to leases executed prior to Act.)

In Note 1 line 8 after the words "and good conscience" place figure 4a and add the following as Foot Note

4a. [*See* 1951 Bom 283 (A I R V 38 C 57 P 7) : I L R (1951) Bom 283 (DB), *Tatya* v. *Yeshwant.* (Section 111 (g) — Requirements of notice of forfeiture, contain principles of justice, equity and good conscience, and can be applied to agricultural leases.)]

[But see 1950 Bom 123 (AIR V 37 33 P 5, 6): I L R (1949) Bom 883 (DB), *Namdeo Lokman* v. *Keshoodeo.* (Section 111 (g) — Requirement of notice of forfeiture does not contain principles of justice, equity and good conscience and cannot therefore be applied to leases executed before Act.)]

Add after Pt. 6 in same para :

[Pt. 6a] A tenancy can be determined in any of the modes laid down in S. 111, T. P. Act, and once the tenancy is determined, under S. 108 (q) the lease is bound to put the lessor into possession of the property. *1953 Bom 76 (AIR V 40 C 23 P 5) (DB), Raghubir Narayan* v. *Fernandes* ✠ *('49) 53 Cal W N 859 (862) (DB), Mohammad Ekramal Haque* v. *Rabati Bhusan Mukherjee.* (The Calcutta House Rent Control Order does not furnish any additional grounds for ejectment.)

Add after Pt. 8 as a separate para :

[Pt. 9] This section has to be read along with S. 116. Thus, where the tenant continues in possession after the determination of the lease, with the consent of the landlord, his possession is not that of a trespasser. *1950 East Punj 175 (AIR V 37 C 34 P 22), Messrs. Thakar Dass Pyarelal* v. *Custodian, Evacuees Property.*

Note 2

Add in the Foot Notes indicated :

2. 1955 N U C (Madh B) 1197 (AIR V 42), *Wazir Pahlwan* v. *Harnarayan Gangaram.* (Lease for a fixed period of one year ending on January 16, 1951. It automatically determined by efflux of time.)

3. 1953 Trav-Co 353 (A I R V 40 C 132 P 9), *Easwara Pillai* v. *Krishna Prabhu.* (Cultivation of Punja lands — Lease is for period of harvest only, according to custom — No renewal for next harvest, unless fresh arrangement is made — No particular formality in matter of surrender is required.)

4. 1955 N U C (Madh B) 1197 (A I R V 42), *Wazir Pahlwan* v. *Harnarayan Gangaram.*

Add after Pt. 5 in same para, the following words :

"As to determination of agricultural lease for a fixed period, see Note 25."

Note 4

Add after Pt. 7 as a separate para :

[Pt. 7a] Where the terms of the rent note provided that the tenants would vacate the premises when the landlord sold them, it was held that the tenants were to vacate the premises upon the sale without insisting upon other formalities by which the tenancy would terminate and that stipulation did not exclude the landlord's right to terminate the tenancy after a notice; for, the stipulation merely provided an additional mode of termination of the tenancy. *1951 Kutch 72 (A I R V 38 C 46 P 2), Vishanji Kunvarji* v. *Punchibai.*

Add after Pt. 7a :

[Pt. 7b] As for distinction between cl. (b) and cl. (g) see the undermentioned case. *1952 Cal 207 (AIR V 39 C 75 (6) P 13, 16), Srinath Zemindary, In re.*

Note 5

Add in the Foot Note indicated :

2. 1953 Punj 297 (A I R V 40 C 132 P 7, 8) : I L R (1954) Punj 144 (DB), *Malkishan* v. *Baldeo Kumar.* (Mortgage with possession — Upon redemption the lease is determined — Tenant cannot set up title against owner, the ex-mortgagor—Punjab Urban Rent Restriction Act, 1947, S. 13 has no application.) ✠ 1953 Hyd 129 (A I R V 40 C 52 P 4, 5) : I L R (1952) Hyd 1012, *Ameenuddin* v. *Mohammad Khader Ali.* (Case of usufructuary mortgage—1952 S C 205 (A I R V 39) : 1952 S C R 775 (S C), Mahabir Gope v. Harbans Narain Singh, Relied on : Lessee does not become a statutory tenant—Mortgagor can eject him without applying to Rent Controller under Hyderabad Rent Control Order, (1353-F), S. 8) ✠ 1951 Punj 404 (A I R V 38 C 119 P 20, 23) : I L R (1950) Punj 271 (DB), *Somnath* v *Desai, L. D.* (Tenant cannot claim protection under S. 13, East Punjab Rent Restriction Act — The reason is that the mortgagor does not come within the definition of landlord in S. 2 (c) of the Rent Restriction Act and the tenant also does not come within the definition of tenant in S. 2 (i) and the protection of the Rent Restriction Act is available only to a tenant against a landlord.)

Place figure 1a after the words "ipse haberet' in line 3 of the Note and add the following as Foot Note :

1a. 1953 Hyd 129 (A I R V 40 C 52 P 4, 5) : I L R (1952) Hyd 1012, *Ameenuddin* v. *Mohammad Khader Ali.*

Add after Pt. 2 :

[Pt. 2a] In the undermentioned case, it was held that S. 111 (c) does not mean that if in the exercise of his powers of due management as a person of ordinary pru-

dence the mortgagee has entered into an agreement of tenancy, on the mere redemption of the mortgage without the mortgagor exercising his option of putting an end to the tenancy, the tenancy automatically and ipso facto lapses on the date of the redemption. Thus, a mortgagee in possession of a shop has a right under S. 76 (a) to let out the shop and the room appertaining thereto on a monthly tenancy and on the redemption of the mortgage, the tenant continues to be a tenant and does not become a trespasser. *1954 All 16 (A I R V 41 C 13 P 6, 8) (DB), Hardei* v. *Wahid Khan.* (1952 S C 205 (A I R V 39) : 1952 S C R 775 (S C), Mahabir Gope v. Harbans Narain Singh, Rel. on.)

Add as a separate para after Pt. 5 :

[Pt. 6] A tenant holding the premises under the Custodian of Evacuee properties cannot assert that during the period the property vested in the Custodian she got some statutory rights which continue even after the interest of the lessor (Custodian) has ceased. It follows that, in the absence of such statutory rights in favour of the tenant, the general rule of law, that the termination of the superior tenure affects all sub-tenures, applies and the lease by the Custodian cannot be extended after the release of property in favour of the purchaser. *1955 Hyd 98 (Pr 8) (A I R V 42 C 24) : I L R (1955) Hyd 71 (DB), Sakeen Banoo* v. *Afzul Begum.*

Note 6

Add in the Foot Note indicated :

3. 1952 I D A 9467 (Punj), *Baldeo Inder Singh* v. *Bachan Singh.* (Lease for a term or monthly tenancy — Legal representative of deceased lessee would have the same protection as the lessee has under the provisions of the East Punjab Urban Rent Restriction Act.)

Add after Pt. 6 :

[Pt. 6a] Similarly tenancy-at-will is determined by the death of the lessee. *1950 All 583 (A I R V 37 C 228 P 12) : I L R (1952) 1 All 85 (DB), Ramanilal* v. *Bhagwan Das.*

Note 7

Add in the Foot Note indicated :

6. 1954 Cal 219 (A I R V 40 C 81 P 2), *Raju Singh* v. *Nagendra Nath.* (The theory of intention or benefit of estate may lead to an inference of merger in a particular case.) ✠ 1954 Nag 328 (Pr 8) (A I R V 41 C 114) : I L R (1954) Nag 634 (DB), *Balaprasad* v. *Asmabi.* (Lease hold rights merge in reversion — Reversion must, however, be acquired by valid transaction.)

Add before Pt. 1, in the beginning of the para:

[Pt. 1a] The broad English law of merger does not apply to India, especially in the mofussil, and generally speaking, the law of merger is contained in S. 111 (d). *1954 Cal 219 (A I R V 41 C 81 P 2), Raju Singh* v. *Nagendra Nath.* (Law of merger is also contained in S. 22, Bengal Tenancy Act (1885).)

For full-stop at the end of Pt. 10 substitute a comma, and add the following as :

[Pt. 10a] That is to say, there must be a union of the entire interest of the lessor and the lessee or the landlord's interest must sink in the reversion. *1950 Cal 1 (A I R V 37 C 1 P 22) : I L R (1950) 2 Cal 183 (DB), Probodh Kumar Roy* v. *Sm. Maya Debi.* (*A*, a darpatnidar depositing under S. 13 (4), Bengal Putni Reg. 1819, entering into possession of putni and obtaining decree for arrears of rent against *B*, another darpatnidar of same putni and purchasing the putni in execution — Acquisition of *B's* darpatni interest by *A*, held did not extinguish darpatni interest so purchased and that there was no merger.)

Add after Pt. 12 :

[Pt. 12a] In such a case, the leasehold and the reversion cannot be said to coincide. *1951 S C 186 (A I R V 38 C 29 P 9, 10) : I L R 30 Pat 664 : 1951 SCR 153 (SC), Badri Narain Jha* v. *Rameshwar Dayal Singh.* (In the case of an estate which is subject to lakhraj and mokarrari interests, mere purchase by one of the several joint holders of the mokarrari interest of portions of the lakhraj interest cannot bring about an extinction of the lease or break its integrity and the mokarrari interest of the purchaser does not merge in his lakhraj interest.)

Add after Pt. 14 as separate para :

[Pt. 15] The defendant was an under-raiyat of *D* who in his turn was the under-raiyat of *B* who was the raiyat. *B* subsequently granted to the plaintiff an ijara lease by virtue of which the plaintiff became an under-raiyat of the first degree and *D* became an under-raiyat of the second degree. Before the expiration of plaintiff's ijara lease he acquired the interest of *D* by purchase in execution of his rent decree and kept it quite distinct from his own ijara interest. The plaintiff filed a suit for rent against the defendant for a period subsequent to the date of the expiry of his ijara. It was held that there

was no merger of the under-raiyati interest of *D* which the plaintiff had acquired by purchase with his own ijara interest, so as to disentitle him from asserting the under-raiyati interest or from claiming rent from the defendant on the strength of that interest even after the expiry of the ijara lease and that neither the theory of intention nor the doctrine of benefit could be invoked to infer merger in the present case. *1954 Cal 219 (A I R V 41 C 81 P 2), Raju Singh* v. *Nagendra Nath.*

Note 8

Add after Pt. 4 :

[Pt. 4a] Surrender to a person having no title cannot operate as a surrender. *1953 Trav-Co 12 (A I R V 40 C 2 P 5), Philipose, E. J.* v. *Karunakara Nair.* (It will, however, operate as an assignment and if it does operate as an assignment, it would not be vitiated by *lis pendens* unless the transfer is given by a defendant in the suit, the proceedings in which operate as *lis pendens.)*

Add after Pt. 4a and before the beginning of para 2 :

[Pt. 4b] One of two joint lessees cannot, in the absence of express words or authority, surrender the rights held jointly. If property or rights are held jointly, *prima facie*, a transfer must be by or under the authority of all interested. *('52) 1952-2 All E R 492 (495, 496) : (1952) 2 Q B 788, Leek and Moorlands Building Society* v. *Clerk.*

Add after Pt. 11 :

[Pt. 11a] Just like the existence of the estate of lessee or mortgagee, the existence of an attachment also operates to prevent the merger of the two estates on surrender by the lessee. *1955 N U C (Trav-Co) 1040 (A I R V 42), Michel Michel* v. *Narayanan Patti.* (A attaching *B's* possessory right and purchasing it in Court auction — *B* surrendering his leasehold to *C*, his lessor — *Held* surrender in fact and in law operates as assignment of attached property and is imperative against *A's* rights.)

Add after Pt. 13 :

[Pt. 14] For distinction between assignment and surrender of tenancy see the undermentioned case. *1952 S C 156 (A I R V 39 P 9) : 1952 S C R 418 : 1952 Cri L Jour 836 (SC), W. H. King* v. *Republic of India.* **(In the case of an assignment, the assignor continues to be liable to the landlord for the performance** of his obligations under the tenancy and this liability is contractual while the assignee becomes liable by reason of privity of estate. The consent of the landlord to an assignment is not necessary, in the absence of a contract or local usage to the contrary. But in the case of relinquishment, it cannot be a unilateral transaction ; it can only be in favour of the lessor by mutual agreement between them. The relinquishment of possession must be to the lessor or one who holds by his interest. In fact, a surrender or relinquishment terminates the lessee's rights and lets in the lessor)

Note 9

Add in the Foot Note indicated :

1. 1950 Bom 89 (A I R V 37 C 26 P 9, 10), *Tarabai Jivanlal* v. *Padamchand.*

Add after Pt. 9 in separate para :

[Pt. 9a] Where after the determination of the defendant's tenancy by notice the defendant holds over and during the period of the holding over the Government requisitions the premises, it amounts to the yielding over possession to the landlord, when the premises are taken over by the Government from the defendant and the defendant thereafter pays rent to the Government. *1952 Cal 455 (A I R V 39, P 17, 26), Sailabala Dassee* v. *Tappassier, H. A.* (In the alternative, there is implied surrender or surrender by operation of law.)

Note 10

Add in the Foot Notes indicated :

3. 1952 Cal 196 (AIR V 39 C 73 P 11): ILR (1952) 2 Cal 167 (D B), *Mahammad Ibrahim* v. *Bani Madhab.* +1953 Pepsu 26 (AIR V 40 C 15 P 5): I L R (1952 Patiala 228 (DB), *Vasdev* v. *Custodian General.* (The principle of the section was applied in Pepsu, where the T. P. Act was not in force.)

9. 1953 Mad 339 (AIR V 40 C 144 P 4), *Gopalakrishna Menon* v. *Vellakutty, K. P.* (Where the new lease is executed when the leasehold was under an attachment the lease is void and there is no implied surrender, though under S. 64, Civil P. C. a transfer is not absolutely void, that is, void as against all the world, but void only against all the claims enforceable under the attachment.)

In Note 10 line 2 after the words "by operation of law" insert the following as :

[Pt. 1a] Implied surrender or surrender by operation of law occurs, (1) by creation of new relationship or (2) by relinquishment of possession. *1952 Cal 455 (A I R V 39 P 19), Sailabala Dassee* v. *Tappassier, H. A.*

Add after Pt. 2 in same para :

[Pt. 2a] It does not depend on the intention of the parties like express surrender. It has to be implied from the conduct of the parties or such facts as relinquishment of possession by the lessee and taking over possession by the lessor. *1952 Cal 455 (A I R V 39 P 19), Sailabala Dassee* v. *Tappassier, H. A.*

Add after Pt. 2a in the beginning of para 2, under sub-heading " By acceptance of new lease" :

[Pt. 2b] The principle underlying cl. (f) of S. 111 is that whenever a certain relationship exists between two parties in respect of a subject-matter and a new relationship arises as regards the identical subject-matter, if the two sets of relationships cannot co-exist as being inconsistent and incompatible, that is to say, if the latter can come into effect only on termination of the earlier that would be deemed to have been terminated in order to enable the latter to operate *1953 Trav-Co 584 (A I R V 40 C 231 P 5) : I L R (1953) Trav-Co 568, Velu* v. *Lekshmi.*

Add after Pt. 16 in same para :

[Pt. 16aa] But where the tenant takes a new lease of a portion of the building not covered by the old lease, there is no implied surrender of the old lease. *1946-52 I D 40636 (Nag), M. C. Arvi* v. *Hiralal.*

Add after Pt. 20 as separate para :

Tenant taking possessory mortgage of lease hold.

[Pt. 20a] The acceptance by the lessee, who takes possessory mortgage of his leasehold from the lessor, of the obligation to surrender the property on redemption by payment of the price of redemption, namely, all the mortgage money and value of improvements, necessarily implies the non-existence of his rights to possession of the property as lessee. There is, therefore, an implied surrender of the lease, with the execution and acceptance of the possessory mortgage. *1953 Trav-Co 584 (A I R V 40 C 231 P 5, 6) : I L R (1953) Trav-Co 568, Velu* v. *Lkshmi.*

Add after Pt. 21 in separate para :

Requisition by Government from tenant holding over.

[Pt. 22] Where after the determination of the defendant's tenancy by notice, the defendant holds over and during the period of the holding over the Government requisitions the premises, it amounts to the yielding over possession to the landlord, when the premises are taken over by the Government from the defendant and the defendant thereafter pays rent to the Government, or in the alternative it amounts to implied surrender or surrender by operation of law of the tenancy. *1952 Cal 455 (AIR V 39 P 17, 18, 19, 26), Sailabala Dassee* v. *Tappassier, H. A.*

Add after Pt 22 as a separate para :

Requisition under Rule 75 (a), Defence of Inaia Rules, 1939

[Pt. 23] Where the Government takes possession of the property under a requisition order under R. 75 (a), Defence of India Rules, 1939, there is no mutuality because it takes possession both from landlord and from the tenant. It cannot, therefore, operate as surrender so as to terminate the tenancy. *1950 Bom 89 (A I R V 37 C 26 P C 9, 10), Tarabai Jivanlal* v. *Padamchand.*

Note 11

Add in the Foot Note indicated :

4. ('51) 1951 All W R 24 (26), *Saghir Ahmad* v. *Hasmat Hussain.*

Add after Pt. 1 :

[Pt. 1a] Forfeiture does not for the first time give title to the lessor. On forfeiture he re-enters upon what has all along been his own property. The interest of the lessor in demised premises cannot be described as a contingent interest which would become vested on the expiry or sooner on determination of the lease. *1953 SC 16 (A I R V 40 C 5 P 12) : 1953 S C R 185 (SC), Bhatia Co-operative Housing Society Ltd.* v *Patel D. C.*

Add after Pt. 1a :

[Pt. 1b] The actual date of the forfeiture is the date of the notice of the forfeiture. Where a forfeiture has been incurred for breach of any condition the lessor must do some act evidencing his intention to avail of the forfeiture and that act under the Transfer of Property Act is to give notice to determine the lease and the lease will be avoided from that time only. *1952 Cal 47 (AIR V 39 C 15 P 23), Talbot & Co.* v. *Haricharan Halwasiya.*

Page 1864—In Note 11 Para 2 line 3 after the words "the lease" add the following as :

[Pt. 1c] The forfeiture is not complete unless and until the lessor elects to avail of the breach by giving notice of his intention to determine the lease. *1952 Cal 47 (A I R V 39 C 15 P 17), Talbot & Co.* v. *Haricharan Halwasiya.*

In Para 2 line 5 after the words "the lease" place figure 1d and add the following as Foot Note :

1d. 1952 I D A 17319 (PC), *Ngara Hotel Limited* v. *Rajavally Hassan Suleman*. (Case from Eastern Africa where T. P. Act as amended up to 1907 applies—Institution of suit for possession or application to Rent Controller for lease to take proceeding, is "act showing intention to determine lease.")

Add after Pt. 2 in same para :

[Pt. 2a] The amendment requiring notice does not embody principles of justice, equity and good conscience. Consequently no notice would be required in cases of leases executed prior to the Act, if any of the conditions expressly providing for forfeiture on its breach is broken. *1950 Bom 123 (AIR V 37 C 33 P 5, 6): I L R (1949) Bom 883 (DB), Namdeo Lokman* v. *Keshoodeo.*

[But see 1951 Bom 283 (A I R V 38 C 57 P 7) : ILR (1951) Bom 293 (DB), *Tatya* v. *Yeshwant* (Requirements of notice of forfeiture embody principles of justice equity and good conscience, and extend to agricultural leases.)]

Add after Pt. 2a as separate para :

[Pt. 2b] Leases executed in territories to which the Act did not apply will be governed by the Common Law principles which were usually held applicable by all Courts in India. In such a case it is not necessary for the landlord to do any overt act showing an intention to determine the lease nor is any notice to determine the lease necessary. The mere institution of a suit for ejectment is a sufficient indication of landlord's intention to determine the lease and no separate notice is necessary to determine it. *1953 Sau 113 (AIR V 40 C 59 P 16) (DB), Karsandas Ramji* v. *Karsanji Kalyanji.* (Lease executed in former State of Nawanagar, before T. P. Act was made applicable.)

Page 1865—In the para. beginning with the words "where all the conditions ....." place figure 10a after the words "relieved against" in line 3 and add the following as Foot Note :

10a. 1952 Cal 47 (A I R V 39 C 15 P 17), *Talbot & Co.* v *Haricharan Halwasiya*+1952 Punj 82 (A I R V 39 C 24 P 21, 25, 26) (DB), *New Garrage Ltd.* v. *Khuswant Singh.* (S. 9 (1) (b), Delhi and Ajmer-Merwara Rent Control Act, 1947 would be defeated by waiver on the part of the landlord if it is proved that by his past conduct he had consented to a particular breach of the covenant with regard to user of the premises.)

Add after Pt. 14 as a separate para :

[Pt. 15] In case of a lease for five years if there is a forfeiture at the end of one year as per terms, the case is governed by S. 111 and not by S. 106, which applies to leases where no term is fixed. *1946-52 I D 40648 (Nag), S K. Karim* v. *Jagannath.* (Note—See also S. 106, N. 3)

Add after Pt. 15 as a separate para :

[Pt. 16] The plea of determination of tenancy by forfeiture is not a plea of confession and avoidance and should be pleaded in the plaint or by seeking an amendment of the plaint. *1946-52 I D 7606 (Nag), Mst. Indibai* v. *Shyam Sunder.* (Plaintiff sued for ejectment and pleaded notice under S. 111 (1), Transfer of Property Act. The stand of determination by forfeiture was taken by him only in the rejoinder that was allowed to be filed by way of confession and avoidance—*Held*, that the plea should have been raised by an amendment of the plaint.)

Add after Pt. 16 as a separate para :

Distinction between cls. (b) and (g).

[Pt. 17] In forfeiture under cl. (g) "the term created by the instrument" is defeated on the happening of a particular event or the doing of a particular act. In clause (b), on the other hand, the term does not come to an end on the doing of an act or the happening of an event. It applies where the time is limited conditionally on the happening of some event and that event happens. In cl. (b) the term is fixed conditionally and depends upon the happening of a future event. In cl. (g) the term is brought to an end by a defeasance clause. This is the difference between cls. (b) and (g). *1952 Cal 207 (AIR V 39 C 75 (6) P 13, 16, 20, 30, 31), Srinath Zamindary, In re.* (Lease to company for 99 years—Lease to cease to be operative on company's liquidation—Company going into voluntary liquidation—*Held*, cl. (g) and not cl. (b) applied and a valid notice to determine lease was essential.)

Note 12

Add after Pt. 2 :

[Pt. 2a] But where the contractual relation created is in the nature of a perpetual tenure rather than the creation of relationship of 'landlord' and 'tenant' and the position is really that of a 'grantor' and 'grantee' the law of forfeiture on non-payment of rent is not applicable in the absence of proof of a definite contract to that effect. *1952 Orissa 99 (A I R V 39 C 24 P 24) : I L R (1949) 1 Cut 139 (D B), Tirtha Naik* v. *Lal Sadanand Singh.*

Note 13

Add in the Foot Notes indicated:

4. 1954 Cal 541 (Pr 4) (A I R V 41 C 182) (D B), *Bishnupuriya* v. *Panchkari Das.* (Tenancy for construction of pucca building created before T. P. Act — Provision against transfer without right of re-entry—Suit for possession by landlord on transfer by lessee — S. 111 applied as rule of justice, equity and good conscience—Suit held not maintainable as there was no right of re entry.)

[*See* 1953 Sau 113 (A I R V 40 C 59 P 17) (DB), *Karsandas Ramji* v. *Karsanji Kalyani.* (Lease in former Nawanagar State before T. P. Act was made applicable, not reserving right of re-entry — Sub-letting — Landlord can recover possession by reason of S. 13 (e), Bombay Rents, Hotel and Lodging House Rates Control Act, (1947.)]

5. 1955 N U C (Cal) 2865 (A I R V 42) (D B), *Madan Theatres Ltd.* v. *Sm. Charushila Dassi.* (The section has misplaced the word "express" unless there was a deliberate intention to depart from the English law.)✣1953 Nag 353 (A I R V 40 C 151 P 7, 9) : I L R (1953) Nag 932 (D B), *Salla Edu Musalman* v. *Janab Bi.* (Condition against non-payment of rent—No express provision for re-entry – No forfeiture.)

8. 1952 Cal 47 (A I R V 39 C 15 P 17), *Talbot & Co.* v. *Haricharan Halwasiya* ✣ ('50) 86 Cal L Jour 198 (209), *Sm. Durgarani Devi* v. *Mohiuddin.* (If the lessor does not avoid the lease the lease continues.)✣1949 Assam 61 (AIR V 36 C 29 P 6, 7) : I L R (1949) 1 Assam 105 (D B), *Jankep Boro* v. *Kuar Majhi.*

21. 1953 Sau 94 (A I R V 40 C 45 P 5), *Harsur Samat* v. *Samat Rama.* (Buta Hak Tenure — No forfeiture on account of non-payment of rent unless there is a clause in the deed.)

22. 1953 Nag 353 (A I R V 40 C 151 P 7, 9) : I L R (1953) Nag 932 (DB). *Salla Edu Musalman* v. *Janab Bi.*

Page 1866—In the first sentence of the paragraph which comes after Pt. 3 for the words "This clause also not recognise" read "This clause does not recognise."

Add at the end of the para. that comes after Pt. 3:

[Pt. 3a] See the undermentioned case. *('50) 86 Cal L Jour 198 (208), Sm. Durgarani Devi* v. *Mohiuddin.* (In India condition is not used in the Transfer of Property Act in the same sense as in English Law and overlaps what is called a covenant in English Law. The Transfer of Property Act does not distinguish conditions from covenants. In India, the assignee of the reversion of the whole or part is entitled to enforce conditions. The burden of the condition runs with the land and conditions may be enforced against the assignee of land.)

Add after Pt. 5 :

[Pt. 5a] It is the proviso for re-entry which is required in English law to be express, because the law leans against forfeiture and gives effect to it only when the stipulation is direct and clear. Under S. 111 (g) it is the condition broken and not the provision for re-entry which is required to be express. *1955 N U C (Cal) 2865 (AIR V 42) (DB), Madan Theaters Ltd.* v. *Sm. Charushila Dassi.* ((1910) 8 Ind Cas 309 (Mad), Mussa Kutti v. Rangachariar and 1914 Cal 850 (A I R V 1), Naba Kumar v. Trailokya Nath, criticised.)

[Pt. 5b] The reasonable construction to put upon the words 'express condition' is to hold them to mean a condition contained in an express term of the lease, whether in explicit and positive terms or as implied covenant, provided in the latter case that the Court can reasonably hold it to be a part of the stipulation between the parties. *1955 N U C (Cal) 2865 (A I R V 42) (DB), Madan Theatres Ltd.* v. *Sm. Charushila Dassi.*

Add after Pt. 15 in separate para :

[Pt. 15a] There must be something more than a mere transfer of the holding to forfeit the tenancy and give the landlord the right of re-entry. *1953 Pat 199 (AIR V 40 C 68 P 14) : 31 Pat 787 (D B), Rupai Devi* v. *Bambdeb Das.* (Where a tenant of a chandna tenancy holding transfers the same without the landlord's consent but notwithstanding such transfer remains in possession of the holding by paying rent to the landlord so that there is neither abandonment of the holding nor repudiation or relinquishment of the relationship of landlord and tenant, the landlord would not be entitled to obtain a decree for khas possession of the holding.)

Change the full point at the end of Pt. 19 into a comma and add the following :

[Pt. 19a1] or where one of two partners after the dissolution of the partnership assigns to the other partner the interest of the partnership in premises which had been taken on lease by the partnership. *1950 Mad 25 (A I R V 37 C 11 P 3) (D B), K. Devarajulu Naidu* v. *C Ethirajavathi Thayaramma.*

Add after Pt. 20b :

[Pt. 20c] An alienation in breach of the condition is merely voidable at the instance of the landlord. *1949 Assam 61 (A I R V 36 C 29 P 6, 7): ILR (1949) 1 Assam 105 (DB), Jankep Boro* v. *Kuar Majhi.* (Acceptance of rent from transferee — Landlord will not be entitled to dispossess transferee without recourse to suit for ejectment.)

Page 1869—Under the sub-heading "Non-payment of rent" in line 3 from top, add before Pt. 21 :

[Pt. 20d] Mere non-payment of rent does not of itself determine the tenancy. *1951 Him Pra 65 (AIR V 38 C 20 P 9), Kamla* v. *Mt. Nahin* —

[Pt. 20e] unless the landlord has been able to establish by evidence that payment of rent regularly was a condition in the lease. *('49) 27 Mys L Jour 85 (95) (DB), Sigamma* v. *Srikantiah.*

[*See also* 1952 Orissa 99 (AIR V 39 C 24 P 24): I L R (1949) 1 Cut 139 (DB), *Tirtha Naik* v. *Lal Sadanand Singh.* (Perpetual tenure—Relationship not of landlord and tenant but of grantor and grantee—Law of forfeiture on non-payment of rent is not applicable in absence of a definite contract to this effect.)]

Add after Pt. 24 in separate para :

[Pt. 24a] In the case of a lease executed prior to the Act, where there is an express provision for forfeiture for non-payment of rent, no notice of forfeiture is required, upon the breach of the condition. The requirement of notice introduced by the amendment does not embody the principles of justice, equity and good conscience and cannot be given effect to in the case of lease not governed by the Act. *1950 Bom 123 (AIR V 37 C 33 P 5, 6): ILR (1949) Bom 883 (DB), Namdeo Lokman* v. *Keshoodeo.*

Add after Pt. 24a as separate sub-heading :

"*Encroachment by lessee.*"

And after this sub-heading add :

[Pt 24b] Where a tenant occupies a portion of the house not included in the rent-note, his act cannot be regarded as breach of any term of tenancy. He is at the most a trespasser on portion unauthorisedly occupied *1953 Sau 119 (AIR V 40 C 60 P 3) (D B), Keshavlal Virchan* v. *Bai Ajawali Vachharaj.*

Note 14

Add in the Foot Notes indicated :

7. *See also* 1955 N U C (Orissa) 979 (A I R V 42) *Killamsetti Suryanarayan* v. *Maharaja Sri Vikrama Deo Verma.* (Resisting landlord's attempt to change the entry in the House Tax Demand Register and to make it in his favour constituted repudiation of title.)

7a. 1953 All 797 (A I R V 40 C 391 P 19), *Ramdas* v. *Shree Ram Lakshman Janki.* (When the title of the real heir or of the original lessor is denied, it certainly amounts to setting up a title in somebody else, because the property does not remain in vacuum.)

8. 1953 All 797 (A I R V 40 C 391 P 8, 10), *Ramdas* v. *Shree Ram Lakshman Janki.* (Owner of property by will bequeathing property to deity—Deity by its sarbarkar suing tenant for rent—Tenant in his written statement stating that will was never executed and that plaintiff was not owner of property—Further assertion that sarbarkar was a very clever man—Denial could not be read as mere omission to admit plaintiff's title with a view to putting him to proof of it but is disclaimer of title.) ✣ 1952 All 141 (A I R V 39 C 51 P 10), *Amar Singh* v. *Hoshiar Singh.* (Denial of landlord's title in earlier suit.) ✣ ('51) 1951 All W R 24 (26), *Saghir Ahmad* v. *Hashmat Hussain.*

10a. See however 1952 Punj 52 (AIR V 39 C 13 P 6, 7), *Faquria* v. *Kalu Mal.* (Provisions as to forfeiture upon denial of landlord's title were applied to agricultural tenancy, as rules of justice, equity and good conscience)

13a. 1953 All 797 (AIR V 40 C 391 P 11), *Ramdas* v. *Shree Ram Laxman Janki.* (If the title of the heir of the landlord is denied, the denial acts as a forfeiture of the tenancy, and the heir is entitled to eject the tenant on this ground. 1926 Cal 1205 (AIR V 13), *Abdulla* v. *Mohammad Muslim.* Dissented from.)

14. 1953 All 797 (AIR V 40 C 391 P 8, 10), *Ramdas* v. *Shree Ram Lakshman Janki.* (Owner of property by will bequeathing property to deity—Deity by its sarbarkar suing tenant for rent—Tenant in his written statement stating that will was never executed and that plaintiff was not owner of property — Further assertion that sarbarkar was very clever man—Denial could not be read as mere omission to admit plaintiff's title with view to putting him to proof of it but is disclaimer of title)

15. 1953 Nag 253 (A I R V 40 C 151 P 6): I L R 1953 Nag 962 (DB), *Salla Edu Muslaman* v. *Jainab Bi.* (Defendant not setting up title in third person or in himself but simply denying title of plaintiff who claimed as heir of lessor—No disclaimer.)

17. ('51) 1951 All W R 24 (26), *Saghir Ahmad* v. *Hashmat Hussain.*

30. 1953 Nag 353 (AIR V 40 C 151 P 6) : I L R (1953) Nag 932 (DB), *Salla Edu Musalman* v. *Jainab Bi.* (There must be disclaimer and manifestation of intention to determine lease prior to institution of suit in which title is denied : S. A. No. 232 of 1947 D/- 8-12-52 (Nag), Reversed.)

(But see 1951 Assam 70 (A I R V 38 C 36 F 15): I L R (1950) 2 Assam 166 (DB), *Ratneswar Gosswami* v. *Mongoli Chutiani.* (Suit for ejectment of monthly tenant — Defendant denying landlord's title—Defendant held not entitled to notice to quit)]

34. 1954 Nag 328 (Pr 6) (A I R V 41 C 114) : I L R (1954) Nag 634 (DB), *Balaprasad* v. *Asmabi.* (There is no determination of lease by forfeiture unless and until the lessor gives notice that he has exercised the option to determine the lease)

Add after Pt. 10a :

[Pt. 10a1] But where a lessee does not set up a title in himself but only questions the extent of the lessor's title, admitting that a part of the title vests in him, there is no disclaimer within cl. (g) of S. 111, and hence there is no forfeiture of the tenancy. *('51) 1951 All W R 24 (26), Saghir Ahmad* v. *Hashmat Hussain.*

Add after Pt. 30 :

[Pt. 30a] In other words, the case of forfeiture cannot be considered unless it is set up in the plaint. Where the plaintiff, an heir of the lessor, brought a suit for arrears of rent and ejectment alleging that "in spite of demands the defendant did not pay the rent and now he is denying the plaintiff's title," it was held that there was no plea of forfeiture by disclaimer, that the suit was for ejectment for non-payment of rent and that since there was no express provision for re-entry on non-payment of rent, the suit was not maintainable. The defendant's allegation in the written statement that the husband of the plaintiff and others tried to oust the defendant by force, was also held not to amount to admission of the plaintiff's manifestation of intention to determine the lease. *1953 Nag 353 (AIR V 40 C 151 P 6, 7, 9) : ILR (1953) Nag 932 (DB), Salla Edu Musalman* v. *Jainab Bi.* (S. A. No 232 of 1947 D/- 8-12-52 (Nag), Reversed.)

Add after Pt. 33 :

[Pt. 33a] Upon the lessee's repudiation of the plaintiff landlord's title, the plaintiff gave a notice to quit and on non-compliance of the notice brought a suit for recovery of arrears of rent only till the date of suit. This suit was ultimately decreed but during this suit there was a fresh disclaimer of plaintiff's title and the plaintiff without serving any fresh notice to quit brought a suit for possession and injunction in respect of the demised premises. It was held that the suit was not maintainable on the basis of disclaimer of plaintiff's title in the previous suit as the plaintiff had failed to give fresh notice as required by S. 111 (g). The previous notice to quit could not avail him as it had been waived by suing for arrears of rent only. *1951 Pat 190 (AIR V 38 C 33 P 6, 7, 8) (DB), Jai Narain* v. *Syed Ali Murtaza.*

Note 15

Add after Pt. 3 as a separate para :

[Pt. 4] A lease for a term of 99 years was granted to a company. The lease contained a clause of re-entry to the effect that upon company's liquidation, the lease was to cease to be operative. Upon the company going into liquidation, it was contended on behalf of the lessor that the lease had determined under clause (b). It was held that clause (g) and not clause (b) applied and notice to determine the lease was essential. *1952 Cal 207 (A I R V 39 C 75 (6) P 20, 30, 31), Srinath Zemindary, In re.* (Quaere : Whether "insolvency" in cl. (g) includes liquidation of a company.)

Note 16

Add in the Foot Notes indicated :

1. 1953 S C 228 (A I R V 40 C 55 P 20) : 1953 S C R 1009) (S C). *Namdeo Lokman Ladhi* v. *Narmadabai.*
2. 1953 S 228 (A I R V 40 C 55 P 20) : 1953 S C R 1009 (S C), *Namdeo Lokman Ladhi* v. *Narmadabai.* (1947 Mad 68 (A I R V 34 C 28) *Umar Pulavar* v. *Dawood Rowther* and 1951 Bom 283 (A I R V 38 C 57) : I L R (1951) Bom 293, *Tatya Saula* v. *Yeshwanta Kondiba*, Overruled)
3. 1953 S C 228 (A I R V 40 C 55 P 20) : 1953 S C R 1009 (S C), *Namdeo Lokman Ladhi* v. *Narmadabai.*
6. 1952 I D A 17319 (P C), *Ngara Hotel Ltd.* v. *Rajabally Kassam Suleman.* (Case from Eastern Africa where T. P. Act as amended upto 1907 only applies.)
7. 1954 All 649 (650) (Pr 4 to 7) (A I R V 41 C 255, *Asghar* v *U. P. Government.* ✠ 1952 All 141 (A I R V 39 C 51 P 10), *Amar Singh* v. *Hoshiar Singh.* (Intimation by landlord that he required premises for his personal use held intimation of intention to determine lease.)
8. 1954 All 649 (Pr 4) (AIR V 41 C 255), *Asghar* v. *U P. Government.*
9. 1954 Mad 739 (Pr 2) (AIR V 41 C 243) : I L R (1955) Mad 227 (DB), *Eranki Narasimham* v. *Penumutchu Atchayya.* (Agricultural lease — S. 111 (g) does not apply—1953 S. C. 228 (A I R V 40 C 55) : 1953 S C R 1009 (S C) *Namdeo* v. *Narmadabai* ✠ 1951 Bom 283 (A I R V 38 C 57 P 7) : I L R (1951) Bom 293 (DB), *Tatya* v. *Yeswanta.* (Agricultural lease—Requirements of notice embody principles of justice, equity and good conscience and therefore would be extended to agricultural leases, in case of forfeiture due to disclaimer of lessor's title.)

[But see 1950 Bom 123 (AIR V 37 C 33 P 5, 6): I L R (1949) Bom 883 (DB), *Namdeo Lokman* v. *Kesheodeo.* (No notice would be required in the case of a lease executed prior to the Act. The requirement of notice introduced by the amendment does not contain principles of justice, equity and good conscience and cannot be applied to such cases.)]

[*See also* 1955 N U C (Vind Pra) 1674 (A I R V 42), *Shiva Pratap Singh* v. *Chhote Ram.* (Quaere: Whether or not the principles embodied in S. 111 (g) are applicable to agricultural tenancies under the Rewa Tenancy Code.)]

12. But see 1946-52 I D 7054 (Nag), *Mst. Indibai* v. *Shyam Sunder.* (If the cause of action is denial of title the allegations of denial of title and consequent notice under S. 111 (g), are necessary.)

Add after Pt. 8 in same para :

[Pt. 8a1] Two notices in writing, namely one under S. 111 (g) and one under S. 114-A are not necessary. S. 114-A was added by an amendment of 1929 and must be deemed to have specified the nature of the notice required under S. 111 (g). *1953*

Mad 313 (AIR V 40 C 106 P 7) : I L R (1953) Mad 615 (DB), Margaret Jean Massy v. *Colonel Granville Alric Richard Spain.*

In foot note 9 add the following note after the words "held necessary" in foot note remarks to 1947 Mad 68 (A I R V 34 C 28), *Umar Pulavar* v. *Dawood Rowther*, in the square brackets :

"*Note:*— This case is overruled in *1953 S C 228 (A I R V 40 C 55): 1953 S C R 1009 (S C), Namdeo Lokman Ladhi* v. *Narmadabai.*"

Add after Pt. 9 in the end of para :

[Pt. 9a] It was however held by the Supreme Court in the following case that the provision in S. 111 (g) as to notice in writing as a preliminary to a suit for ejectment based on forfeiture of a lease is not based on any principle of justice, equity or good conscience and cannot govern leases made prior to the coming into force of the T. P. Act, 1882, or to leases executed prior to 1st April 1930. The rights and obligations under those leases have to be determined according to the rules of law prevailing at the time and the only rule applicable is that a tenant cannot by his unilateral act and by his own wrong determine the lease unless the lessor gives an indication by some unequivocal expression of intention on his part of taking advantage of the breach. *1953 S C 228 (AIR V 40 C 55 P 20): 1953 S C R 1009 (S C), Namdeo Lokman Ladhi* v. *Narmadabai. (1947 Mad 68 (A I R V 34 C 28), Umar Pulavar* v. *Dawood Rowther; 1951 Bom 283 (A I R V 38 C 57) I L R (1951) Bom 293, Tatya Saula* v. *Yeshwanta Kondiba, Overruled. 1948 Mad 275 (AIR V 35 C 140) : I L R (1948) Mad 757 (FB) Brahmayya* v. *B. Sundaramma, Commented on.)*

Add after Pt. 14 in separate para the following sentence :

On the question of notice under cl. (g) in case of denial of title in suit for ejectment, see Note 14.

Note 19

Add in the Foot Note indicated :

2. *See also* ('50) 86 Cal L Jour 198 (208), *Sm. Dugarani Devi* v. *Mohiuddin.*

Note 23

Add in the Foot Notes indicated :

1. 1946-52 I D 40627 (Kutch), *Thaker Devchand* v. *Rajyagor Harisaw.* (Lease from month to month.)
2. 1952 All 579 (A I R V 39 C 93 P 3), *Khumani* v. *Saktey Lal.* (Under U. P. (Temporary) Control of Rent and Eviction Act, 1947, there should be a wilful default on the part of the tenant in payment of rent within one month of the service of notice. If there is such default, parties are relegated to the general law.) ✠ 1946-52 I D 40627 (Kutch), *Thaker Devchand* v. *Rajyagor Harisaw.* (Lease from month to month.)
5. 1953 Sau 113 (A I R V 40 C 59 P 14) (DB), *Karsandas Ramji* v. *Karsanji Kalyani.* (Tenancy has to be duly determined by notice to quit before a landlord can sue to evict tenant on any of grounds contained in clauses to S. 13 (1), Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947, as applied to Saurashtra.)

Add after Pt. 8 :

[Pt. 8a1] When once a proper notice has been given by the tenant and the tenancy has been properly terminated the landlord's right would be not to question the notice or the termination of the tenancy, but to claim damages for any loss caused to him by reason of any wilful negligence or default on the part of the tenant. If in such a case of valid termination of lease, the landlord refuses to take possession which has been offered, it cannot be held that the lease would still continue in favour of the landlord. *1953 Mad 996 (A I R V 40 C 391 P 5), Raman A. C.* v. *Muthavally.*

Add after Pt 8a in separate para :

[Pt. 8b] The lessor has no right to terminate the tenancy by giving notice to quit a part of the demised premises and the assignee of the reversion of part does not acquire a right to terminate the tenancy by giving notice to quit as to such part. If the tenancy has not been broken up it is quite clear that it must be terminated as a whole. But if the tenant recognises the severance of the reversion or acknowledges the title of the owner of a severed part of the reversion the notice to quit severed part would be good and binding on the tenant. Such recognition may be either by express agreement by attornment and other formal acknowledgment (as by paying a nominal sum of money) or by payment of rent or of a nominal sum as rent or by submission to a distress. *('50) 86 Cal L Jour 198 (211), Sm. Durgarani Devi* v. *Mohiuddin.* (1920 Mad 838 (A I R V 7) (FB), Kannayan v. Alikutti, Dissent. from.)

Add after Pt. 8b as separate para :

[Pt. 8c] Where the terms of the rent note provided that the tenants would vacate the premises when the landlord sold them, it was held that the tenants

were to vacate the premises upon the sale, without insisting upon other formalities by which the tenancy would terminate and that the stipulation did not exclude the landlord's right to terminate the tenancy after a notice and that the stipulation merely provided an additional mode of termination of the tenancy. *1951 Kutch 72 (A I R V 38 C 46 P 2), Vishanji Kunvarji* v. *Panchibai.*

Add after Pt. 10 as a separate para :

[Pt. 10a] When the lessor sues for ejectment of a tenant he must state the facts constituting the cause of action in detail and state when it arose. In a case under S. 111 (h), the cause of action is the agreement of tenancy in which the date of commencement is an essential ingredient as also a valid notice determining the tenancy and these must be stated. *1946-52 I D 7054 (Nag), Mst. Indibai* v. *Shyam Sunder.*

Add after Pt. 11 as a separate para :

Effects of breach of condition and notice to quit :—

[Pt. 11a] The effects of a breach of condition and of a notice to quit are widely different. On the expiration of the notice to quit the lease determines automatically. Breach of condition makes the lease voidable at the option of the lessor. If the lessor does not avoid the lease, the lease continues to exist. Further there is a fundamental difference between a waiver of a forfeiture which can be done at the election of the landlord alone and waiver of notice to quit which proceeds on the basis of a new agreement between the landlord and tenant. When a valid notice to quit has been given a new tenancy can be created only by an express or implied agreement. *('50) 86 Cal L Jour 198 (209), Sm. Durgarani Devi* v. *Mohiuddin.*

Note 23a

Page 1882—In the second column of the Foot Notes before the fourth citation, viz. "(49) 36 A I R 1949 Mad 780" insert "S. 111 — Note 23a" and at the beginning of the said citation place Foot Note indication number 1.

Add in the Foot Note indicated :

1. 1953 Mad 221 (A I R V 40 C 80): I L R (1953) Mad 460 (DB), *S. Venkatratnam* v. *G. Lalluram.*

Add after Pt. 1 in the end of para :

[Pt. 2] See also the undermentioned cases. *1951 Hyd 111 (AIR V 38 C 46 P 3) : I L R (1951) Hyd 542 (DB), Mohommed Gous Mohiuddin* v. *Karunnissa Begum.* (It is not necessary for a landlord, wishing to proceed under the Hyderabad Rent Control Order, 1353F., to issue notice under the Transfer of Property Act before commencing such proceedings — 1949 Mad 780 (A I R V 36 C 351), Krishnamurthy v. Parthasarathy, Rel. on.) ✠ *1951 Pat 529 (A I R V 38 C 149 P 11) : I L R 30 Pat 366 (DB), Baijnath Sao* v. *Ram Parsad.* (Section 111, T. P. Act, has no application to the proceeding for eviction under the Bihar Buildings (Lease, Rent and Eviction) Control Act : 1949 Mad 780, (A I R V 36 C 351), Krishnamurthy v. Parthasarathy, Rel. on.)

Add after Pt. 2 as separate paras :

[Pt. 3] Madhya Bharat Sthan Niyantran Vidhan (15 of 1950), S. 4 — Before the landlord can seek protection of the provisions of S. 4 of the Sthan Niyantran Vidhan he must prove that he had determined the tenancy by a valid notice to quit. It is true that by merely proving a valid notice to quit, a landlord cannot get a decree for ejectment and possession. He has to prove one of the grounds mentioned in S. 4 of the Sthan Niyantran Vidhan. However where the tenancy is not a statutory one but by contract the provisions of the Transfer of Property Act are neither repealed nor abrogated by the Sthan Niyantran Vidhan. Consequently before a landlord can sue for eviction of a tenant he must have terminated the tenancy i. e., either by effluxion of time or by determination of the lease providing for a forfeiture or by a notice to quit in accordance with law. Section 4 of the Sthan Niyantran Vidhan in no way interferes with those provisions. *1952 Madh B 121 (A I R V 39 P 5, 11) : I L R (1952) Madh B 126, Chhote Lal* v. *Abdullabhai.*

[*See also* 1955 N U C (Ajmer) 321 (A I R V 42), *Panchulal* v. *Atumal.* (S. 9 (1) of the Delhi and Ajmer Merwara Rent Control Act does not confer any right on the landlord. The landlord will in addition to establishing his right to a decree for ejectment under the general law have to comply with the provisions of that Act.)

[Pt. 3aa] Where the landlord has already given notice for ejectment, since S. 4 f) of Sthan Niyantran Vidhan enables the landlord to evict the tenant on the ground of disclaimer or denial of the landlord's title, a fresh notice is not necessary. *1955 N U C (Madh B) 1814 (AIR V 42), Abdul Karim Mohorkhan* v. *Sugrabai.*

[Pt. 3a] Bombay Rents, Hotel and Lodging House Rates (Control) Act (1947) — This Act does not affect the basic requirement of the Transfer of Property Act and before the suit for eviction can be instituted, the tenancy requires to be terminated in accordance with the provisions of the Transfer of Property Act. A repeal of Ss. 108 (j) and 111 cannot be implied from the provisions of the Bombay Act. *1953 Sau 113 (A I R V 40 C 59 P 14, 15) (DB), Karsandas Rimji* v. *Karsanji Kalyani.* (1949 Mad 780 (AIR V 36 C 351); Krishnamurthy v. Parthasarthy; 1951 Hyd 111 (AIR V 38 C 46) : I L R (1951) Hyd 542, Mohemed Gous v. Karunissa Begum, Distinguished; 1949 Mad 127 (A I R V 36 C 54), Narayanan Nair v. Kunhan Mannadiar and 1952 Madh B 121 (AIR V 39 C 54): I L R (1952) Madh B 126, Chhote Lal v. Abdullabhai, Rel. on.) + *1953 Sau 119 (A I R V 40 C 60 P 7) (DB), Keshavlal* v. *Bai Ajawali.*

[Pt 4] Where the tenant admits by his written statement in a suit for ejectment that he was in arrears of three months' rent though he stated that the landlord had wrongfully refused to accept the rent which was tendered to him before the suit, it is the tenant's duty to deposit in Court the full rent due up to the date of written statement. The moment he admitted that there were arrears of rent, there was admittedly a forfeiture of tenancy and subject to the provision of S. 12 (2) and (3), Bombay Rents, Hotel and Lodging Rates Control Act as applied to Saurashtra the plaintiff *prima facie* becomes entitled to the decree for eviction. *1953 Sau 99 (AIR V 40 C 47 P 3) (DB), Jamna Bai Govindji* v. *Lallubhai Narsidas.* (*Held*, that there was failure to comply with S. 12 (3) and the Court had no jurisdiction to refuse to pass decree for eviction.)

[Pt. 5] The C. P. and Berar House Rent Control Order does not require the landlord to state the grounds of determination of tenancy in the notice to be served on the tenant under S. 111, T. P Act. The House Rent Control Order imposes a condition of obtaining permission to determine a tenancy. There is no bar to the landlord giving notice under S. 111 (h), even if the permission is granted on the ground that the tenant denied the title of the landlord. *1946-52 I D 25006 (Nag), Mst. Indibai* v. *Shyam Sundar.*

[Pt. 6] The expression 'lawfully determined' in S. 13 (2) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, means the determination of the contractual tenancy under S. 111 of the Transfer of Property Act as well as the withdrawal of the statutory protection afforded by S. 12 (1) of the Act. Both these elements must be present in order to constitute lawful determination of a tenancy within the meaning of S. 13 (2). *1955 Cal 226 (Pr 4) ((S) A I R V 42 C 57) (DB), Haralal Das* v. *Pasupati Charan Biswas.*

Note 24

Add in the Foot Notes indicated :

1 See however 1953 Trav-Co 369 (A I R V 40 C 142 P 3) (DB), *Nagamony* v. *S. Thiruchittambalam.* (Tenant holding over as tenant-at will — Tenancy can be brought to an end by notice to quit.)

4 1950 All 583 (A I R V 37 C 228 P 12) : I L R (1952) 1 All 85 (DB), *Ramanlal* v. *Bhagwan Das.*

5 1950 All 583 (A I R V 37 C 228 P 12) : I L R (1952) 1 All 85 (DB), *Ramanlal* v. *Bhagwan Das.*

Note 25

Add in the Foot Notes indicated :

1 1952 Punj 52 (A I R V 39 C 13 P 6, 7), *Faqiria* v. *Kalu Mal.* (Tenancy of agricultural land is forfeiture by repudiation by the tenant of the tenancy by claiming in himself the title to the land.)

2. 1951 Bom 283 (A I R V 38 C 57 P 7) : I L R (1951) Bom 293 (DB), *Tatya* v. *Yeshwant.* (Section 111 (a)—Requirement of notice of forfeiture contains priciples of justice, equity and good conscience and can be applied to agricultural leases)

[See however 1950 Bom 123 (A I R V 37 C 33 P 5, 6) : I L R (1949) Bom 883 (DB), *Namdeo Lokman* v. *Keshoodeo.* (Section 111 (g) — Requirement of notice of forfeiture does not contain principles of justice, equity and good conscience and cannot, therefore, be applied to leases executed before Act.)]

4. 1955 N U C (Sau) 971 (A I R V 42), *Vanand Valji Nathu* v. *Vora Bhaijibhai Mulla Mamuji.* (A lease executed before the Transfer of Property Act governed by the local law — Technical requirements of notice under S. 106, not applicable — Tenant entitled only to a reasonable notice under the local law.)

In foot note 2 add the following note after the foot note remarks to A I R 1947 Mad 68, in square brackets :

"Note : This case is overruled in 1953 S C 229" (A I R V 40 C 55) : 1953 S C R 1009 (SC), *Namdeo Lokman Ladhi* v. *Narmadabai.*

Add after Pt. 3 :

[Pt. 3a] In the undermentioned case the Supreme Court held that the provisions of S. 111 (g) as to notice in writing

as preliminary to a suit for ejectment based on forfeiture is not based on any principle of justice, equity or good conscience and cannot govern the leases made prior to the coming into force of the Act or prior to its amendment in 1929. Such leases are to be governed by the rules of law prevailing at the time, the rule being that the lessor cannot take advantage of the breach of a condition by the lessee unless he gives some indication by some unequivocal expression of intention to take advantage of the breach. *1953 S C 228 (A I R V 40 C 55 P 20)* : *1953 S C R 1009 (SC)*, *Namdeo Lokman Ladhi* v. *Narmadabai*. (1947 Mad 68 (A I R V 34 C 28) Umar Pulavar v. Dawood Rowther; 1951 Bom 283 (A I R V 38 C 57) : I L R (1951) Bom 293, Tatya Savla v. Yeshwanta Kondiba, Overruled; 1948 Mad 275 (A I R V 35 C 140) : I L R (1948) Mad 757 (FB), Brahmayya v. B. Sundaramma, commented upon.)

Add after Pt. 5 as a separate para :

[Pt. 6] Unlike a terminable lease under the Act which determines by an efflux of the time limited thereby, an agricultural lease in Bengal does not determine of itself on the expiry of the lease but it has to be terminated by a decree of the Court as laid down in S. 89 of the Bengal Tenancy Act. *1952 Cal 567 (AI R V 39 P 7)*, *Sakhisona Dasi* v. *GourHari Jana*. (Suit for ejectment after the termination of period fixed in the tenancy is maintainable even though the tenant is not in actual possession, the land having been requisitioned by Government.)

Note 26

Add in the Foot Note indicated :

2. 1952 Cal 207 (A I R V 39 C 75 (6) P 32, 34), *Srinath Zemindary, In re.* (Notice of intention to determine lease upon forfeiture.)

Add after Pt. 2 :

[Pt. 2a] Thus, one of several joint lessors cannot determine the tenancy and a notice to quit must be given by all. The position of a joint landlord is not improved after partition. There is no severance of the tenancy by reason merely of such partition, and the landlord to whom a divided part of the reversion has been allotted acquires no right by reason merely of the partition to terminate the tenancy by giving notice to quit as to that part. *('50) 86 Cal L Jour 198 (213, 214)*, *Sm. Durgarani Devi* v. *Mohiuddin*.

Add after Pt. 3 as a separate para :

[Pt. 3a] If there is severance of the reversion and if the tenant recognises it or acknowledges the title of the owner of a severed part of the reversion, the notice to quit the severed part would be good and binding on the tenant. Such recognition may be either by express agreement, by attornment or other formal acknowledgment as by paying a nominal sum as rent or by submission to a distress. But an arrangement between the several cosharer landlords and the tenant that each cosharer landlord would be entitled to collect his share of rent separately would not amount to severance of the tenancy. Such an arrangement would be consistent with the continuation of the original lease of the entire tenure. It would not entitle the landlords to give separate notices to quit in respect of their respective shares of the reversion. *('50) 86 Cal L Jour 198 (214)*, *Sm. Durgarani Debi* v. *Mohiuddin*.

Note 27

Add in the Foot Note indicated :

1. *See also* 1955 NUC (Madh B) 52 (AIR V 42), *Santsaran* v. *Bankelal Ramlal*, (Determination of tenancy by efflux of time — Position of tenant after termination of tenancy would be that of licensee or trespasser.)

Add before Pt. 1 as first sentence :

[Pt. 1a] This section has to be read along with S. 116. Thus, where the tenant continues in possession after the determination of the lease, with the consent of the landlord obtained before the determination of the lease, his possession is not wrongful. *1950 East Punj 175 (AIR V 37 C 34 P 22)*, *Messrs. Thakar Das Pyarelal* v. *Custodian, Evacuee Property*.

Add after Pt. 3 as a separate para :

[Pt. 4] When the lease has been terminated by the tenant by a valid notice and when possession has been offered and the landlord has refused to take possession, it cannot be held that the lease would still continue in favour of the landlord. *1953 Mad 996 (AIR V 40 C 391 P 5)*, *Raman A. C.* v. *Muthavally*.

SECTION 112

Note 1

Add in the Foot Notes indicated :

6. 1950 F C 38 (A I R V 37 C 4 P 17) : 1949 F C R 537 (FC), *Shammugam Pillai* v. *Annalakshmi Ammal*. (Lease for term with clause for forfeiture on default in payment of any instalment of rent — Lessor determining the tenancy by notice upon default of 5th instalment — Second notice by lessor demanding arrears of

rent and damages for wrongful use and occupation by lessee subsequent to the date of first notice — Payment endorsed on back of lease as in settlement of account for lessee having cultivated the lands but not as instalment of rent payable under the lease—All previous amounts paid endorsed as "lease amounts payable"—*Held* that no inference of waiver arose from the lessor accepting the amounts in question.)

6a. 1949 All 610 (A I R V 36 C 222 P 4) (DB), *Mt. Bitti Kuer* v. *Benarasi Baboo.* (Defendant in arrears of rent — Plaintiff obtaining permission of Town Rationing Officer for ejectment of defendant — Permission granted is a privilege conferred on the landlord which could be waived —Arrears paid before institution of suit for ejectment and accepted without protest and without reservation of right to bring suit in ejectment — Permission held lapsed by acceptance of arrears of rent — Suit for ejectment not maintainable.)

Page 1885 — In Note 1 line 4 after the words "or not" add Pt. 1a :

[Pt. 1a] The concept of waiver is in essence based on agreement of landlord to waive the forfeiture. Such agreement may be imported from any provision contained in the statute or may be by express conduct of the lessor from which an agreement will be implied as a necessary corollary to the act or conduct of the lessor. *1952 Cal 47 (A I R V 39 C 15 P 18), Talbot & Co.* v. *Haricharan.*

Add after Pt. 6a :

[Pt. 6aa] A forfeiture can be waived only in the sense that the right to forfeit can be waived, that is to say, before the forfeiture has been actually effected or incurred. Once a lease has determined by forfeiture that is to say, once the landlord relying on the breach of a covenant entailing forfeiture has given a notice forfeiting the lease there can be no waiver of such forfeiture. S. 112 does not talk of such waiver and the landlord cannot, after such notice, set up the lease on its test again by any unilateral act of his own. *1955 NUC (Cal) 1100 (AIR V 42), Nemai Chand Sen* v. *Kumud Behari Basu.*

Add after Pt. 6a :

[Pt. 6a1] The lessor's applying to the Rent Control authority for leave to take proceeding for possession and his instituting a suit for possession are all acts which show an intention on his part of determining the lease. *1952 I D A 17319 (P C), Ngara Hotel Ltd.* v. *Rajabally Kassam Suleman.*

Add after Pt. 7 as independent para :

[Pt. 8] Section 112 deals only with a forfeiture under S. 111, cl. (g) of the Transfer of Property Act. Obviously, the determination of the lease intended by the notice based on S. 6(8) of the Bengal Suppression of Immoral Traffic Act (6 of 1933), is not a determination on any of the grounds mentioned in cl. (g) of S. 111, T. P. Act and hence S. 112 does not apply to such a case. *1955 NUC (Cal) 1100 (A I R V 42) Nemai, Chand Sen* v. *Kumud Bhari Basu.*

Note 2

Add in the Foot Notes indicated :

1. *See also* 1952 Punj 82 (A I R V 39 C 24 P 21, 25, 26) (D B), *M/s. New Garage Limited* v. *Khuswant Singh.* (Use of rented premises for different purpose amounting to breach of covenant under S. 9 (1) (b) of the Rent Control Act—Landlord accepting rent after knowing the breach—Landlord's right to eject the tenant is lost by waiver - Acceptance of rent after notice to quit on the ground of forfeiture — It will be presumed that the landlord has released the covenant.)

7. 1955 N U C (Sau) 974 (A I R V 42), *Chandrasinhji Kalubha* v *Kanbi Vaghji Thakershi.* †1952 Cal 47 (A I R V 39 C 15 P 14, 16), *Talbot & Co.* v. *Haricharan.*

9. 1949 Assam 61 (A I R V 36 C 29 P 6) : I L R (1949) 1 Assam 105 (DB), *Jankep Boro* v. *Kuar Majhi.* (Transfer of lessee rights in contravention of term in lease — Landlord accepting rent from transferee — Transferee can remain in possession till evicted in due course by subsequent lessee.)

10. *See also* 1954 Madh B 26 (A I R V 41 C 17 P 3) : I L R (1954) Madh B 279, *Ganpatrao* v. *Anant Ramchand.* (Failure of tenant to pay rent—Right to forfeit lease accruing to landlord under H. B. Sthan Niyantran Vidhan—Landlord can choose to retain that right and at the same time demand rent upto date on which he requires tenant by notice to quit—In such case the landlord treats the other as tenant until that date but this is not sufficient for holding waiver of the right to avoid lease—The real point to see is whether the landlord expressed his intention to continue tenancy even after date on which the tenant is required by the notice to quit, in the event of the tenant paying entire amount of rent due — If there is no such intention, there is waiver.)

In Note 4 line 3 after the words "the lease as subsisting' place figure 1a and add the following as Foot Note :

1a. 1952 Cal 47 (A I R V 39 C 35 P 17), *Talbot & Co.* v. *Haricharan.*

Add after Pt. 12 :

[Pt. 12a] No hard and fast rule can, however, be laid down which can be said to exhaust the categories of acts which can be regarded as showing an intention of the lessor to treat the lease as subsisting. Each case must be decided on its own merits. *1952 Cal 47 (A I R V 39 C 15 P 18), Talbot & Co.* v. *Haricharad.*

Note 5

Add in the Foot Notes indicated :

1. 1952 Cal 47 (A I R V 39 C 15 P 17), *Talbot & Co. Haricharan* ✠ 1952 I D A 17319 (P C), *Ngara Hotel Ltd* v. *Rajabally Kassam Suleman.* ✠1949 Nag 218 (A I R V 36 C 88 P 18) : I L R (1949) Nag 167, *Fatelal Shah* v. *Dayalal Bishrambhai*

2. 1949 Nag 218 (A I R V 36 C 88 P 18) : I L R (1949) Nag 167, *Fatelal Shah* v. *Dayalal Bishrambhai.*

Note 6

Add in the Foot Notes indicated :

1. 1950 Cal 256 (A I R V 37 C 90 P 17), *Amulya Charan De* v. *Corporation of Calcutta.* (The breach of a covenant in a lease not to erect any structure on the land is not a continuing but a single breach. If it is waived by subsequent acceptance of rent, it cannot be availed of thereafter.)

2. 1952 Cal 47 (A I R V 39 C 15 P 19), *Talbot & Co.* v. *Haricharan.* ✠ 1952 I D A 17319 (P C), *Ngara Hotel Ltd.* v. *Rajabally Kassam Suleman.*

3. 1952 Cal 47 (A I R V 39 C 15 P 20), *Talbot & Co.* v. *Haricharan.* (Dumpor's case, 4 Co. Rep. 119a, held not followed in India.)

Add after Pt. 4 :

[Pt. 5] The effect of a waiver of forfeiture is that the tenancy which runs after the waiver is not a fresh tenancy but is a continuation of the previous tenancy, the forfeiture of which has been waived. *1951 All 478 (A I R V 38 C 104 P 16, 17), Chotey Lal* v. *Sheo Shankar.*

SECTION 113

Note 1

Add in the Foot Note indicated :

1a. 1955 N U C (Cal) 1100 (A I R V 42), *Nemai Chand Sen* v. *Kumad Behari Basu.* ((1920) 3 K B 428 : 90 L J K B 164 : Davies v. Bristow ; (1949) 1 All E R 768 : (1950) 1 K B 104, Clarke v. Grant and 1917 Pat 469 (A I R V 4); Shahwali Ahmad v. Mt. Hussaini Begum, *Rel. on*) ✠1954 Madh B 37 (A I R V 41 C 25 P 9) : ILR (1953) Madh B 193, *Hindusingh* v. *Rao Nihalkaranji.* (Agricultural lease—Section applied)

In Foot Note 1, before the citation ('45) 32 AIR 1945 Bom 132 (134) place the foot note number '1a".

Add after Pt. 2, as separate para :

[Pt. 2a] Though S. 113 is inapplicable to agricultural leases, it is based on general principles applicable to leases and hence will have to be applied to agricultural leases. *1954 Madh B 37 (AIR V 41 C 25 P 8) I L R (1953) Madh B 193, Hindusingh* v. *Rao Nihalkaranji.*

Note 2

Add in the Foot Notes indicated :

1. 1953 Cal 349 (AIR V 40 C 130 P 15), *Muralidhar Kulthia* v. *Tara Dye.* ✠ 1951 Cal 342 (A I R V 38 C 81 P 19), *Manindra Nath De* v. *Man Singh.*

In line 3 of the note, place figure 1a after the words 'notice is given' and add the following as foot note :

1a. 1955 N U C (Cal) 1100 (A I R V 42), *Nemai Chand Sen* v. *Kumud Behari Basu.* (In order to make S. 113 applicable, it is not enough to have a unilateral act on the part of the landlord but there must be an agreement. (1920) 3 K B 428 : 90 L J K B 164, Davies v. Bristow; 1949-1 All E R 768 : (1950) 1 K B 104, Clarke v. Grant ; 1917 Pat 469 (A I R V 4), Shahwali Ahmad v. Mt. Hussaini Begum, *Rel. on.*) ✠ 1954 Madh B 37 (A I R V 41 C 25 P 9) : I L R (1953) Madh B 193, *Hindusingh* v. *Rao Nihalkaranji.* (Agricultural lease—Section applied.)

Note 3

Add in the Foot Notes indicated :

1. 1952 All 863 (AIR V 39 P 11, 12), *Ram Sarup* v. *Gayatri Devi.*

2. 1951 All 478 (A I R V 38 C 104 P 14), *Chotey Lal* v. *Sheo Shankar.*

2a. ('49) 1949-1 All E R 768 (769): (1950) 1 K B 104, *Clarke* v. *Grant.* (Acceptance of rent by agent of landlord, in respect of a period after expiry of notice to quit, under belief that it was rent in arrears in respect of earlier period, held did not operate as waiver of notice and the landlord held was entitled to possession.)

2b. 1952 Cal 455 (A I R V 39 P 15), *Sailabala Dassee* v. *Tappassier H. A.*

4. *See also* 1955 N U C (Cal) 1100 (A I R V 42), *Nemai Chand Sen* v. *Kumud Behari Basu.* (A mere mistake of draftsman of plaint in suit for ejectment in claiming rent for period subsequent to notice determining tenancy is not evidence that the landlord had agreed to new tenancy, particularly when he is at the same time also asking for possession and mesne profits.)

6. 1955 N U C (Orissa) 1853 (A I R V 42), *Jagabandhu Sahu* v. *Surendra Nath.*

6a 1952 All 579 (AIR V 39 C 96 P 6), *Kumani* v. *Saktey Lal.*

9. 1951 All 478 (A I R V 38 C 104 P 16), *Chotey Lal* v *Sheo Shankar.*

13. *See also* 1952 All 863 (A I R V 39 P 12, 13), *Ram Sarup* v. *Gayatri Devi* (Permission under S. 3 (a), U. P. Temporary Rent Control and Eviction Act—Long interval between default in payment of rent and filing suit caused by intervening notice under S. 106—It does not show intention to continue lease.)

In Note 3 line 3 after the words "the tenancy" place figure 1a and add the following as Foot Note :

1a. 1954 Cal 404 (Pr 12) (AIR V 41 C 138), *Mahadeo Prasad* v. *Sulekha Sarkar* ✠ 1953 Cal 349 (AIR V 40 C 130 P 15, 16), *Muralidhar Kulthia* v. *Tara Dye* ✠1952 Cal 455 (A I R V 39 P 15), *Sailabala Dassee* v. *Tappassier H. A.*

Add after Pt. 1a as a separate para after the words "giving a second notice to quit" in line 7 of the Note :

[Pt. 1b] When any act on the part of the landlord is relied upon as constituting waiver, that act must be of the landlord or some person authorised by him or who is authorised even without his knowledge or consent to continue or restore the old

tenancy. *1954 Madh B 37 (A I R V 41 C 25 P 16): I L R (1953) Madh B 193, Hindusingh* v. *Rao Nihalkaranji.*

Place figure 2aa after the words "Consents to waiver" in line 5 in para 1 under sub-note "Acceptance of rent" and add the following as Foot Note :

2aa. 1954 Madh B 37 (A I R V 41 C 25 P 16) : I L R (1953) Madh B 193, *Hindusingh* v. *Rao Nihalkaranji.* (Illustration (a) to S. 112 is quite clear.)

Page 1891—In Col. 1 of the Foot Notes, put figure 2a before the citation (1946) 2 All E L R 778 Maconochie Bros. Ltd. v. Brand. and figure 2b before the citation ('45) 32 A I R 1945 Bom 132 (134). . . . Navnital v. Baburao (No. 1).

Add as a separate para after Pt. (2b).

[Pt. 2bb] Similarly an acceptance of rent by agent of landlord after notice to quit by principal contrary to the express intention of principal to the knowledge of tenant does not amount to waiver of notice to quit. *1955 N U C (All) 168 (A I R V 42), Govind Ram* v. *Parshotam Narain.*

At the end after para 2 after the words "treat the lease as subsisting" place figure 2c and add the following as Foot Note :

2c. 1955 N U C (Sau) 971 (A I R V 42), *Vanand Valji Nathu* v. *Vora Bhaijibhai MullaMamuji* ✣1954 Cal 404 (Pr 12) (A I R V 41 C 138), *Mahadeo Prasad* v. *Sulekha Sarkar.* (Landlord accepting rent during pendency of appeal by tenant on the representation of the tenant to relieve him from depositing 'rent' with the Rent Controller which was necessary for his protection under the Rent Control Act but which he was finding 'difficult and costly.' No waiver.) ✣ 1954 Cal 460 (Pr 12) (A I R V 41 C 156) (D B), *Panchannan Ghose* v. *Haridas Banerjee.* (Payment of rent is made to ensure protection against ejectment under any rent control law, and is accepted by the landlord, mere acceptance of rent does not lead to an inference that the parties intended to re-establish the relationship of landlord and tenant.)✣1953 Hyd 97 (A I R V 40 C 37 P 2) : I L R (1953) Hyd 110, *Muhammed Sadruddin Khan* v. *Gulam Mohiuddin.*✣1951 Cal 342 (A I R V 38 C 81 P 20, 21), *Mahindra Nath De* v. *Man Singh.* (Ordinarily acceptance of rent is an excellent evidence of waiver. But where rent is paid by tenant only to protect his rights under the Rent Control Act and produces those receipts they would not be sufficient to prove waiver.)

Add after Pt. 2c :

[Pt. 2cc] The question whether the act of the landlord (whether it is a receipt of amount sent as rent or without any statement at all) is one from which one can impute to the landlord the intention of creating a renewal of the tenancy or treating the tenancy as still subsisting is a question of fact. *1955 N U C (Sau) 971 (A I R V 42), Vanand Valji Nathu* v. *Vora Bhaijibhai Mulla Mamuji.*

[Pt. 2d] Thus in the cases governed by the rent Acts, the acceptance of rent might be referable either to the fact that under the rent control law in force the tenant has become a statutory tenant or to the landlord's intention to treat the lease as subsisting. In such a case, the onus is upon the tenant to prove waiver of the notice to quit. For the tenant to succeed, such acceptance must be shown, aliunde, to be attributable only to the landlord's assenting to a new tenancy coming into existence. *1954 Cal 460 (Pr 15) (A I R V 41 C 156) (DB), Panchanan Ghose* v. *Haridas Banerjee.*

Add After Pt. 7 :

[Pt. 7a] So also where pending the suit for ejectment and damages for use and occupation the defendant made certain payments without insisting upon the withdrawal of the suit the plaintiff was held not to have waived the rights asserted by him in the suit by the acceptance of that payment. *1953 Nag 219 (AIR V 40 C 84 P 12) : I L R (1954) Nag 147, Ilahibux* v. *Munir Khan.*

Add after Pt. 10 as separate para :

[Pt. 10a] In the undermentioned case, it was held by the Punjab High Court that where a notice to quit has been given, a subsequent notice to quit is of no effect unless it can be inferred from other circumstances that a new tenancy has been created after the expiry of the first notice; nor does it amount to a waiver of the first notice in the absence of any proof thereof. *1953 Punj 243 (A I R V 40 C 101 P 7): I L R (1954) Punj 149 (DB), Basheshar Nath Sarin* v. *Delhi Improvement Trust.* ((1947) 1 All E R 116, Loewenthal v. Vanthoute, Rel. on.)

Add after Pt. 13 :

[Pt. 13a] Where a landlord institutes a proceeding for fixing standard rent before the Rent Controller before the date of the notice of ejectment and continues it after the notice and during the hearing of the suit for ejectment, he cannot be said to have waived the notice *1950 Cal 515 (AIR V 37 C 193 P 3, 4), S. K. Chaudhury* v. *Joy Kumar Sarkar*✣*1952 Cal 130 (AIR V 39 C 51 P 21): I L R (1952) 2 Cal 138, Joy Kumar Sarkar* v. *S. K. Chaudhury.*

[But see 1950 Mad 60 (A I R V 37 C 36 P 4), *Sunkavally* v. *Singaruju Malaparaju.* (Suit for ejection cannot be prosecuted further where on the pending application of the landlord fair rent is fixed.)]

SECTION 114

Note 1

Add after Pt. 4 :

[Pt. 4a] The tenant before he can become entitled to the protection of the section has to show that forfeiture has been incurred as required by S. 111 (g). *1953 Bom 129 (133) (A I R V 40 C 43 P 11)* : *I L R (1953) Bom 98 (D B), Bhagwant Rambhau* v. *Ramchandra Kesho* ✣ *1951 Nag 207 (AIR V 38 C 51 P 9, 10)* : *ILR (1950) Nag 870, K. G. Pandit* v. *Narasinghadas Sitaram.* (Breach of an express covenant to pay rent unless there is also a right of re-entry provided for will not result in forfeiture. In such a case S. 114 will not be attracted.)

Add after Pt. 4a :

[Pt. 4b] The provisions of the section cannot be given effect to so as to override the express provisions contained in a special statute, such as S. 8 (2), Mysore House Rent Control Order. *('47) 52 Mys H C R 455 (481) (D B), Gururajachar* v. *Rangiah.*

Note 4a

Add after Pt. 1 :

[Pt. 2] The tender of a cheque is not a payment. *('47) 52 Mys H C R 455 (481) (D B), Gururajachar* v. *Rangiah.*

Note 5

Add in the Foot Notes indicated :

1. 1953 Bom 129 (A I R V 40 C 43 P 11) : I L R (1953) Bom 98 (D B), *Bhagwant Ramchandra* v. *Ramchandra Kesho.*
   [*See also* 1955 N U C (Raj) 1248 (A I R V 42) *Harakchand* v. *Amarchand.*]
3. 1951 Raj 148 (A I R V 38 C 67 P 3), *Pirdan Jethmal* v. *Sarswati.* (After a decree has been passed, the executing Court has no power to lessen the rigour of the decree, so far as it relates to eviction because the judgment-debtor expresses his willingness and readiness to pay the rent decreed.) ✣ ('50) I L R (1950) All 523 (526), *Northern India Coal Company* v. *Mt. Bitti Kuer.*

Note 6

Place figure 1a after the words 'due to the lessor' in line 4 from top of p. 1896 and add the following as footnote.

1a. 1955 N U C (Sau) 974 (A I R V 42), *Chandrasinhji Kalubha* v. *Kanbi Vaghji Thakershi.*

Note 7

Add in the Foot notes indicated :

1. 1952 All 579 (A I R V 39 C 96 P 5), *Kumani* v. *Saktey Lal.* (Irregularity in payment of rent —Tenant's failure to pay whole rent either after notice of demand or when about to be sued — Court has good cause for not exercising discretion in tenant's favour.)
5. 1953 S C 223 (A I R V 40 C 55 P 29) : 1953 S C R 1009 (S C), *Namdeo Lokman Ladhi* v. *Narmadabai.* (Person who comes in equity must do equity : 1914 Mad 706 (A I R V 1), *Rama Krishna Mallya* v. *Baburaya*; 1925 Mad 250 (A I R V 15), *Ramabrahmam* v. *Rami Reddi*, Ref.)

Add after Pt. 1 :

[Pt. 1a] Each case must be judged by itself; the delay, the conduct of the parties and the difficulties to which the landlord has been put should be weighed against the tenant. *1953 S C 228 (A I R V 40 C 55 P 29)* : *1953 S C R 1009 (S C), Namdeo Lokman Ladhi* v. *Narmadabai.* (1916 Mad 680 (2) (A I R V 3) Appayya Shetty v. Mahammad Beari, Approved.)

Note 8

Add in the Foot Notes indicated :

1. *See* 1950 F C 38 (A I R V 37 C 4 P 12) : 1949 F C R 537 (F C), *Shammugan Pillai* v. *Annalakshmi Ammal.* (Per Majority — Mahajan and Mukherjea JJ. contra.)
   [*See also* 1951 Punj 438 (A I R V 38 C 138 P 7), *Kapur Chand* v. *Munshi Ram.* (Consent decree for ejectment—Decree containing condition that if tenant paid arrears of rent within a period suit will stand dismissed, otherwise there shall be decree for ejectment — Held, it was not a case of penalty but a concession and that the tenant who has defaulted should not be given relief against the enforcement of decree.)]
2. 1949 Mad 841 (A I R V 36 C 379 P 4, 6, 7), *Chilukuri Tripura Sundaramma* v. *Chilukuri Venkateswarlu.* (Rule applies to agricultural leases also.)
   [*See also* 1951 Punj 438 (A I R V 38 C 138 P 8), *Kapur Chand* v. *Munshi Ram* (Consent decree with condition that if tenant paid arrears of rent within stipulated time the suit would stand dismissed otherwise there would be decree for ejectment — Even if the case is one of penalty equity will refuse to aid the tenant whose default is wilful or grossly negligent.)]

Note 9

Add in the Foot Note indicated :

2. 1951 Bom 290 (A I R V 38 C 61 P 3, 7) : ILR (1951) Bom 240 (D B), *Gajanan Govind* v. *Pandurang Keshav.* (I L R 31 Bom 15 (F B), *Krishna Bai* v. *Hari*, held still good law.) ✣ 1951 Punj 438 (A I R V 38 C 139 P 8), *Kapur Chand* v. *Munshi Ram.* (Consent decree imposing condition that if tenant paid within stipulated time the suit would stand dismissed otherwise there would be decree for ejectment—Wilful or grossly negligent default — No relief should be given.)

TABLE OF CASES INCLUDED IN THE SUPPLEMENT

N. B. (1) The First Number in a column stands for the page of the Report. The last number in a column stands for the foot note.

(2) The First Reference in the foot notes to the Commentary and the reference to the Official Reports are indicated in the Table of Cases.

(3) Sometimes citations are given in the remarks to the foot notes.

(4) This table of cases is arranged in the following order.

I. The All India Reporter.
II. Notes of unreported cases of the All India Reporter.
III. Official Law Reports.
IV. Criminal Law Journal.
V. Indian Cases.
VI. Other Journals.
VII. Indian Digest.
VIII. Appeal Numbers of unreported cases.
IX. English Decisions.

N.=Note; Pre=Preamble; S=Section.

I. THE ALL INDIA REPORTER

AIR PRIVY COUNCIL

1920 PC

67	S 105 N 43	4

1922 PC

17	S 60 N 29	2

1924 PC

102	S 58 N 33	38
226	S 58 N 33	25

1925 PC

89	S 3 N 18	2

1928 PC

66	S 123 N 6	12
174	N 3 N 24	7
"	S 6 N 17	14

1929 PC

289	S 10 N 15	4

1931 PC

79	S 53A N 18	6

1932 PC

279	S 106 N 41	8

1933 PC

67	S 8 N 5	5

1934 PC

235	S 53A N 18	6

1942 PC

51	S 5 N 4	12

1949 PC

68	S 72 N 8	9
380	S 60 N 3	1a
"	S 60 N 27	1a
"	S 60 N 4	1

1950 PC

56	S 105 N 44	16
83	S 60 N 26	1b
99	S 55 N 8	1a
"	S 55 N 8	17
"	S 55 N 8	18
105	S 8 N 20	9
"	S 8 N 20	21a

AIR FEDERAL COURT

1949 FC

64	S 8 N 20	8a

1950 FC

1	S 53A N 10	2
"	S 60 N 22	7a
"	S 60 N 26	17c
"	S 60 N 26	17d
"	S 60 N 48	10
38	S 112 N 1	6
"	S 114 N 8	1

AIR SUPREME COURT

1950 SC

1	S 53A N 3	14
"	S 53A N 5	3a
"	S 53A N 6	2a
"	S 53A N 9	2
"	S 53A N 16	3
"	S 53A N 16	5a
"	S 53A N 17	1a
"	S 53A N 17	3
272	S 58 N 39	77
"	S 58 N 39	78

1951 SC

1	S 108(j) N 1	6
"	S 108(j) N 1	9
139	S 8 N 5	5
"	S 8 N 6	23
"	S 8 N 20	1
"	S 8 N 20	7
186	S 108(l) N 7	4a
"	S 111 N 7	12a
189	S 60 N 41	13
247	S 105 N 44	16
285	S 116 N 6	1a
"	S 116 N 6	3b
"	S 116 N 6	3bb
293	S 8 N 20	15a
469	S 53A N 3	15
"	S 53A N 3	19

1952 SC

23	S 106 N 2	9a
"	S 106 N 12	3a
"	S 106 N 12	5
"	S 106 N 15	1
"	S 106 N 15	2
"	S 106 N 15	2b
"	S 106 N 15	3
"	S 106 N 18	1
"	S 106 N 18	2
47	S 82 N 6	1
"	S 82 N 7	1
"	S 82 N 14	8
"	S 92 N 15	3
156	S 108(j) N 4	2
"	S 111 N 8	14
205	S 76 N 6	1
"	S 76 N 6	11

1952 SC *con*

205*con*	S 76 N 6	13
"	S 76 N 6	13a
"	S 76 N 6	14
"	S 76 N 10	1
"	S 76 N 10	9a
"	S 111 N 5	2
"	S 111 N 5	2a
207	S 41 N 3	3a
401	S 65A N 1	6
"	S 65A N 1	8a
"	S 65A N 4	5a
"	S 65A N 4	6a
"	S 66 N 1	1a
"	S 66 N 1	5
"	S 66 N 3	1a

1953 SC

1	S 92 N 24	3a
7	S 15 N 2	27
16	S 108(Gen) N 1	1a
16	S 108(b) N 2	6c
"	S 111 N 11	1a
28	S 111 N 16	1
153	S 105 N 48	3a
"	S 105 N 48	4
"	S 105 N 49	1
"	S 105 N 49	5
"	S 105 N 49	6a
"	S 105 N 51	1a
195	S 105 N 44	4a
228	Pre N 2	11
"	S 1 N 5A	1
"	S 105 N 1	3a
"	S 105 N 1	7a

1953 S C *con*
228*con* S 106 N 13 1a
" S 111 N 16 2
" S 111 N 16 3
" S 111 N 16 9
" S 111 N 16 9a
" S 111 N 25 2
" S 111 N 25 3a
" S 114 N 7 1a
" S 114 N 7 5
" S 116 N 1 8a
" S 117 N 2 18
503 S 53A N 14a 5a
" S 53A N 15 1

1954 SC
44 S 54 N 23 6
75 S 54 N 23 12a
S 55 N 9 13
316 S 3 N 11a 4
336 S 60 N 23 10
345 S 8 N 20 1
" S 8 N 20 2
" S 8 N 20 3
" S 8 N 20 7
" S 58 N 33 3
" S 58 N 33 4
" S 58 N 33 17
" S 58 N 33 42a
" S 58 N 33 45
" S 58 N 33 46
" S 58 N 33 47bb
355 S 8 N 6 1a
" S 8 N 6 23
470 S 36 N 3 3
496 S 105 N 4 3a
758 S 105 N 8 1a

1955 SC
(S)328 S 107 N 7 5
(S)376 S 3 N 23 1
" S 3 N 23 2
" S 3 N 23 2a
" S 5 N 7 1a
" S 8 N 9 1a
" S 8 N 17 19
" S 130 N 19 4a

AIR
AJMER

1949 Ajmer
38 S 106 N 39 6
52 S 59A N 3 1

1950 Ajmer
29 S 52 N 41 4
41 S 53 N 6 17
59 S 48 N 3 2
" S 54 N 23 6
" S 58 N 35 11a
" S 58 N 35 17a
" S 108(j) N 8 1
79 S 106 N 2 7
" S 106 N 32 8a

1951 Ajmer
10 S 63A N 3 1
18 S 51 N 1 10
" S 51 N 10 1
" S 51 N 18 2
21 S 60 N 50 2
28 S 60 N 39 1
" S 63A N 4 1
" S 63A N 7 3

1951 Ajmer *con*
52 S 106 N 36 6
74 S 106 N 40 6
" S 11 N 11 9

1953 Ajmer
19 S 53A N 5 3
" S 53A N 13 3
24 S 105 N 40 1
" S 105 N 40 1a
" S 115 N 40 2
47 S 53A N 9 1
" S 53A N 10 7
" S 53A N 13 7aa
50 S 67A N 1 10

1954 Ajmer
45 S 106 N 45 8
47 S 60 N 50 2
53(1) S 60 N 23 8a
62 S 106 N 19 5
" S 106 N 40 6
63 S 8 N 19 6
" S 8 N 20 3
65 S 105 N 70 10
" S 106 N 37 3
" S 106 N 45 6
" S 106 N 45 8a
70 S 53A N 10 3
" S 53A N 10 9
77 S 8 N 20 40
" S 100 N 5 23

1955 Ajmer
23 S 51 N 10 1

AIR ALLAHABAD

1925 All
203 S 54 N 21 9

1928 All
71 S 68 N 16 5

1931 All
277 S 2 N 6 9
" S 63A N 2 1a

1932 All
444 S 122 N 7 5
" S 122 N 7 6

1933 All
449 S 43 N 4 3

1934 All
115 S 106 N 22 5

1935 All
351 S 68 N 1 7

1936 All
600 S 54 N 4 3c

1937 All
25 S 54 N 4 3c
317 S 6 N 16 9

1938 All
577 S 58 N 4 2
649 S 106 N 19 7
" S 106 N 41 6
" S 116 N 11 3

1939 All
279 S 137 N 4 17
415 S 8 N 3 6b
611 S 53A N 13 3
687 S 52 N 14 11
" S 52 N 20 1
" S 52 N 20 6

1940 All
340 S 53A N 13 3

1942 All
39 S 55 N 9 1b

1943 All
393 S 60 N 50 14b

1944 All
17 S 3 N 5 5
233 S 76 N 18 3

1948 All
344 S 76 N 18 3

1949 All
173 S 106 N 40 1
433 S 5 N 5 1
" S 5 N 5 2
" S 5 N 5 5
" S 5 N 5 8
" S 5 N 5 18a
" S 6 N 16 7
" S 6 N 16 9
" S 6 N 17 7a
539 S 100 N 5 4
" S 100 N 5 23
555 S 55 N 12 1
589 S 83 N 2 10
610 S 112 N 1 6a
681 S 63A N 1 8
" S 76 N 8 5
703 S 106 N 2 8
" S 116 N 11 1
" S 116 N 11 3
733 S 122 N 11 3

1950 All
53 S 82 N 16 3
88 S 60 N 26 2
105 S 76 N 19 5
109 S 41 N 8 5
" S 41 N 9 4a
" S 41 N 21 6a
192 S 76 N 18 3
320 S 5 N 4 4
" S 5 N 4 14a
" S 6 N 3 19
" S 6 N 4 8
430 S 58 N 33 3
" S 58 N 33 4
" S 58 N 33 6
" S 58 N 33 38
466 S 62 N 5 13
535 S 51 N 10 4
583 S 105 N 29 6
" S 105 N 32 5a
" S 105 N 32 8a
" S 105 N 32 15
" S 105 N 72 6
" S 105 N 80a 1a
" S 106 N 6 7
" S 106 N 24 4
" S 111 N 6 6a
" S 111 N 24 4
" S 111 N 24 5
" S 116 N 1 1
598 S 67 N 27 4
" S 67 N 27 6
632 S 54 N 5 5
" S 54 N 5 13
" S 54 N 5 14
" S 54 N 12 18
" S 54 N 14 2
" S 54 N 23 2

1950 All *con*
661 S 105 N 7 1a
" S 105 N 7 8
" S 105 N 8 4
" S 105 N 9 1
" S 105 N 9 2
" S 105 N 9 3a
" S 107 N 7 7
" S 107 N 10 5
682 S 92 N 22 4
700 S 53A N 6 5

1951 All
86 S 54 N 4 3c
" S 54 N 12 5
" S 123 N 4 2
93 S 55 N 1 1a
" S 55 N 9 1b
" S 55 N 9 13
" S 55 N 9 14
" S 55 N 9 68
141 S 39 N 2 1
" S 39 N 2 2
" S 39 N 5 1a
" S 52 N 11 13c
" S 52 N 14 11
" S 52 N 20 1
" S 52 N 20 6
" S 100 N 28 11
" S 100 N 28 14
195 S 68 N 16 5
392 S 60 N 5 19a
396 S 106 N 13 3a
" S 106 N 40 1
" S 106 N 45 14
431 S 58 N 2 11
443 S 53 N 5 3
" S 53 N 6 1
" S 53 N 10 4
" S 53 N 14 1
" S 83 N 6 15
462 S 5 N 1 3
478 S 112 N 6 5
" S 113 N 3 2
" S 113 N 3 9
" S 116 N 12 1
483 S 106 N 43 2a
522 S 6 N 4 7
" S 6 N 4 8
529 S 123 N 12 7
596 S 82 N 17 10a
" S 92 N 22 4
599 S 23 N 6 1a
" S 123 N 1 4
" S 126 N 2 4
618 S 58 N 21 5
643 S 76 N 18 3
" S 76 N 18 4a
654 S 73 N 2 3
655 S 91 N 13 3
" S 105 N 6 2a
" S 105 N 6 6a
" S 105 N 42 13
623 S 5 N 4 4
" S 5 N 4 6
" S 5 N 4 15
853 S 106 N 32 5

1952 All
32 S 106 N 40 1
83 S 53 N 5 2
125 S 108 (1) N 14 11

1952 All. *con.*

141 S 106 N 6 1a
" S 106 N 19 7
" S 106 N 41 6
" S 110 N 1 5
" S 111 N 14 8
" S 111 N 16 7
146 S 122 N 2 5a
163 S 56 N 8 1b
" S 56 N 8 3
200 S 54 N 5 5
" S 58 N 33 14
" S 58 N 33 44
" S 58 N 33 45
" S 58 N 33 46
226 S 53 N 24 9
287 S 43 N 12 3
298 S 52 N 32 2
301 S 43 N 7 2
" S 43 N 13 1a
" S 43 N 13 1b
" S 43 N 13 2a
" S 43 N 13 2b
315 S 100 N 17 2
344 S 105 N 9 2
" S 105 N 14 10a
579 S 106 N 24 13
" S 106 N 40 6
" S 111 N 23 2
" S 113 N 3 6a
" S 114 N 7 1
634 S 107 N 4 4
" S 116 N 11 6
662 S 6 N 10 9
" S 6 N 13 13b
716 S 58 N 31 32b
" S 58 N 33 47b
" S 58 N 33 47c
863 S 106 N 24 15
" S 113 N 3 1
" S 113 N 3 13

1953 All

33 S 62 N 2 2
" S 83 N 2 9
147 S 67 N 19 3
" S 73 N 1 6
213 S 5 N 4 4
" S 5 N 4 6
" S 5 N 4 15
" S 6 N 4 8
218 S 106 N 19 5b
" S 106 N 24 15
" S 106 N 40 6
295 S 67 N 21 4
" S 67 N 21 5a
" S 92 N 5 1
" S 92 N 8 1
" S 92 N 22 4
406 S 38 N 5 8
" S 51 N 7 8
" S 51 N 8 14
" S 51 N 9 1
449 S 2 N 6 9
" S 51 N 6 1
" S 51 N 6 4
472 S 76 N 1 9
" S 76 N 6 6
" S 83 N 2 10
499 S 105 N 9 1
" S 105 N 9 2
" S 107 N 3 2

1953 All. *con.*

499*con* S 107 N 10 3
" S 107 N 15 4
503 S 60 N 26 2
588 S 100 N 28 6b
598 S 106 N 40 6
620 S 60 N 4 1a
" S 62 N 2 9
705 S 8 N 4 2a
797 S 111 N 14 7a
" S 111 N 14 8
" S 111 N 14 13a
" S 111 N 14 14

1954 All

16 S 76 N 6 6
" S 76 N 6 13a
" S 111 N 5 2a
195 S 8 N 20 5
" S 8 N 20 9
" S 8 N 20 28
" S 54 N 5 9a
" S 54 N 10b 1
314 S 58 N 21 1
" S 68 N 3 12a
348 S 55 N 15 1
" S 55 N 15 3
" S 55 N 15 4
" S 65 N 11 2
" S 68 N 8 9
" O 34 R 6 N 4 2
420 S 72 N 3 13a
452 S 43 N 4 1
" S 43 N 11 3a
475 S 107 N 9 8b
" S 116 N 1 6
" S 116 N 1 7
" S 116 N 4 6
" S 116 N 6 7
" S 116 N 13 6
595 S 41 N 22 4
" S 122 N 7 6
" S 123 N 6 12
" S 125 N 16 1a
643 S 55 N 7 4a
649 S 111 N 16 7
" S 111 N 16 8
" S 114 A N 2 3
747 S 137 N 5 2
" S 137 N 5 6c
770 S 128 N 4 1

1955 All

(S)24 S 3 N 30 9
" S 55 N 2 15
(S)255 S 123 N 4 2
(S)288 S 43 N 2 14
" S 43 N 5 1
" S 43 N 5 2
(S)292 S 8 N 19 3a
(S)339 S 51 N 8 8
" S 51 N 8 13
" S 60 N 34 2

AIR ANDHRA

1954 Andhra

15 S 92 N 31 2

1955 Andhra

(S)49 S 6 N 4 5
" S 6 N 4 7
(S)62 S 108(b) N 2 1
" S 108(b) N 2 5a

1955 Andh. *con.*

(S)62*con* S 108(b) N 2 7
" S 108(c) N 4 5
199 S 52 N 14 11b

AIR ASSAM

1949 Assam

17 S 41 N 7 1
" S 41 N 21 1
" S 41 N 23 1a
" S 41 N 23 9
61 S 111 N 13 8
" S 111 N 13 20
S 112 N 2 9
78 S 105 N 35 7a
87 S 116 N 12 1
S 116 N 12 3

1950 Assam

1 S 44 N 4 3a
17 S 105 N 8 6
18 S 58 N 35 28
" S 58 N 41 3
" S 58 N 41 5
59 S 43 N 9 5
" S 91 N 5 3
107 S 53A N 9 1
" S 54 N 19 14a
" S 58 N 40 6
" S 58 N 41 3
119 S 52 N 27 2
129 S 53A N 6 4a
" S 53A N 10 1
" S 53A N 10 2

1951 Assam

20 S 43 N 7 2b
" S 43 N 7 8
" S 55 N 1 13
56 S 3 N 22 21
" S 100 N 4 1
62 S 108(c) N 1 7
" S 109(q) N 2 2
68 S 91 N 5 4
70 S 105 N 25 4
" S 111 N 14 30
88 S 105 N 63 1
101 S 65A N 1 7a
" S 91 N 12 1a
140 S 105 N 72 4a
" S 108(j) N 8 1

1952 Assam

19 S 53 N 35 23
" S 58 N 35 34a
" S 58 N 41 3
" S 60 N 28 13
28 S 53A N 13 2a
52 S 54 N 21 12
100 S 103 N 13 2
111 S 52 N 40 5
132 S 106 N 40 8

1953 Assam

19 S 123 N 5 1
82 S 82 N 19 2
202 S 106 N 41 1
" S 106 N 42 2
206 S 106 N 84 20
" S 106 N 84 21
" S 106 N 84 23
" S 106 N 45 2

1954 Assam

23 S 130 N 15 8
45 S 8 N 20 2
" S 8 N 20 3
53 S 105 N 25 2b
" S 105 N 26 1a
" S 105 N 26 1b
" S 105 N 26 1c
" S 105 N 26 1d
" S 105 N 31 18
" S 106 N 15 2
95 S 3 N 24 7
" S 6 N 17 14
" S 14 N 10 2b
102 S 107 N 4 1
" S 107 N 6 1
" S 116 N 1 8b
" S 116 N 11 7
" S 116 N 12 2
" S 117 N 2 1b
" S 117 N 2 17
" S 117 N 4 1

1955 Assam

102 S 106 N 2 7a
" S 106 N 13 5
" S 106 N 15 1

AIR BHOPAL

1953 Bhopal

18 S 58 N 33 38
" S 58 N 33 47d

AIR BOMBAY

1926 Bom

374 S 8 N 20 4
" S 8 N 20 9
" S 105 N 27 2
" S 105 N 27 6
" S 107 N 3 3

1927 Bom

115 S 108(f) N 1 4

1933 Bom

97 S 91 N 12 9a
3-1 S 53A N 13 3

1934 Bom

134 S 76 N 8 21

1935 Bom

247 S 106 N 45 7

1939 Bom

403 S 52 N 20 8

1941 Bom

346 S 53A N 13 8

1943 Bom

306 S 106 N 2 7
" S 106 N 41 2
431 S 54 N 21 9

1944 Bom

105 S 53A N 9 2
" S 53A N 16 5a

1945 Bom

132 S 118 N 1 1

1947 Bom

152 S 68 N 5 10a

1948 Bom
347 S 106 N 24 11
1949 Bom
367 S 52 N 4 1a
1950 Bom
49 S 69 N 3 8
71 S 65A N 1 8
" S 65A N 2 1
89 S 111 N 9 1
" S 111 N 10 23
123 S 111 N 1 3
" S 111 N 1 4a
" S 111 N 11 2a
" S 111 N 13 24a
" S 111 N 16 9
" S 111 N 25 2
155 S 6 N 23 3a
161 S 105 N 26 1
" S 105 N 27 9a
" S 105 N 47 6
" S 105 N 47 10
" S 105 N 47 11
" S 105 N 72 2
" S 105 N 72 7
" S 105 N 72 12
247 S 53 N 5 11b
278 S 52 N 14 5
" S 53 N 5 11a
289 S 19 N 10a 4
401 S 55 N 9 25
" S 55 N 9 37
1951 Bom
4 S 122 N 1 8
19 S 72 N 4 6
" S 76 N 7 18
94 S 5 N 1 1
" S 5 N 4 20
127 S 3 N 2 3
" S 53A N 6 2
" S 105 N 2 2
" S 105 N 3 1
205 S 108 (b) N 2 6b
283 S 111 N 1 2
" S 111 N 1 4a
" S 111 N 11 2a
" S 111 N 16 2
" S 111 N 16 9
" S 111 N 16 9a
" S 111 N 25 2
" S 111 N 25 2a
290 S 114 N 9 2
365 S 108 (q) N 1 7a
1952 Bom
56 S 54 N 12 2a
" S 54 N 13 1a
" S 54 N 14 1
" S 54 N 14 3
67 S 55 N 20 10
" S 55 N 20 10a
" S 55 N 20 15
" S 55 N 20 36
100 S 108 (b) N 2 9
" S 108 (o) N 4 1a
1952 Bom con
217 S 59A N 3 1aa
425 S 9 N 2 4
454 S 3 N 2 6
" S 3 N 2 7
" S 58 N 4 2
1953 Bom
76 S 108 (q) N 1 1
" S 111 N 1 6a
101 S 6 N 3 5
" S 43 N 7 12
" S 100 N 4 1
129 S 114 N 1 4a
" S 114 N 5 1
145 S 54 N 8 2
" S 54 N 17 1
" S 65 N 20 1
" S 55 N 20 4
280 S 103 (b) N 5 2
" S 108 (l) N 6 5
315 S 91 N 12 9a
332 S 106 N 9 2
405 S 91 N 5 3
" S 91 N 5 4
408 S 60 N 28 6
" S 60 N 28 6a
" S 60 N 28 7
412 S 10 N 15 4
424 S 60 N 22 15
437 S 54 N 22 2
" S 54 N 22 5
1954 Bom
56 S 106 N 9 3
81 S 58 N 38 27
95 S 5 N 4 16a
" S 54 N 11a 2
153 S 53A N 14 3-4
167 S 6 N 17 9a
257 S 8 N 20 4
" S 8 N 20 9
" S 105 N 26 1a
" S 105 N 27 1
" S 105 N 27 2
" S 105 N 27 6
" S 105 N 41 3a
" S 105 N 47 8
" S 105 N 50 1
" S 105 N 72 3
" S 105 N 72 6
" S 105 N 72 6a
" S 107 N 3 3
" S 108 (j) N 1 11a
358 S 116 N 13 10
370 S 1 N 5A 2
" S 2 N 6 1a
" S 8 N 20 1
" S 8 N 20 2
" S 8 N 20 4
" S 8 N 20 9
" S 8 N 20 28
" S 105 N 1 7b
" S 105 N 13 1a
" S 105 N 13 1d
407 S 68 N 5 10a
417 S 76 N 22 2a
417 con S 76 N 22 5
518 S 54 N 14 2
1955 Bom
175 S 8 N 20 9
" S 105 N 14 1a
" S 105 N 14 7

AIR CALCUTTA

1914 Cal
850 S 111 N 13 5a
1916 Cal
870 S 65A N 1 6
1917 Cal
222 S 65A N 1 6
1919 Cal
54 S 116 N 11 3
1921 Cal
582 S 108(j) N 1 2
1922 Cal
168 S 3 N 17 5a
1923 Cal
524 S 108(f) N 1 4
1926 Cal
1205 S 111 N 14 12a
1927 Cal
39 S 108(j) N 1 2
210 S 105 N 44 13a
1932 Cal
451 S 100 N 9 1
" S 100 S 9 4
1934 Cal
135 S 106 N 2 8
" S 116 N 11 1
" S 116 N 11 3
549 S 137 N 4 17
1936 Cal
240 S 108(b) N 7 2
1937 Cal
245 S 105 N 44 16
1938 Cal
656 S 106 N 2 7
1939 Cal
460 S 6 N 16 16a
" S 6 N 20 10
1944 Cal
84 S 106 N 42 2
1946 Cal
129 S 5 N 4 20
1947 Cal
378 S 105 N 35 6
1949 Cal
47 S 116 N 6 3b
204 S 53 N 7 2
" S 53 N 9 8
278 S 5 N 5 24
510 S 55 N 8 2a
519 S 3 N 2 33a
668 S 41 N 23 1a
" S 41 N 23 3
" S 41 N 23 5a
" S 41 N 23 6a
" S 41 N 23 9
1950 Cal
1 S 111 N 7 10a
20 S 106 N 13 2
23 S 53A N 13 1
" S 53A N 13 8
" S 53A N 13 10a
" S 53A N 16 3
" S 105 N 14 2
" S 105 N 14 3
" S 105 N 14 3a
" S 105 N 14 7
" S 106 N 12 6
" S 107 N 1a 1
111 S 44 N 8 3
195 S 40 N 1 4
" S 40 N 25 1b
225 S 106 N 43 6
256 S 112 N 6 1
323 S 100 N 5 1
333 S 55 N 6 5
" S 55 N 7 5
" S 55 N 7 6
" S 55 N 8 13b
441 S 108(e) N 4 1a
" S 108(e) N 6 2
515 S 113 N 3 13a
1951 Cal
151 S 54 N 1 2a
202 S 91 N 3 3
" S 91 N 3 4
221 S 52 N 14 17a
251 S 108(j) N 4 4
269 S 106 N 43 4
343 S 113 N 2 1
" S 113 N 3 2c
361 S 107 N 10 2
" S 107 N 12 4
" S 117 N 3 19
385 S 105 N 44 13a
" S 105 N 45 2a
" S 105 N 65 1a
394 S 50 N 1 3
398 S 3 N 23 9a
" S 3 N 29 6
" S 3 N 30 10
" S 3 N 33 2
" S 100 N 1 1
" S 100 N 22 3
412 S 44 N 8 2a
448 S 105 N 70 10
481 S 52 N 31 2
" S 52 N 35 1
560 S 108(q) N 2 2
1952 Cal
19 S 106 N 40 6a
" S 106 N 42 2
47 S 111 N 11 1b
" S 111 N 11 1c
" S 111 N 11 10a
" S 111 N 13 8
" S 112 N 1 1a
" S 112 N 2 1a
" S 112 N 2 7
" S 112 N 2 12a
" S 112 N 5 1
" S 112 N 6 2
" S 112 N 6 3
93 S 55 N 20 24
" S 55 N 20 25
" S 55 N 20 26
" S 55 N 20 27

1952 Cal con.
98con S 55 N 20 28
" S 55 N 20 33
130 S 113 N 3 13a
141 S 108(j) N 1 5
196 S 111 N 10 3
" S 115 N 1 3
207 S 111 N 4 7b
" S 111 N 11 17
" S 111 N 15 4
" S 111 N 26 2
221 S 106 N 2 5
" S 106 N 19 12
" S 106 N 45 9a
253 S 44 N 8 1
" S 44 N 8 2a
" S 44 N 8 3
" S 44 N 8 3a
" S 44 N 9 1a
320 S 106 N 13 2b
" S 106 N 13 2c
" S 106 N 13 3d
" S 107 N 4 2a
352 S 107 N 10 5
391 S 105 N 59 1a
427 S 13 N 5 1
" S 15 N 5 1
455 S 106 N 2 8
" S 111 N 9 9a
" S 111 N 10 1a
" S 111 N 10 2a
" S 111 N 10 22
" S 113 N 3 1a
" S 113 N 3 2b
" S 116 N 12 5
" S 116 N 12 7
567 S 111 N 25 6
749 S 101 N 4 5
773 S 106 N 43 6
915 S 105 N 14 13a

1953 Cal
149 S 105 N 14 3
" S 105 N 14 7
160 S 106 N 19 5a
" S 106 N 19 7
" S 106 N 38 1a
208 S 58 N 39 87
" S 68 N 2 2
" S 68 N 18 2a
" S 68 N 18 5
" S 96 N 2 1
251 S 53 N 5 2
" S 53 N 14 2
259 S 44 N 9 5a
321 S 6 N 16 11
" S 6 N 16 16
" S 6 N 18 2
349 S 53A N 13 10a
" S 105 N 8 4a
" S 105 N 82 1a
" S 106 N 6 3
" S 106 N 18 1
" S 106 N 39 2
" S 113 N 2 1
" S 113 N 3 1a
352 S 106 N 19 4
" S 106 N 19 6
" S 106 N 19 7
536 S 114A N 1 6
585 S 106 N 19 7
676 S 100 N 28 18a

1953 Cal con.
729 S 108(j) N 1 13

1954 Cal
129 S 6 N 17 15
207 S 53A N 6 3aa
" S 107 N 7 1
" S 107 N 7 5
" S 107 N 10 6a
219 S 111 N 7 1a
" S 111 N 7 6
" S 111 N 7 15
224 S 106 N 13 3c
" S 10·(p) N 1 1a
243 S 106 N 41 3
345 S 51 N 7 9
367 S 3 N 28 9
" S 3 N 34 9
400 S 11 N 7 5
404 S 113 N 3 1a
" S 113 N 3 2c
" S 116 N 6 2
440 S 53 N 24 18
460 S 113 N 3 2c
" S 113 N 3 2d
480 S 8 N 20 40
539 S 116 N 12 1
541 S 108 j) N 1 2
" S 111 N 13 4

1955 Cal
21 S 40 N 8 3
(S)101 S 54 N 14 3
169 S 106 N 13 3d
(S)194 S 60 N 5 11
" S 60 N 5 16
" S 67 N 5 3
" S 67 N 5 5
" S 79 N 2 2a
" S 79 N 2 2b
" S 93 N 3 1a
" S 93 N 3 1b
(S)226 S 106 N 9 5
" S 110 N 3 1
" S 111 N 23a 6
237 S 55 N 7 2a

AIR DACCA
1950 Dacca
9 S 81 N 7 1
" S 82 N 12 1

AIR EAST PUNJAB
1949 E P
193 S 52 N 28 1
251 S 82 N 6 13
" S 92 N 24 3a
389 S 60 N 5 8

1950 E P
74 S 55 N 1 7
" S 55 N 9 10a
" S 55 N 9 17
" S 55 N 9 19
175 S 111 N 1 9
" S 111 N 27 1a
" S 116 N 1 6
" S 116 N 5 1
" S 116 N 6 1
278 S 55 N 2 5
296 S 105 N 5 1a

1950 E P con.
296con S 105 N 5 8a
" S 105 N 14 1
" S 105 N 14 2
" S 105 N 14 3

AIR HIMACHAL PRADESH
1951 Him Pra
54 S 126 N 9 11
65 S 105 N 79 6a
" S 111 N 13 20d

AIR HYDERABAD
1950 Hyd
51 S 58 N 33 40
" S 58 N 33 41
58 S 54 N 19 20

1951 Hyd
42 S 53A N 12 5
" S 54 N 21 7
" S 54 N 21 9
111 S 111 N 23a 2
" S 111 N 23a 3a
167 S 82 N 12 3

1952 Hyd
3 S 54 N 12 5a
" S 122 N 16 2
" S 129 N 2 2
5 S 58 N 4 7a
" S 58 N 4 6
" S 59 N 4 7

1953 Hyd
14 S 3 N 6 3
" S 3 N 7 3
" S 3 N 9 4a
" S 3 N 10 4a
" S 3 N 10 6
77 S 39 N 6 2
" S 53 N 7 1
97 S 53A N 6 2
" S 53A N 17 3
" S 113 N 3 2c
114 S 53A N 8 3b
" S 53A N 10 4
129 S 111 N 5 1a
" S 111 N 5 2
137 S 67 N 13 2a
225 S 55 N 5 11a
231 S 68 N 5 7
" S 68 N 5 9
" S 68 N 5 10

1954 Hyd
41 S 68 N 5 9
185 S 19 N 6 9
" S 51 N 3 1
" S 52 N 35 1
" S 52 N 35 2
" S 52 N 35 3

1955 Hyd
98 S 111 N 5 6
101 S 6 N 3 22
" S 51 N 8 8
" S 51 N 8 13
" S 53A N 3 14
" S 53A N 5 3
" S 53A N 10 2
" S 53A N 13 13
" S 53A N 13 15

1955 Hyd con.
101con S 53A N 19 1
(S)158 S 83 N 2 4
" S 83 N 17 19
" S 83 N 17 20

AIR JAMMU AND KASHMIR
1952 J & K
18 S 5 N 4 20
35 S 106 N 24 4
" S 116 N 2 3
" S 116 N 13 2
" S 116 N 13 5

1953 J & K
14 S 63A N 1a 2
15 S 106 N 2 7

AIR KUTCH
1949 Kutch
10 S 58 N 31 29a
" S 58 N 31 29b
13 S 53A N 13 3

1950 Kutch
14 S 63A N 5 3
34 S 41 N 8 10a
" S 41 N 10 3c
36 S 60 N 41 4
" S 60 N 50 9
49 S 130 N 17 15a
57 S 53 N 34 1a
" S 53 N 31 3
64 S 1 N 1 1
" S 53A N 18 1
" S 53A N 18 6
74 S 63A N 4 1
77 S 76 N 7 7
88 S 58 N 6 4
90 S 72 N 11 5
" S 76 N 12 14a
" S 76 N 16 1a

1951 Kutch
4 S 58 N 9 12
" S 53 N 37b 1
72 S 105 N 71 5
" S 111 N 4 7a
" S 111 N 23 8c
85 S 41 N 10 2b

1952 Kutch
1 S 60 N 22 1
" S 60 N 23 1b
" S 60 N 22 7
" S 60 N 50 1
10 S 55 N 1 7
" S 55 N 20 3a
13 S 105 N 31 9
" S 105 N 31 10
" S 105 N 32 2
" S 106 N 6 5
18 S 68 N 5 8a
55 S 41 N 2 2
" S 41 N 2 2a
" S 41 N 8 1a1
" S 41 N 10 5a
" S 41 N 10 9
" S 41 N 22 6a
" S 41 N 24 4
65 S 53 N 37b 1
" S 58 N 37b 2

1952 Kutch *con.*
65*con* S 58 N37b 3
" S 58 N37b 4

1953 Kutch
4 S 58 N35 1
" S 58 N37c 1
" S 58 N37c 2
8 S 58 N37c 1
" S 60 N41 12
" S 60 N44 5

AIR LAHORE

1919 Lah
127 S 118 N2 8

1923 Lah
659 S 106 N2 7

1926 Lah
372 S 123 N4 1a

1940 Lah
269 S 3 N34 11

1947 Lah
273 S 61 N5 2

1949 Lah
264 S 58 N4 2

1950 Lah
54 S 100 N13 5
106 S 55 N2 24
" S 55 N20 14

AIR MADHYA BHARAT

1950 Madh B
19 S 115 N1 2
39 S 108(h) N2 8
72 S 68 N1 5
" S 83 N8 9a
" S 108(j) N1 5
" S 108(j) N2 2

1951 Madh B
92 S 3 N2 31
" S 3 N31 1
120 S 6 N6 3

1952 Madh B
6 S 60 N22 7a
" S 63A N1 2
16 S 100 N9 1
" S 100 N9 2
" S 100 N9 4
56 S 105 N59 12a
" S 105 N64 1
121 S 106 N24 14
" S 111 N23a 3
" S 111 N23a 3a
145 S 55 N2 13
" S 55 N3 13
" S 55 N3 14
" S 55 N20 14
" S 55 N20 36
196 S 58 N11 8a
" S 58 N11 9

1953 Madh B
9 S 58 N35 28
" S 58 N36 9
" S 58 N41 9
" S 98 N3 1a

1954 Madh B
6 S 58 N11 9
" S 58 N11 11

1954 Madh B *con.*
6*con* S 58 N11 12
" S 58 N11 12a
26 S 112 N2 10
37 S 113 N1 1a
" S 113 N1 2a
" S 113 N2 1a
" S 113 N3 1b
" S 113 N3 2aa
" S 117 N2 15a
67 S 60 N44 2
" S 60 N44 3
" S 60 N44 5
" S 60 N44 6
" S 91 N24 1
123 S 53A N10 8
" S 53A N15 2
" S 53A N18 2
153 S 6 N3 19
156 S 67A N6 1a
181 S 73 N10 9a
193 S 60 N27 15

1955 Madh B
49 S 53A N5 3
" S 53A N10 3
" S 53A N10 4
" S 53A N10 5
" S 53A N13 2
" S 53A N16 3
(S)93 S 53A N10 2
" S 53A N15 2
" S 53A N20 2

AIR MADRAS

1914 Mad
706 S 114 N7 5

1915 Mad
972 S 6 N7 10

1916 Mad
526 S 55 N9 24
680 S 114 N7 1a

1918 Mad
491 S 3 N18 2
674 S 100 N9 1
" S 100 N9 4

1919 Mad
12 S 1 N5A 1

1920 Mad
838 S 111 N23 8b

1921 Mad
12 S 60 N29 2

1927 Mad
403 S 52 N20 8
502 S 52 N20 8

1928 Mad
250 S 114 N7 5
545 S 54 N21 9

1930 Mad
824 S 52 N20 8

1933 Mad
583 S 67 N20 2
795 S 6 S7 10

1935 Mad
837 S 52 N20 8

1936 Mad
84 S 52 N20 8
301 S 54 N21 9

1940 Mad
69 O 34 R1 N5 6
" O 34 R1 N6 10
140 S 3 N2 33a
703 S 48 N14 2

1945 Mad
225 S 60 N26 17c
" S 60 N48 10

1946 Mad
38 O 34 R8 N4 1a
456 S 85 N33 44

1947 Mad
68 S 111 N16 2
" S 111 N16 9
" S 111 N16 9a
" S 111 N25 2
" S 111 N25 3a
86 S 82 N15 3

1948 Mad
275 S 105 N1 3a
" S 106 N13 1a
" S 111 N16 9a
" S 111 N25 3a
" S 116 N1 8a
" S 117 N2 18

1949 Mad
52 S 8 N17 9a
127 S 111 N23a 3a
148 S 3 N2 33b
275 S 106 N13 1a
618 S 105 N62 2
" S 108(j) N6 5
" S 106(l) N7 4
768 S 60 N32 8
780 S 111 N23a 1
" S 111 N23a 2
" S 111 N23a 3
841 S 114 N8 2
882 S 54 N5 3
886 S 52 N36 1

1950 Mad
25 S 111 N13 19a1
39 S 100 N29 12b1
60 S 113 N3 13a
146 S 58 N18 1
186 S 92 N1 5
" S 92 N1 9
" S 92 N7 1
" S 92 N22 4
189 S 52 N31 5
224 S 56 N8 1a
" S 56 N8 1aa
" S 56 N8 1c
271 S 122 N1 3
333 S 72 N3 1
396 S 52 N11 13c
560 S 6 N16 16a
" S 6 N20 10
606 S 38 N5 4
" S 38 N7 2a
" S 38 N8 4b
612 S 58 N37 6a
621 S 55 N9 19
746 S 116 N2 4
824 S 6 N22 1

1951 Mad
187 S 58 N37 2
" S 58 N37 5

1951 Mad *con.*
187*con* S 72 N3 9
" S 98 N7 2
213 S 5 N4 21
" S 53A N6 4a
318 S 8 N9 10
388 S 53 N35 1
408 S 106 N2 6a
" S 106 N2 7
470 S 85 N7 14
524 S 60 N30 1
" S 60 N30 6
601 S 8 N14 2
" S 8 N14 4
" S 36 N2 7a
" S 36 N4 1
628 S 6 N19 4
657 S 52 N30 1
718 S 108(l) N10 1
767 S 14 N10 2
" S 54 N23 6
798 S 11 N2 5a
" S 14 N10 2
" S 32 N8 9
" S 32 N9 3
809 S 134 N3 1
817 S 6 N16 16a
" S 6 N20 10
917 S 92 N20 9
" S 92 N20 10

1952 Mad
11 S 58 N33 23
" S 58 N33 27
" S 58 N33 28
" S 58 N33 30
" S 58 N33 38
59 S 3 N3 2
" S 52 N15 3
163 S 100 N16 6a
166 S 11 N7 4
" S 105 N69 8
176 S 58 N37 8
263 S 73 N1 3a
265 S 3 N28 9
" S 3 N29 1
" S 3 N30 11
" S 3 N39 9a
419 S 44 N6 1
510 S 117 N3 10
602 S 119 N5 1a
671 S 54 N4 3b
678 S 55 N11 13
" S 55 N11 14
" S 55 N12 10
856 S 58 N35 11a
" S 58 N35 14aa
" S 58 N35 34a
" S 58 N41 5
" S 67 N15 3
" S 67 N18 1
863 S 107 N11 1a

1953 Mad
13 S 58 N35 34a
" S 58 N40 5
" S 58 N41 3
" S 58 N11 5
" S 67 N18 1
" S 68 N12 2a
" S 98 N5 3
32 S 67 N3 1
" S 100 N25 3

1953 Mad *con*

71 S 52 N 1 12
" S 52 N 6a 1
" S 52 N 11 11
" S 100 N 28 15
161 S 5 N 4 12
" S 35 N 15 1
202 S 6 N 13 7
221 S 111 N 23a 1
313 S 111 N 16 8a1
" S 114A N 2 2
" S 114A N 3 1
356 S 115 N 1 2
" S 115 N 3 1b
366 S 60 N 46 1
370 S 55 N 11 15a
" S 55 N 14 8
" S 55 N 18 5
399 S 111 N 0 9
409 S 40 N 8 1
" S 40 N 8 3
" S 40 N 17 1
" S 54 N 23 6
456 S 105 N 13 14
" S 105 N 13 14a
473 S 116 N 12 2
529 S 55 N 9 25
" S 55 N 9 50
" S 55 N 9 51
" S 55 N 9 56
545 S 53 N 5 6
" S 53 N 9 11
" S 53 N 9 13
566 S 8 N 20 7
" S 8 N 20 9
" S 8 N 20 14
" S 8 N 20 24
" S 8 N 20 34
603 S 58 N 18 9
628 S 55 N 2 14
632 S 105 N 58 3a
" S 105 N 60 5a
637 S 6 N 7 5
" S 6 N 7 6
" S 6 N 7 10
" S 43 N 7 1
692 S 52 N 31 8
720 S 60 N 44 5
" S 72 N 2 7a
" S 72 N 3 1a
764 S 58 N 9 12
769 S 8 N 20 19
" S 55 N 2 28a
" S 55 N 2 30
" S 55 N 2 32
S 55 N 2 33
" S 55 N 9 24
821 S 84 N 3 3aa
" S 84 N 19 1
" O 34 R 1 N 6 1
830 S 58 N 33 44
873 S 82 N 18 1
" S 82 N 18 2a
876 O 34 R 15 N 10a 3
O 34 R 15 N 10a 6
" O 34 R 15 N 10a 8
884 S 106 N 2 8
" S 106 N 45 7

1953 Mad *con*

884*con* S 106 N 49 2a
" S 106 N 49 3
" S 116 N 11 3
" S 117 N 2 5aa
925 S 53A N 10 3
" S 53A N 15 3
948 O 34 R 11 N 2 40
926 S 108(m) N 2 6
" S 108(q) N 1 14
" S 111 N 23 8a1
" S 111 N 27 4
1000 S 78 N 11 1

1954 Mad

89 S 63A N 3 3
123 S 3 N 11 1a
" S 3 N 17 5a
" S 69 N 8 2b
128 O 34 R 5 N 16 4
161 S 105 N 42 5
" S 105 N 42 8
173 S 53 N 8 4
" S 53 N 10 4
" S 53 N 11 3
" S 53 N 11 4
" S 53 N 13 1
" S 53 N 13 2
" S 53 N 32 1
" S 53 N 32 6
193 S 60 N 5 6
197 S 48 N 14 1
" S 48 N 14 2
215 S 122 N 7 6a
" S 123 N 6 1
" S 123 N 6 12
" S 126 N 16 1
266 S 67 N 20 2
" O 34 R 1 N 19 41
412 S 105 N 49 1
" S 105 N 49 2
" S 105 N 50 1
" S 105 N 50 2a
" S 105 N 50 4
508 S 55 N 14 14a
" S 55 N 18 2
514 S 109 N 4 1a
540 S 67 N 28 2
" O 34 R 1 N 19 10a
556 S 35 N 2 2
592 S 52 N 38 1
" S 52 N 39 2
" S 52 N 38 4
604 S 44 N 4 3
" S 92 N 13 1
650 S 59A N 2 1
" S 59A N 3 3a
" S 60 N 26 1
" S 60 N 26 2
" S 67 N 21 4a
702 S 53A N 13 2
" S 53A N 13 3
729 S 55 N 14 7
739 S 111 N 16 9
818 S 60 N 41 7
" S 60 N 41 7a

1954 Mad *con*

820 S 137 N 4 15
" S 137 N 4 17
830 S 84 N 6 3
861 S 43 N 2 14
" S 43 N 9 11
896 S 69A N 5 2
935 S 108(b) N 3 3
" S 108(b) N 3 4
1008 S 8 N 20 1
" S 8 N 20 7
" S 8 N 20 8
" S 8 N 20 9
" S 8 N 20 11
" S 8 N 20 13
1045 S 8 N 20 23

1955 Mad

(S)93 S 105 N 60 17
(S)135 S 69 N 3 8a
" S 69 N 3 9
(S)165 S 6 N 13 14
" S 6 N 16 14
" S 6 N 19 1
(S)206 S 106 N 4 13a
" S 16 N 12 2
(S)208 S 56 N 12 4
" S 81 N 6 1a
245 S 5 N 3 16
" S 72 N 5 5aa
(S)260 S 60 N 41 14
265 S 76 N 12 22
(S)331 S 9 N 18 1a
" S 69 N 18 4
" S 69 N 23 5
" S 90 N 10 19
(S)350 S 10 N 1 2
" S 10 N 1 3
" S 10 N 1 4
" S 10 N 3 4a
S 10 N 6 1a
" S 10 N 6 4
" S 10 N 8 2
" S 10 N 12 2
" S 10 N 12 2a
" S 11 N 2 2
439 S 56 N 1 8
" S 60 N 43 8

AIR MANIPUR

1952 Manipur

10 S 38 N 5 1
11(1) S 7 N 3 3c
" S 7 N 3 7a

1954 Manipur

1 S 53 N 5 3
" S 53 N 5 6
" S 53 N 14 1
" S 53 N 14 2
22 S 7 N 7 15
" S 123 N 2 4
" S 123 N 2 5
" S 123 N 15 2

AIR MYSORE

1950 Mysore

9 S 108(c) N 3 5
33 S 122 N 2 7
63 S 108 N 24 7
" S 106 N 40 1

1951 Mys.

13 S 105 N 9 2
" S 105 N 9 3
24 S 105 N 7 4a
" S 105 N 9 2
" S 105 N 9 4a
103 S 53 N 5 2
" S 53 N 10 4
" S 53 N 24 14
126 S 53A N 5 3a

1952 Mys

12 S 91 N 8 1
56 S 53 N 33 42a
99 S 82 N 6 6
109 S 55 N 15 7
117 S 51 N 1 10
" S 51 N 4 1
" S 51 N 3 4
" S 51 N 19 1
" S 51 N 19 1
120 S 55 N 8 8a
125 S 67 N 15 6
" S 68 N 12 3
139 S 106 N 41 3
" S 106 N 41 8
" S 110 N 1 5a
" S 110 N 1 6a
" S 110 N 12

1953 Mys

22 S 3 N 34 9
" S 53 N 5 6
29 S 105 N 47 1
" S 105 N 47 6a
62 S 106 N 24 4
" S 105 N 35 4
105 S 58 N 33 1
" S 58 N 33 6
" S 58 N 33 31
" S 58 N 33 39
" S 58 N 33 44
" S 58 N 33 45
111 S 58 N 1 7
114 S 72 N 5 4a
" S 76 N 8 5
" S 76 N 8 31
122 S 101 N 9 1a

1954 Mys

26 S 52 N 13 24
41 O 34 R 6 N 3 18
89 S 105 N 13 12
" S 105 N 14 5
" S 105 N 17 2
" S 106 N 48 1
142 S 43 N 12 3
145 S 55 N 5 5b
" S 55 N 5 13a
177 S 58 N 40 3
" S 67 N 15 6
" S 68 N 17 11
187 S 60 N 5 21
" S 60 N 23 8
" S 60 N 27 2
" S 62 N 5 9a

1955 Mys

(S)8 S 43 N 2 13a
" S 43 N 2 14
" S 43 N 9 5
(S)38 S 53A N 10 3
" S 60 N 22 6

A I R NAGPUR

1931 Nag

91 S 84 N 6 3

1937 Nag

139 S 106 N 41 2

1938 Nag

377 S 54 N 19 4a

1940 Nag

382 S 3 N 19 3

1949 Nag

34 S 1 N 3a 2
81 S 65 N 4 2
218 S 112 N 5 1
" S 112 N 5 2
296 O 34 R 1 N 18 1
319 S 55 N 15 1
336 S 105 N 40 2
" S 105 N 70 5a
346 S 82 N 12 3
354 S 68 N 2 14a
368 S 88 N 11 8a
" S 68 N 11 8aa
389 S 54 N 11 1
" S 105 N 6 5a
" S 105 N 6 8a
" S 107 N 1 1a
410 S 53A N 13 7a
" S 54 N 17 4
" S 54 N 21 1
" S 54 N 21 9
" S 54 N 22 7
" S 54 N 22 8a

1950 Nag

22 S 58 N 33 42a
69 S 38 N 5 4
" S 38 N 8 4c
" S 38 N 8 8
83 S 3 N 15 1
" S 67 N 14 2
89 S 54 N 19 21
107 S 105 N 5 5
" S 105 N 14 1
" S 105 N 14 2
" S 105 N 14 3a
" S 105 N 14 7
117 S 9 N 2 5b
" S 100 N 13 5
" S 100 N 13 8
" S 100 N 16 5
" S 100 N 22 4
" S 100 N 28 1
" S 100 N 28 2
" S 100 N 28 10
198 S 58 N 33 1
" S 58 N 33 29
" S 58 N 33 42a
" S 58 N 33 45
" S 58 N 33 46
229 S 55 N 9 15
" S 55 N 9 55b
" S 55 N 22 1
" S 55 N 22 3
233 S 106 N 41 2
" S 110 N 1 9

1951 Nag

128 S 105 N 70 10
129 S 54 N 3 4
164 S 101 N 9 1a
171 S 5 N 4 15
" S 53A N 9 1
171 con S 53A N 10 4
" S 54 N 5 4
" S 54 N 17 1
" S 60 N 22 5a
" S 60 N 22 7a
" S 67 N 10 1
194 S 52 N 12 4
" S 52 N 13 21
" S 52 N 31 2
203 S 106 N 24 11
207 S 108(Gen) N 1 1b
" S 114 N 1 4a
241 S 43 N 2 16
" S 43 N 7 7
254 S 76 N 8 1
" S 76 N 8 17
" S 76 N 8 31
285 S 53A N 9a 1a
" S 53A N 16 3
" S 107 N 15 2
299 S 8 N 14 2
379 S 108(c) N 8 1
403 S 38 N 8 4c
" S 38 N 11 1
" S 38 N 12 1
" S 41 N 8 5
" S 41 N 23 1
" S 41 N 23 5
" S 53A N 4 4
" S 53A N 13 13
" S 53A N 13 14
" S 53A N 19 1
" S 54 N 5 5
428 S 54 N 4 3aa

1952 Nag

29 S 43 N 2 15
" S 43 N 2 16
" S 43 N 7 1a
" S 43 N 7 2
" S 43 N 7 2a
" S 43 N 7 3
" S 43 N 7 7
" S 43 N 7 7a
" S 43 N 13 1
" S 43 N 13 2a
45 S 54 N 11 2
" S 54 N 17 12
55 S 8 N 4 10a
" S 8 N 20 31
" S 8 N 20 37
" S 8 N 20 40
" S 122 N 1 3b
" S 122 N 14 1
60 S 8 N 20 40
" S 38 N 8 4a
64 S 41 N 3 3
" S 41 N 10 3d
" S 41 N 21 3
" S 41 N 23 5
101 S 106 N 19 4
" S 106 N 19 6
" S 106 N 40 6
106 S 3 N 29 7
" S 3 N 34 9
" S 41 N 2 5
" S 41 N 7 1
" S 41 N 8 3b
" S 41 N 8 5
" S 41 N 8 8
" S 41 N 8 9a
106 con S 41 N 22 4a
" S 41 N 22 5a
" S 41 N 23 4a
" S 41 N 23 4a 1
" S 41 N 23 5
" S 41 N 23 9
" S 41 N 25 1
" S 53 N 18 1
115 S 53A N 17 2
202 S 60 N 26 17
244 S 53A N 4 5
" S 53A N 11 1
" S 53A N 13 2
" S 53A N 15 2
246 S 53 N 7 3
" S 53A N 9 1
" S 53A N 11 1
321 S 54 N 19 4a
325 S 105 N 3 2
" S 105 N 14 3b
" S 105 N 14 10b
341 S 52 N 32 3
" S 60 N 27 1a
" S 60 N 41 12
" S 60 N 44 6
398 S 51 N 9 3

1953 Nag

4 S 91 N 32 1
18 S 106 N 34 4
31 S 106 N 36 4
167 S 54 N 5 10
" S 54 N 5 15
182 S 54 N 17 12
200 S 101 N 10 2
219 S 105 N 7 7a
" S 105 N 24 2a
" S 106 N 40 1
" S 113 N 3 7a
224 S 3 N 6 6
" S 3 N 9 9
236 S 52 N 35 2
" S 52 N 40 2
251 S 106 N 38 1
259 S 60 N 23 8
" S 60 N 27 1a
" S 60 N 44 5
" S 72 N 3 10
335 S 6 N 16 13a
" S 6 N 21 4
337 S 58 N 33 16c
" S 58 N 33 42a
339 S 3 N 19 3
353 S 111 N 13 5
" S 111 N 13 22
" S 111 N 14 15
" S 111 N 14 30
" S 111 N 14 30a

1954 Nag

11 S 3 N 14 4
" S 3 N 14 5a
20 S 105 N 69 3
65 S 55 N 8 2
" S 55 N 8 7
" S 55 N 8 13c
84 S 60 N 22 5b
109 S 54 N 18 2
" S 54 N 18 3
" S 54 N 19 13
" S 54 N 19 18b
109 con S 54 N 21 9
" S 54 N 22 7
129 S 53 N 6 9
" S 53 N 8 3
" S 53 N 15 2
" S 53 N 34 1a
" S 53 N 34 5
" S 53 N 34 7
" S 53 N 53 1
193 S 58 N 33 1
" S 58 N 33 3
" S 58 N 33 14
" S 58 N 33 23
" S 58 N 33 25
" S 58 N 33 26
" S 58 N 33 28a
" S 58 N 33 29
" S 58 N 33 32b
" S 58 N 33 38
" S 58 N 33 42a
" S 58 N 33 46
" S 84 N 5 26
" S 84 N 8 12
292 S 106 N 19 2
" S 106 N 19 4a
" S 106 N 40 2a
305 S 108(q) N 1 12a
328 S 111 N 7 6
" S 111 N 14 34

1955 Nag

(S)27 S 106 N 2 11
" S 106 N 39 1a
" S 107 N 7 3a
" S 116 N 11 7
(S)38 S 55 N 20 28b
170 S 105 N 4 2
" S 107 N 15 2
" S 107 N 15 2a
" S 107 N 15 5

A I R ORISSA

1950 Orissa

1 S 106 N 30 3
" S 106 N 40 1
" S 106 N 41 1
" S 106 N 41 2
" S 110 N 1 9
36 S 52 N 32 2
143 S 41 N 25 2
150 S 91 N 16 3
" S 91 N 16 4
" S 92 N 16 1
210 S 52 N 7 1
" S 52 N 31 2
" S 52 N 31 5
217 S 53A N 13 14
220 S 6 N 13 14
" S 6 N 13 15

1951 Orissa

11 S 54 N 21 13
41 S 52 N 14 2
" S 52 N 14 11a
" S 100 N 12 2a
132 S 126 N 11 2a
147 S 58 N 40 5
153 S 117 N 2 1b
" S 117 N 3 14a
262 S 106 N 6 5

SECTION 114A

Note 1

Add after Pt. 5c :

[Pt. 6] Where all the conditions of S. 114A are satisfied and the lessee fails to remedy the breach which was capable of remedy, no relief against forfeiture can be granted to the lessee. *1953 Cal 536 (AIR V 40 C 202 P 43), Charusila Dassi* v. *Madan Theatres, Ltd.*

Note 2

Add after Pt. 1 :

[Pt. 2] The Madras High Court also in a recent case has taken the same view. *1953 Mad 313 (A I R V 40 C 106 P 7) : I L R (1953) Mad 615 (DB), Mrs. Margaret Jean Massy* v. *Colonel Granville Alric Richard Spain.*

Add as separate para :

[Pt. 3] The right to institute a suit for ejectment accrues only after the requirements of S. 114-A have been complied with. The section requires that the plaintiff should allege in the plaint that their requirements of the section have been complied with. Where there is no evidence to show that the lease had been validly determined by notice as required by S. 114-A the suit cannot be decreed. *1954 All 649 (Prs 5, 6) (A I R V 41 C 255), Asghar* v. *U. P. Government.*

Note 3

Add in the Foot Note indicated :

1. 1953 Mad 313 (A I R V 40 C 106 P 8): I L R (1953) Mad 615 (DB), *Margaret Jean Massy* v. *Colonel Granville Alric Richard Spain.* (Technical defects in notice will not prevent lessor from availing himself of the right of forfeiture where the notice substantially complies with the section in that there is clear information to the lessee as regards the breaches complained so as to give him an opportunity to remedy them.)

SECTION 115

Note 1

Add in the Foot Notes indicated :

2. 1953 Mad 356 (A I R V 40 C 122 P 5) (DB), *Devaraja Bhatt* v. *Raja, V. S.* ✠ 1950 Madh B 19 (A I R V 37 C 10 P 4) (DB), *Shankarrao* v. *Kisanlal.* (Decree for ejectment against lessee and his sub-lessee — Decree becoming final as against lessee — Sub-lessee would be bound by the decree on the principles of second part of S. 115.)

3. 1952 Cal 196 (A I R V 39 C 73 P 15) : I L R (1952) 2 Cal 167 (DB), *Mahammad Ibrahim* v. *Bani Modhab.* (Such a surrender operates as an assignment to the lessor of the lessee's interest and thus brings the underlessee into immediate relation with the lessor.)

Note 3

Add in the Foot Note indicated :

1b. 1953 Mad 356 (A I R V 40 C 122 P 5) (DB), *Devaraja Bhatt* v. *Raja, V. S.*

SECTION 116

Note 1

Add in the Foot Notes indicated :

1. 1950 All 583 (A I R V 37 C 228 P 6) : I L R (1952) 1 All 85 (DB), *Raman Lal* v. *Bhagwan Das.* (When the lease has not been determined and the possession continues in accordance with the terms of the lease, the question of holding over does not arise)

6. 1954 All 475 (Pr 11) (A I R V41 C 197) (DB), *Sheo Dulare* v. *Anant Ram* ✠ 1950 East Punj 175 (A I R V 37 C 34 P 22), *Thakar Dass* v. *Custodian, E. P.* (Lessee before determination of lease by efflux of time applying to Custodian under S. 5A, East Punjab Evacuees (Administration of Property) Act, 1947—Custodian assenting to continuance in possession — There is renewal of lease.)

7. [*See also* 1954 All 475 (Pr 13) (A I R V 41 C 197) (DB), *Skeo Dulare* v. *Anant Ram.* (No fresh tenancy after termination of tenancy seems to arise in England unless both parties agree.)

Add after Pt. 7a.

[Pt. 7b] Where the relationship of landlord and tenant has ceased between the parties after the expiry of lease there could not have been any holding over after the service of two notices on the lessees which fact has been admitted by the lessees. 1955 N U C (Madh B) 52 (A I R V 42), *Santsaran* v. *Bankelal Ramlal.* (Lease expired by efflux of time— Notices to quit served on tenants — Tenants admitting service — No relationship of landlord and tenant—Doctrine of holding over does not apply.)

Add after Pt. 8 :

[Pt. 8aa] It was held by the Supreme Court in the undermentioned case that the statement in *Brahmayya* v. *Sundaramma,* 1948 Mad 275 (A I R V 35 C 140) : I L R (1948) Mad 757 (FB) that Ss. 105 to 116 are founded upon the principle of reason and equity could not be accepted either as correct or precise. It was however held that to the extent that these sections give statutory recognition to principles of justice, equity and good conscience, they are applicable to cases not governed by the Act.) 1953 S C 228 (A I R V 40 C 55 P 23) : 1953 S C R 1009 (S C), *Namdeo Lokman Lodhi* v. *Narmadabai.*

[Pt. 8b] It was further held by the Assam High Court that even if the principle behind S. 116 is allowed to operate in the case of an agricultural lease, a strict

adherence to its requirement would not be necessary. *1954 Assam 102 (Pr 11) (AIR V 41 C 37) : I L R (1954) 6 Assam 95, (DB), Sajid Mia Majumdar* v. *Abdul Sattar Gani.*

Add after Pt. 9 :

[Pt. 10] Similarly, though the Act was not in force in Pepsu in 1948, the principles of S. 116 were applied. *1953 Pepsu 26 (A I R V 40 C 15 P 8) : I L R (1952) Patiala 228, Vasudev* v. *Custodian General*

Add after Pt. 10 :

[Pt. 11] As regards the effect of holding over in the case of a kanom tenancy see the undermentioned case. *('49) 1949 Ker L Tim 15 (19) (DB), Parameswaran Namboodripad* v. *Variathu,*

Note 2

Add in the Foot Notes indicated :

2. 1946-52 I D 40728 (Nag), *Gajendrasing* v. *Shri Deo Jankiramanji.* (Decree for rent and ejectment — Dispute over property between lessee and third party — Property leased out to third party under S. 146, Criminal P. C. — Lessor accepting rent from third party and lastly from lessee—Lessee's continuance of possession not interrupted by order under S. 146, Criminal P. C.)

3. 1952 J & K 35 (AIR V 39 P 2) : 11 J & K L R 59, *Ramzan Khan* v. *Ghani Sufi.*

4. 1950 Mad 746 (A I R V 37 C 310 P 6) : I L R (1950) Mad 844, *Kuppuswami* v. *Mahadeva.*

Add after Pt. 3 :

[Pt. 3a] Where the lease had expired and the lessee continued in possession under an express agreement to do so till the lessor reached a final decision as to granting of fresh lease, there is no holding over by the lessee. *1950 Pat 222 (A I R V 37 C 55 P 7), Subodh Gopal* v. *Province of Bihar.*

Note 4

Add after Pt. 5 :

[Pt. 6] This view was dissented from by the High Court of Allahabad in the undermentioned case which held that where the defendants being the legal representatives of the tenant holding over are not tenants on sufferance but hold the property under an independent title of their own then Art. 139 would not apply at all. If, on the other hand, they hold the property in the same right as the deceased tenant being his legal representatives, there is no reason why the position should be different and the landlord should not be able to give his assent to their continuing in possession as he could have done if the deceased was alive. *1954 All 475 (Pr 13) (A I R V 41 C 197) (DB), Sheo Dulare* v. *Anant Ram,* ((1908) I L R 31 Mad 163 (DB), Vadapalli Narasimham v. Dronamraju, commented and dissented from.)

Note 5

Add in the Foot Note indicated :

1. 1950 East Punj 175 (A I R V 37 C 34 P 22), *Thakar Dass* v. *Custodian. E. P.* (Lessee before determination of lease by efflux of time applying to Custodian under S. 5A, East Punjab Evacuees (Administration of Property) Act, 1947 — Custodian assenting to continuance in possession — There is renewal of lease.)

Note 6

Add in the Foot Notes indicated :

1. 1950 East Punj 175 (AIR V 37 C 34 P 22), *Thakar Dass* v. *Custodian E. P.*

1a. 1955 Pat 158 (Pr 6) ((S)AIR V 42 C 34) (DB), *E. H. Christian* v. *Hari Prasad* ✠ 1951 S C 285 (AIR V 38 C 48 P 9) : 1951 S C R 560 (SC), *Karnani Industrial Bank Ltd.* v. *Province of Bengal.*

2. 1954 Cal 404 (Pr 12) (AIR V 41 C 138), *Mahadeo Prasad* v. *Sulekha Sarkar.* (Acceptance of rent pending appeal from ejectment decree on the representation of the tenant to relieve him from depositing 'rent' with the Rent Controller which was necessary for his protection under the Rent Control Act but which he was finding 'difficult and costly' — Does not operate as renewal.)

3b. 1951 S C 285 (AIR V 38 C 48 P 9) : 1951 S C R 560 (SC), *Karnani Industrial Bank Ltd.* v. *Province of Bengal.* (What is contemplated is that the payment of rent and its acceptance should be made at such a time and in such a manner as to be equivalent to the landlord assenting to the lessee continuing in possession. 1949 Cal 47 (AIR V 36 C 4), Karnani Industrial Bank Ltd. v. Bengal Province, Affirmed.)

Add after Pt. 1a :

[Pt. 1b] And it is for the tenant to prove the overt acts by which the relation was allowed to continue. *1955 Pat 158 (Pr 6) ((S)AIR V 42 C 34) (DB), E. H. Christian* v. *Hari Prasad.*

Add after Pt. 3b :

[Pt. 3bb] The fact that the payment was made at a time when there was no question of the lessor assenting to the lessee's continuing in possession and neither party treated the payment as importing such assent is sufficient to take the case out of the mischief of S. 116. *1951 S C 285 (AIR V 38 C 48 P 10) : 1951 S C R 560 (SC), Karnani Industrial Bank Ltd.* v. *Provincial of Bengal.*

Add after Pt. 6 as a separate para :

[Pt. 7] Where the tenant had remained in possession after the determination of

the tenancy the requirements of S. 116 are satisfied by giving the notice demanding rent for the period after the termination of the tenancy and the landlord must be deemed to have assented to his continuing in possession and the tenant at sufferance becomes a tenant from month to month. *1954 All 475 (Pr 12) (AIR V 41 C 197) (DB), Sheo Dulare* v. *Anant Ram.*

Note 9

Add after Pt. 2 :

[Pt. 3] Thus where a landlord, purporting to act under S. 6 (8) of the Bengal Suppression of Immoral Traffic Act (6 of 1933) served a notice on the tenant determining his tenancy and calling upon him to quit, vacate and make over possession of the premises to him and subsequently he sued the tenant for possession and also for rent for the subsequent period, S. 116 cannot apply, because the plaintiff did not by making the claim for rent intend that the tenant would continue in possession, for then he would not have claimed possession. *1955 NUC (Cal) 1100 (AIR V 42), Nemai Chand Sen* v. *Kumud Behari Basu.*

Note 11

Add in the Foot Notes indicated :

1. *See also* 1949 All 703 (AIR V 36 C 261 P 20) : I L R (1949) All 840 (DB), *Suiti Devi* v. *Banarasidas.* (The expression also refers to the existence of an agreement to the contrary regarding the period of notice provided in S. 106 for a particular kind of notice : 1934 Cal 135 (AIR V 21), Dasarathi Kumar v. Sarat Chandra, dissented from.)

3. 1953 Mad 884 (AIR V 40 C 347 P 15) : I L R (1953) Mad 31 (DB), *Bapayya* v. *Venkataraman.*

[But see 1949 All 703 (AIR V 36 C 261 P 20) : I L R (1949) All 840 (DB), *Suiti Devi* v. *Banarasidas.* (Lease for manufacturing purposes held over on the terms of the original lease—Original lease providing for 3 months' notice for the determination under certain circumstances—Provisions of 6 months' notice laid down in S. 106 cannot apply. ('09) 12 Oudh Cas 279, Khuda Bakhsh v. Abid Husain; 1925 Oudh 173 (AIR V 12), Lalman v. Mt. Mullo; 1938 All 649 (AIR V 25), Badal v. Ram Bharosa; 1919 Cal 54 (AIR V 6), Manmothan v. Peary Mohan, Relied on; 1934 Cal 135 (AIR V 21), Dasarathi Kumar v. Sarat Chandra, Dissented from.)]

Add after Pt. 5 :

[Pt. 6] It has been held in the undermentioned case that when a person holds over, after an unregistered lease of a shop for manufacturing purpose for one year, which fixes only monthly rent, the holding over cannot be from year to year as that would amount to negativing the provisions of S. 107 and that the tenancy must be held to be from month to month, so far as the period of holding over is concerned. *1952 All 634 (AIR V 39 C 123 P 4, 5), Kishanlal* v. *Lal Ram Chander.*

It is submitted that a lease by holding over under S. 116 though it may be from year to year does not require any registration. There seems no question of negativing the provisions of S. 107 as the section does not apply to leases by holding over. But the actual decision may perhaps be justified on the ground that the provision for monthly rent is an "agreement to contrary" within the meaning of S. 116.

[Pt. 7] A executed a kabuliyat by which he agreed to take settlement of the land for agricultural and residential purposes for a term of one year as a non-occupancy tenant on Rs. 10 as its annual *paikast* rent payable on the first Pous of the year. A further agreed in express terms that he shall vacate the land without any notice on the expiry of the term of settlement and would be liable to punishment as a trespasser if he failed to comply. A continued in possession after the expiry of the first year by paying rent to the landlord plaintiff. After the expiry of the second year the plaintiff gave a 15 days' notice to quit and on failure to comply sued for ejectment it was held that as the contract was renewed by conduct of the parties without any kind of qualification the condition requiring the tenant to vacate without notice was part of the renewed lease and it operated as a contract to the contrary within S. 116. The renewal was only for a year and not from year to year and no notice of ejectment was necessary. *1954 Assam 102 (Pr 10) (AIR V 41 C 37) : ILR (1954) 6 Assam 95 (DB), Sajid Mia Majumdar* v. *Abdul Sattar Gani.*

[Pt. 8] Where the kind of agreement which a tenant sets up cannot be proved except by a registered instrument and there is no registered agreement, the requirement of the law that he must prove an agreement to the contrary, even if such a contract is pleaded cannot be fulfilled. *1955 Nag 27 (Pr 8) ((S)AIR V 42 C 6): ILR (1954) Nag 957 (DB), Baldeoprasad* v. *Dashrathlal.*

Note 12

Add in the Foot Notes indicated :

1. 1954 Cal 539 (Prs 5, 10) (AIR V 41 C 181), *Mahadeb Ram Kahar* v. *Tinkori Roy.* (Tenancy by 'holding over' is new tenancy— Tenant is entitled to protection under S. 9 (i) (b) (iii), West Bengal Non-agricultural Tenancy Act (XX of 1949).) ✣ 1951 All 478 (AIR V 38 C 104 P 19), *Chotey Lal* v. *Sheo Shankar* ✣ 1949 Assam 87 (AIR V 36 C 42 P 7) (DB), *Ambar Ali Barbhuiya* v. *Anjab Ali.*

2. 1955 Mad 206 (Pr 3) ((S)AIR V 42 C 52), *Alphonso Pinto* v. *Thukru Hengsu.* (Tenant held to be subject to the covenant in respect of improvements contained in the original lease.) ✣ 1954 Assam 102 (Pr 10) (AIR V 41 C 37) : ILR (1954) 6 Assam 95 (DB), *Sajid Mia Majumdar* v. *Abdul Sattar Gani.* (Agricultural lease for a year expiring under an express term without notice —Tenant hold ng over for second year— Renewal by conduct of landlord—Renewal is on same terms as there is contract to the contrary —Renewed lease is only for one year and not from year to year—No notice necessary.) ✣ 1953 Mad 473 (AIR V 40 C 180 P 5) (DB), *Sanjeevi Naidu D. V.* v. *M. N. Chittibabu Mudaliar.* (If tenant holds over, terms of tenancy under which he came into occupation including that relating to rent would govern case.) ✣ 1952 Mys 139 (AIR V 39 P 7) : I L R (1953) Mys 7, *Krishnaiah Setty* v. *Lashmana Rao.*

3. 1949 Assam 87 (AIR V 36 C 42 P 7) (DB), *Ambar Ali Barbhuiya* v. *Anjab Ali,*

5. 1952 Cal 455 (AIR V 39 P 12), *Sailabala Dassee* v. *Tappassier H. A.*

7. 1952 Cal 455 (AIR V 39 P 12), *Sailabala Dassee* v. *Tappassier H. A.*

Note 13

Add in the Foot Notes indicated :

2. 1952 J & K 35 (AIR V 39 P 2) : 11 J & K L R 59, *Ramzan Khan* v. *Ghani Sufi* ✣ 1952 Trav-Co. 359 (A I R V 39 P 11) : I L R 1951 Trav.-Co. 522 (DB), *Abraham* v. *Boothalingam Pillai.* (The original tenant or any person deriving possession from him who continues to hold over after the expiry of the terms of the lease without the consent of the landlord would be liable to the landlord for damages for use and occupation) ✣ ('49) 8 J & K L R 191 (195) (DB), *Pt. Wasdev* v. *Karam Chand.* (Period of tenancy fixed at 11 months expiring on 1st of Baisakh— Tenant continuing in possession after that date and rent paid to and received by landlord — Notice by landlord to tenant on 16th of Assuj 2005 to vacate on 1st of Maghur 2005—Tenant failing to vacate — Possession of tenant after 1st of Maghur held became wrongful.)

5. 1952 J & K 35 (AIR V 39 P 1) : 11 J & K L R 59, *Ramzan Khan* v. *Ghani Sufi.*

6. 1954 All 475 (Pr 22) (A I R V 41 C 197) (DB), *Sheo Dulare* v. *Anant Ram.* (Tenant dying after expiry of lease — His son, continuing in possession—Landlord demanding rent by notice — Such notice renews tenancy, in favour of son — Son repudiating landlord's title in reply to this notice — Fresh cause of action accrues to landlord on such repudiation—Art. 144 applies and limitation starts from date of repudiation.)

10. 1954 Bom 358 (Pr 4) (A I R V 41 C 102) : I L R (1954) Bom 950 (DB), *Verma K. K.* v. *Union of India.*

Note 14

Add after Pt. 1 :

[Pt. 2] See also the undermentioned case. *1951 Pat 483 (A I R V 38 C 134 P 3) (DB), Surya Lall* v. *Tulsi Modak.* (In Pursuance of invalid lease plaintiff obtaining possession of land and paying rent to landlord for several years and obtaining rent receipts — Plaintiff will be deemed to be a tenant from month to month under S. 116 — Ratio of *1934 Pat 369 (A I R V 21) (DB), Alauddin Ahmad* v. *Aziz Ahmad*, Applied.)

SECTION 117

In section 117 for the word 'Provincial' the word 'State' shall be substituted.
—Substituted by A. L. O., 1950.

Note 2

Add in the Foot Notes indicated :

1b. 1954 Assam 102 (Pr 7) (A I R V 41 C 37) : I L R (1954) 6 Assam 95 (DB), *Sajid Mia Majumdar* v. *Abdul Sattar Gani*, (The requirements of S. 107 about execution and registration thus are not necessary.) ✣ 1952 I D A 17298 (DB) (Pat), *Kazim Ali* v. *Welayat Hossain.* (Agricultural leases not executed both by lessor and lessee are not bad.) ✣ 1951 Orissa 153 (A I R V 38 C 43 P 13) : I L R (1950) Cut 617 (SB), *Abdul Hamid* v. *Bora Tataya.* (Obiter : Darchandna lease for residential purpose is governed by provisions of T. P. Act and not by Orissa Tenancy Act.)

4. ('49) 27 Mys L Jour 85 (92) (DB), *Singamma* v. *Srikantiah.*

5aa. 1953 Mad 884 (A I R V 40 C 347 P 18) : I L R (1953) Mad 31 (DB), *Bappayya* v. *Venkataratnam.* (Agricultural lease — Provisions of S. 106 as to notice are applicable on grounds of of justice, equity and good conscience — It is enough if the notice is in fact reasonable.)

13. 1952 Punj 52 (A I R V 39 C 13 P 6, 7), *Faqiria* v. *Kalu Mal.* (Tenancy of agricultural land is forfeited by repudiation by the tenant of the tenancy by claiming in himself the title to the land.) ✣ ('49) 27 Mys L Jour 85 (95) (DB), *Singamma.* v. *Srikantiah.* (Forfeiture due to non-payment of rent.)

17. See however 1954 Assam 102 (Pr 11) (A I R V 41 C 37) : I L R (1954) 6 Assam 95 (DB), *Sajid Mia Majumdar* v. *Abdul Sattar Gani.* (Even if the principle behind S. 116 is allowed to operate a strict adherence to its requirements would not be necessary. Agricultural lease — Renewal by acceptance of rent—Lease is renewed for year—No justification to import into it the principle of renewal from year to year.)

Add after Pt. 15 :

[Pt. 15a] (CC) Section 113. *1954 Madh B 37 (A I R V 41 C 25 P 8) : I L R*

(1953) Madh B 193, Hindusingh v. *Rao Nihalkaranji.*

Add after Pt. 17 :

[Pt. 18] In a recent case, it was held by the Supreme Court that the statement in *Brahmayya* v. *Sundaramma, 1948 Mad 275 (A I R V 35 C 140) : I L R (1948) Mad 757 (FB)*, that Ss. 105 to 116 are founded upon the principles of reason and equity could not be accepted either as correct or precise. It was, however, held that to the extent that these sections give statutory recognition to principles of justice, equity and good conscience, they are applicable to cases not governed by the Act. *1953 S C 228 (AIR V 40 C 55 P 23) : 1953 S C R 1009 (S C), Namdeo Lokman Ladhi* v. *Narbadabai.*

Note 3

Add in the Foot Notes indicated :

10. See however 1952 Mad 510 (A I R V 39 C 115 P 15) : I L R (1951) Mad 932 (DB), *The State of Madras* v. *V. K. M Surya Rao.* (Lease by Zamindar to member of his family held valid.)

14. 1951 Orissa 262 (AIR V 38 C 63 P 8), *Banamali Behera* v. *Padmalabha.* (Sale of Jafi Kharidar and Lakhraj bajiaftidari lands reciting that the purchaser could cultivate them himself or get them cultivated by others—Holding held agricultural land.)

15a. 1949 Sind 34 (A I R V 36 C 12 P 3, 4) : I L R (1948) Kar 77, *Noor Mahomed* v. *Dhirsing.*

16. But see ('48) 53 Mys H C R 64 (67) (FB), *Achappa* v. *Gopala Setty.*

19. 1951 Cal 361 (A I R V 38 C 86 P 108) : I L R (1951) 2 Cal 444 (DB), *Manindranath* v. *Amiya Pal.*

Page 1911—In line 1 after the words "not one for agricultural purposes" place figure 14a and add the following as foot note :

14a. 1951 Orissa 153 (A I R V 38 C 43 P 13) : I L R (1950) Cut 617 (SB), *Abdul Hamid* v. *Bora Tataya.* (Darachandna lease for residential purposes is governed by provisions of T. P. Act, though included in Orissa Tenancy Act.)

Note 4

Add in the Foot Note indicated :

1. 1954 Assam 102 (Pr 7) (A I R V 41 C 37) : I L R (1954) 6 Assam 95 (DB), *Sajid Mia Majumdar* v. *Abdul Sattar Gani* ✠ 1950 Pat 22 (A I R V 37 C 8 P 6) : I L R 28 Pat 814 (DB), *Tarak Nath Dubey* v. *Raghu Nandan Pandey.* (Alteration of rent — Verbal declaration would be sufficient.) ✠ (48) I L R (1948) 1 Cal 520 (523), *Benoy Krishna Bhoumik* v. *Biseswar Sanyal.*

SECTION 118

Note 2

Add in the Foot Note indicated :

8. But see 1954 Punj 115 (AIR V 41 C 54 P 8), *Sajan Singh* v. *Phuman Singh.* (1919 Lah 127 (A I R V 6), *Gul Muhammad* v. *Saliz Ali Khan*, Followed; 1944 Pesh 15 (A I R V 31), *Fazal Mohd.* v. *Ghulam Haidar*, dissented from.)

Note 9

Add after Pt. 6 :

[Pt. 6a] But a contrary view is taken in the undermentioned case. *1954 Orissa 105 (A I R V 41 C 31 P 4, 5) : I L R (1953) Cut 706, Kama Sahu* v. *Krishna Sahu.* (The consideration for the one document executed in pursuance of an agreement for exchange is the execution of a document by the other. Unless it is so done, the party who has taken the deed from the other party without himself executing any document in favour of the other party, cannot claim to have got a valid title to the property until and unless he executes a similar document transferring his interest in favour of the other party. The mere fact of exchange of possession cannot be sufficient in such a case to complete the passing of title in favour of each other especially when properties to be exchanged are each worth more than Rs. 100.)

SECTION 119

Note 5

Add after Pt. 1 :

[Pt. 1a] Where A is deprived of a portion of the property got by him in exchange from B, but the property transferred by A to B has passed out into the possession of the trespasser A is not entitled to the return of the property under S. 119. His only remedy is to claim compensation from B for the loss suffered. *1952 Mad 602 (A I R V 39 P 4, 5), Sitaramiah* v. *Sanka Kanakaiah.*

SECTION 120

Note 2

Add after Pt. 2 :

[Pt. 3] It has, however, been held in the undermentioned case that the liability to be pre-empted is not such a defect of title as is contemplated in S. 119, Transfer of Property Act. Loss of the property exchanged because of the exercise of a right of pre-emption by a third person is not deprivation, as money equivalent is received. Thus, where plaintiff and defen-

dant exchanged lands and plaintiff lost the land obtained in exchange as a result of a successful suit for pre-emption by a co-occupant of the field, it was held that the plaintiff was not entitled to succeed. *1952 I D A 17124 (DB) (Nag), Bhiksen* v. *Balaram.*

SECTION 122

Note 1

Add in the Foot Notes indicated :

2. 1955 NUC (Trav-Co) 1249 (AIR V 42), *Kathiru Kunju* v. *Muhammad Kunju.* (A gift deed otherwise valid does not become invalid because the donor reserves a right for his life to take the profits of the subject of the gift.) ✠ 1954 Trav-Co 404 (Pr 3) (AIR V 41 C 142) (DB), *State* v. *Narayani Parvathi.* (Where no right in the property was reserved in the donor, the fact that there was a clause in the deed that the donee should maintain the donor, does not show that the donor continued to be the beneficial owner.)

3. 1950 Mad 271 (AIR V 37 C 116 P 2), *Palla Sanyasi* v. *Kayitha Guruvulu.* (Custom in Galla community that upon remarriage of widow jewels presented to her on her previous marriage by family of her late husband reverted to his family — Gift is not absolute but is conditional.)

Add after Pt. 3a :

[Pt. 3b] Even if the purpose of the gift is stated to be for maintenance of the donee, it does not necessarily follow that the estate given is limited to the life of the donee if the dispositive words are clear that an absolute estate is given. *1952 Nag 55 (AIR V 39 C 26 P 11) : ILR (1952) Nag 60, Yadeorao Jageshwar* v. *Vithal Shamji.*

Add after Pt. 7 at the end of the Note before the words "(see S. 5, Note 4.)" :

[Pt. 8] A transaction by which a father makes a division of his self-acquired property between his sons by effecting a severance of status between them does not amount to a gift within the meaning of this section. *1951 Bom 4 (AIR V 38 C 2 P 7) : ILR (1951) Bom 148 (DB), Kisan Singh Mohansing* v. *Vishnu Balkrishna.*

Note 2

Add in the Foot Note indicated :

7. 1954 Pat 280 (Pr 10) (AIR V 41 C 96) (DB), *Devji Shivji* v. *Kasandas Kamji* ✠ 1950 Mys 33 (AIR V 37 C 13 P 25) : 55 Mys H C R 67 (FB), *Rukn-ul-Mulk* v. *R Viswanatham.* (One brother paying a sum of money to his brother in consideration of the latter giving up his claim, however imaginary such claim might be, to the property of the former.)

Add after Pt. 5 :

[Pt. 5a] Where the motive behind the deed of gift is an unequivocal intention on the part of the transferor to give to the transferee a title which would act as a safeguard against any claim for the pre-emption in respect of other property intended to be sold, the transaction for that reason cannot be called sale. *1952 All 146 (AIR V 39 C 54 P 15, 16) : 1952 Cri L Jour 299 (DB), Hari Singh* v. *Kallu.*

Add after Pt. 7 as separate para :

[Pt. 8] No question of unlawful consideration arises in the case of a gift which is a transfer without consideration. The only relevant factor to be taken into consideration in deciding the question whether a gift would come under section 6 (h), T. P. Act, is the object of the donor in making the gift. *1954 Trav-Co 348 (Pr 8, 9) (AIR V 41 C 118) : ILR (1953) Trav-Co 1121, Kalliyani Amma* v. *Kutty Amma.*

Note 7

Add in the Foot Notes indicated :

5. ('51) I L R (1951) 1 Cal 295 (297), *Jatindra Mohan Karamakar* v. *Nityananda Das Bairagya.* (Whether a gift is known or unknown to the donee, there is no presumption in favour of acceptance of a gift in India. The provisions contained in S. 122 negative such a presumption. 1917 Pat 551 (AIR V 4), Muhammad Abdul Nayeem v. Jhonti Mahton, Not foll.; 1932 All 444 (AIR V 19), Anadi Devi v. Mohan Mal, Ref.)

6. 1955 NUC (Trav-Co) 1046 (AIR V 42), *Ganapathi Subramaniya Ayyar* v. *Kulathu Ayyar Sankara Ayyar.* (An acceptance may be either express or implied. 1932 All 444 (AIR V 19), Mt, Anandi Devi v. Mohanlal Ref.) ✠ 1954 All 595 (Pr 5) (AIR V 41 C 233), *Union Bank Ltd., Utraula* v. *Mst. Ram Rati.* (Gift is not complete unless it is accepted by the donee ✠ ('51) ILR (1951) 1 Cal 295 (298), *Jatindra Mohan Karamakar* v. *Nityananda Das Bairagya.* (The acceptance of a gift may be either express or implied. Whether there has been an acceptance or not must depend on the facts of each particular case.) ✠ 1952 Trav-Co 47 (A I R V 39 C 16 P 4, 12) (DB), *Gangadhara Iyer* v. *Sankara Iyer.* (An acceptance may be either express or implied—An acceptance can be inferred from the facts and surrounding circumstances attending a transaction of gift.) ✠ ('49) ILR 28 Pat 75 (77) (DB), *Jyoti Prasad Banerjee* v. *Baidyanath Banerjee.* (There must however be something to show acceptance by the donee.)

6a. 1954 Mad 215 (AIR V 41 C 90 P 7), *Venkatasubbamma* v. *Narayanaswami.* (The law re-

quires acceptance which may even be implied. But the facts relied on to draw an inference of acceptance must be by acts of positive conduct on the part of the donee or persons acting on his behalf and not merely passive acquiescence such as standing by when the deed was executed or registered.)

7. 1952 I D A 17351 (Nag), *Poma* v. *Krishna.* (Donee not present at execution or registration —Document and property all along with donor till death—No title passes.)

Add after Pt. 6 :

[Pt. 6aa] The question whether the gift was accepted by the donee will have to be decided upon the evidence and circumstances of the case. The fact that the original gift deed was produced in court by the donee who had paid the tax for the property from that year are sufficient to show that he accepted the gift. *1954 Trav.Co 348 (Pr 5, 7) (AIR V 41 C 118): ILR (1953) Trav-Co 1121, Kalliyani Amma* v. *Kutty Amma* ✠ *1955 N U C (Trav.Co) 1046 (AIR V 42), Ganapathi Subramania Ayyar* v. *Kulathu Ayyar Sankara Ayyar.* (Internal evidence in gift indicating that deed was executed with concurrence of donee—Donee held accepted it.)

Add after Pt. 7b :

[Pt. 7c] But the donee's receiving the document from the donor after due execution thereof, and presenting it for registration and getting it registered have been held to be sufficient indications of the acceptance of the gift. *1953 Trav-Co. 336 (AIR V 40 C 124 P 5) (DB). Esakkimadan Pillai* v. *Esakki Amma.*

[Pt. 7d] Where there is evidence that the gift of property by a person to his wife and children was accepted by the donees, the fact that the donor who had no other property stayed on it even after the gift does not show that the gift had not taken effect. *1954 Trav.Co 404 (Pr 3) (AIR V 41 C 142) (DB), The State* v. *Narayani Parvathi.*

Place figure 7e after the words 'on behalf of the donee' in line 12 on p. 1937 and add the following as Foot Note :

7e. 1955 N U C (Trav-Co) 1046 (AIR V 42), *Ganapathi Subramania Ayyar* v. *Kulathu Ayyar Sankara Ayyar.* (Per Govinda Pillai J.)

Note 11

Add in the Foot Note indicated :

3. 1949 All 733 (AIR V 36 C 268 P 6), *Chandi* v. *Kali Charan.* (Property purchased in name of father and son in equal shares—Money supplied by father—Father gifting away his share to another son—Gift deed reciting that he, the father, had only half share in property though he supplied the money — In the circumstances, no presumption that son's name stood benami and that his share vested in father held arose.)

Add after Pt. 4 :

[Pt. 4a] It has been held in the following case that where a sale is by the husband to his wife the presumption that the purchase is made by the husband with his own funds and for the benefit of the wife and children can arise only in the absence of evidence to the contrary and there is nothing in law to prevent a separate acquisition being made in the name of a Marumakkathayee woman by her husband. *1951 Trav.Co 195 (AIR V 38 C 79 P 2, 3) (DB), Achuthan Prabhakaram* v. *Parameswara Menon.*

Note 13

Add after Pt. 3 as a separate para :

[Pt. 4] Even if the marriage between the donor and the donee is not valid according to law, the object in making the gift cannot be said to be unlawful so long as the donor regards the donee as his lawfully wedded wife. *1954 Trav.Co 348 (Prs 8, 9) (AIR V 41 C 118) : I L R (1953) Trav.Co 1121, Kalliyani Amma* v. *Kutty Amma.*

Note 14

Add in the Foot Note indicated :

1. 1953 Punj 135 (AIR V 40 C 52 P 4) (DB), *Bhim Singh* v. *Chandigi.* (After mentioning the various Khatas and Khasra numbers which were owned by him the donor stated in the gift deed. "Now I have gifted the above-mentioned land with all rights appurtenant thereto . . . . . and having taken the land out of my own possession I have given the possession to Juglal aforesaid and just as I was the owner in possession of the aforesaid land Juglal will also have the same rights—*Held*, that the wording of the gift deed was sufficient to divest the donor of all rights which he possessed including the right to *shamilat*) ✠ 1952 Nag 55 (AIR V 39 C 26 P 11) : ILR (1952) Nag 60, *Yadeorao Jageshwar* v. *Vithal Shamji.* (Even if the purpose of the gift is stated to be for maintenance of the donee the estate given is not necessarily limited to the life of the donee if the dispositive words are clear that an absolute estate is given.)

Note 16

Add in the Foot Notes indicated :

1. 1954 Punj 116 (A I R V 41 C 55 P 7), *Bakshi Ram* v. *Dewat Ram.* (The vendors were a Christian Mission. They wanted to help Christians who had been serving them. Property worth Rs. 8,000 was alleged to be sold for

Rs. 190. No money was paid before the Registrar. There was evidence that no money was received from the alleged transferee as price but he had only to pay some subscription—*Held*, that the transaction was a gift and not a sale.)

2. 1952 Hyd 3 (A I R V 39 C 2 P 9) : I L R (1952) Hyd 7 (D B), *Hashim Mohd.* v. *Aminabi.* (An entry in Column 11 of the Siaha (marriage certificate) was to the following effect: "Rs. 500 of the current coin as prompt dower in lieu of which a house is given."—*Held* that as the house was being given in lieu of *Mehar* the transaction was a simple gift and not a transfer made in consideration of the relinquishment of the *Mehar* by the proposed bribe. The transaction being unilateral act was a pure gift and not a sale.)

Note 17

Add in the Foot Note indicated :

4. 1953 Trav-Co 336 (AIR V 40 C 124 P 3) (DB), *Esakkimadan Pillai* v. *Esakki Amma.* (In construing a deed, the entire document should be considered and this has to be done in the light of the surroundiog circumstances. In ascertainiug the true intention of the maker the name by which he called the instrument must not be lightly brushed aside. The fact that a deed is registered as a deed of gift is undoubtedly one of the several tests to acertain whether the document in question is a gift or a will. Reading the document in question as a whole it was held that rights over the properties comprised therein vested in the executees from the date of the document subject to the life estate in favour of executant and that the document was therefore a gift and not a will.) ✠ 1952 I D A 17349 (DB) (Nag), *Sitaram* v. *Chandrashekhar*, (*C* deposited with defendant a certain amount. On *C's* death *C's* brother sued defendant and *S* for the return of the amount. Defendant pleaded that a few days before his death *C* gifted the amount orally to *S* and asked defendant to make necessary entry in his account books. The entry showed that the amount was to be paid to *S* after *C's* death. As there could be no oral gift and as there was no delivery of possession the defence failed in both the lower Courts. In second appeal a case of trust *in præsenti* was sought to be made out—*Held* that there could be no valid gift or will or a testamentary trust.)

Note 20

Add in the Foot Note indicated :

1. 1955 N U C (Trav-Co) 1046 (A I R V 42), *Ganapathi Subramania Ayyar* v. *Kulathu Ayyar Sankara Ayyar.*

SECTION 123

In S. 123 above the Synopsis and after remark (a) insert the following :

" The Central Government has exempted from the operation of this section all territories in the State of Himachal Pradesh except—

(i) an area within the limits of a municipality, and

(ii) a notified area as declared and notified under S. 241 of the Punjab Municipal Act, 1911, as applied to Himachal Pradesh.

—Gaz. Ind., 1-12-1951, Part II-Sec. 3, Page 2040 (S. R. O. 1873.)

Note 1

Add in the Foot Notes indicated :

1. 1953 Punj 304 (A I R V 40 C 136 P 4) (D B), *Mst. Parkash Vati* v. *Maya Devi.* (By notification No. 183 St. dated the 27th April, 1935, under S. 1 of the Transfer of Property Act, S. 123 was extended to all Municipal Committees of the Punjab and thereafter in order to make a valid gift it was necessary that there was a written instrument signed by or on behalf of the donor and attested by two witnesses and registered.) ✠ ('51) I L R (1951) 1 Cal 295 (297), *Jatindra Mohan Karmakar* v. *Nityananda Das Bairagya.*

2. 1950 Trav-Co 73 (A I R V 37 C 34 P 8): 1950 Trav-Co L R 532 (DB), *S. Krishnan* v. *Lakhmi Ammal.* (Where a gift of certain amount is made by father to his daughter in the form of a promissory-note for the amount executed by the father in favour of his daughter and the note is registered the gift cannot be objected to on the ground that there was no delivery of movable property.)

Add after Pt. 3 as a separate para :

[Pt. 4] Where a donee under a registered deed of gift agreed by a separate unregistered agreement to maintain the donor till his death and that if he failed to do so the donor might revoke the gift or in the alternative obtain maintenance allowance, it was held that the deed of gift and the agreement formed part of the same transaction and that the agreement as to the condition upon which the donor was given the right to revoke the gift did not require registration. *1951 All 599 (A I R V 38 C 153 P 5, 12, 13), Jagat Singh* v. *Dungar Singh.*

Note 2

Add in the Foot Notes indicated :

3. 1955 NUC (Madh-B) 199 (AIR V 42), *Bhawarsingh Dulesingh* v. *Gambhirmal Bhagirath.* (Deed of gift executed before Transfer of Property Act was applied to Gwalior State — Technical provisions of S. 123 cannot be applied —Matter arising between donee and donor or persons claiming interest of donor — Deed of gift though duly registered but not accompanied by delivery of possession cannot confer title upon donee under Hindu Law.)

4. 1954 Manipur 22 (Pr 5) (A I R V 41 C 10), *Kali Prasad Gupta* v. *Rameshwar Prosad Gupta*✠('51) ILR (1951) 1 Cal 295 (297), *Jatindra Mohan Karamakar* v. *Nityananda Das Bairagya.*

5. 1954 Manipur 22 (Pr 5) (AIR V 41 C 10), *Kali Prosad Gupta* v. *Rameshwar Prosad Gupta.*

Note 4

Add in the Foot Notes indicated :

2. 1955 All 255 (Pr 2) ((S) A I R V 42 C 79), *Mehdi Husain* v. *Sikandar Nawab.* (Property subject to usufructuary mortgage—Gift of equity of redemption—Gift is valid—Mere failure to inform mortgagee that donee is the mortgagor or omission to remove his name from municipal record does not affect validity — Unequivocal declaration is sufficient delivery of possession—(1882) I L R 6 Bom 650, Mohinuddin v. Manohershah and (1899) I L R 23 Bom 682, Ismal v. Ramji, Dissented from.) ✣ 1955 N U C (Andhra) 3607 (A I R V 42), *S. Chinna Budha Saheb* v. *Raja Subbamma* ✣ 1951 All 86 (A I R V 38 C 12 P 15) : I L R (1952) 1 All 477 (F B), *Ghulam Abbas* v. *Razia Begam.*

3. 1955 N U C (Andhra) 3607 (A I R V 42), *S. Chinna Budha Saheb* v. *Raza Subbamma.*

Put figure 1a after (See Section 129) in the second line of the Note and add the following as foot note :

1a. 1955 N U C (Andhra) 3607 (A I R V 42), *S. Chinna Budha Saheb* v. *Raja Subbamma.* (But if a gift is reduced to writing, it requires to be registered under S. 17 (1) (a) of the Registration Act. 1926 Lah 372 (A I R V 13), Maula Bukhsh v. Hafizuddin, Rel. on.)

Add after Pt. (1) :

[Pt. 1aa] The three essentials of a gift under Muhammadan law are: — (1) a declaration of the gift by the donor; (2) an acceptance express or implied by or on behalf of the donee, and (3) delivery of possession of the subject of the gift by the donor to the donee. *1955 NUC (Andhra) 3607 (A I R V 42), S. Chinna Budha Saheb* v. *Raja Subbamma.*

Add after Pt. 6 as a separate para :

There is a difference of opinion as to whether a hiba-bil-ewaz is a gift or a sale. The question is important from the point of view that while a gift under the Muhammadan Law need not be in writing, a sale for more than one hundred rupees would require a registered instrument for its validity under the provisions of this Act. For a discussion of this topic, see S. 54, Note 4.

Note 5

Add in the Foot Notes indicated :

1. 1953 Assam 19 (A I R V 40 C 5 P 4) : I L R (1950) 2 Assam 444, *Samar Roy Ghatwar* v. *Dinanath Nath.* (Oral gift of immovable property is invalid.) ✣ 1946-52 I D 40777 (Nag), *Ramdhar* v. *Dularibai.* (Party not estopped from challenging validity of gift.)

3. *See also* ('51) I L R (1951) 1 Cal 295 (297), *Jatindra Mohan Karmakar* v. *Nityananda Das Bairagya.* (Transfer must be effected by a registered document—Delivery of possession is rendered unnecessary.)

Note 6

Add in the Foot Notes indicated :

1. 1954 Mad 215 (AIR V 41 C 90 P 7), *Venkatasubbamma* v. *Nelluri Narayanaswami.* (The fact that the deed was executed and registered would not make the gift irrevocable if in fact there was no acceptance either before registration but after execution or even after registration.)

[*See* ('51) 1951 All W R (H C) 11 (13), *Makha Lal* v. *Mohd. Amir Hasan Khan.*]

12. *See also* 1954 All 595 (Pr 6, 8) (A I R V 41 C 233), *Union Bank, Ltd., Utraula* v. *Mst. Ram Rati.* (Thus a completed gift which has been subsequently registered cannot be revoked by a registered sale-deed executed after the gift but before its registration. 1928 P C 86 (A I R V 15) (PC), Venkat Subba Srinivas v. Subba Rama, Rel. on.) ✣ 1954 Mad 215 (AIR V 41 C 90 P 7), *Venkatasubbamma* v. *Nelluri Narayanaswami.* (If there is acceptance of the gift after execution of the deed, even though the registration was postponed to a later date, the gift would become irrevocable.)

Note 12

Add in the Foot Note indicated :

7. *See also* 1951 All 529 (AIR V 38 C 124 P 73) : 1 L R (1951) 2 All 439 (DB), *Mrs. Chandramani Dubey* v. *Pama Shankar Dubey.* (Husband depositing certain ornaments with bank for safe custody on joint names of himself and wife with direction that they should be delivered to either or survivor — This does not amount to gift as the husband retains dominion over them.)

Note 15

Add in the Foot Notes indicated :

1. *See also* 1955 N U C (Madh-B) 199 (AIR V 42), *Bhawarsingh Dulesingh* v. *Gambhirmal Bhagirath.* (Deed of gift executed before Transfer of Property Act was applied to Gwalior State — Technical provisions of S. 123 cannot apply — Matter arising between donee and donor or persons claiming interest of donor — Deed of gift though duly registered but not accompanied by delivery of possession cannot confer title upon donee under Hindu Law.)

2. 1955 N U C (Madh B) 199 (A I R V 42), *Bhawar Singh* v. *Gambhirmal.* (Deed of gift executed before Transfer of Property Act was applied to Gwalior State—Technical provisions of S. 123 cannot be applied — Matter arising between donee and donor or persons claiming interest of donor — Deed of gift though duly registered but not accompanied by delivery of possession cannot confer title upon donee under Hindu law.) ✣ 1954 Manipur 22 (Pr 5) (A I R V 41 C 10), *Kali Prosad Gupta* v. *Rameshwar Prosad Gupta.* (Gift by Hindu at Maxwell Bazar, Imphal, in 1935 — Transfer not effected by registered instrument — Registration Act (1908), or Rules for the Management of the State of Manipur — Rules relating to registration or T. P. Act, 1882 not applicable — Oral gift with delivery of possession held sufficient.)

SECTION 126

Note 2

Add in the Foot Note indicated :

2. 1953 Trav-Co 115 (A I R V 40 C 39 P 2, 3), *Subramanian Asari* v. *Kanni Ammal.* (The condition under S. 126 should not be repugnant to the estate created under the gift. Where under a gift-deed the donor unequivocally and unconditionally transfers all his rights over certain property to the donee with absolute powers to deal with the same from the date of gift, a subsequent clause in the deed to the effect that on the death of the donee the property shall not devolve on any of her heirs but will revert to the donor will be repugnant to the absolute estate created in favour of the donee and to the legal incidents of such estate and as such the provision will be ineffective and wholly void. Such a provision cannot be said to be an agreement for the suspension or revocation of the gift within the meaning of S. 126.)

Add after Pt. 3 :

[Pt. 4] Where a donee under a registered deed of gift agreed by a separate contemporaneous unregistered agreement to maintain the donor till his death and that if he failed to do so the donor might revoke the gift or in the alternative obtain maintenance allowance, it was held that the agreement to revoke the gift was valid under this section and, therefore, the donor was entitled to revoke the gift on donee's failure to maintain him. *1951 All 599 (AIR V 38 C 153 P 5, 6, 8, 12, 13), Jagat Singh* v. *Dungar Singh.*

Note 9

Add in the Foot Notes indicated :

2a. *See also* P C A No. 13 of 1953, D/- 8-7-1953 (PC), *Bridget Antoni* v. *Imelda Weerasekara* (Certain circumstances can give rise to a relationship between two parties which makes it the duty of one party to take care of the other and the duty of taking care includes the duty of giving advice.)

11. 1954 Trav-Co 407 (Prs 21, 21) (A I R V 41 C 144) (D B), *M. K. A. Janaki Amma* v. *Parameswaran Nair.* ✠ P C A No. 13 of 1953, D/- 8-7-1953 (PC), *Bridget Antony* v. *Imelda Weerasekara.* (Voluntary gifts would be set aside in two classes of cases — First where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justified the Court in holding that the gift was the result of a free exercise of the donor's will.) ✠ 1951 Him Pra 54 (A I R V 38 C 15 P 5, 6), *Mst. Sewti* v. *Rattan.* (Gift deed by old illiterate widow in favour of nephew her only relation.)

Add after Pt. 2 as separate para :

[Pt. 2aa] The cases in which the Court enables the donor to set aside a voluntary gift on the ground of undue influence may be divided into two classes : first, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose : secondly, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain the benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused. *1954 Trav-Co 407 (Pr 18) (AIR V 41 C 144) (DB), M.K. A. Janaki Amma* v *Parameswaran Nair.* (Allcard v. Kinner, (1887) 36 Ch D 145 : 56 L J Ch 1052, applied.)✠ *P C A No. 13 of 1952 D/-8-7-1953 (P C.) Bridget Antony* v. *Imelda Weerasekara.* (Voluntary gifts would be set aside in two classes of cases — First where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justified the Court in holding that the gift was the result of a free exercise of the donor's will.)

Note 11

Add after Pt. 2 after deleting the full point :

[Pt. 2a] Or a mistake of law. *1951 Orissa 132 (AIR V 38 C 34 P 10) : ILR*

(1950) Cut 374 (DB), Narsingh Charan v. Radhakanta.

Note 16

Add in the Foot Notes indicated :

1. 1955 NUC (Trav-Co) 1046 (AIR V 42), *Ganapathi Subramania Ayyar* v. *Kulathu Ayyar Sankara Ayyar* ✣ 1954 Mad 215 (AIR V 41 C 90 P 7), *Venkatasubbamma* v. *Nelluri Narayanaswami.* (The fact that the deed was executed and registered would not make it irrevocable, if in fact there was no acceptance by the donee, either before registration but after execution or even after registration. What the law requires is acceptance of the gift after its execution though the deed may not be registered.) ✣ 1952 Trav.Co 47 (AIR V 39 C 16 P 10) (DB), *Gangadhar Iyer* v. *Sankara Iyer.*

1a. 1955 NUC (Trav-Co) 1046 (AIR V 42), *Ganapathi Subramania Ayyar* v. *Kulathu Ayyar Sankara Ayyar.* (A gift deed providing after the operative portion that the donee was to render services to the donor and to meet the expenses in connection with the donor's funeral — *Held* (per Govinda Pillai J.) that the two directions were only pious wishes and did not give any right to the donor to revoke the gift if the conditions were not observed.) ✣ 1954 All 595 (Prs 6, 8) (AIR V 41 C 233), *Union Bank Ltd., Utraula* v. *Mst. Ram Rati.* (Thus a completed gift which has been subsequently registered cannot be revoked by a registered saledeed executed after the gift but before its registration) ✣ 1954 Trav-Co 348 (Pr 10) (AIR V 41 C 118) : ILR (1953) Trav-Co 1121, *Kalaiyani Amma* v. *Kutty Amma.* (Operative portion of gift giving property to the donee unconditionally, followed by a direction that donee should continue to be subservient to donor as she used to be, it is only a pious wish of the donor and not a condition that had to be fulfilled before the gift could take effect.) ✣ 1952 Trav-Co 47 (AIR V 39 C 16 P 10) (DB), *Gangadhara Iyer* v. *Sankara Iyer.* (Gift in praesenti to donee but enjoyment of profits of gifted property postponed till after death of donor—Gift is complete and cannot be revoked unless there is express reservation to that effect in the deed itself)

SECTION 127

Note 3

Add after Pt. 1 as a separate para :

[Pt. 2] Where there is an out and out transfer by way of gift followed by a direction to the donee to maintain the donor the latter direction is only a pious wish and not a condition and will not give any right to the donor to revoke the gift if the direction is not observed. *1952 Trav.Co 47 (AIR V 39 C 16 P 7) (DB), Gangadhara Iyer* v. *Sankara Iyer.*

SECTION 128

Note 4

Add in the Foot Note indicated :

1. 1954 All 770 (Pr 4) (AIR V 41 C 305) (DB), *Mewa Ram* v. *Deo Prakash.* (Where under the deed of gift *A* gifted to *B* a 1/54th share of the property and he remained owner of the 1/54th share that he had purchased the fact that *B* got his name mutated over the entire 1/27th share would not make him a universal donee.)

Note 5

Add after Pt. 6 as a separate para :

[Pt. 6a] The right of a creditor to follow the properties in the hands of a universal donee is a right which nas to be exercised by a suit. That right cannot be exercised merely by levying execution against the properties in their hands under a judgment obtained against the donor. *1952 Trav-Co 23 (AIR V 39 C 6 P 18) : I L R (1951) Trav-Co 357 (DB), Muthamathu Kunju* v. *Muhammathu Kunj*

SECTION 129

Note 2

Add in the Foot Note indicated :

2. *See also* 1952 Hyd 3 (AIR V 39 C 2 P 9): ILR (1952) Hyd 7 (DB), *Hashim Mohd.* v. *Aminabi.* (Transfer of immovable property in lieu of dower — It is a simple gift and formalities laid down by S. 123 are not applicable.)

SECTION 130

Add in the Synopsis after item 9 :

9a. Debts due to a Hindu widow :

Note 4

Add in the Foot Note indicated :

8. 1952 Raj 187 (AIR V 39 P 2) : I L R (1952) 2 Raj 5, *Chiman Lal* v. *Ganesh.*

Note 9a

Add after Note 9 :

9a. Debts due to a Hindu widow :

[Pt. 1] Where a Hindu widow who has succeeded to her husband's property embraces a civil death by her re-marriage, the next reversioner succeeds to the estate and is entitled to enforce an actionable claim in respect of land granted by widow on bhag cultivation. No question of transfer of an actionable claim by written instrument as contemplated by S. 130,

T. P. Act can arise in such case. *1954 Pat 32 (AIR V 41 C 11 P 6), Hari Mahato* v. *Jugal Mahato.*

[*See also* 1954 Orissa 44 (AIR V 41 C 13 P 15) : ILR (1953) Cut 630 (DB), *Balram Panda* v. *Gopinath Misra.* (To effecutate an assignment there must be words of transfer in the instrument.)]

Note 15

Add in the Foot Note indicated :

4. ('50) 1950 Ker L Time 509 (512) *In re Central Banking Corpn. Ltd.* (When a debtor directs a third party to pay a certain some of money to his creditor out of a particular fund in the possession of the third party there must be some communication from the debtor to the creditor, which from the express or implied intention of the parties would be deemed in equity to be a transaction under which the debtor assigns the rights to recover the debt to the creditor. If that is done that is sufficient to infer a case of equitable assignment.)

Add after Pt. 6 :

[Pt. 7] A letter did not show that the writer of it, namely, an insurance agent, was transferring his interest in the commission to the chief agent; it was not addressed to the chief agent at all but it was just an order to the Branch Manager of the Company to pay the commission due to the insurance agent to the chief agent. It was held that the letter was not an assignment of the commission due to the insurance agent but was merely a pay order which could be cancelled by the agent. *1954 Orissa 44 (AIR V 41 C 13 P 15): ILR (1953) Cut 630 (DB), Balaram Panda* v. *Gopinath Misra.*

Add after Pt. 7 :

[Pt. 8] *A*, a bank, started an overdraft account in *B's* name in order to finance *B* in carrying out certain military contracts. *B* executed a power-of-attorney in *A's* favour, authorising *A* to collect all bills and to receive all payments in respect of the contract and to act on behalf of *B*, who undertook to ratify and confirm those acts. A copy of the power of-attorney was sent to and was duly noticed by the military authorities. On finding that certain amount due under a bill on which *B* had obtained overdraft facility, was paid directly to *B*, in spite of the repeated demands for it by *A*, *A* sued both *B* and the Union of India for its recovery. A claimed that a charge was created with respect to the bills under S. 130, T. P. Act, in favour of the holder of the power-of-attorney who became an assignee and the Government, as a debtor was bound to pay to *A*, the assingee, after the express notice. It was held that no charge was created or assignment made in favour of the bank with respect to the bill or bills and there was therefore no legal obligation on the part of the military authorities or the Government to pay up the sum covered by the bill once again to the Bank simply because it held a power-of-attorney. *1954 Assam 23 (AIR V 41 C 5 P 9, 13): ILR (1953) 5 Assam 115 (DB), Union of India* v. *Bank of the East, Ltd.*

Note 17

Add in the Foot Notes indicated :

5. 1951 Raj 74 (A I R V 38 C 30 P 20) (DB), *Kanraj* v. *Vijai Singh.* (The words "shall be complete and effectual upon the execution of such instrument" do not mean that the assignment once having been executed cannot be challenged on grounds, including want of consideration, on which any other contract can be impeached.)

17. *See* 1951 Raj 74 (AIR V 38 C 30 P 20) (DB), *Kanraj* v. *Vijai Singh.* (The words "shall be complete and effectual upon the execution of such instrument" do not mean that once the assignment is executed it cannot be challenged on grounds, including want of consideration, on which any other contract can be challenged.)

Add after Pt. 15 as a separate para :

[Pt. 15a] Where after an assignment of a debt by the heirs of the deceased creditor and notice of assignment by the assignee to the debtor, the debtor advised the rival claimants to obtain a succession certificate and thereupon the assignors obtained a succession certificate and recovered the debt from the debtor by virtue of the certificate, it was held that the debtor obtained a valid discharge of the debt. *1950 Kutch 49 (A I R V 37 C 38 P 4), Keshavji Lakhamshey* v. *Nanji Devji.*

Note 19

Add after pt. 4 as a separate para :

[Pt. 4a] In cases of transfer of book debts or property coming within the definition of actionable claim pending a suit for its recovery there is necessarily involved also a transfer of the transferor's right in a decree which may be passed in his favour in the pending litigation and the moment a decree is passed in his favour by the court of law, that decree is also automatically transferred in favour of the transferee by virtue of the assignment in writing already executed by the transferor. The

debt is merged in the decree and the transferee of the actionable claim becomes entitled by virtue of the assignment in writing in his favour not only to the book debt but also to the decree in which it has merged. The transferee can therefore claim to execute the decree under O. 21, R. 16 of the C. P. Code.. *1955 S C 376 (Pr 56) ((S) AIR V 42 C 66) (SC), Jugalkishore Saraf* v. *Raw Cotton Co. Ltd.* (Per Bhagwati J.)

SECTION 131

Note 2

Add after Pt. 1 :

[Pt. 2] It has been held that the principle embodied in this section is applicable in the case of a sub-pledge and that unless the sub-pledgee has given a notice to the original pledgor, the sub-pledgee is not entitled to restrain the original pledgor from paying off the amount due from him to the pledgee. *1946-52 I D 12523 (All), Thakur Das Marakhanlal* v. *Mathura Prasad.*

Note 3

Add in the Foot Notes indicated :

1. 1951 Raj 74 (A I R V 38 C 30 P 12) (DB), *Kanraj* v. *Vijai Singh.* (The notice of transfer is to be given by the transferor and if given by the transferee it should be alleged or shown that the transferor had refused to sign the notice, although that circumstance need not be mentioned in the notice.)

2. 1951 Raj 74 (A I R V 38 C 30 P 12) (DB), *Kanraj* v. *Vijai Singh.*

Add after Pt. 3 at the end of para :

[Pt. 4] It has been held that a delivery of a copy of the plaint in the suit for the recovery of the debt by the transferee along with the summons served on the debtor cannot be deemed to be a notice of transfer of the debt. *1951 Raj 74 (A I R V 38 C 30 P 11) (DB), Kanraj* v. *Vijai Singh.*

SECTION 132

Note 3

Add in the Foot Note indicated :

6. 1946-52 I D 2260 (Trav Co.) (DB), *Ouseph Thommon* v. *Uthruppu Varkki.* (A chitty hypothecation bond executed by *A* in favour of *B* the foreman of the Chitty was assigned by *B* in favour of *C* for Rs. 350, which was calculated to be the amount due under the hypothecation bond. Held that, when it was found that less amount was due from the debtor *A* than was calculated at the time of assignment, *C* could recover the balance from *B.*)

SECTION 134

Note 3

Add in the Foot Note indicated :

1. *See also* 1951 Mad 809 (A I R V 38 C 277 P 3), *Veerayamma* v. *Venkanna.* (A debt, apart from the security, can be transferred though the debt can be realised by enforcing the security by the mortgagee or an assignee from him. As it is assignable as a debt simpliciter it is equally partible.)

Note 6

Add after Pt. 2 :

[Pt. 3] Where *C* hypothecates a pornote in his favour for the debt of *M* and the latter obtains a decree on the pronote and realises some amount, *C* is entitled to the surplus under this section and his remedy is, where the surplus is known, by a suit for that amount, and, where it is not known, by a suit for accounts and not by a suit for redemption. *1946-52 I D 40096 (Nag), Wasudeo* v. *Nanibai.* (Doctrine of substituted security in favour of the mortgagee cannot be extended to the case and the decree would not take the place of the security.)

SECTION 137

Note 4

Add in the Foot Notes indicated :

15. 1954 Mad 820 (Prs 5, 6) (A I R V 41 C 274) *Seshachalam Naidu* v. *A. Venkatachalam Chetty.* (Agreement in writing transferring all assets and liabilities of a concern including a promissory note in favour of it — Title passes to transferee by reason of the deed though the note is not duly endorsed to the transferee.) ✣ (1955) 1955 Andhra W. R. 91, (98, 99) *Vaddadi Venkataswami* v. *Muhamad Beegum.* (A comparison of Section 130 with Section 137 of the Transfer of Property Act clearly shows that the transfer of a promissory note by means of writing is not barred. Section 137 saves negotiable instruments from the operation of Section 130.)

17. (1955) 1955 Andhra W.R. 91 (98,99), *Vaddadi Venkataswami* v. *Muhamad Beegum.* (An assignee of a promissory note otherwise than by indorsement such as a transfer by means of writing under S. 130 of the Transfer of Property Act, can file a suit on the promissory note.) ✣ 1954 Mad 820 (Prs. 5, 6) (A I R V 41 C 274), *Seshachalam Naidu* v. *A Venkatachalam Chetty* ((1888) ILR 11 Mad 290, Pattat Ambadi v. Krishnan and 1939 All 279 (A I R V 26) Jang Bahadur Singh v. Chander Bali Singh, Disting-

uished; (1894) I L R 17 Mad 461, Abboy Chetti v. Ramchandra Rau; (1901) I L R 24 Mad 654, Muhammad Khumarali v. Rangarao; (1905) I L R 28 Mad 544, Muthar Sahib Maraikar v. Kadir Sahib Maraikar; 1934 Cal 549 (A I R V 21), Surathchandra Shah v. Narayan Chandra Chandhuri and 1937 Pat 100 (A I R V 24) (FB), Ghanshayamdas Marwari v. Raghasahu, *Rel. on.*)

Note 5

Add in the Foot Note indicated :

2. 1954 All 747 (Pr 11) (A I R V 41 C 296) (DB), *Sheo Prasad* v. *Dominion of India.*

Add after pt. (6b) :

[Pt. 6c] Similarly a railway receipt being a mercantile document of title to goods, it is possible to transfer the title in the goods, to the endorsee by mere endorsement. The presumption is in favour of the endorsee though from other facts and circumstances it may be possible to hold that the goods have not been transferred to the endorsee and he is merely deputed to act as agent.

In a suit by the plaintiff to recover value for shortage of goods delivered to him by the railway, it was admitted that the goods belonged to the consignor, that the consignor had merely authorised the plaintiff by endorsement to him of the railway receipt to take delivery of the goods and that the goods were kept at the shop of the plaintiff for the purpose of sale as an agent of the consignor.

Consignor merely authorising the plaintiff by endorsing railway receipt to him to take delivery and to keep them in his shop for sale on commission — Held, that the plaintiff's right being only to get a share in the sale proceeds by way of commission, he was not entitled to sue railway for value of shortage in delivery. *1954 All 747 (Pr 11, 13) (A I R V 41 C 296) (DB), Sheo Prasad* v. *Dominion of India.*

1951 Orissa *con*
262*con* S 106 N 6 6
" S 106 N 6 7a
" S 106 N 15 1
" S 117 N 8 14
300 S 76 N 8 26
" S 76 N 8 32
" S 76 N 12 1
306 S 52 N 11 13b
" S 52 N 20 6
362 S 58 N 33 8a
" S 58 N 33 32e
" S 58 N 33 32f
" S 58 N 33 38
" S 58 N 33 42a
" S 58 N 33 47a

1952 Orissa
64 S 52 N 18 11
" S 52 N 31 1
" S 52 N 31 2
" S 52 N 32 3
" S 52 N 40 4
75 S 41 N 10 3a
" S 41 N 10 4a1
" S 41 N 25 3
99 S 105 N 42 7a
" S 105 N 44 3
" S 105 N 44 5
" S 105 N 44 5b
" S 111 N 12 2a
" S 111 N 13 20e
116 S 3 N 2 28
" S 4 N 3 2
" S 4 N 5 7
118 S 53A N 10 1
143 S 53A N 13 3
163 S 53A N 15 2
165 S 105 N 43 1
" S 105 N 43 4
" S 105 N 14 3
" S 105 N 48 2
" S 105 N 49 2
239 S 51 N 8 2
" S 51 N 8 2a
" S 51 N 8 3
" S 51 N 8 4
" S 51 N 8 7a
" S 51 N 8 11a

1953 Orissa
17 S 60 N 26 4
59 S 106 N 40 6b
92 S 105 N 44 12a
" S 105 N 65 2
103 S 100 N 29 1
245 S 106 N 12 2
" S 108 N 34 2
315 S 54 N 14 2
" S 54 N 14 15
" S 54 N 14 13
" S 54 N 14 11

1954 Orissa
31 S 54 N 21 1
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44 S 130 N 9a 1
" S 130 N 15 7
105 S 118 N 9 6a
110 S 40 N 25 4
" S 40 N 25 5aa
" S 40 N 25 6a1
" S 105 N 86 1
" S 105 N 86 4

1954 Orissa *con*
110*con* S 108 (j) N 2 3
" S 103 (j) N 3 1a
" S 108 (j) N 4 4a
132 S 108 (j) N 1 4
195 S 3 N 20 3
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1955 Orissa
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" S 55 N 20 29
" S 55 N 20 33
" S 55 N 20 33a
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(S)20 S 55 N 20 25
" S 55 N 20 26
" S 55 N 20 27
64 S 105 N 50 1

A I R OUDH

1925 Oudh
173 S 116 N 11 3

1938 Oudh
16 S 60 N 50 14a

1943 Oudh
354 S 82 N 14 11
" S 52 N 20 1
" S 52 N 20 6

1944 Oudh
212 S 53A N 13 3

A I R PATNA

1917 Pat
469 S 113 N 1 1a
" S 113 N 2 1a
551 S 122 N 7 5

1929 Pat
620 S 54 N 21 9

1934 Pat
369 S 116 N 14 2

1937 Pat
100 S 37 N 4 17

1940 Pat
385 S 92 N 2 1

1944 Pat
3 S 59 N 13 4

1947 Pat
1 S 54 N 14 15
345 S 58 N 33 47c

1949 Pat
364 S 54 N 14 15
464 S 53A N 13 3
466 S 39 N 8 1a1
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487 S 65 N 10 2b
" S 68 N 1 6
" S 68 N 4 18a
" S 68 N 5 4
" S 68 N 5 26

1949 Pat *con*
504 S 54 N 19 13
505 S 58 N 9 14a
509 S 58 N 33 38
522 S 82 N 14 2
" S 82 N 14 5
" S 82 N 17 11
" S 92 N 15 5

1950 Pat
13 S 92 N 1 9
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" S 117 N 4 1
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174 S 82 N 14 1a
" S 82 N 17 12
" S 92 N 15 5
206 S 60 N 23 2a
" O 34 R 1 N 19 16
211 S 8 N 17 2a1
222 S 116 N 2 3a
246 S 76 N 6 11
284 S 105 N 59 5
288 S 54 N 14 14
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379 S 76 N 7 5
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478 S 100 N 5 1
488 S 6 N 4 9a

1951 Pat
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" S 105 N 13 12
" S 105 N 14 7
" S 111 N 14 33a
254 S 91 N 10 5
" S 91 N 25 6
" S 100 N 5 1
277 S 53A N 16 3
315 S 43 N 2 3
" S 43 N 10 2
327 S 58 N 33 8
" S 58 N 33 38
" S 60 N 20 1
363 S 3 N 12 8
" S 3 N 18 6
415 S 3 N 21 11
" S 6 N 16 8a
454 S 54 N 5 5
" S 54 N 14 13
463 S 116 N 14 2
488 S 12 N 1 3
502 S 53A N 20 1
508 S 108 (f) N 2 4
" S 108 (f) N 2 4a
" S 108 (f) N 1 3a
529 S 111 N 23a 2
556 S 8 N 20 2
566 S 59 N 13 4

1951 Pat *con*
566*con* S 60 N 27 2
" S 60 N 27 3
600 S 51 N 22 11
" S 51 N 22 19
" S 51 N 22 23
" S 108 (p) N 1 1a
" S 108 (p) N 1 8
" S 108 (p) N 1 9
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" S 834 N 14a 1

1952 Pat
9 S 52 N 7 1
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43 S 105 N 43 1
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312 S 58 N 36 9
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" S 108(j) N 5 1
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469 S 58 N 4 2a
476 S 60 N 23 8

1953 Pat
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" S 52 N 37 3a
" S 100 N 24 1
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193 Pre N 2 4
" S 56 N 7 2
" S 56 N 7 3aa
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" S 111 N 13 15a
298 S 3 N 9 8
330 S 54 N 14 12

1954 Pat
32 S 130 S 9a 1
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280 S 54 N 10a 1
" S 54 N 16 1
" S 122 N 2 7
304 S 68 N 5 16a
" S 105 N 19 8
" S 105 N 70 7
340 S 105 N 6a 1

1955 Pat
108 S 56 N 10 3
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" S 56 N 12 5
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(S)126 S 53A N 10 1
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" S 116 N 6 1b
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" S 58 N 9 12
(S)194 S 58 N 13 8
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" S 55 N 14 5a
(S)254 S 55 N 18 5
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AIR PEPSU
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" S 63A N 5 1b
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AIR PESHAWAR
1944 Peshawar
15 S 118 N 2 8

AIR PUNJAB
1951 Punjab
404 S 60 N 3 2
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438 S 114 N 8 1
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1952 Punjab
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AIR RAJASTAAN
1955 Rajasthan
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74 S 130 N 17 5
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88 S 106 N 2 7
" S 106 N 37 4
120 S 108(m) N 2 1
148 S 114 N 5 3
1952 Rajasthan
72 S 84 N 5 36
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" S 6 N 16 9
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" S 130 N 4 8
1953 Rajasthan
144 S 6 N 6 11
1954 Rajasthan
252 S 105 N 64 1a
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1955 Rajasthan
(S) 1 S 106 N 2 7
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70 S 53A N 23 16
" S 54 N 1 9a
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AIR RANGOON
1928 Rang
67(2) S 36 N 2 7a
1934 Rang
321 S 48 N 14 2
1935 Rang
212 S 58 N 33 47c

AIR SAURASHTRA
1951 Sau
53 S 60 N 3 2a
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64 S 106 N 2 7
1952 Sau
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1953 Sau con
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193 S 60 N 32 6
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1954 Sau
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82 S 50 N 1 4
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93 S 68 N 14 6
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AIR SIND
1915 Sind
21 S 3 N 34 9a
1937 Sind
56 S 3 N 34 9a
1949 Sind
34 S 117 N 3 15a

AIR TRAVANCORE-COCHIN
1950 Trav-Co
16 S 91 N 8 1
33 S 76 N 12 21
60 S 53 N 9 4
73 S 123 N 1 2
78 S 63 N 3 1aa
81 S 53A N 6 1a
105 S 76 N 12 3
1951 Trav-Co
17 S 1 N 5 1
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71 S 60 N 5 18a
94 S 63 N 7 2
101 S 60 N 44 4
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109 S 63A N 9 1
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154 S 58 N 35 7
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170 S 60 N 5 17
180 S 6 N 18 2

1951 Trav-Co *con.*

187	S 52 N 2	2a
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195	S 39 N 6	2
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212	S 60 N 44	5
237	S 53 N 13	1
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1952 Trav-Co

23	S 126 N 5	6a
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61	S 52 N 32	1
62	S 100 N 5	23
92	S 60 N 10	3a
"	S 84 N 16	3
96	S 82 N 32	1
102	S 52 N 31	2
104	S 105 N 67	10
105	S 53 N 8	2
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"	S 92 N 17	1
150	S 61 N 6	1
181	S 108(l) N 5	8
191	S 63A N 9	1
195	S 51 N 10	1
205	O 34R 10 N 3	1
230	S 52 N 32	1
236	S 84 N 11	3a
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254	S 8 N 12	4
286	S 60 N 5	17
295	S 60 N 49	1
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309	S 52 N 38	1
333	S 105 N 5	7a
351	S 6 N 4	4a
359	S 108(q) N 1	1a
"	S 116 N 13	2
363	S 61 N 2	9
386	S 60 N 5	15a

1952 Trav-Co *con.*

395	S 76 N 6	14
433	S 58 N 37	1
467	S 54 N 23	21
479	S 41 N 3	3
487	S 82 N 18	2
"	S 82 N 18	6
507	S 63A N 9	1
539	S 100 N 17	10
552	S 61 N 5	2
"	S 63 N 2	1
"	S 76 N 16	9

1953 Trav-Co

12	S 52 N 27	7a
"	S 52 N 36	1
"	S 111 N 8	4a
63	S 58 N 35	7a
69	S 92 N 23	10
89	S 13 N 2	5
"	S 13 N 5	3
"	S 14 N 5	3a
"	S 14 N 13	3
"	S 45 N 6	12a
115	S 11 N 9	11
"	S 126 N 2	2
161	S 51 N 13	1a
193	S 100 N 28	1a
236	S 55 N 2	32a
265	S 60 N 26	2
271	S 58 N 5	5a
"	S 58 N 5	5b
"	S 55 N 5	5c
273	S 58 N 37	2
"	S 58 N 37	4
283	S 60 N 43	1
"	S 82 N 19	1
321	S 53 N 3	2
"	S 53 N 8	1
335	S 60 N 46	1
336	S 122 N 7	7c
"	S 122 N 17	4
344	S 100 N 9	1
"	S 100 N 9	4
349	S 51 N 1	1
"	S 51 N 10	6
"	S 51 N 10	9
353	S 105 N 26	1a
"	S 105 N 71	3
"	S 111 N 2	3
364	S 52 N 14	13a
"	S 52 N 40	1
369	S 105 N 40	1

1953 Trav-Co *con.*

369*con*	S 105 N 70	7a
"	S 111 N 24	1
375	S 60 N 23	5
383	S 195 N 71	4
423	S 60 N 49	1
441	S 63A N 6	3
462	S 108(f) N 1	7
"	S 108(f) N 3	5
"	S 108(m) N 1	4
"	S 108(m) N 2	3a
"	S 108(m) N 7	2
536	S 92 N 11	1
565	S 60 N 27	2
570	N 60 N 28	15
573	S 52 N 9	6
"	S 52 N 16	1
"	S 52 N 27	8
577	S 106 N 3	2
584	S 108(h) N 3	1
"	S 108(h) N 4	6
"	S 108(l) N 8	1a
"	S 111 N 10	3b
"	S 111 S 10	20a

1954 Trav-Co

7	S 58 N 12	1
"	S 58 N 35	16
"	S 60 N 28	12
"	S 60 N 29	2
"	S 60 N 37	6
10	S 53A N 13	2
"	S 53A N 16	5
"	S 54 N 23	3
"	S 54 N 23	6
"	S 54 N 23	22
38	S 52 N 18	4
"	S 52 N 18	6
"	S 52 N 37	1
53	S 76 N 8	30
122	S 52 N 32	1
142	S 58 N 31	35
"	S 58 N 33	38
"	S 60 N 28	5
165	S 58 N 33	38
"	S 60 N 28	5
"	S 60 N 29	13
239	S 108(h) N 2	6
"	S 108(m) N 1	2a
"	S 108(o) N 4	3
251	S 60 N 41	3
"	S 76 N 8	21a
"	S 91 N 8	3

1954 Trav-Co *con.*

299	S 52 N 31	2
313	S 60 N 49	9
348	S 6 N 27	1a
"	S 122 N 2	8
"	S 122 N 7	6au
"	S 122 N 13	4
"	S 126 N 16	1a
357	S 6 N 3	8
384	S 91 N 3	6
392	S 58 N 37	1
404	S 53 N 11	4
"	S 122 N 1	2
"	S 122 N 7	7d
407	S 126 N 9	2aa
"	S 126 N 9	11
427	S 55 N 14	1
443	S 60 N 37	6
467	S 105 N 40	2
471	S 51 N 9	8
473	S 60 N 7	3a

1955 Trav-Co.

(S) 3	S 52 N 13	28
"	S 52 N 38	1
(S) 9	S 60 N 26	3
"	S 60 N 46	10
17	S 67 N 27	3
"	S 67 N 27	30
(S) 130	S 2 N 6	10
"	S 58 N 3	8
"	S 60 N 3	2b

AIR TRIPURA

1952 Tripura

28	S 54 N 23	22

1954 Tripura

21	S 106 N 24	4

AIR VINDHYA PRADESH

1952 Vind. P.

69	S 53 N 5	8
"	S 53 N 9	11

1955 Vind. P.

4	S 58 N 31	24
"	S 60 N 29	2
"	S 5 N 2	9aaaa
15	S 53A N 5	3
"	S 53A N 16	5
"	S 53A N 18	1

II. NOTES OF UNREPORTED CASES OF THE ALL INDIA REPORTER

AIR 1955 NUC

6	S 53 S 6	9
17	S 55 N 7	2
25	S 44 N 9	1
"	S 44 N 9	2a
52	S 105 N 40	2
"	S 106 N 3	2
"	S 111 N 27	1
"	S 116 N 1	7b
69	S 106 N 42	2

1955 NUC *con.*

69*con*	S 107 N 1	5
77	S 60 N 50	15
"	S 62 N 3	4
84	S 60 N 22	15
"	S 60 N 26	1
"	S 60 N 26	17d
121	S 106 N 29	1
"	S 106 N 37	11
"	S 10-(j) N 5	1
"	S 108(j) N 5	1a

1955 NUC *con.*

168	S 113 N 3	2bb
198	S 106(f) N 1	1
"	S 108(f) N 1	4
199	S 123 N 2	3
"	S 123 N 15	1
"	S 123 N 15	2
203	S 53A N 13	2
"	S 60 N 48	7a
217	S 76 N 20	1
224	S 82 N 2	1

1955 NUC *con.*

224*con*	S 82 N 2	11
230	S 56 N 7	2
"	S 56 N 7	3aa
"	S 56 N 7	4aa
231	S 52 N 10	8
"	S 52 N 11	12
"	S 52 N 13	21
"	S 52 N 20	1
"	S 52 N 38	3
"	S 69 N 5	10

1955 NUC *con*

242	S 43 N 2	3
"	S 43 N 9	7
"	S 92 N 2	1
"	S 92 N 19	8
257	S 58 N 35	6a
287	S 76 N 15	1
"	S 83 N 17	7
"	S 83 N 17	1a
"	S 83 N 17	2
"	S 83 N 17	3
296	S 76 N 12	6
"	S 77 N 1	2
"	S 77 N 1	13
321	S 105 N 24	1b
"	S 111 N 23a	3
333	S 55 N 20	27
438	S 54 N 21	1
"	S 54 N 22	5
537	S 92 N 15	3
"	S 95 N 1	12
542	S 92 N 1	5
543	S 8 N 20	28
"	S 98 N 8	1
544	S 63A N 5	1a
"	S 63A N 5	3
588	S 59 N 8	19
622	S 54 N 4	3
695	S 58 N 37	1
"	S 98 N 7	1
"	S 98 N 7	1a
"	S 98 N 7	2
712	S 53A N 9a	1
"	S 53A N 10	4
"	S 53A N 11	1
743	S 60 N 27	6
748	S 55 N 12	32
756	S 105 N 31	14
"	S 105 N 31	17a
"	S 106 N 17	1a
765	S 1 5 N 32	7
"	S 106 N 6	5
"	S 106 N 8	6
787	S 5 N 3	6
844	S 53A N 13	2
"	S 105 N 9	2
"	S 106 N 3	6
"	S 106 N 18	2
866	S 106 N 24	13a
"	S 108(l) N 1	1
912	S 52 N 35	1
921	S 53A N 9a	1
931	S 50 N 2	8
949	S 54 N 23	17

1955 NUC *con*

954	S 76 N 4	6
"	S 76 N 20	5
967	S 106 N 49	2a
971	S 106 N 49	2a
"	S 111 N 25	4
"	S 113 N 3	2c
"	S 113 N 3	2cc
974	S 112 N 2	7
"	S 114 N 6	1a
979	S 109(b) N 4	5
"	S 111 N 14	7
983	S 105 N 32	2b
"	S 106 N 15	3
"	S 106 N 49	2a
985	S 105 N 32	5b
"	S 106 N 12	2
"	S 106 N 18	1
"	S 107 N 7	4
1040	S 3 N 2	33c
"	S 108 (h) N 2	6
"	S 109 (h) N 4	5
"	S 108 (h) N 4	6
"	S 111 N 8	11a
1043	S 52 N 2	2a
"	S 52 N 31	1
"	S 52 N 31	2
"	S 52 N 32	1
1046	S 122 N 7	6
"	S 122 N 7	6aa
"	S 122 N 7	7d
"	S 122 N 20	1
"	S 126 N 16	1
"	S 126 N 16	1a
1068	S 8 N 20	19
1075	S 60 N 17	2a
"	S 91 N 32	1
1100	S 106 N 9	4
"	S 112 N 1	6aa
"	S 112 N 1	8
"	S 113 N 1	1a
"	S 113 N 2	1a
"	S 113 N 3	4
"	S 116 N 9	3
1115	S 106 N 45	2
1119	S 44 N 8	1
"	S 44 N 8	3
"	S 51 N 1	14
1138	S 106 N 49	2a
"	S 109 N 5	1

1955 NUC *con*

1185	S 108 (L) N 5	5a
1197	S 106 N 3	2
"	S 111 N 2	2
"	S 111 N 2	4
1236	S 52 N 7	1
"	S 105 N 7	7b
1248	S 114 N 5	1
1249	S 8 N 20	14
"	S 11 N 2	2
"	S 122 N 1	2
1260	S 54 N 21	1
"	S 55 N 5	6
"	S 55 N 7	2
1294	S 106 N 15	3
1309	S 67 N 19	5
1355	S 60 N 41	2
"	S 92 N 15	3
1357	S 105 N 14	2
"	S 105 N 14	3
1414	S 108 (L) N 14	49
1459	S 5 N 4	21
1488	S 106 N 19	7
"	S 106 N 40	6c
"	S 106 N 49	15
1492	S 106 N 19	7
"	S 108 N 41	6
1541	S 104 (h) N 7	2
1553	S 105 N 9	2
"	S 105 N 9	5
"	S 107 N 10	3
1578	S 55 N 4	2
1591	S 8 N 20	16
1595	S 55 N 3	19a
1596	S 52 N 35	14a
1597	S 52 N 19	1
"	S 52 N 31	1
"	S 52 N 31	2
1608	S 108 (q) N 1	9
1655	S 52 N 35	12
1669	S 108 (L) N 5	8
1671	S 83 N 8	6a
"	S 83 N 10	2
"	S 84 N 5	3
"	S 84 N 5	31a
"	S 84 N 5	43
1674	S 111 N 16	9
1691	S 65A N 7	1

1955 NUC *con*

1691 *con*	S 65A N 7	8
"	S 108 (c) N 8	5
1695	S 58 N 15	1
"	S 91 N 4	2b
1698	S 41 N 1	5a
"	S 41 N 3	1
"	S 41 N 24a	2
"	S 52 N 39	2a
1704	S 8 N 20	34
1705	S 53A N 9a	1
"	S 53A N 13	10a
1763	S 62 N 2	10
1767	S 105 N 67	4
"	S 105 N 67	8
"	S 105 N 67	9
1814	S 111 N 23a	3aa
1826	S 105 N 67	19
1828	S 69 N 3	8
1853	S 113 N 3	6
1859	S 43 N 7	1
"	S 92 N 19	2
1886	S 105 N 70	10
1906	S 60 N 50	14b
1912	S 39 N 5	1a
"	S 39 N 8	1a1
"	S 39 N 8	1b
1915	S 106 N 3	3
"	S 108 (q) N 1	9
1950	S 43 N 2	14
"	S 43 N 5	1
2420	S 6 N 16	19
2865	S 8 N 20	40
"	S 103 (G) N 4	3
"	S 111 N 13	5
"	S 111 N 13	5a
"	S 111 N 13	5b
3203	S 91 N 3	1
"	S 91 N 5	3
"	S 92 N 11	1
3607	S 122 N 4	1a
"	S 123 N 4	1aa
"	S 123 N 4	2
"	S 123 N 4	3
3608	S 58 N 35	25
"	S 59 N 2	3a
4462	S 60 N 41	7a
"	S 92 N 23	1

III. OFFICIAL LAW REPORTS

PRIVY COUNCIL

L. R. Indian Appeals

75 I A

160	S 72 N 3	9

76 I A

271	S 105 N 44	16

77 I A

53	S 60 N 26	1b
156	S 55 N 8	1a
"	S 55 N 8	17
"	S 55 N 8	18

FEDERAL COURT

FEDERAL COURT REPORTS

1948 F C R

239	S 8 N 20	8a

1949 F C R

484	S 53A N 10	2
"	S 60 N 22	7a
"	S 60 N 26	17c
"	S 60 N 26	27d
	S 60 N 48	10

1949 F C R *con*

537	S 112 N 1	6
"	S 114 N 8	1

SUPREME COURT

SUPREME COURT REPORTS

1950 S C R

75	S 53A N 3	14
"	S 53A N 5	3a

1950 S C R *con*

75 *con*	S 53A N 6	2a
"	S 53A N 9	2
"	S 53A N 16	3
"	S 53A N 16	5a
"	S 53A N 17	1a
"	S 53A N 17	3

1950 S C R *con.*

548 S 58 N 39 77
" S 58 N 39 78
706 S 8 N 5 5
" S 8 N 6 23
" S 8 N 20 1
" S 8 N 20 7
840 S 108 (j) N 1 6
" S 108 (j) N 1 9

1951 S C R

153 S 108 (l) N 7 4a
" S 111 N 7 12a
288 S 6 N 26a 5c
292 S 60 N 41 13
431 S 105 N 44 16
534 S 6 N 2Ca 5c
560 S 116 N 6 1a
" S 116 N 6 3b
" S 116 N 6 3bb
1125 S 8 N 20 15a

1952 S C R

43 S 53A N 3 15
" S 53A N 3 19
179 S 82 N 6 1
" S 82 N 7 1
" S 82 N 14 8
" S 92 N 15 3
269 S 106 N 2 9a
" S 106 N 12 3a
" S 106 N 12 5
" S 106 N 15 1
" S 106 N 15 2
" S 106 N 15 2b
" S 106 N 15 3
" S 106 N 18 1
" S 106 N 18 2
418 S 108 (j) N 4 2
" S 111 N 8 14
775 S 76 N 6 1
" S 76 N 6 11
" S 76 N 6 13
" S 76 N 6 13a
" S 76 N 6 14
" S 76 N 10 1
" S 76 N 10 9a
S 111 N 5 2
" S 111 N 5 2a
793 S 41 N 9 3a

1953 S C R

108 S 65A N 1 6
" S 65A N 1 8a
" S 65A N 4 5a
" S 65A N 4 6a
" S 66 N 1 1a
" S 66 N 1 5
" S 66 N 3 1a
185 S 108 (Gen) N 1 1a
" S 108(h) N 2 6c
" S 111 N 11 1a
232 S 15 N 2 27
249 S 92 N 24 3a
930 S 105 N 48 3a
" S 105 N 48 4
" S 105 N 49 1

1953 S C R *con.*

930*con* S 105 N 49 5
" S 105 N 49 6a
S 105 N 51 1a
1001 S 105 N 44 4a
1009 Pre N 2 11
" S 1 N 5A 1
" S 105 N 1 3a
" S 105 N 1 7a
" S 106 N 13 1a
" S 111 N 16 1
" S 111 N 16 2
" S 111 N 16 3
" S 111 N 16 9
" S 111 N 16 8a
" S 111 N 25 2
" S 111 N 25 3a
" S 114 N 7 1a
" S 114 N 7 5
" S 116 N 1 1a
" S 117 N 2 1a

1954 S C R

310 S 54 N 23 6
360 S 54 N 23 12a
" S 53 N 9 13
919 S 3 N 11a 4

1955 S C R

51 S 8 N 6 1a
" S 8 N 6 23
158 S 105 N 4 3a
174 S 8 N 20 1
" S 8 N 20 2
" S 8 N 20 3
" S 8 N 20 7
" S 58 N 33 3
" S 58 N 33 4
" S 58 N 33 17
" S 58 N 33 42a
" S 58 N 33 45
" S 58 N 33 46
" S 58 N 33 47bb
313 S 36 N 3 3

ALLAHABAD

ILR 21 All

496 S 51 N 22 19

ILR 22 All

149 S 58 N 33 14

ILR 25 All

115 S 105 N 67 4

ILR 29 All

679 S 91 N 12 9a

ILR 35 All

524 S 3 N 2 33a

ILR (1948) All

310 S 76 N 18 3
344 S 72 N 8 9

ILR (1949) All

414 S 106 N 40 1
692 S 55 N 12 1
746 S 6 N 5 1
" S 5 N 5 2
" S 6 N 5 5
3 S 5 N 6 8
" S 5 N 5 19a
" S 6 N 16 7
" S 6 N 16 9
" S 6 N 17 7a
790 S 100 N 5 4

ILR (1949) All *con.*

790*con* S 100 N 5 23
803 S 83 N 2 10
840 S 106 N 2 8
" S 116 N 11 1
" S 116 N 11 3

ILR (1950) All

32 S 10 N 6 17b
" S 10 N 16 8b
" S 54 N 23 7
" S 54 N 23 17
228 S 76 N 13 3
254 O 34 R 7 N 3 12
311 S 43 N 4 5
523 S 114 N 5 3
1001 S 41 N 8 5
" S 41 N 9 4a
" S 41 N 21 6a
1033 S 55 N 1 1a
" S 55 N 9 1b
" S 65 N 9 14
" S 55 N 9 18
1150 S 82 N 16 3

ILR (1951) 1 All

117 S 60 N 26 2
199 S 60 N 26 1b
515 S 67 N 21 4
" S 67 N 21 5a
" S 92 N 5 1
" S 92 N 8 1
" S 92 N 22 4
740 S 6 N 19 9
" S 6 N 13 136

ILR (1951) 2 All

384 S 92 N 22 4
439 S 123 N 12 7
475 S 67 N 27 6
703 S 5 N 1 2

ILR (1952) 1 All

85 S 105 N 29 6
" S 105 N 32 5a
" S 105 N 32 8a
" S 105 N 32 15
" S 105 N 72 6
" S 105 N 80A 1a
" S 106 N 6 7
" S 105 N 24 4
" S 111 N 6 6a
" S 111 N 24 4
" S 111 N 24 5
" S 116 N 1 1
477 S 54 N 4 3c
" S 54 N 12 5
" S 123 N 4 2

ILR (1952) 2 All

200 S 58 N 31 32b
" S 58 N 33 47b
" S 58 N 33 47c
703 S 53A N 3 5

ILR (1953) 1 All

265 S 54 N 5 5
" S 54 N 5 13
" S 54 N 5 14
" S 54 N 12 13
" S 54 N 14 2
" S 54 N 23 2
284 S 39 N 2 1
" S 39 N 2 2
" S 39 N 5 1a
" S 52 N 11 13c

ILR (1953) 1 All *con.*

284*con* S 52 N 14 11
" S 52 N 20 1
" S 52 N 20 6
" S 100 N 28 11
" S 100 N 28 14
437 S 6 N 4 7
" S 6 N 4 8
896 S 15 N 2 27

ILR (1953) 2 All

195 S 41 N 9 3a

ILR (1954) 1 All

147 S 76 N 1 9
" S 76 N 6 6
" S 83 N 2 10
631 S 60 N 2 1a
" S 62 N 2 9

ILR (1954) 2 All

675 S 38 N 5 8
" S 51 N 7 8
" S 51 N 8 14
" S 51 N 9 1

ASSAM

ILR (1949) 1 Assam

1 S 41 N 7 1
" S 41 N 21 1
" S 41 N 23 1a
" S 41 N 23 9
40 S 44 N 4 3a
59 S 43 N 9 5
" S 91 N 5 3
105 S 111 N 13 8
" S 111 N 13 20c
" S 112 N 2 9
167 S 58 N 35 28
" S 58 N 41 3
" S 58 N 41 5
198 S 65A N 1 7a
" S 91 N 12 1a

ILR (1950) 2 Assam

1 S 43 N 7 2b
" S 43 N 7 8
" S 55 N 1 13
144 S 60 N 28 13
166 S 111 N 14 30
225 S 52 N 27 2
275 S 91 N 5 4
279 S 108(q) N 2 2
297 S 108(c) N 1 7
444 S 58 N 35 28
" S 58 N 35 34a
" S 58 N 41 3
" S 123 N 5 1

ILR (1951) 3 Assam

1 S 3 N 22 21
" S 100 N 4 1
35 S 104 N 72 4a
" S 108(j) N 8 1
171 S 105 N 63 1
240 S 105 N 40 8

ILR (1952) 4 Assam

118 S 82 N 19 2
166 S 108 N 25 4
247 S 52 N 40 5
357 S 108 N 34 20
" S 106 N 34 21
" S 106 N 34 23
" S 106 N 45 2

ILR (1952) 4 Ass *con*
401 S 106 N 13 2
441 S 106 N 41 1
" S 106 N 42 2

ILR (1953) 5 Assam
94 S 8 N 20 2
" S 8 N 20 3
115 S 130 N 15 8
207 S 105 N 25 2b
" S 105 N 26 1a
" S 105 N 26 1b
" S 105 N 26 1d
" S 105 N 31 18
" S 106 N 15 2
" S 106 N 26 1c

ILR (1954) 6 Assam
95 S 107 N 4 1
" S 107 N 6 1
" S 116 N 1 8b
" S 116 N 11 7
" S 116 N 12 2
" S 117 N 2 1b
" S 117 N 2 17
" S 117 N 4 1

BOMBAY

ILR 1 Bom
267 S 3 N 2 33a

ILR 6 Bom
650 S 123 N 4 2

ILR 9 Bom
198 S 105 N 84 3

ILR 22 Bom
610 S 8 N 2 1

ILR 23 Bom
682 S 123 N 4 2

ILR 26 Bom
252 S 105 N 67 4

ILR 29 Bom
391 S 76 N 8 21

ILR 31 Bom
15 S 114 N 9 2

ILR (1949) Bom
480 S 52 N 4 1a
883 S 111 N 1 3
" S 111 N 1 4a
" S 111 N 11 2a
" S 111 N 13 24a
" S 111 N 16 9
" S 111 N 25 2

ILR (1950) Bom
114 S 52 N 14 5
" S 53 N 5 11a
185 S 6 N 23 3a

ILR (1951) Bom
148 S 122 N 1 8
203 S 19 N 10a 4
209 S 72 N 4 6
" S 76 N 7 18
240 S 114 N 9 2
293 S 111 N 1 2
" S 111 N 1 4a
" S 111 N 11 2a
" S 111 N 16 2
" S 111 N 16 9
" S 111 N 19 9a
" S 111 N 25 2
" S 111 N 25 3a

ILR (1951) Bom *con*
670 S 108(q) N 1 7a
679 S 5 N 1 1
" S 5 N 4 20
692 S 3 N 2 3
" S 83A N 6 2
" S 105 N 2 2
" S 105 N 3 1

ILR (1952) Bom
1090 S 3 N 2 6
" S 3 N 2 7
" S 58 N 4 2

ILR (1953) Bom
98 S 114 N 1 4a
" S 114 N 5 1
253 S 54 N 8 2
" S 54 N 17 1
" S 55 N 20 1
" S 55 N 20 4
633 S 108(l) N 5 2
" S 108(l) N 6 5
727 S 91 N 12 9a
773 S 60 N 28 6
" S 60 N 28 6a
" S 60 N 28 7
948 S 10 N 15 4
1055 S 60 N 22 15
1071 S 54 N 22 2
" S 54 N 22 5
1153 S 58 N 28 27
1281 S 5 N 4 16a
" S 54 N 11a 2

ILR (1954) Bom
10 S 91 N 5 3
" S 91 N 5 4
194 S 53A N 14 3–4
424 S 6 N 17 9a
448 S 8 N 20 4
" S 8 N 20 9
" S 105 N 26 1a
" S 105 N 27 1
" S 105 N 27 2
" S 105 N 27 6
" S 105 N 41 3a
" S 105 N 47 8
" S 105 N 50 1
" S 105 N 72 3
" S 105 N 72 6
" S 105 N 72 6a
" S 117 N 3 3
" S 108(j) N 1 11a
615 S 1 N 5A 2
" S 2 N 6 1a
" S 8 N 20 1
" S 8 N 20 2
" S 8 N 20 4
" S 8 N 20 9
" S 8 N 20 28
" S 105 N 1 7b
" S 105 N 13 1a
" S 105 N 13 1d
717 S 68 N 5 10a
950 S 116 N 13 10
1131 S 76 N 22 2a
" S 76 N 22 5
1256 S 8 N 20 9
" S 105 N 14 1a
" S 105 N 14 7

CALCUTTA

BENGAL LAW REPORTS

7 Beng L R
152 108(j) N 1 2

ILR 1 Cal
391 S 105 N 42 13

ILR 7 Cal
474 S 108(e) N 6a 1

ILR 10 Cal
1035 S 92 N 11 1

ILR 14 Cal
687 S 100 N 9 1
" S 100 N 9 4

ILR 23 Cal
450 S 3 N 2 32a

ILR 24 Cal
272 S 105 N 67 4
440 S 105 N 42 13

ILR 29 Cal
370 S 108(l) N 14 13

ILR 32 Cal
123 S 106 N 2 8

ILR 36 Cal
1003 S 105 N 42 13

ILR (1945) 2 Cal
526 S 3 N 2 33a
651 S 5 N 4 29

ILR (1948) 1 Cal
492 S 40 N 1 9
" S 40 N 1 9a
" S 40 N 5 2
" S 40 N 5 3
" S 40 N 9 3
" S 40 N 17 5
" S 55 N 9 29
" S 58 N 4 8a
" S 58 N 4 9
" S 65 N 3 1a
" S 100 N 13 5
" S 100 N 13 8
" S 100 N 13 9
" S 108(c) N 1 3
520 S 117 N 4 1

ILR (1948) 2 Cal
107 S 105 N 35 6
284 S 108(l) N 14 13

ILR (1949) 1 Cal
378 S 52 N 31 2
" S 52 N 35 1
392 S 100 N 28 12
" S 100 N 28 14
487 S 58 N 36 4
" S 58 N 44 1
498 S 8 N 20 2
" S 8 N 20 4
" S 8 N 20 16
" S 8 N 20 16a
" S 8 N 20 29

ILR (1950) 1 Cal
17 S 8 N 20 8a
396 S 106 N 43 6

ILR (1950) 2 Cal
183 S 111 N 7 10a
268 S 106 N 13 2
352 S 108(j) N 4 4
443 S 53A N 13 1

ILR (1950) 2 Cal *con*
443 *con* S 53A N 13 8
" S 53A N 13 10a
" S 53A N 16 3
" S 105 N 14 2
" S 105 N 14 3
" S 105 N 14 3a
" S 105 N 14 7
" S 106 N 12 6
" S 107 N 1a 1

ILR (1951) 1 Cal
103 S 44 N 8 3
276 S 40 N 1 4
" S 40 N 25 1b
283 S 52 N 14 17a
295 S 122 N 7 5
" S 122 N 7 6
" S 123 N 1 1
" S 123 N 2 4
" S 123 N 5 3
331 S 55 N 8 2a
507 S 100 N 5 1

ILR (1951) 2 Cal
37 S 108(e) N 4 1a
" S 108(e) N 6a 2
76 S 106 N 49 4
263 S 44 N 8 1
" S 44 N 8 2a
" S 44 N 8 3
" S 44 N 8 3a
" S 44 N 9 1a
309 S 91 N 3 3
" S 91 N 3 4
444 S 1 7 N 10 2
" S 107 N 12 4
" S 116 N 3 19

ILR (1952) 1 Cal
111 S 108(j) N 1 6
" S 108(j) N 1 9
263 S 54 N 1 2a

ILR (1952) 2 Cal
138 S 113 N 3 13a
167 S 111 N 10 3
" S 115 N 1 3
209 S 8 N 20 15a

ILR (1954) 1 Cal
384 S 44 N 9 5a

EAST PUNJAB

ILR (1949) E P
305 S 52 N 23 1

HYDERABAD

ILR (1951) Hyd
91 S 67 N 13 2a
189 S 58 N 33 40
" S 58 N 33 41
283 S 54 N 19 20
542 S 111 N 23a 2
" S 111 N 23a 3a

ILR (1952) Hyd
7 S 54 N 12 5a
" S 122 N 16 2
" S 129 N 2 2
23 S 82 N 12 3
351 S 58 N 4 7a
" S 59 N 4 6
" S 59 N 4 7
449 S 53A N 6 3b

ILR 1952 Hyd *con.*

449*con* S 53A N 10 4
495 S 3 N 6 3
" S 3 N 7 3
" S 3 N 9 4a
" S 3 N 10 4a
" S 3 N 10 6
1012 S 111 N 5 1a
" S 111 N 5 2

ILR (1953) Hyd

110 S 53A N 6 2
" S 53A N 17 3
" S 113 N 3 2c
165 S 39 N 6 2
259 S 55 N 5 11a
331 S 68 N 5 7
" S 68 N 5 9
" S 68 N 5 10
642 S 63 N 5 9

ILR (1954) Hyd

250 S 19 N 6 9
" S 21 N 3 1
" S 52 N 35 1
" S 52 N 35 2
" S 52 N 35 3
822 S 6 N 3 22
" S 51 N 8 8
" S 51 N 8 13
" S 53A N 3 14
" S 53A N 5 3
" S 53A N 10 2
" S 53A N 13 13
" S 53A N 13 15
" S 53A N 19 1

ILR (1955) Hyd

71 S 111 N 6 6
147 S 83 N 2 4
" S 83 N 17 19
" S 83 N 17 20

JAMMU & KASHMIR

Jammu and Kashmir Law Reports

7 J & K L R

158 S 54 N 17 4
" S 54 N 21 7
" S 54 N 23 2a
224 S 54 N 11 3

8 J & K L R

34 S 44 N 4 3
157 S 105 N 79 4
191 S 106 N 39 2
" S 11. N 13 2
204 S 105 N 79 1
" S 105 N 79 3

10 J & K L R

176 S 5 N 4 20

11 J & K L R

59 S 106 N 24 4
" S 116 N 2 3
" S 116 N 13 2
" S 116 N 13 5
234 S 68A N 1a 2*

12 J & K L R

21 S 106 N 2 7

LAHORE

I L R 12 Lah

161 S 58 N 36 3

PAKISTAN LAW REPORTS LAHORE

Pak L R (1949) Lah

595 S 100 N 13 5

Pak L R (1950) Lah

1 S 55 N 2 24
" S 55 N 20 14

MADHYA BHARAT

ILR (1952) Madh B

126 S 111 N 23a 3
" S 111 N 23a 3a
136 S 5. N 11 8a
" S 58 N 11 9

ILR (1953) Madh B

104 S 58 N 35 28
" S 58 N 36 9
" S 58 N 41 9
" S 98 N 3 1a
147 S 6. N 44 2
" S 60 N 44 3
" S 60 N 44 5
" S 60 N 44 6
" S 91 N 24 1
193 S 113 N 1 1a
" S 113 N 1 2a
" S 113 N 2 1a
" S 113 N 3 1b
" S 113 N 3 2aa
" S 117 N 2 15a

ILR (1954) Madh B

237 S 53A N 5 3
" S 53A N 10 3
" S 53A N 10 4
" S 53A N 10 5
" S 53A N 13 2
" S 53A N 16 3
279 S 112 N 2 10

MADRAS

ILR 7 Mad

203 S 105 N 67 4

ILR 11 Mad

290 S 137 N 4 17

ILR 13 Mad

275 S 44 N 6 1

ILR 17 Mad

461 S 137 N 4 17

ILR 19 Mad

151 S 91 N 12 9a

ILR 21 Mad

858 S 105 N 67 4

ILR 24 Mad

47 S 108(b) N 2 6
654 S 137 N 4 17

ILR 27 Mad

28 S 84 N 3 3aa
" S 84 N 19 1
162 S 8 N 9 10

ILR 28 Mad

544 S 137 N 4 17

ILR 31 Mad

163 S 116 N 4 6

ILR 33 Mad

71 S 76 N 22 2a

ILR 35 Mad

607 S 3 S 11 1a

ILR (1945) Mad

803 S 60 N 26 17a
" S 60 N 48 10

ILR (1948) Mad

757 S 10. N 1 3a
" S 111 N 16 9a
" S 111 N 25 3
" S 116 N 1 8a
" S 116 N 2 18

ILR (1949) Mad

904 S 52 N 36 1

ILR (1950) Mad

844 S 116 N 2 4

ILR (1951) Mad

607 S 5 N 4 21
" S 53A N 6 4
932 S 117 N 3 10

ILR (1952) Mad

92 S 58 N 37 2
" S 58 N 37 5
" S 72 N 3 9
" S 98 N 7 2
604 S 58 N 33 23
" S 58 N 33 27
" S 58 N 33 28
" S 58 N 33 30
" S 58 N 33 38
682 S 8 N 20 19
" S 55 N 2 28
" S 55 N 2 30
" S 55 N 2 32
" S 55 N 2 33
" S 55 N 9 24
835 S 44 N 6 1
993 S 58 N 35 34a
" S 58 N 40 5
" S 58 N 41 3
" S 58 N 41 5
" S 67 N 18 1
" S 68 N 12 2
" S 98 N 5 8
1010 S 54 N 4 3b

ILR (1953) Mad

31 S 106 N 2 8
" S 106 N 45 7
" S 106 N 49 2a
" S 106 N 49 3
" S 116 N 11 3
" S 117 N 2 5a
427 S 6 N 7 5
" S 6 N 7 6
" S 6 N 7 10
" S 43 N 7 1
460 S 111 N 23a 1
527 S 6 N 13 7
566 S 58 N 9 12
616 S 111 N 16 8
" S 114A N 2 2
" S 114A N 3 1
1009 S 52 N 31 8
1196 S 58 N 33 44
1200 S 60 N 44 5
" S 72 N 2 7a
" S 72 N 3 1a

ILR (1954) Mad

80 S 43 N 4 3
" S 92 N 13 1
484 S 55 N 14 14a
" S 55 N 18 2
537 S 43 N 4 6
" S 43 N 7 6
" S 53A N 12 1
664 S 59A N 2 1
" S 59A N 3 3a
" S 60 N 26 1
" S 60 N 26 2
" S 67 N 21 4a
791 S 43 N 2 14
" S 43 N 9 11
1231 S 69A N 5 2

ILR (1955) Mad

227 S 111 N 16 9
274 S 60 N 41 7
" S 60 N 41 7a
519 S 52 N 38 1
" S 52 N 38 2
" S 52 N 38 4
570 S 5 N 3 16
" S 72 N 5 5aa
774 S 108(b) N 3 3
" S 108(b) N 3 4

MYSORE

MYSORE HIGH COURT REPORTS

51 Mys H C R

148 S 53A N 5 3a

52 Mys H C R

443 S 54 N 21 10
455 S 10 N 17 8
" S 114 N 1 4b
" S 114 N 4a 2

53 Mys H C R

64 S 117 N 3 16
278 S 5 N 5 11a

54 Mys H C R

136 S 83 N 20 1a
" S 83 N 20 3
" S 83 N 21 1
" S 83 N 22 2

55 Mys H C R

67 S 122 N 3 7
174 S 52 N 1 12
" S 52 N 11 13
" S 52 N 13 21
" S 52 N 14 1a
" S 52 N 35 1
" S 52 N 37 1a
" S 52 N 37 8
" S 52 N 38 5
299 S 108(c) N 3 5
389 S 91 N 8 1
407 S 53 N 5 2
" S 53 N 10 4
" S 53 N 24 14
414 S 53A N 5 3a
427 S 58 N 33 42a
503 S 72 N 5 4a
" S 76 N 8 5
" S 76 N 8 31

ILR (1952) Mys

227 S 101 N 9 1
247 S 58 N 31 1

Sri Bagga...

ILR (1952) Mys *con*

247*con* S 58 N 33 6
" S 58 N 33 31
" S 58 N 33 39
" S 58 N 63 44
" S 58 N 33 45
259 S 82 N 6 6
316 S 55 N 15 7
368 S 106 N 24 4
" S 106 N 35 4
384 S 51 N 1 10
" S 51 N 4 1
" S 57 N 8 4
" S 57 N 10 1
" S 57 N 19 1

ILR (1953) Mys

1 S 67 N 15 6
" S 68 N 12 3
7 S 106 N 41 3
" S 106 N 41 8
" S 110 N 1 5a
" S 110 N 1 6a
" S 116 N 12 2
29 S 55 N 8 18a
92 S 105 N 47 1
" S 105 N 47 6
98 S 68 N 1 7
152 S 53 N 5 6
165 S 53 N 7 1
332 S 52 N 13 24
530 S 43 N 12 3
578 S 105 N 13 12
" S 105 N 14 5
" S 105 N 17 2
" S 106 N 43 1

ILR (1954) Mys

274 S 55 N 5 5b
" S 55 N 5 13a

NAGPUR

ILR (1948) Nag

290 S 65 S 4 2
327 S 1 N 3a 2

ILR (1949) Nag

102 S 9 N 2 5b
122 S 55 N 15 1
167 S 112 N 5 1
" S 112 N 5 2
243 S 58 N 11 8a
" S 58 N 11 8aa
284 S 68 N 2 14a
376 S 82 N 12 3
426 S 54 N 4 3aa
432 S 105 N 40 2
" S 105 N 70 5a
526 S 60 N 26 17
534 S 53A N 13 7a
" S 54 N 17 4
" S 54 N 21 1
" S 54 N 21 9
" S 54 N 22 7
" S 54 N 22 8a
625 S 54 N 3 4
699 S 54 N 11 2
" S 54 N 17 12
802 S 100 N 13 5
" S 100 N 13 8
" S 100 N 16 5
" S 100 N 22 4
" S 100 N 28 1

ILR (1949) Nag *con*

802*con* S 100 N 28 2
" S 100 N 28 10
849 S 54 N 11 1
" S 105 N 6 5a
" S 105 N 6 8a
" S 107 N 1 1a
933 S 58 N 33 42a
959 S 53A N 4 5
" S 53A N 11 1
" S 53A N 13 2
" S 53A N 15 2

ILR (1950) Nag

25 S 38 N 8 4c
" S 38 N 11 1
" S 38 N 12 1
" S 41 N 8 5
" S 41 N 23 1
" S 41 N 23 5
" S 53A N 4 4
" S 53A N 13 13
" S 53A N 13 14
" S 53A N 19 1
" S 54 N 5 5
218 S 105 N 5 5
" S 105 N 14 1
" S 105 N 14 2
" S 105 N 14 3a
" S 105 N 14 7
321 S 3 N 15 1
" S 67 N 14 2
355 S 54 N 19 21
437 S 106 N 41 2
" S 110 N 1 9
467 S 55 N 9 15
" S 55 N 9 58b
" S 55 N 22 1
" S 55 N 22 3
618 S 5 N 4 15
" S 53A N 9 1
" S 53A N 10 4
" S 54 N 5 4
" S 54 N 17 1
" S 60 N 22 5a
" S 60 N 22 7a
" S 67 N 10 1
625 S 55 N 20 18
" S 55 N 20 27
679 S 38 N 8 4a
698 S 101 N 9 1a
719 S 58 N 33 1
" S 58 N 33 29
" S 58 N 33 42a
" S 58 N 33 45
" S 58 N 33 46
795 S 33 N 5 4
" S 38 N 8 4c
" S 38 N 8 8
799 S 53A N 9a 1a
" S 53A N 16 3
" S 107 N 15 2
862 S 76 N 8 1
" S 76 N 8 17
" S 76 N 8 31
870 S 108 (Gen) N 1 1b
" S 114 N 1 4a

ILR (1951) Nag

12 S 43 N 2 16
" S 43 N 7 7
241 S 52 N 12 4

ILR (1951) Nag *con*

241*con* S 52 N 13 21
" S 52 N 31 2
279 S 105 N 70 10
334 S 53 N 7 3
" S 53A N 9 1
" S 53A N 11 1
471 S 106 N 24 11
516 S 108C N 8 1
835 S 51 N 9 3

ILR (1952) Nag

37 S 54 N 18 2
" S 54 N 18 3
" S 54 N 19 13
" S 54 N 19 18b
" S 54 N 21 9
" S 54 N 22 7
60 S 8 N 4 10a
" S 8 N 20 31
" S 8 N 20 37
" S 122 N 1 3b
" S 122 N 14 1
150 S 52 N 35 2
" S 52 N 40 2
211 S 52 N 32 3
" S 60 N 27 1a
" S 60 N 41 12
" S 60 N 44 6
238 S 91 N 32 1
366 S 60 N 23 8
" S 60 N 27 1a
" S 60 N 44 5
" S 72 N 3 10
464 S 105 N 3 2
" S 105 N 14 3b
" S 105 N 14 10b
604 S 53A N 17 2
629 S 43 N 2 15
" S 43 N 2 16
" S 43 N 7 1a
" S 43 N 7 2
" S 43 N 7 2a
" S 43 N 7 3
" S 43 N 7 7
" S 43 N 7 7a
" S 43 N 13 1
" S 43 N 13 2c
636 S 54 N 17 12
644 S 54 N 5 10
" S 54 N 5 15
684 S 101 N 10 2
" O 34 R 1 N 19 27
" O 34 R 1 N 19 34
767 S 106 N 36 4

ILR (1953) Nag

281 S 3 N 14 4
" S 3 N 14 5a
333 S 105 N 69 3
488 S 3 N 6 6
" S 3 N 9 9
507 S 3 N 19 3
579 S 55 N 8 2
" S 55 N 8 7
" S 55 N 8 13c
672 S 106 N 34 4
684 S 3 N 29 7
" S 3 N 34 9
" S 41 N 2 5
" S 41 N 7 1

ILR (1953) Nag *con*

684*con* S 41 N 8 1b
" S 41 N 8 5
" S 41 N 8 8
" S 41 N 8 9a
" S 41 N 22 4a
" S 41 N 22 5a
" S 41 N 23 4a
" S 41 N 23 4a1
" S 41 N 23 5
" S 41 N 23 9
" S 41 N 25 1
" S 53 N 18 1
764 S 6 N 16 13a
" S 6 N 21 4
797 S 50 N 22 5b
837 S 106 N 33 1
932 S 111 N 13 5
" S 111 N 13 22
" S 111 N 14 15
" S 111 N 14 30
" S 111 N 14 30a
937 S 53 N 6 9
" S 53 N 8 3
" S 53 N 15 2
" S 53 N 34 1a
" S 53 N 34 5
" S 53 N 34 7
" S 53 N 35 1

ILR (1954) Nag

147 S 105 N 7 7a
" S 105 N 24 2a
" S 106 N 40 1
" S 113 N 3 7a
172 S 54 N 19 4a
414 S 108(q) N 1 12a
624 S 106 N 19 2
" S 106 N 19 4a
" S 106 N 40 2a
634 S 111 N 7 6
" S 111 N 14 34
957 S 106 N 2 11
" S 106 N 39 1a
" S 107 N 7 3a
" S 116 N 11 7

ILR (1955) Nag

151 S 105 N 4 2
" S 107 N 15 2
" S 107 N 15 2a
" S 107 N 15 5

ORISSA

ILR CUTTACK

ILR (1949) 1 Cut

121 S 76 N 8 26
" S 76 N 8 32
" S 76 N 12 1
139 S 105 N 42 7a
" S 105 N 44 3
" S 105 N 44 5
" S 105 N 44 5b
" S 111 N 12 2a
" S 111 N 13 20e
231 S 105 N 30 3
" S 106 N 40 1
" S 106 N 41 1
" S 106 N 41 2
" S 110 N 1 9
336 S 52 N 11 13b

ILR (1949) 1 Cut *con*

336*con* S 52 N 0 6
559 S 52 N 22 2
705 S 53A N 13 3
776 S 58 N 33 47a

ILR (1950) Cut

107 S 53A N 13 14
143 S 53A N 10 1
195 S 52 N 14 2
" S 52 N 14 11a
" S 100 N 12 2a
322 S 54 N 21 13
374 S 126 N 11 2a
486 S 52 N 7 1
" S 52 N 31 2
" S 52 N 31 5
617 S 116 N 2 1b
" S 117 N 3 14a

ILR (1951) Cut

134 S 105 N 43 1
" S 105 N 43 4
" S 105 N 44 3
" S 105 N 48 2
" S 105 N 49 2
281 S 58 N 33 8a
" S 58 N 33 32e
" S 58 N 33 32f
" S 58 N 33 38
" S 58 N 33 42a
" S 58 N 33 47a

ILR (1952) Cut

277 S 52 N 18 11
" S 52 N 31 1
" S 52 N 31 2
" S 52 N 32 3
" S 52 N 40 4
493 S 60 N 26 4

ILR (1953) Cut

343 S 54 N 14 2
" S 54 N 14 11
" S 54 N 14 13
" S 54 N 14 15
630 S 130 N 9a 1
" S 130 N 15 7
706 S 118 N 9 6a

ILR (1954) Cut

1 S 40 N 25 4
" S 40 N 25 5aa
" S 105 N 36 1
" S 105 N 36 4
" S 108(j) N 2 3
" S 108(j) N 3 1a
" S 108(j) N 4 4a
33 S 109(j) N 1 4
298 S 3 N 20 3
526 S 55 N 20 25
" S 55 N 20 26
" S 55 N 20 27
" S 55 N 20 28b
" S 55 N 20 29
" S 55 N 20 33
" S 55 N 20 33a
588 S 38 N 8 3
" S 38 N 11 1

OUDH

OUDH CASES

12 O C

279 S 116 N 11 3

PATNA

ILR 25 Pat

666 S 58 N 33 47c

ILR 27 Pat

123 S 54 N 14 15
202 S 54 N 19 13
421 S 100 N 29 1
526 S 91 N 7 5
572 S 60 N 44 5

ILR 28 Pat

75 S 122 N 7 6
97 S 53 N 18 3
158 S 3 N 12 8
" S 3 N 18 6
286 S 58 N 33 38
303 S 58 N 9 14a
325 S 82 N 14 2
" S 82 N 14 5
" S 82 N 17 11
" S 92 N 15 5
336 S 39 N 8 1a1
" S 100 N 30 8
351 S 53A N 13 3
359 S 65 N 10 2b
" S 68 N 1 6
" S 68 N 4 18a
" S 68 N 5 4
" S 68 N 5 25
531 S 92 N 1 9
" S 92 N 11 1
" S 98 N 3 1a
542 S 41 N 15 1
" S 41 N 24 2
844 S 40 N 25 1a
" S 117 N 4 1
955 S 82 N 14 1a
" S 82 N 17 12
" S 92 N 15 5

ILR 29 Pat

1 S 105 N 44 16
180 S 76 N 6 11
545 S 76 N 7 5
" S 76 N 15 1
628 S 53A N 16 3
713 S 12 N 1 3

ILR 30 Pat

317 S 52 N 7 1
" S 52 N 14 2
" S 52 N 14 11a
366 S 111 N 23a 2
391 S 53 N 13 4
" S 60 N 27 2
" S 60 N 27 3
406 S 8 N 20 2
613 S 91 N 10 5
" S 91 N 25 6
" S 100 N 5 1
664 S 109(l) N 7 4a
" S 111 N 7 12a
871 S 105 N 44 16
931 S 6 N 26a 1c
1146 S 6 N 13 7a
1155 S 106 N 40 6
1161 S 100 N 16 5

ILR 31 Pat

21 S 106 N 2 9a
" S 106 N 12 8a
" S 106 N 12 5
" S 106 N 15 1
" S 106 N 15 2

ILR 31 Pat *con*

21*con* S 106 N 15 2b
" S 106 N 15 3
" S 106 N 18 1
" S 116 N 18 2
365 S 76 N 8 18
722 S 52 N 18 7a
" S 52 N 37 3a
" S 100 N 24 1
" S 100 N 24 3
787 S 53 N 9 7
" S 111 N 13 15a
1020 S 65A N 1 6
" S 65A N 1 8a
" S 65A N 4 5a
" S 65A N 4 6a
" S 66 N 1 1a
" S 66 N 1 5
" S 66 N 3 1a

ILR 32 Pat

887 S 105 N 3 2
" S 105 N 13 1a

ILR 33 Pat

198 S 105 N 6a 1
313 S 3 N 11a 4

ILR 34 Pat

13 S 53 N 5 2
133 S 53 N 4 2
" S 53 N 5 19
" S 53 N 6 5a
" S 53 N 6 9
" S 53 N 6 15
" S 53 N 8 1
" S 53 N 8 2
" S 53 N 13 1
" S 53 N 13 3
" S 53 N 14 2

PEPSU

PEPSU LAW REPORTS

1 Pepsu L R

198 S 53 N 6 23
" S 53 N 6 42
" S 53 N 21 16a
312 S 44 N 4 5a
430 S 63 N 1 5
" S 63 N 9 1

2 Pepsu L R

237 S 3 N 31 4
571 S 3 N 34 9
619 S 59 N 14 1b

3 Pepsu L R

373 S 67 N 27 4
" S 76 N 15 1
" S 76 N 15 3
413 S 3 N 31 8
484 S 60 N 41 2

I L R (1952) Patiala

101 S 91 N 16 2
" S 92 N 16 1
228 S 111 N 10 3
" S 116 N 1 10

I L R (1953) Patiala

319 S 53A N 13 2
" S 53A N 13 3
508 S 53A N 13 15
" S 53A N 14 2

PUNJAB

ILR (1950) Punj

271 S 60 N 3 2
" S 60 N 40 7
" S 60 N 40 9a
" S 111 N 5 2

ILR (1952) Punj

219 S 55 N 18 2
495 S 92 N 24 3a

ILR (1953) Punj

100 S 106 N 40 6
" S 106 N 100 5
271 S 60 N 44 8

ILR (1954) Punj

144 S 111 N 5 2
149 S 106 N 23 1
" S 113 N 3 10a
165 S 10 N 14 4
" S 10 N 16 6a
355 S 60 N 22 1a

RAJASTHAN

ILR (1951) 1 Raj

597 S 3 N 31 1
918 S 53A N 10 3

ILR (1952) 2 Raj

5 S 3 N 21 11
" S 3 N 22 8
" S 3 N 22 11a
" S 3 N 22 21
" S 6 N 16 9
" S 6 N 16 16b
" S 130 N 4 8
116 S 6 N 6 11

ILR (1954) 4 Raj

705 S 53A N 23 16
" S 54 N 1 9a
" S 54 N 23 16

RANGOON

ILR 13 Rang

679 S 5 N 4 12

SIND

Sind Law Reporter

7 Sind L R

23 S 105 N 70 10

ILR KARACHI

ILR (1948) Kar

77 S 116 N 3 15a

TRAVANCORE-COCHIN

Travancore-Cochin Law Reports

1949 T C L R

18 S 9 N 2 4
" S 9 N 2 5a
" S 54 N 23 16
50 S 58 N 37 4a
" S 105 N 33 6
" S 108(j) N 4 2
264 S 60 N 5 18a

1950 T C L R
23 S 52 N 1 2
" S 52 N 27 2
" S 52 N 37 8
121 S 41 N 23 4a
137 S 53 N 37 4
" S 60 N 5 17
140 S 55 N 12 26
" S 55 N 12 29
150 S 91 N 8 3
333 S 52 N 32 1
398 S 60 N 10 3a
" S 84 N 16 3
477 S 55 N 12 8
496 S 60 N 28 15
" S 60 N 29 2
511 S 63A N 2 1a
532 S 123 N 1 2
636 S 52 N 18 3
" S 52 N 31 4
658 S 63 N 7 2
665 S 52 N 31 2
683 S 67 N 28 3

ILR TRAVANCORE COCHIN

ILR (1951) T C
32 S 52 N 4 1a
209 S 63A N 9 1
" S 76 N 10 7

ILR (1951) TC con.
209con S 76 N 10 14
282 S 51 N 18 4
" S 60 N 5 18a
" S 63A N 9 1
" S 76 N 8 5
294 S 53 N 13 1
" S 53 N 13 3
" S 53 N 24 2a
357 S 128 N 5 6a
414 S 60 N 5 17
522 S 108(q) N 1 1a
" S 116 N 13 2
554 S 52 N 31 1
743 S 8 N 12 4
788 S 53 N 13 1
" S 53 N 13 3
" S 53 N 24 2a

ILR (1952) T C
61 S 76 N 6 1a
115 S 82 N 18 2
" S 82 N 18 6
152 S 60 N 49 1
" S 61 N 2 9
" S 61 N 6 2
" S 63A N 9 1
201 S 54 N 23 21
241 S 100 N 28 1a
329 S 6 N 4 4a

ILR (1952) TC con.
336 S 58 N 37 1
438 S 58 N 12 1
" S 58 N 35 16
" S 60 N 28 12
" S 60 N 29 2
" S 60 N 37 6
696 S 58 N 35 7a
890 O 34 R 7 N 6 1
911 S 92 N 23 10

ILR (1953) T C
206 S 60 N 43 1
" S 82 N 19 1
298 S 100 N 9 1
" S 100 N 9 4
326 S 53 N 3 2
" S 53 N 8 1
388 S 60 N 23 5
568 S 108(h) N 3 1
" S 108(h) N 4 6
" S 108(l) N 8 1a
" S 111 N 10 2b
" S 14 N 10 20a
578 O 34 R 1 N 19 42b

ILR (1953) TC con.
595 S 108(h) N 2 6
" S 108(m) N 1 2a
" S 108(o) N 4 3
706 S 106 N 3 2
823 S 60 N 49 9
835 S 76 N 8 30
871 S 59 N 33 38
" S 60 N 28 5
" S 60 N 28 13
999 S 59 N 31 35
" S 58 N 33 38
" S 60 N 28 5
1121 S 6 N 27 1a
" S 122 N 2 8
" S 122 N 7 6aa
" S 122 N 13 4

ILR (1954) T C
427 S 60 N 7 3a
609 S 55 N 14 1
675 S 60 N 26 3
" S 60 N 48 10
794 S 52 N 13 28
" S 52 N 38 1
841 S 51 N 9 8

16 Cri L J
706 S 3 N 34 9a

38 Cri L J
510 S 3 N 34 9a

1952 Cri L J
299 S 122 N 2 5a
826 S 108(j) N 4 2
" S 111 N 8 14

1954 Cri L J
132 S 3 N 28 9
" S 3 N 34 9
299 S 3 N 34 9a
" S 55 N 2 32a

1954 Cri L J con
684 S 3 N 9 10
" S 105 N 3 2
" S 105 N 13 1a
1333 S 105 N 4 3a

3 I C
346 S 105 N 70 10

8 I C
309 S 111 N 13 5a

11 I C
629 S 100 N 9 1
" S 100 N 9 4

ALLAHABAD LAW JOURNAL
1949 A L J
566 S 26 N 2 1
" S 54 N 5 5
" S 54 N 5 13
" S 54 N 5 14
1950 A L J
453 S 58 N 36 3
1951 A L J
281 S 76 N 19 9
285 S 106 N 40 6
328 S 76 N 7 15
" S 76 N 7 17
750 S 55 N 12 8

ALLAHABAD WEEKLY REPORTER
1950 A W R (HC)
447 S 53A N 13 13
498 S 6 N 1 2

1951 AWR (HC)
11 S 123 N 6 1
24 S 111 N 11 4
" S 111 N 14 8
" S 111 N 14 10a
" S 111 N 14 17

REVENUE DECISIONS
1952 R D (HC)
14 S 105 N 14 10a

ANDHRA WEEKLY REPORTER
1955 Andhra W R
91 S 130 N 4 15
" S 137 N 4 17

CALCUTTA LAW JOURNAL
85 C L J
81 S 52 N 39 2
" S 108(q) N 2 2

86 C L J
198 Pre N 2 4
" Pre N 6 1a
" S 5 N 4 21
" S 37 N 2 1
" S 37 N 4 2
" S 37 N 4 4
" S 37 N 4 5
" S 40 N 25 6a1
" S 106 N 19 3
" S 105 N 19 4
" S 106 N 19 6
" S 106 S 19 9
" S 105 N 34 4
" S 106 N 34 5
" S 106 N 34 6
" S 106 N 35 7
" S 108(c) N 6 1a
" S 108(j) N 4 1
" S 111 N 13 3a
" S 111 N 13 8
" S 111 N 19 2

86 C L J con.
198con S 111 N 23 8b
" S 111 N 23 11a
" S 111 N 26 2a
" S 111 N 26 3a

88 C L J
27 S 108(h) N 3 3
" S 108(h) N 5 2

CALCUTTA WEEKLY NOTES
2 C W N
34 S 108(f) N 1 4
6 C W N
5 S 3 N 2 33a
12 C W N
625 S 3 N 2 33a
49 C W N
779 S 5 N 4 20
51 C W N
650 S 106 N 45 9a

IV. CRIMINAL LAW JOURNAL

V. INDIAN CASES

VI. OTHER JOURNALS

53 C W N
96 S 58 N 35 26
659 S 111 N 1 6a

53 C W N (1 Dacca Report)
15 S 58 N 35 30
62 S 58 N 35 30

54 C W N
710 S 58 N 9 17a
" S 58 N 39 42c
906 O 34 R 1 N 5 16a

54 C W N (2 Dacca Report)
280 O 34 R 1 N 4 1

55 C W N
21 S 105 N 65 1aa
86 S 105 N 5 2b
" S 108(1) N 10 a1
656 S 40 N 25 5a
" S 109 N 2 1
" S 109 N 4 1a

SUTHERLAND WEEKLY REPORTER

10 Suth W R
325 S 65A N 1 6

JAIPUR LAW REPORTS

1949 J L R
49 S 106 N 34 7
" S 106 N 39 9
97 S 83 N 17 2
" S 83 N 17 3
184 S 106 N 45 12
257 S 108 N 32 2a

MADHYA BHARAT LAW REPORTER

1949 M B L R
484 S 10 N 1 2
" S 10 N 5 1a
" S 10 N 7 1
" S 10 N 7 4
" S 10 N 16 8a
497 S 108(b) N 2 8

MADRAS LAW JOURNAL

(1950) 2 M L J
262 S 8 N 18 2
496 S 11 N 2 2
" S 11 N 7 5
" S 11 N 9 1

(1951) 1 M L J
143 S 52 N 20 8

(1954) 1 M L J
439 S 58 N 37 1
" S 98 N 7 1a
" S 98 N 7 2

(1955) 1 M L J
322 S 65A N 7 5

MYSORE LAW JOURNAL

27 Mys L J
61 S 52 N 7 4
85 S 105 N 44 6a
" S 111 N 13 20e
" S 117 N 2 4
" S 117 N 2 13

28 Mys L J
36 S 10 N 17 8
165 S 55 N 9 25
" S 55 N 9 43
" S 55 N 9 45
" S 55 N 9 46
" S 55 N 9 56

29 Mys L J
51 S 66 N 5 8
" S 67 N 5 4
64 S 5 N 5 11a

NAGPUR LAW JOURNAL

1949 N L J (Notes)
12 S 55 N 9 5ab
" S 55 N 22 3
22 S 3 N 31 1
54 S 8 N 15 2
55 S 3 N 12 8
" S 3 N 18 6
59 S 54 N 14 1
" S 54 N 14 2
101 S 41 N 25 1
196 S 41 N 10 2a 1
207 S 53A N 12 1
262 S 105 N 14 12b

1950 N L J (Notes)
28 S 52 N 39 1
30 S 54 N 3 9
" S 54 N 17 10
43 S 39 N 8 1a 1
61 S 53A N 10 4
83 S 8 N 2 1
" S 8 N 15 2
" S 8 N 15 2a
" S 54 N 5 5

1951 N L J (Notes)
89 S 52 N 35 12
82 S 53 N 12 1
" S 53A N 20 1
85 S 51 N 1 11
" S 51 N 8 2a
" S 51 N 8 3
" S 51 N 8 4

1951 NLJ (Notes) con
85 con S 51 N 22 1
" S 51 N 22 6
122 S 106 N 24 12
156 S 3 N 31 1
" S 3 N 31 2
157 S 52 N 16 1
166 S 39 N 2 2
" S 39 N 8 1a 1
" S 52 N 20 1
" S 52 N 31 2
" S 105 N 28 16a

1952 N L J (Notes)
66 S 52 N 40 1
69 S 52 N 29 1
148 S 6 N 16 10a1
" S 6 N 16 11
164 S 7 N 3 3d

PUNJAB LAW REPORTER

54 P L R
193 S 41 N 8 10b
425 S 106 N 49 2a

RAJASTHAN LAW WEEKLY

1951 R L W
9 S 76 N 15 7

1952 R L W
400 S 106 N 43 2b

BURMA LAW REPORTS

1949 Bur L R (H C)
50 S 60 N 48 6
58 S 58 N 32 1
58 S 84 N 5 36
553 S 58 N 38 42a
" S 58 N 39 42b
625 S 43 N 7 1

1950 Bur L R (S. C.)
64 S 105 N 5 5
" S 105 N 14 1
" S 105 N 14 2
" S 105 N 14 2a

1950 Bur L R (H C)
1 S 105 N 14 2a
" S 105 N 14 6
71 S 105 N 7 1a
" S 105 N 9 2
" S 105 N 9 4a
" S 106 N 4 2a
80 S 3 N 2 6
" S 53A N 6 1a
" S 53A N 8 1
119 S 54 N 21 1
" S 54 N 21 1a
" S 54 N 21 9
163 S 41 N 10 8b

1950 BurLR (HC) con
163 con S 43 N 10 2
" S 65A N 4 8
" S 76 N 1 8

SAURASHTRA LAW REPORTER

2 Sau L R
146 S 58 N 17 2
203 S 41 N 7 1
" S 41 N 23 9
215 S 60 N 33 17
" S 63A N 4 1a

TRAVANCORE LAW JOURNAL

18 Trav L J
478 S 52 N 13 28

18 Trav L J (Short Notes)
147 S 52 N 13 28

23 Trav L J
466 S 100 N 9 1
" S 100 N 9 4

29 Trav L J
317 S 92 N 1 5
1267 S 92 N 1 5

TRAVANCORE LAW REPORTS

7 Trav L R
42 S 52 N 13 28

1948 Trav L R
556 S 60 N 28 15
" S 60 N 29 2

KERALA LAW TIMES

1949 K L T
15 S 116 N 1 11
92 S 63A N 9 1
103 S 8 N 20 5
130 S 76 N 10 13
" S 76 N 13 1
187 S 60 N 7 3a

1950 K L T
356 S 76 N 12 8
" S 76 N 16 9
502 S 53 N 7 2
" S 53 N 34 1a
" S 53 N 34 7
509 S 130 N 15 4

1951 K L T
179 S 105 N 64 1a
" S 105 N 64 1b
" S 108(1) N 8 1

1953 K L T (Short Notes)
183 S 91 N 32 1

VII. INDIAN DIGEST

1946-52 I D (Point numbers)
1474 S 6 N 10 3
2280 S 132 N 8 6
2633 S 8 N 3 2
" S 8 N 3 3
" S 8 N 3 6c
4648 S 111 N 11 15

1946-52 I D con (Point numbers)
7054 S 111 N 16 12
" S 111 N 23 10a
7606 S 111 N 11 16
12523 S 131 N 2 2
17073 S 52 N 18 4
25006 S 111 N 23a 5

1946-52 I D con (Point numbers)
29369 S 5 N 1 1
" S 5 N 8 16
39415 S 8 N 3 2
" S 8 N 3 6b
39451 S 35 N 2 2
39598 S 52 N 2 2b

1946-52 I D con (Point numbers)
39598 S 52 N 11 12
39601 S 52 N 11 11
39605 S 52 N 18 21
39606 S 52 N 18 20a
39611 S 52 N 16 1
39627 S 52 N 7 1

1946-52 I D *con*
(Point numbers)

39736 S 53A N 11 1
39789 S 58 N 32 1
" S 58 N 33 14
" S 58 N 33 42a
" S 58 N 33 45
39871 S 55 N 12 27
" S 55 N 12 28
39901 S 56 N 7 4a
39902 S 56 N 12 4
39929 S 58 N 33 39
39944 S 58 N 33 14
" S 58 N 33 40
39945 S 58 N 33 14
39948 S 58 N 33 42a
40005 S 59 N 2 9aa
40008 S 59 N 8 14a
40009 S 59 N 8 21
40024 S 60 N 27 1a
40066 S 60 N 32 6
40080 S 60 N 44 24
40082 S 60 N 41 12
40096 S 134 N 6 3
40102 S 60 N 49 1
40104 S 60 N 50 1
40131 S 63A N 6 2
40135 S 63A N 9 1
40136 S 63A N 9 1
40137 S 63A N 9 1
40164 S 63A N 1 4a
40165 S 67A N 1 14
40193 S 70 N 2 4b
40220 S 76 N 10 19
40227 S 76 N 8 13
40264 S 82 N 13 1

1946 52 I D *con*
(Point numbers)

40267 S 82 N 15 3
" S 82 N 26 3
40278 S 83 N 17 1
40279 S 84 N 19 1
40287 S 84 N 5 3
" S 84 N 5 10
" S 84 N 8 6
40316 S 92 N 13 1
40342 S 100 N 1 2a
40365 S 100 N 14 2
40369 S 100 N 25 1
40420 S 105 N 34 1a
" S 105 N 72 12
40427 S 105 N 44 5
" S 105 N 44 5a
" S 105 N 45 3a
40461 S 106 N 39 3
40464 S 106 N 21 2
40487 S 106 N 41 1
" S 106 N 41 3a
" S 107 N 9 6
40501 S 106 N 32 8
40516 S 106 N 40 6
40517 S 106 N 39 1
40529 S 106 N 21 2
40582 S 109 N 9 1a
40591 S 108(l) N 1 2
40604 S 108(m) N 2 7
40609 S 109 N 9 1a
40627 S 111 N 23 1
" S 111 N 23 2
40636 S 111 N 10 16aa
40728 S 116 N 2 2
40777 S 123 N 5 1

1952 INDIAN DIGEST
(ANNUAL PART)
(Point Numbers)

797 S 52 N 18 14
1796 S 53 N 5 21
9467 S 111 N 6 3
11000 S 55 N 9 12
" S 55 N 9 17
" S 55 N 9 18
" S 55 N 22 1
" S 55 N 22 3
17002 S 3 N 34 11
17094 S 53 N 24 9
17095 S 53 N 16 2
17097 S 53 N 6 46
" S 53 N 24 5
17117 S 54 N 5 5
" S 54 N 12 9
17119 S 54 N 8 2
" S 54 N 17 1
17124 S 120 N 2 3
17146 S 58 N 33 42a
17147 S 58 N 33 6
" S 58 N 33 39
17148 S 58 N 33 38
17149 S 58 N 33 1
17169 S 60 N 44 5
17172 S 61 N 5 3
17191 S 67a N 1 13
17207 S 76 N 7 10
17215 S 91 N 4 1
" S 91 N 8 3a
17237 S 105 N 72 2
" S 105 N 72 4

1952 I D *con*
(Annual Part)
(Point numbers)

17242 S 105 N 5 5
" S 105 N 14 1
" S 105 N 14 2
" S 105 N 14 2a
17254 S 105 N 32 2
17256A S 105 N 2 1
" S 105 N 3 2
" S 105 N 5 5
" S 105 N 13 1b
" S 105 N 14 2
" S 105 N 14 4
17282 S 106 N 12 2
17283 S 106 N 12 2
" S 106 N 15 3
17284 S 106 N 43 5
17285 S 106 N 19 6
" S 106 N 19 7
17297 S 107 N 7 7
17298 S 117 N 2 1b
17302 S 108(b) N 4 5
17319 S 111 N 11 1d
" S 111 N 16 6
" S 112 N 1 6a1
" S 112 N 5 1
" S 112 N 6 2
17349 S 122 N 17 4
17351 S 120 N 7 7

Yearly Digest
(Fortnightly)
1953 Y. D. F.

1381 S 7 N 3 10
1393 S 55 N 14 5a

VIII. APPEAL NUMBERS AND DATE OF DECISIONS OF UNREPORTED CASES

Privy Council

P. C. A. No 42 of 1951 D/- 5-10-1953
S 55 N 9 42a
" S 55 N 9 58aa

P. C. A. No. 13 of 1953, D/- 8-7-1953
S 126 N 9 2a

P. C. *(contd.)*
" S 126 N 9 2aa
" S 126 N 9 11

Allahabad

Civ. Rev. No. 197 of 1945, D/- 5-1-1949
S 76 N 18 3

All. *(contd.)*

Civ. Revn. No. 544 of 1945, D/- 1-10-1948
S 76 N 1 9
" S 83 N 2 10

C. R. No. 100 of 1946, D/- 10-2-1950
" S 76 N 18 3

Calcutta

A. F. O. D. No. 52 of 1950, D/- 23-11-1950
" S 106 N 13 3d

Nagpur

S. A. No. 232 of 1947 D/- 8-12-1952
" S 111 N 14 30
" S 111 N 14 30a

IX. ENGLISH CASES

All England Law Reports (1947) 1 All E R
116 S 113 N 3 10a

(1949) 1 All E R
768 S 113 N 1 1a
" S 113 N 2 1a
" S 113 N 3 2a

(1949) 2 All E R
90 S 3 N 11 13

(1950) 1 All E R
436 S 105 N 35 5a
834 S 108(a) N 2 7

(1951) 1 All E R
628 S 15 N 4 7

(1951) 2 All E R
235 S 39 N 5 10

(1952) 1 All E R
1199 S 105 N 3 2a
" S 105 N 13 3
1199 S 105 N 14 1a
" S 105 N 14 5
" S 105 N 14 9a
" S 105 N 15 2a
" S 105 N 32 2a

(1952) 2 All E R
492 S 105 N 31 3
" S 111 N 8 4b

(1953) 1 All E R
308 S 32 N 3 6

(1954) 1 All E R
227 S 18 N 3 12a

(1954) 2 All E R
601 S 105 N 11 1
" S 105 N 62 1

(1954) 3 All E R
214 S 106 N 19 7

CHANCERY DIVISION
19 Ch. D.
342 S 6 N 3 5
" S 43 N 7 12
" S 100 N 4 1

36 Ch D
145 S 126 N 9 2aa

COKE'S REPORTS
4 Co. Rep.
119a S 112 N 6 3

EXCHEQUER
8 Ex.
689 S 108(l) N 5 2
" S 108(l) N 6 5

ENGLISH REPORTS
44 E. R.
924 S 58 N 33 17

51 E R
770 S 55 N 3 24b
" S 55 N 4 1

HOUSE OF LORDS CASES
10 H L C
191 S 6 N 3 5
" S 43 N 7 12
" S 100 N 4 1

KING'S BENCH
(1911) 1 K. B.
905 S 108(M) N 2 3a

(1920) 2 K. B.
287 S 108(l) N 5 2

(1920) 3 K. B.
428 S 113 N 1 1a
" S 113 N 2 1a

(1925) 1 K B
514 S 105 N 11 1

QUEEN'S BENCH DIVISION
6 Q B D
345 S 58 N 33 27

7 Q B D
516 S 3 N 17 5a

Overlooking of Precedents leads to Erroneous Decisions

"Ignorance of the Judge is the misfortune of the innocent." ***Latin Maxim.***

1953 S. C. 478 (Pr. 20) (AIR V 40 C 118)— "It cannot be disputed that the High Court, even though it was hearing an appeal from an order of acquittal, had full powers to review the entire evidence on the record and reach its own conclusion that the acquittal order should be set aside. But, as the Privy Council pointed out in *Sheoswarup* v. *Emperor*, 1934 P. C. 227 (2) (AIR V 21) in exercising these powers the High Court should and will always give proper weight and consideration to such matters as : . . . . . The High Court, in our opinion, did not clearly keep before it these rules and principles well known and recognised in the administration of criminal justice."

1953 S. C. 473 (Pr. 7) (AIR V 40 C 116) — "It is unfortunate that the last mentioned case (i. e. (1949) 29 Tax Cas 395) was not brought to the notice of the High Court before the judgment under appeal was delivered."

1952 S. C. 358 (361) (Pr. 12) (AIR V 39) — "This decision (*Md. Keramuttullah Miah* v. *Keamutulla*, 1919 Cal. 218) (AIR V 6) was reached on 19-7-1918, i. e. almost 5 months after the decision of their Lordships of the Privy Council (in 1918 P. C. 11 (AIR V 5)), but it does not appear that the ruling was brought to the notice of the learned Judges of the Calcutta High Court."

1953 S. C. 459 Pr. (10) (AIR V 40 C 111) —"It seems to us that the attention of the High Court was not drawn to this Court's decision in *Surajpal Singh's case* (1952 S. C. 52 (AIR V 39)) wherein it was pointed out that . . . . compelling reasons."

1943 Privy Council 189 (191) AIR V 30) — In an appeal from Allahabad the question for decision involved was as to the inherent power of the Court to grant restitution to the successful defendant. Their Lordships observed: "The decision of the Board in 1919 P. C. 55 (AIR V 6) was not cited in either of the Courts in India . . . . The application now before the Board . . . . invoked the powers of the learned Subordinate Judge to assess the sum due by way of restitution . . . . by the method laid down in 1919 P. C. 55 (AIR V 6), . . . For this purpose the case must go back to the Court of the Subordinate Judge. . . ."

1922 Privy Council 11 (13) (AIR V 9) — Section 89, T. P. Act, 1882, ended after providing for the decree "and thereafter the defendants' right to redeem and the security shall both be extinguished." These words do not occur in either the foreclosure section of the Act of 1882 or the corresponding rule of O. 34, Civil P. C.

"The difficulty which had arisen as to these words in several cases, e.g., *Vanmikalinga* v. *Chidambara*, (1905) I. L. R. 29 Mad. 37 — which case, it may be mentioned, does not seem to have been brought to the notice of the Board in *Het Ram's case*, 1918 P. C. 34 (AIR V 5) —therefore no longer arises."

1956 All. 338 (Pr. 22) (FB) (AIR V 43 C 125)—"A learned single Judge of this Court held in *Chunna Lal* v. *Governor-General in Council*, 1950 ALL. 89 (A I R V 37 C 30) that if the consignor could establish that the consignee was merely a commission agent he could sue. It seems that the earlier cases of various High Courts were not placed before the learned Judge except for one case of the Madras High Court which he distinguished."

1954 All. 557 (Pr. 7) (A. I. R. V. 41 C. 192)—"No doubt, a contrary view was expressed by single Judge of this Court in *Damodar Swarup* v. *State*, Cri. Ref. No. 267 of 1951 decided by Brij Mohan Lal J. on 4-12-1951 (ALL.) but obviously his attention was not invited to these and other cases previously decided by this Court."

1955 Andhra 112 (Pr. 9) ((S) A. I. R. V 42 C. 41) — "A careful perusal of that judgment (1954.2 M. L. J. 707) shows that none of the cases cited before me were placed before the learned Judge, who states at p. 708 of the report as follows: I have no doubt that, if the learned Judge's attention had been drawn to the Bench decision of the Madras High Court in *Narayayyan* v. *Nageswarayyan*, ((1894) 17 Mad. 389), the learned Judge would have followed it and come to a different conclusion."

Side pp. 1956 (4 pp.)

1955 Andhra 49 (Pr. 27) ((S) A. I. R. V. 42 C. 21) — "I am really surprised that the Courts below summarily dealt with the question of estoppel and regarded the matter so simple that they did not even refer to the decision of the Privy Council or the Full Benches of the Allahabad, Bombay and Madras High Courts or even the passages from the leading Text books. I wish to condemn the practice of the Subordinate Judiciary in not referring to the decisions which are binding upon them. By a casual reference to the leading text books, the courts below should have discovered that the Full Bench case in 1929 Mad. 502 (AIR V 16) has at least an important bearing in deciding the question of estoppel. It is the bounden duty of the members of the bar and the Judges who administer the law to keep themselves informed of the march and progress of law, i.e. statutory and case law. If every illiterate man is presumed to know law and ignorance of law is no excuse, it is all the more important that those who are concerned in the administration of law, namely the members of the Bar and the Judges should read the law Reports regularly and be aware not only of the latest reports, but also decisions of the Supreme Court and the High Courts."

1955 Bom. 227 (Pr. 6) ((S) A. I. R. V. 42 C. 57)—"With very great respect to the Federal Court, Mr. Justice Kania completely overlooked the judgment of the Bombay High Court (in 1945 Bom. 315 (AIR V 32)) to which reference has been made and to which he was a party."

1954 Bom. 273 (Pr. 11) (A. I. R. V. 41 C. 78)—"It does not appear to have been brought to the notice of the learned Judges (in 1951 Pun. 324 (A. I. R. V. 38 C 79)) that the view which they were taking was opposed to the consensus of judicial opinion amongst the other Indian High Courts."

1954 Cal. 412 (Pr. 9) (A. I. R. V. 41 C. 141) — "Unfortunately the earlier decision in the case of 11 Cal. L. J. 87 was not brought to the notice of the learned Judges in Afazuddi's case, (39 Cal. 133) with the result that the expression 'Projabili' was held to include the creation of a tenure in the latter case, while the decision in the former case was to the contrary."

1955 Hyd. 28 (Pr. 15) ((S) A. I. R. V. 42 C. 7) (F. B.) — "After carefully considering the views expressed in the aforesaid two sets of authorities reported in the Urdu Law Reports, one thing is clear that the first set of rulings followed the line taken by the former British Indian High Courts and that a Full Bench of the pre-constitution High Court of the State has also expressed similar view in 9 Ain-e-Deccan 530 (Q); as against this the later set of cases so far as the Abkari Act is concerned are decisions by Division Benches, which did not consider the Full Bench ruling referred to above which was evidently not brought to their Lordships' notice."

1955 Mad. 78 (Pr. 5) ((S) A. I. R. V. 42 C. 21)—"But neither of the decisions of the Privy Council, viz., 22 All. 149 (P. C.) and 1924 P. C. 226 (AIR V 11) appear to have been placed before the learned Judges (in 1925 Bom. 501 (AIR V 12)) and if the learned Judges had before them the principle governing such cases as laid down by the Privy Council, it was not likely that they would have taken a strict and narrow view of the scope of the Proviso 6 to S. 92, Evidence Act."

1955 Mad. 341 (Pr. 6) ((S) A. I. R. V. 42 C. 92) (F. B.) — "The Full Bench in 1936 Mad. 324 (AIR V 23) which till then governed the practice on the original side of this Court, does not appear to have been placed before the learned Judge, in (1953 Mad. 858 (AIR V 40 C 335)) as it should have been by the learned Advocates on the original side who appeared in that case."

1954 Mad. 788 (Pr. 23) (A. I. R. V. 41 C. 260) (F. B.)—"Before leaving this case, we have to point out, that had the learned Advocate for the respondent, when the case was referred to the Full Bench, brought to our notice, the cases which he cited before the Full Bench, we might not have referred the matter to the Full Bench and therefore the remarks by the Full Bench "therefore a reference to the Full Bench was not strictly necessary" would not have been made. Before us only two decisions were cited and the learned Advocates on either side suggested a reference to a Full Bench."

A. I. R. Commentaries Judicially Noticed.

1953 S. C. 23 (27) (A. I. R. V. 40 C 7)— [Touching the revisional jurisdiction of the High Court set out in s. 115, Civil P. C.] "A large number of cases have been collected in Edn. 4 of Chitaley & Rao's Code of Civil Procedure (vol 1) which only serve to show that the High Courts have not always appreciated the limits of the jurisdiction conferred by this section."

1949 P. C. 156 (158) (A. I. R. V. 36. C 47)— *Sir John Beaumont.*—"There have been no doubt, decisions in some High Courts in India which lend support to the view upon which the Judges acted. The cases are collected in Edn. 4 of Chitaley and Rao on the Code of Civil Procedure Vol. I, page 1105."

(1949) 15 Malayan L. Jour. 134 (135).—*Per Storr J.*—"On the point relating to section 127, Civil Procedure Code (corresponding to O. 9, R. 13 in Indian Civil P. C.), raised in this appeal . . . . A. I. R. Commentaries, Code of Civil Procedure (4th Edition, 1944) at page 1755 states: 'But a person who is not a party though he may be interested in the suit is not entitled to apply under this rule' . . . . Agreeing with the views expressed above, I am of the opinion that section 127, Civil Procedure Code, is not available to a person who is not a party to the suit . . . ."

1955 J. & K. 1 (Pr. 5) ((S) A. I. R. V. 42 C. 1), *Shahmiri J.*—"As stated in Chitaley's Code of Criminal Procedure (1950) Edition) a valid divorce of the wife by the husband where it is sanctioned by personal law, puts an end to the marital relation and the status of husband and wife, and no order for maintenance can be made subsequent to the date of such divorce."

1955 Mad. 100 (Pr. 16) ((S) A. I. R. V. 42, C 28), *Ramaswami J.*—"The most exhaustive, lucid and analytical commentary on Art. 14 is to be found in the recently published A.I.R. Commentaries on the Constitution of India, Vol. 1 pp. 202-295. I am greatly indebted to this monumental work in the preparation of this decision. It is now well settled as these learned commentators of what may legitimately be described as the Indian Willoughby that this conception does not involve the idea of absolute equality among human beings which is a physical impossibility."

1955 Mad. 350 (Pr. 31) ((S) A. I. R. V. 42 C. 94), *Ramaswami J.*—"Some of the decisions relating to Rent Control Acts and their being upheld as valid are collected in the characteristically exhaustive and meticulously accurate A. I. R. Commentaries on the Constitution of India Vol. 1 pp. 439-440 and are indicated below—*Ramandas* v. *State of Uttar Pradesh*, 1952 ALL 703 at p. 705 (AIR V 39) (FB) . . . . . ."

1955 Mysore 81 (Pr. 22) ((S) A. I. R. V 42 C. 27), *Vasudevamurthy J.*—"Interference by the Court will be warranted by the law when even an executive authority is not exercising its powers bona fide for the purpose contemplated by the law or influenced by extraneous and irrelevant considerations and where injustice has resulted—*See* the Constitution of India by V. V. Chitaley 1954 Edn. Vol. 2 pp. 1799-1800."

1956 Sau. 54 (56) (Pr. 3) (A I R V 43 C 18) — *Shah C. J.* — "The question has been considered in a lucid and exhaustive note in the Constitution of India by Chitaley and Rao Vol. 1 (N. 2 at pp. 183-185) which is in accord with the view of Chagla C. J. and we are in agreement with this view."

1956 Trav.-Co. 127 (Pr 12) (A I R V 43 C 52)—*Varadaraja Iyengar J.*—"The error may be one of fact but is not limited to matters of fact and include also errors of law. But the law must be definite and capable of ascertainment. An erroneous view of law on a debatable point or a wrong exposition of the law or a wrong application of the law or a failure to apply the appropriate law cannot be considered a mistake or error apparent on the face of the record. See Chitaley's C. P. C. Vol. III, pp. 3549-50, 5th Edn."

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